PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Rushton*, 2017 NSPC 2

Date: 2017-01-17
Docket: 2835034/36
2843984/86/87
Registry: Amherst

Between:

Her Majesty the Queen

v.

Ashton John Rushton

DECISION ON SENTENCE

Judge: The Honourable Judge Elizabeth A. Buckle

Heard: November 22, 2016, in Amherst, Nova Scotia

Oral Decision: January 9, 2017

Release of Written Decision: January 19, 2017

Charges: That he, on or about the 13th day of February in the year 2015 at the Town of Oxford in the Province of Nova Scotia, did possess a substance included in Schedule I to wit cocaine for the purpose of trafficking contrary to Section 5(2) of the *Controlled Drugs and Substances Act*;

AND FURTHERMORE on or about the 13th day of February in the year 2015 at the Town of Oxford in the Province of Nova Scotia, did possess a substance included in Schedule II

to wit cannabis for the purpose of trafficking contrary to Section 5(2) of the *Controlled Drugs and Substances Act*;

AND FURTHERMORE on or about the 13th day of February in the year 2015 at the Town of Oxford in the Province of Nova Scotia, did unlawfully possess a substance included in Schedule I to wit methamphetamine contrary to Section 4(1) of the *Controlled Drugs and Substances Act*;

AND FURTHERMORE on or about the 13th day of February, 2015 at, or near Oxford, Nova Scotia, did wilfully fail or refuse to comply with a sentence or disposition, to wit not possess or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription for you or a legal authorization, to wit: cocaine, contrary to section 137 of the *Youth Criminal Justice Act*;

AND FURTHERMORE, on or about the 13th day of February in the year 2015 at the Town of Oxford in the Province of Nvoa Scotia, being a person subject to a youth sentence under the *Youth Criminal Justice Act*, did wilfully fail or refuse to comply with a sentence or disposition, to wit not possess or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription for you or a legal authorization to wit: cannabis marihuana contrary to section 137 of the *Youth Criminal Justice Act*.

Counsel: Mr. Douglas Shatford, for the Federal Crown
Mr. Paul Drysdale, for the Provincial Crown
Ms. Stephanie Hillson, for the Defence

By the Court:

Introduction

[1] Ashton Rushton has pleaded guilty to:

- possession for the purpose of trafficking of cocaine, a substance in Schedule I of the CDSA, contrary to s. 5(2) of the CDSA;
- possession for the purpose of trafficking of cannabis, a substance in Schedule II of the CDSA, contrary to s. 5(2) of the CDSA;
- possession of methamphetamine, a substance in Schedule I of the CDSA, contrary to s. 4(1) of the CDSA;
- failure to comply with a youth sentence or disposition by possessing a controlled drug, contrary to s. 137 of the YCJA; and,
- failure to comply with a youth sentence or disposition by failing to keep the peace and be of good behavior, contrary to s. 137 of the YCJA

[2] On February 13th, 2015, police executed a Search Warrant at the home Mr. Rushton shared with his mother in Oxford. He was arrested, drugs and paraphernalia associated with trafficking were seized and he was charged with the offences currently before the court. He was held in custody until February 17th, 2015 when he was released from custody on a Recognizance.

[3] He initially pleaded not guilty and filed a *Charter* application alleging violations of ss. 8 and 9 and seeking exclusion of evidence. On August 31st, 2016, I rendered a decision finding a breach of s. 8 of the *Charter* resulting from inadequate grounds to issue the Search Warrant but did not exclude the evidence under s. 24(2). Guilty pleas were entered immediately following and sentencing was adjourned to allow for the preparation of an updated Pre-Sentence Report and for Defence to file letters of support and arrange for the attendance of witnesses. The sentencing hearing proceeded on November 22nd, 2016 and I reserved decision.

[4] The position of the Federal Crown is that Mr. Rushton should be sentenced globally to a custodial sentence of two years in a penitentiary. The Provincial Crown takes the position that any sentence I impose for the breach of the YCJA disposition should be concurrent to the sentence imposed for the drug offences.

[5] The Defence seeks a suspended sentence with probation or, in the alternative, a period of custody to be served intermittently, to be followed by a period of probation.

[6] In the broadest sense, my task is to determine a fit and proper sentence for Mr. Rushton. Given the principles and purposes of sentencing and the guidance provided by our Court of Appeal in sentencing those who traffic or possess Schedule I substances for the purpose of trafficking, I have to consider the following specific issues:

- Is this one of those "exceptional", "rare" or "unusual" cases where the principles of sentencing can be adequately addressed by a sentence less than a period of custody in a penitentiary; and,
- If so, are those principles best addressed through a shorter period of incarceration in a provincial institution or through suspending the passing of sentence and placing Mr. Rushton on probation?

Circumstances of the Offence

[7] The offence occurred in the town of Oxford, Nova Scotia and relate to the following items seized during the search of Mr. Rushton's home on February 13th, 2015:

- 6 grams of powder cocaine plus 2 "dime bags" of cocaine
- 2.5 pounds of cannabis marihuana
- 5 tablets of methamphetamine
- $510 in cash
- 2 digital scales
- New "dime bags" and zip locks

[8] On that date, Mr. Rushton was on a YCJA probation order imposed on October 1st, 2014 which included conditions prohibiting him from possessing or consuming controlled drugs and requiring him to keep the peace and be of good behaviour.

[9] Following his arrest, Mr. Rushton provided a statement to police admitting trafficking in cocaine.

Mr. Rushton's Circumstances

[10] Mr. Rushton has been in the community on a Recognizance since his release from custody on February 17th, 2015. For the first ten months, the Recognizance included house arrest and for the past 14 months it has included a curfew.

[11] Information about his background and current circumstances has been provided through the following: A Pre-Sentence Report, prepared in September of 2015, in relation to other offences; an updated Pre-Sentence Report with Addendum, prepared in November of 2016; character letters filed in support of Mr. Rushton; witnesses who testified at the hearing; and Mr. Rushton himself who also testified.

