COURT OF APPEAL OF YUKON

Citation: *R. v. Aguilera Jimenez*,
2020 YKCA 5

Date: 20200220
Docket: 19-YU849

Between:

Regina

Appellant

And

Dawson Aguilera Jimenez

Respondent

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Harris
The Honourable Madam Justice Dickson

On appeal from: Orders of the Territorial Court of Yukon, dated September 9, 2019 (*R. v. Aguilera Jimenez*, 2019 YKTC 40, Whitehorse Docket 18-00180); and September 30, 2019 (*R. v. Aguilera Jimenez*, 2019 YKTC 42, Whitehorse Docket 18-00180*).*

Counsel for the Appellant:	P. Battin
Counsel for the Respondent:	L.S. Faught
Place and Date of Hearing:	Vancouver, British Columbia November 8, 2019
Place and Date of Judgment:	Vancouver, British Columbia February 20, 2020

Written Reasons by:
The Honourable Madam Justice Dickson

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Harris

Summary:

The Crown appeals from an order suspending the passing of sentence in respect of a dial-a-dope offence, arguing the sentencing judge erred in overemphasizing the offender's mitigating, but not exceptional, circumstances, failing to apply the principles of denunciation and deterrence and, therefore, imposing a demonstrably unfit sentence. The Crown also argues that the judge erred by not stating oral reasons for sentence when the sentence was imposed. Held: Appeal allowed in part. The judge erred by failing to state oral reasons when he imposed sentence, as required by s. 726.2 of the Criminal Code, but this error had no material impact on the fairness of the proceedings. His written reasons provided later reflect the basis for the sentence. Although the judge did not overemphasize the mitigating circumstances or fail to apply the principles of denunciation and deterrence, the conditions of probation were insufficiently stringent for the sentence to be fit.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

[1] The respondent, Dawson Aguilera Jimenez, is an Ontario resident. In early 2018 he travelled to the Yukon and, shortly thereafter, was charged with participating in a dial-a-dope operation there. He returned to Ontario and came back to the Yukon a year later to plead guilty to possession of cocaine for the purposes of trafficking. The sentencing judge suspended the passing of sentence and imposed a two-year probation order subject to various conditions, including requirements that Mr. Jimenez reside as directed, participate in counselling and perform 40 hours of community work service.

[2] The Crown seeks leave to appeal the sentence, contending it is demonstrably unfit given the seriousness of the offence, the significant community impact of drug trafficking and the unexceptional nature of Mr. Jimenez's circumstances. If leave to appeal is granted, the Crown seeks an order varying the sentence to a term of imprisonment for a period of 15 to 18 months.

[3] For the reasons that follow, I would grant leave to appeal and allow the appeal to the extent of increasing the period of probation to three years, striking the condition that Mr. Jimenez must not attend "at any known place where drug

trafficking is known or suspected to occur" and varying the condition imposing a curfew in the terms outlined below.

Background

[4] Mr. Jimenez was born and raised in Toronto, Ontario by immigrant parents. He lived with his family in a low-income area of the city until February 2018, when he travelled to Whitehorse, Yukon.

[5] On June 15, 2018, Mr. Jimenez was driving a car in Whitehorse when he was pulled over by police for erratic driving. There were two passengers with him in the car, including a 16-year-old male. The officer searched all three occupants, found cash, drugs and cell phones and arrested Mr. Jimenez and his passengers. The cash, found on the passengers, amounted to $3,585. The drugs, found on Mr. Jimenez, included nine small bags of crack cocaine and one small bag of powdered cocaine, as well as five bags of cocaine and a 53.43 gram rock of cocaine found later on the adult passenger.

[6] Mr. Jimenez was 18 years old when he was arrested. He was charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*] and released on a recognizance with cash bail the next day. As soon as he perfected bail, he returned to Toronto to resume living with his parents and he remained there until he came back to Whitehorse to be sentenced. He entered a guilty plea and the sentencing hearing was held on September 9, 2019, by which time Mr. Jimenez was 20 years old.

Sentencing Hearing

[7] A Pre-Sentence Report was prepared in Ontario and provided to the Court to assist in the sentencing process. The report revealed that Mr. Jimenez grew up in a loving, supportive home with parents who had no prior involvement with the criminal justice system. He described his parents as his only source of positive support and his relationship with them and an older sibling as loving and respectful.

[8] Mr. Jimenez was a healthy, prosocial child, but after his closest friend died in 2014 he struggled emotionally, experimented with drugs and alcohol and was expelled from school in Grade 11. When he returned to Toronto following his arrest, however, he re-enrolled in school, obtained his high school diploma and found regular employment. He also limited his drug use significantly, distanced himself from negative companions and completed 41 hours of voluntary community work service. At the time of sentencing, his future plans were to obtain post-secondary education and secure a trades apprenticeship.

[9] Two social workers from the Toronto Youth Addictions and Concurrent Disorder Service provided letters to the Court describing Mr. Jimenez's progress since his return to Ontario. Both referred to his active participation in substance abuse relapse prevention counselling, his efforts to maintain a healthy lifestyle and his positive future goals. One social worker wrote that "he exhibits the qualities of an individual that can become a leader in his community". The other described him as "communicative, respectful and engaged".

[10] The Crown sought a sentence of 15 to 18 months' imprisonment, pointing to Mr. Jimenez's role as a dealer in a dial-a-dope operation. In support of this position, Crown counsel emphasized the involvement of the 16-year-old youth, the significant community impact of drug trafficking in the Yukon and the need for deterrence and denunciation. Defence counsel sought a suspended sentence and a period of probation, focusing on Mr. Jimenez's guilty plea and acceptance of responsibility, as well his youth, lack of prior criminal record and progress in turning his life around. He also emphasized the harsh effect imprisonment would have on Mr. Jimenez because of the distance from his family and their financial inability to visit him in jail.

[11] As noted, the sentencing hearing was held on September 9, 2019 in Whitehorse. Defence counsel advised the judge that Mr. Jimenez had returned to the Yukon solely to attend the hearing and intended to go back to Ontario as soon as he could. When closing submissions concluded, the judge imposed sentence immediately, stating:

> I am going to do written reasons. There is a co-accused coming up for sentencing. I think that it would be more responsible of me to provide written reasons. I am not going to explain why I am doing what I am doing now because that will all be explained properly in the written reasons. I am just going to impose the sentence and it will be explained later.
>
> I am going to suspend the passing of sentence and I am going to place you on probation for a period of two years.
>
> The terms of the probation order are going to require you to do as follows …

[12] Among other things, the probation order included terms requiring that Mr. Jimenez was to abide by a curfew when he was in Whitehorse, perform a further 40 hours of community work service and participate in educational, life skills and counselling programs as directed by his probation officer. Condition 6 provided that Mr. Jimenez was not to attend "at any known place where drug trafficking is known or suspected to occur".

[13] On September 26, 2019, the Crown filed a Notice of Appeal raising three grounds of appeal, namely, that the judge erred by: i) failing to comply with s. 726.2 of the *Criminal Code* by pronouncing sentence without providing reasons; ii) considering Mr. Jimenez's unremarkable circumstances as exceptional, rendering the sentence unfit; and iii) failing to apply the sentencing principles of denunciation and deterrence, rendering the sentence unfit. On September 30, 2019, written reasons for sentence, indexed as 2019 YKTC 42, were filed in the Territorial Court of Yukon