[12] This information gives me a good sense of Mr. Rushton's progress from the promising athlete and good student he was as a pre-teen, through troubled teen years, marked by mental health challenges, anger and addiction, to the thoughtful and respectful young man who testified before me.

[13] Mr. Rushton was born on November 26th, 1996. So, at the time of the offence (February 2015), he had just turned 18. He is now 20 years old.

[14] Despite what appear to be some difficult circumstances, Mr. Rushton described his childhood to the author of the PSR as "pretty great". He was close to his extended family and did things he enjoyed.

[15] He had almost no contact with his father while growing up. During his early years, he lived with his maternal grandmother. His mother lived nearby. When he was 13 he moved in with his mother. His mother had been in a long-term relationship with someone who was abusive. That relationship ended shortly after Mr. Rushton moved in with her. After that, she became involved in what appears to be a healthier relationship.

[16] He has lived with his mother since the age of 13 except for a period of 8 months in 2014 when he lived with a girlfriend. At the time, he was 17 and his girlfriend was 22.

[17] In his early teens, Mr. Rushton's behaviour noticeably declined. This led to difficulties with his mother and stepfather. Initially, his mother thought he was struggling with grief over the death of his grandfather. Starting when he was 12, she took him to psychiatrists. He was diagnosed with an anxiety disorder along with situational depression. He was prescribed various medications to address his anger,

depression and sleeping difficulties. Over time he started abusing the medications. He kept this from his mother and his doctor. He was regularly snorting his prescriptions and developed a tolerance to them. He was a gifted basketball player and regularly "played up" so was exposed to older teenagers. He reports that by the age of 15, he was regularly hanging out with older teens and was using methamphetamine. Around this time, he started selling marihuana and speed to fund his own addiction.

[18] His mother became concerned that he was using marihuana and, in fact, on one occasion contacted the police to report her concerns. However, she was not fully aware of the extent of his addiction.

[19] As part of a youth probation order, he was directed to attend for addiction counseling but failed to attend as directed.

[20] His struggles with mental health and subsequent drug abuse impacted his academic performance. He had been a good student and a promising athlete until Grade 9 when he started to have difficulties. He failed and had to repeat the grade. He completed Grade 9, but his grades were not high enough to allow him to play on school sports teams. He continued to struggle in school; his attendance was poor and when he did attend he was frequently under the influence of drugs.

[21] In the Pre-Sentence Report he reports that he was a "mess" when he was arrested for these offences in February of 2015.

[22] Information provided by Mr. Rushton to the author of the Pre-Sentence Report concerning the impact that addictions had on him was confirmed by those contacted during the preparation of the Report, the letters filed in support of Mr. Rushton and the witnesses who testified at the hearing.

[23] Those same sources confirm a dramatic turnaround since his arrest. By all reports he has not used drugs or alcohol since. Gaelene Parsons, a clinical therapist with Mental Health and Addictions Services confirmed that Mr. Rushton completed an Intake with her on February 17th, 2015, the very day he was released from custody on these offences. Subsequently, she saw him regularly for almost a year, ceasing treatment when both agreed it was no longer necessary.

[24] Since his arrest, he has completed community service hours ordered as part of a YCJA probation order with Habitat for Humanity and as an assistant coach for the

senior and junior boys' basketball teams at his school. He continued these volunteer activities even after completion of his court-ordered hours. He has also held full time seasonal employment and a part-time position which is on-going.

[25] He has had no breaches of his Recognizance, despite its strict terms, and no further involvement with police.

[26] In June of 2016, he graduated from high school and in September of 2016 enrolled in the Carpentry Program at the NSCC.

[27] Letters of support were filed on Mr. Rushton's behalf. Doug Hart knows Mr. Rushton from teaching and coaching him since he was 10 years old in Grade 6. Mr. Hart is aware of Mr. Rushton's offences and states that he does not condone his behaviour. His experiences with Mr. Rushton were very positive until Grade 10/11 when Mr. Rushton struggled with attendance and addiction which resulted in failing grades and behavioural issues. Mr. Hart confirms that as of December 4th, 2015, the date of the letter, Mr. Rushton was back at school and attending regularly. Mr. Hart writes that Mr. Rushton would likely graduate in February of 2016, something he would have not thought was possible eight months prior. He also advises that Mr. Rushton had been regularly helping two special need students in the fitness room. Mr. Hart concludes by saying that he believes Mr. Rushton has started the rehabilitation process and has the potential to be a productive member of society because of this experience.

[28] David Smith taught Mr. Rushton Grade 12 English, beginning in September of 2015. He is also aware of Mr. Rushton's offences. Mr. Smith was new to the school so hadn't know him previously. Mr. Smith found him to be intelligent, hardworking and attentive. He consistently contributed to class, offering unique insights to discussion topics and has left Mr. Smith with nothing but good impressions. Mr. Smith notes that he has seen nothing in his behaviour, either in the class or the school in general, that would reflect a vision consistent with his offences. He closes by stating that he feels that Mr. Rushton has learned from his mistakes and achieved rehabilitation. He is so confident of this that he would be willing to be personally responsible to continue guiding Mr. Rushton and helping him with the transition from high school to other aspects of his future life.

[29] Tracy Black reports that she has known Mr. Rushton since he started school. She notes the important role that athletics has played in his life and in that context, has observed him to be patient and instructive with younger or less accomplished

players. She also reports that he is happy and enthusiastic with his carpentry program at NSSC and offers her view that he is capable of learning from his mistakes, making better choices in the future and being productive member of society.

[30] John Redden employs Mr. Rushton part-time while he is in school. Mr. Redden reports that he is dependable, timely and trustworthy.

[31] Three witnesses testified at the sentencing hearing: Chrystal Rushton (a former teacher of Mr. Rushton who has the same surname but is not related to him); Mike Hudson (a former basketball coach of Mr. Rushton); and, Carmen Rushton (Mr. Rushton's mother).

[32] Chrystal Rushton had also provided comments to the author of the update to the Pre-Sentence Report. She has been a teacher since 1995 and has known Mr. Rushton in that capacity since he was in Grade 7. She has also been involved in coaching basketball and commented that since there are only 1500 people in Oxford, she knew him as he was growing up.

[33] In her opinion, in the time leading up to his arrest, Mr. Rushton was using drugs and/or alcohol possibly daily. His attendance at school was poor, his academic performance was poor and his athletic performance was suffering. She recognized that he needed help and spoke to him several times.

[34] The transition back to school and sobriety after he was charged was not easy. He looked terrible for a long time. She attributed this to the impact of withdrawal from drugs. He had missed time from school due to his previous poor attendance, so he had gaps that he had to work hard to overcome. Eventually, he started to look healthy again. He was more clean cut, paid more attention to his grooming and started to work out in the weight room again. His grades improved significantly, especially in math.

[35] She coached the senior boys' basketball team at the high school. She could not allow him to play for the team because of the charges. However, he helped with both the junior and senior teams and was a real asset. He discovered an ability and interest in carpentry and started helping others in technical education. He worked on a Habitat for Humanity project and, because of his abilities, was appointed to supervise a group. She confirmed that he continued to volunteer with basketball and Habitat for Humanity beyond when he had completed his court-mandated hours.

[36] The boys he worked with on the basketball teams were very positive about him and he had been one of the most gifted basketball players she'd ever seen. But for his convictions for the offences before the court, she would not hesitate to recommend that he continue to assist with coaching school basketball but doubted he'd be permitted to now. She was asked if she views him as a person of good character. Her answer was honest and insightful – that she feels he is working his way toward being a person of good character but that it's hard in a small community to change how people see you.

[37] Mike Hudson testified. Mr. Hudson has known Mr. Rushton since he was in Grade 6 and would sometimes "play up" on the junior high basketball team, coached by Mr. Hudson. Mr. Hudson has been employed for nine years as a worker with youth in care in Nova Scotia. As such, he has a great deal of experience dealing with young people who face challenges, including many who come into conflict with the criminal justice system.

[38] Mr. Hudson suspected that Mr. Rushton was using drugs from very early on and by the time Mr. Rushton was in Grade 8, he was pretty certain that he was using both drugs and alcohol. He had become angry and brooding. Mr. Hudson would share his concerns with Mr. Rushton and things would improve for a while but then he would revert. He said that Mr. Ruston was built like a much older kid and gravitated toward the older teens.

[39] He confirmed that Mr. Rushton was removed from the school basketball team as a result of these charges but that he kept in touch with him. He said the change in Mr. Rushton's attitude from before to after was like night to day. Immediately after, he looked run down but after a few months both his attitude and physical appearance improved.

[40] Mr. Rushton had hoped that since he was doing well in school, he could play basketball but he was not permitted to. Despite this, he helped coach the senior team and was a really good coach. He was positive, showed up and worked hard.

[41] Mr. Hudson testified that he has had no suspicion of a relapse. Mr. Rushton is like a different person. He would describe him as a person of good character now. He's made changes and is growing up. In conclusion, Mr. Hudson expressed the hope that he can remain in the community.

[42] Carmen Rushton, Ashton Rushton's mother, testified. She confirmed much of the information that had been provided from other sources. She said that when Mr. Rushton was 12 years old, his grandfather, with whom he had been very close, passed away. He struggled so she took him to mental health professionals. He was prescribed medication and when they weren't effective, he was prescribed more medication. He was at times sleepy and at times angry and violent. In the year leading up to the charges, she had almost no relationship with him. He was living in the same house but was a mean person – both to her and to other people.

[43] She didn't suspect he was misusing his prescriptions or using illegal drugs for a long time. When she first suspected his drug use, she called the police. They came and took him. She felt he hated her after that. She never thought he was selling and didn't understand that he was using serious drugs.

[44] When he was released from custody after being charged with these offences, he was on house arrest. She felt she couldn't trust him and watched him constantly. It took about seven months before she felt he was back to where he'd been as a young boy. He was nicer. He smiled at home and seemed happy. She feels he understands what he's done, that he's ruined his life.

[45] She is clearly proud of what he's accomplished in the past year – going back to school and graduating, facing the community who all know what he's done, doing volunteer work and maintaining his sobriety. She describes him as a new person – a grown up man.

[46] Ashton Rushton testified. He confirmed that he has not used drugs since he was charged. He explained how he came to be addicted to drugs, first by abusing his prescription medication in Grades 7 and 8. He explained that using those drugs made him not afraid of drugs so when he was offered the opportunity to use illegal drugs, he didn't hesitate. From the time he was 12 or 13 years old, he knew and hung around with older kids. By grade 9 he was using speed, cocaine, LSD and anything else that was around. He continued to use until his arrest in February of 2015.

[47] After his arrest, he spent three days in custody. This had a significant impact on him. He was frightened and felt he didn't belong there. When he got out he went to Addictions Services to get help. He saw Ms. Parsons every two weeks initially and then every month. He described her as great to talk to. He initially had bad withdrawal symptoms but after about four months they slowly went away.

Eventually, he and Ms. Parsons agreed that he didn't have anything else to talk about and agreed he could stop seeing her but would go back if he needed her.

[48] He said he feels physically healthier. He's bigger and stronger and cares about his appearance. He also feels mentally better. He's trying to be more positive and to put himself more in other's shoes.

[49] He still takes Ativan as needed for anxiety but doesn't like the foggy feeling it gives him so tries not to use it often.

[50] He explained that he started coaching basketball to complete his 30 hours of community service hours but that was done in two to three weeks. He continued because he'd become attached to the kids and wanted to finish the season with them.

[51] He started with Habitat for Humanity as part of a project in a technical education course but really enjoyed it so stayed with it.

[52] He graduated from high school with marks in the 70s. He's enrolled in the carpentry program at NSSC. This is a two-year full time program with a break during the summer. He hopes to apprentice to a carpenter after that.

[53] He indicates he understands that a lengthy period of custody is a possible sentence. About this, he said "I made my bed, I'll lay in it" and that it would not impact his goals.

[54] He said he is disgusted with himself and can't even remember how he used to think.

[55] After counsel completed questioning him, the Court asked him to comment on some things his mother had said during her testimony. She had expressed guilt about not recognizing his addiction and felt she'd let him down by giving him too much independence. His response confirmed that he takes complete responsibility for the offences he committed and does not lay any of the blame on his mother. In his view, his mother had given him appropriate freedoms and should have been able to trust him. He became quite emotional and broke down when saying that he had let her down.

[56] In his testimony, he demonstrated real insight and understanding of how he became addicted to drugs and the impact addictions have had on him and those

around him. The emotion he showed was sincere and a genuine sign of his remorse for his behaviour and desire to change.

Sentencing Principles

General

[57] In sentencing Mr. Rushton, I must apply the sentencing provisions in 718, 718.1 and 718.2 of the *Criminal Code* and s. 10 of the *Controlled Drugs and Substances Act*.

[58] Those provisions provide me with the general principles as well as the factors I should consider.

[59] The ultimate objectives of sentencing are protection of the public and to contribute to respect for the law and the maintenance of a safe society. Section 718 instructs that this is to be done by imposing just sanctions that have, as their goal, one or more of the following: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

[60] Section 718.1 says that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[61] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender, the principles of parity and proportionality, that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders.

[62] Section 10 of the *CDSA* incorporates these principles and specifically requires that a sentence encourage treatment of offenders in appropriate circumstances.

[63] The overarching goal of long-term protection of the public informs how I balance the principles and purposes of sentencing and apply them to the facts to arrive at a fit sentence. The common law provides me with guidance as to how I should interpret and balance these principles and how they should be applied to

different categories of offence. However, the best means of addressing the principles and attaining the ultimate objective will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that sentencing is a delicate and inherently individualized process (*R. v. LaCasse*, 2015 SCC 64 at para. 1 and *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 91-92).

Denunciation and Deterrence

[64] Our Court of Appeal has repeatedly stated that denunciation and general deterrence must be the primary considerations when sentencing those who traffic in Schedule I drugs. (For example, see: *R. v. Steeves*, 2007 NSCA 130*; R. v. Butt*, 2010 NSCA 56*; R. v. Scott*, 2013 NSCA 28; *R. v Oickle*, 2015 NSCA 87). Emphasizing these objectives reflects society's condemnation for these offences and acknowledges the tremendous harm they do to communities.

Rehabilitation

[65] Rehabilitation continues to be a relevant objective, even in cases requiring that denunciation and deterrence be emphasized. This was recently confirmed by the Supreme Court of Canada in *Lacasse* (*supra)* where, in the context of a sentence appeal for the offence of dangerous driving causing death, Wagner, J., writing for a majority, said:

> One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate. (at para. 4)

[66] The rehabilitative objective of sentencing is even more important when dealing with youthful offenders. This principle has been recognized and applied by our Court of Appeal even in cases where the nature of the offence requires that denunciation and deterrence be paramount. For example, in *R. v. Bratzer* (2001 NSCA 166), the court upheld a conditional sentence for a youthful offender convicted of three counts of robbery. In writing the judgement of the Court, Bateman, J.A., said the following:

> 40 There is ample authority for the proposition that sentences for youthful offenders should be directed at rehabilitation and reformation,

> not general deterrence. (R. v. Leask [1996] M.J. No. 587 (Quicklaw) (C.A.); R. v. Demeter and Whitmore (1976), 32 C.C.C. (2d) 379 (Ont.C.A.); R. v. Casey, [1977] O.J. No. 214 (Quicklaw) (Ont.C.A.)) This is common sense. A youthful offender, particularly one such as Mr. Bratzer, who has an interest in a vocation and can be equipped with the tools to earn an honest living, is more likely to be diverted from a life of crime than would a career criminal.

[67] Bateman, J.A., went on to quote with approval from the Ontario Court of Appeal decision in *R. v. Quesnel*, (1984), 14 C.C.C. (3d) 254:

> In sentencing the respondents as he did, the trial judge acknowledged that the sentences "will undoubtedly be considered lenient in the circumstances". After indicating that he was not satisfied that the respondents were incorrigible, the trial judge explained that he was proceeding on the basis that "a chance for rehabilitation remains" and in "the hope that something good" could come of the sentences thus imposed. Clearly he regarded the sentences as a last chance being offered to the respondents to turn their lives around.
>
> There can, of course, be no quarrel with the proposition that from time to time a judge sentencing a convicted person, particularly a youthful one as in this case, should indeed "take a chance" on such person by exercising leniency in circumstances where leniency might not otherwise appear to be called for. In our opinion, however, there must be some factor present in the case before the sentencing judge that is sufficient to warrant a reasonable belief on his part, going beyond a mere hope, that the leniency proposed to be extended holds some prospect of succeeding where other dispositions available to him may fail.
>
> Whether the factor present is an indication of remorse, a glimpsed change in attitude on the part of the convicted person, or some other sign or signal that the convicted person may have learned something beneficial from his or her past and present encounters with the criminal justice system, there must be something positive weighing in his or her favour which can be looked to to support the judge's chosen course of action.

[68] Decisions like *Bratzer (supra)* and *Quesnel (supra)* confirm that there is a place for leniency when sentencing youthful offenders, even for serious crimes. In the case of a youthful offender, rehabilitation has to be given real consideration; in many cases, it is more than a theoretical objective, it is a reasonable and viable hope.

Proportionality

[69] The principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender requires me to first consider the gravity of the offence.

[70] Possession of cocaine, a Schedule I substance, for the purpose of trafficking is a very serious offence. This is reflected in the fact that Parliament has set the maximum sentence at life imprisonment and removed the offence from consideration for a conditional sentence order.

[71] The tremendous harm that comes from trafficking these substances has been repeatedly commented on by our Court of Appeal and can be seen in this and other courts every day. Going back to the Court of Appeal decision in *R. v. Huskins*, 95 N.S.R. (2d) 109, and perhaps before, the Court of Appeal has recognized the "creeping evil" and danger of cocaine. In *Butt* (*supra)* at para. 13, the court referred to cocaine as a deadly and devastating drug that ravages lives. People who traffic in cocaine take advantage of the vulnerabilities of others. Some do it for profit and some do it because they are themselves addicts with the same vulnerabilities as those they sell to.

[72] Mr. Rushton, as an addict, is himself an example of the harm that can be done. Without a trafficker, Mr. Rushton would still have experienced addiction to prescription drugs but would never have been exposed to cocaine, methamphetamine or LSD. I have spent pages in this decision summarizing the impact those drugs have had on his life and he is one of the lucky ones. His education, relationships and health have been impacted. He's had things he loved, like basketball and coaching, taken away. He's been in custody and had his liberty restricted while on release in the community. He's hurt, disappointed and betrayed the trust of people he loves and respects. He has saddled himself with a criminal record for serious drug offences which will impact his future employment and travel for years to come. But, he's healthy, still has the support of his family and community, and is recovering.

[73] The other aspect of proportionality is the degree of responsibility of the offender. Mr. Rushton was found in possession of a relatively small amount of powder cocaine and a larger amount marihuana. The Crown and Defence agree that he falls within the category of "petty retailer" as that term was used in *R. v. Fifield*, [1978] N.S.J. No. 42.

[74] There is no indication that anyone else was involved in the offence so Mr. Rushton is solely responsible. However, his age and addiction, reduce his moral blameworthiness.

[75] At the time of the offence, he had just turned 18 years old. Had the police been in a position to execute the search warrant and charge him three months earlier, he would have been charged as a youth and subject to the sentencing regime in the *Youth Criminal Justice Act.*

[76] He must be sentenced using the adult sentencing framework, but the term "youthful offender" is not limited to those who fall under the *Youth Criminal Justice Act* (see generally, the comments of Rosenberg, J.A. in *R. v. Priest*, [1996] O.J. No. 3369, and specifically at para. 21). Young people don't magically reach maturity on their eighteenth birthday. Maturation is a gradual process, bringing with it increased moral sophistication and a greater ability to foresee consequences, resist impulse, and make sound judgement.

[77] Mr. Rushton was also an addict. Based on the evidence, I accept that at the time of the offences and for three or four years leading up to that time, Mr. Rushton was addicted to a number of different drugs and alcohol. I also accept that his offences are directly related to his addictions, in the sense that he was selling drugs in order to support his own addictions. There is no evidence to suggest he was selling drugs to fund a luxurious lifestyle – he lived with his mother, no substantial sums of money were discovered and I have no evidence that he owned anything of value.

[78] In *Oickle (supra),* Scanlan, J.A. questions whether addiction is properly considered a mitigating factor on sentencing for drug trafficking offences. He comments that the consequences of drug trafficking to individuals and communities is the same whether the trafficker is motivated by profit or addiction. This is of course correct. However, Scanlan, J.A. does not address addiction as a factor which diminishes moral responsibility. In my view, it does. An addiction certainly doesn't excuse criminal behaviour but it is well recognized as a factor which, when proven, can have a mitigating effect on sentence. In this regard, Justice Hill of the Ontario

Superior Court of Justice in *R. v. Andrews*, [2005] O.J. No. 5708, provides a useful summary of the legal precedent and philosophy behind this approach:

> **36** As a general rule, heroin and cocaine trafficking are properly seen as grave offences with a high degree of moral blameworthiness. Most often, these are planned crimes carried out for profit by individuals apparently philosophically opposed to holding gainful and lawful employment as opposed to simply conducting illicit drug sales. Not surprisingly then, the overarching principles of sentencing in these cases have been denunciation and general deterrence.
>
> **37** That said, the law has tended to treat the addict who trafficks to support her habit somewhat differently - the profiteering for greed element is absent, a serious health issue emerges as context, and many question the efficacy of general deterrence in controlling the actions of one who is ill.
>
> **38** In R. v. Smith, (1987) 34 C.C.C. (3d) 97 (S.C.C.), Justice Lamer, speaking in the context of a drug importing case, stated, at page 124:
>
> "The direct cause of the hardship cast upon their victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their demand for drugs. Such persons with few exceptions (as an example, the guilt of addicts who import not only to meet but also to finance their needs is not necessarily the same in degree as that of cold-blooded non-users), should, upon conviction, in my respectful view, be sentenced to and actually serve long periods of penal servitude."
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> **39** In a possession of heroin for the purpose of trafficking case, R. v. Pimentel, [2004] O.J. No. 5780 (S.C.J.), at paragraph 20, I stated;
>
> > "The gravity of the circumstances of an offender's involvement in marketing heroin may be mitigated in some measure by the existence of any of the following factors:
> >
> > 1) The offender is addicted to heroin. The onus is upon the offender to establish not only the addiction but also "a causal connection" between his or her addiction and the unlawful activity involving the drug in the sense that the addiction was at

> least a materially contributing cause for the criminality: R. v. Holt (1983), 4 C.C.C. (3d) 32 (Ont. C.A.) at 51. Where the evidence is "sketchy", the onus is not discharged: R. v. Bahari, [1994] O.J. No. 2625 (C.A.) at para. 4. Where the matters are proven: 'The courts have always distinguished between a drug addict who is trafficking for the purpose of supplying his habit and the non-addict who is trafficking purely out of motives of greed.' (R. v. Mete, [1980] O.J. No. 1438 (C.A.) at para. 12). See also: R. v. Wright, [1976] O.J. No. 1096 (C.A.) at para. 2; R. v. McCarthy, [1990] O.J. No. 2163 (C.A.) at paras. 2 and 3; R. v. Bell, [1976] O.J. No. 585 (C.A.) at para. 2; R. v. Richards, (1979) 49 C.C.C. (2d) 517 (Ont. C.A.) at 524-5; R. v. Nguyen, [1996] O.J. No. 2593 (C.A.) at para. 5; R. v. Wood, [1979] O.J. No. 855 (C.A.) at para. 5; R. v. Zamini, [1999] O.J. No. 3780 (C.A.) at para. 2."

40 In R. v. Reid, [2003] P.E.I.J. No. 118 (C.A.), at paragraph 19, the Court stated:

> "While the addiction is not an excuse, it becomes relevant when a sentencing decision is made because of the potential for protecting the public in the long term by ordering the addictions issues to be treated as part of the sentence."

Aggravating and Mitigating Factors

[79] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender:

Aggravating Factors

- Nature of substance (cocaine);
- Mr. Rushton had a previous YCJA record which includes assault in October of 2014, and two counts of failing to comply with a YCJA disposition in December of 2015; and,
- He was on probation for YCJA offences at the time of this offence.

Mitigating factors:

- Mr. Rushton is a youthful offender – having turned 18 years only three months before the date of the offence;
- He pleaded guilty;
- He has demonstrated true remorse, insight and understanding;
- His record is limited, unrelated and occurred during a period when he was dealing with mental health and untreated addiction;
- He was an addict at time of the offence;
- The path leading to his addiction is sympathetic;
- After arrest, he immediately sought treatment for his addiction, carried through with treatment and has been drug and alcohol free since the offence;
- He has been in the community for almost two years with no breaches;
- He has complied with strict terms of release, including house arrest for eight months and a curfew for the remainder;
- He has strong family and community support; and,
- Since the offence, he has completed high school, attended community college, worked part-time and during the summer, completed the community service portion of his youth sentence and contributed to his community through volunteer work.

There is an absence of other potential aggravating factors such as weapons or violence.

Parity / Range of Sentences

[80] Section 718.2 also requires consideration of the principles of parity. This requires an examination of the range of sentences imposed for trafficking cocaine or other Schedule I substances. A long line of cases from our Court of Appeal have established that cocaine traffickers should generally expect to be sentenced to imprisonment in a federal penitentiary (See: *Steeves*, 2007 NSCA 130; *Knickle*, 2009 NSCA 59; *Butt*, 2010 NSCA 56; *Jamieson*, 2011 NSCA 122; and *Oickle*, 2015 NSCA 87).

[81] The Court, however, has never established that a federal penitentiary term is mandatory and has recognized that in some circumstances the principles of sentencing can be otherwise satisfied. In those cases, shorter periods of custody served in a provincial institution or in the community under a conditional sentence order, when those were available, have been accepted. (See for example: *R. v. Scott (supra);* and, *R. v. Howell,* 2013 NSCA 67.)

[82] In *R. v. Scott (supra),* Beveridge, J.A., writing for the majority, concluded that it was not necessary for a sentencing judge to find "exceptional" circumstances to justify a sentence lower than two years for trafficking cocaine (at para. 53). The task of a sentencing judge in imposing a sentence for cocaine trafficking is the same as any other offence – "considering all of the relevant objectives and principles of sentence as set out in the *Criminal Code*, balancing those and arriving at what that judge concludes is a proper sentence" (para. 26).

[83] I take from his reasons that while it may be rare for a cocaine trafficker to receive a sentence less than a federal penitentiary sentence, where the proper application of sentencing principles justifies that result, a sentencing judge is not required to make any specific conclusion that the circumstances are exceptional.

[84] In the more recent decision of *Oickle (supra),* Scanlan, J.A. does not comment on whether "exceptional" circumstances are required but he specifically declines to set a hard and fast bottom or top boundary to the range (para. 40). He does, however, make it clear that the message to potential Schedule I traffickers should continue to be that incarceration will be the normal sentence (at para. 61).

[85] Based on the majority decision in *Scott (supra)* and its interpretation of the previous cases, I would say that the range in Nova Scotia for cocaine trafficking includes incarceration in a penitentiary and incarceration in a provincial institution or a lengthy conditional sentence order (when that was an available sentence). The lower end of the range has generally been used in cases involving one or more of the following: addictions; youth; limited or no prior record; relatively small amount of the drug; some hope of rehabilitation; and, absence of aggravating factors.

[86] As was noted in *Oickle (supra),* the range across Canada is broader and includes, in some provinces, intermittent sentences or suspended sentences with probation (see for example: *R. v. Peters,* 2015 MBCA 119; *R. v. McGill,* 2016 ONCJ 138; *R. v. Maynard,* 2016 YKTC 51; *R. v. Voong,* 2015 BCCA 285; *R. v. Carrillo,* 2015 BCCA 192; *R. v. Fergusson,* 2014 BCCA 347; *R. v. Arcand,* 2014 SKPC 12; and, *R. v. Yanke,* 2014 ABPC 88).

[87] Sentencing ranges are important. They are intended to encourage greater consistency between sentences and respect for the principle of parity. However, "they are guidelines rather than hard and fast rules" (*R. v. Nasogaluak*, 2010 SCC 6 at para. 44). This was recognized by Scanlan, J.A. in *Oickle (supra)* at para. 40 when he said "it is not appropriate to set a bottom range or a top range for a particular offence without regard for the offender or other sentencing principles". He went on to quote Justice Farrar in *R. v. Phinn*, 2015 NSCA 27 where he refers to *R. v. A.N.*, 2011 NSCA 21:

> [34] Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: [Authorities omitted]. The range moves sympathetically with the circumstances, and is proportionate to the *Code*'s sentencing principles that include fundamentally the offence's gravity and the offender's culpability. ...

[88] Sentencing judges are permitted to go outside the established range for a given offence as long as the sentence imposed is a lawful sentence that adequately reflects the principles and purposes of sentencing (*Nasogaluak (supra)*, at para. 44). This was recently affirmed by the Supreme Court of Canada in *Lacasse (supra)*, where Wagner, J., writing for the majority, said as follows:

> 58 There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case. …

Reasonable Alternatives to Custody

[89] Finally, s. 718.2 requires me to consider that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions, other than imprisonment, that are

reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders. This is particularly so, in the case of a youthful offender or a first offender (See: *Priest (supra)*). While Mr. Rushton is not a first offender, these are his first adult offences and he has only a limited youth court record.

[90] So, I am required to consider alternatives to imprisonment and impose an alternative if it is reasonable in all the circumstances. The circumstances would include the circumstances of the offence and the offender as well as the statutory and common law principles of sentencing.

[91] Based on the evidence before me, I am satisfied that there is limited, if any, need to further deter Mr. Rushton specifically. I have previously outlined what his addictions have cost him. Here I will summarize the consequences which are specific to these charges. He spent three days in custody at a correctional facility while waiting bail. He had never been incarcerated before and he testified that it had an impact on him. He was frightened and truly felt that he did not belong there. He was not permitted to play basketball on his high school team. He was on house arrest for 10 months and has been on a curfew for 14 months. The convictions for these offences will mean that he will probably never be permitted entry into certain countries, like the U.S., and that he will be prevented from volunteering or being employed in certain sectors. He has faced his community, knowing that they know about his offences. Through his behaviour over the past two years, he has demonstrated that he has been deterred. In my view, sentencing Mr. Rushton to a period of custody at this point would be counterproductive to specific deterrence. I say that because at this point, having experienced a short, sharp custodial period, he still fears it. A lengthier period of custody would probably permit him to acclimatize to the environment and he would be less fearful.

[92] I am also satisfied that Mr. Rushton is an excellent candidate for rehabilitation. His behaviour since being charged has been exemplary. He has demonstrated that he understands his addictions, knows how and where to seek help and can remain drug and alcohol-free for a substantial period of time. He has also shown that he is capable of success in education and employment and can be a contributing member of his community. In my opinion, incarcerating him would also be counter-productive to his rehabilitation. Drugs are available in institutions. I regularly deal with inmates of Springhill Institution (a Federal Penitentiary serviced by Amherst Provincial Court) who are charged with drug-related offences within the institution.

So, in custody, Mr. Rushton would have access to illegal drugs without the supports he has relied on in the community to address his addictions.

[93] That leaves denunciation and general deterrence. In the circumstances of this case, can denunciation and deterrence be satisfied through a non-custodial disposition or is custody the only reasonable alternative?

[94] In cases where denunciation and general deterrence must be emphasized, imprisonment will often be the only option for meeting those objectives (*Lacasse (supra),* at para. 6). In the Schedule I drug trafficking context, our Court of Appeal has repeatedly said that in most cases, denunciation and deterrence will require sentences in the penitentiary range. This was recently reiterated in *Oickle (supra).*

[95] That is not to say that a custodial sentence is the only deterrent and denunciatory impact of the criminal justice system. Pre-sentence or extra-judicial consequences can and often do have a collateral denunciatory and deterrent impact. Things such as pre-trial custody, strict terms of release, public humiliation, or loss of employment or education can provide significant and meaningful consequences that resonate with the specific offender and the public at large. Non-custodial sentences such as probation, while aimed at rehabilitation, can also contribute to denunciation and deterrence (See: *R. v. George* (1992), 112 N.S.R. (2d) 183 (C.A.); *R. v. Martin*, 154 N.S.R. (2d) 268 (C.A.); and, *R. v. R.T.M.*, 151 N.S.R. (2d) 235 (C.A.)). Probationary terms with a primary goal of assisting in rehabilitation or restorative justice, like curfews or community service, can also have a collateral punitive benefit. This was recently confirmed on by E.A. Bennett, J.A. in *Voong* (*supra*):

> **37** A probation order has primarily a rehabilitative objective, however, as the statutory terms refer to the purposes of "protecting society" and "reintegration into the community", it is not limited to this objective.
>
> **38** What is required for the imposition of an optional condition in a probation order is a "nexus between the offender, the protection of the community and his reintegration into the community" (*R. v. Shoker*, 2006 SCC 44 at para. 13).
>
> **39** A suspended sentence has been found to have a deterrent effect in some cases. Because a breach of the probation order can result in a

revocation and sentencing on the original offence, it has been referred to as the "*Sword of Damocles"* hanging over the offender's head. For example, in *R. v. Saunders*, [1993] B.C.J. No. 2887 (C.A.) at para. 11, Southin J.A. said:

> Deterrence is an important part of the public interest but there are other ways of deterring some sorts of crime than putting someone in prison who has no criminal record as this appellant did not. The learned trial judge did not turn her mind to whether the deterrence which is important might be effected by certain terms of a discharge or a suspended sentence such as a lengthy period of community service.

40 This Court, in *Oates*, recently confirmed that *Saunders* stands for the proposition that deterrence might be effected with a suspended sentence (*Oates* at para. 16).

41 In *Shoker*, at para. 15, the Court concluded that supervised probation is a restraint on the probationer's freedom.

42 Other Courts have confirmed the deterrent effect of a suspended sentence and a probation order in certain circumstances. See, for example, *R. v. George* (1992), 112 N.S.R. (2d) 183 (C.A.) at 187 (and a number of cases following, including *R. v. Martin*, 154 N.S.R. (2d) 268 (C.A.); *R. v. R.T.M.*, 151 N.S.R. (2d) 235 (C.A.)) and *R. c. Savenco* (1988), 26 Q.A.C. 291 (C.A.).

43 The statutory phrase "protection of the public" now found in the *Criminal Code* gives a broad discretion to sentencing judges to impose conditions (see *Shoker* at para. 3). The public is protected when a former criminal is rehabilitated and deterred from committing more crimes (see *R. v. Grady* (1971), 5 N.S.R. (2d) 264 at 266). It is also protected when other offenders are deterred by the sentence imposed. Thus, imposing conditions for the protection of the community may have a deterrent and denunciatory effect in addition to a rehabilitative effect. Put another way, a condition need not be punitive in nature in order to achieve deterrence or denunciation. In *D.E.S.M.* (and affirmed in *R. v. Sidhu* (1998), 129 C.C.C. (3d) 26 (B.C.C.A.)), this Court concluded that "home confinement" was an appropriate term of a

> probation order for the purpose of the maintenance of rehabilitation. The court concluded, at p. 381:
>
> It should not be thought that home confinement, if we may call it that, should readily be substituted for regular imprisonment. Such a disposition is suitable, in our judgment, only where very special circumstances are present such as where the accused demonstrates that he has rehabilitated himself prior to arrest, where he is not a danger to anyone, where others are dependent upon him, and where there are no factors that make it necessary in the public interest that punishment should be by conventional imprisonment.
>
> [Emphasis added.]

[96] Our Court of Appeal has similarly recognized that a suspended sentence, when properly administered can be rigorous (see: *R. v. Emerson*, [1993] N.S.J. No. 169).

Conclusion

[97] Based on the circumstances in this case I conclude that the principles and purpose of sentencing, including denunciation and general deterrence do not require a penitentiary sentence.

[98] If I were required to determine whether exceptional circumstances exist in this case, I would find that they do. I say this because of Mr. Rushton's youth (just barely an adult at the time of the offences), his limited prior youth record, his addiction and the circumstances that resulted in his addiction, and his behaviour since arrest which include seeking treatment, maintaining sobriety, complying with terms of release, completing high school, working, and his volunteer activity.

[99] I have considered whether a shorter period of custody in a provincial institution is necessary to address denunciation and general deterrence. I find that while such a sentence may, in the short term, better address those principles than a suspended sentence. It would not in the long term. A suspended sentence allows for the possibility of re-sentencing the offender for this offence, a custodial sentence in a provincial institution does not.

[100] I am satisfied that suspending the passing of sentence and placing Mr. Rushton on probation is the best means to accomplish long term protection of the public. When used as it was intended, a suspended sentence allows for there to be a meaningful incentive for Mr. Rushton to continue his good behaviour and his efforts toward rehabilitation. If Mr. Rushton complies with the terms of probation, he can continue his rehabilitation and work toward being a productive member of society. If he does not, then he can be brought back before me to be sentenced for these offences. In this way, it can provide deterrence and denunciation without interfering with all of Mr. Rushton's accomplishments toward rehabilitation.

[101] The probation order will include conditions that will continue his rehabilitation but will have a collateral punitive benefit, including a curfew and substantial community service hours. I will also impose a condition that he attend back before the court at regular intervals so that his progress can be monitored.

[102] I recognize that this sentence is not within the general range for this offence in Nova Scotia. However, I am satisfied that because of the circumstances, a sentence outside of the range is justified on proper application of the sentencing principles. In short, I am satisfied that leniency is warranted. I see real hope for rehabilitation in Mr. Rushton and I am prepared to take a chance on him.

[103] Therefore, I suspend the passing of sentence for each of the offence before me and place Mr. Rushton on probation for the following periods - all of which will be concurrent:

- Possession for the purpose of trafficking cocaine contrary to s. 5(2) of the *CDSA* - 3 years
- Possession for the purpose of trafficking marihuana contrary to s. 5(2) of the *CDSA* - 3 years
- Possession of methamphetamine contrary to s. 4(1) of the *CDSA* - 6 months
- Failing to comply with disposition of Youth Criminal Justice Court – contrary to s. 137 of the *YCJA* (x2) - 30 days on each

[104] The conditions of probation are as follows:

- Statutory conditions, including to attend back before me on a specified date so that I can monitor the progress of his probation

- Report to a probation officer today and thereafter as directed

- Not possess or consume alcohol or any other intoxicating substances

- Not possess or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription for you or a legal authorization

- Not enter or be in any premises where alcohol is the primary product of sale including liquor stores, taverns, pubs, beverage rooms, night clubs and licensed pool halls

- Attend for, participate in and complete any assessment, counselling or treatment as directed by probation, including mental health counselling and substance abuse counselling

- Submit to urinalysis or other screening to determine the presence of alcohol or drugs in his system

- Not associate with or be in the company of any person known to you to have a *Criminal Code* record, *Controlled Drugs and Substances Act* record, or *Youth Criminal Justice Act* record, unless you have the written permission of your probation officer to associate with such an individual, or unless your association with any such individual is incidental to your attendance at employment or at a program of counselling or educational program which you are participating, or unless that person is a member of your immediate family

- Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer

- For the first 12 months of the Order, comply with a curfew daily in his residence (with reasonable exceptions) and prove compliance with the curfew; and,

- Complete 240 hours of community service within the first 12 months of the Order.

[105] There will also be the following Ancillary Orders:

- Mandatory Victim Fine Surcharge
- S. 109 firearm/weapon prohibition for 10 years
- Forfeiture of certain items seized by police
- DNA Order for databank

Elizabeth Buckle, JPC.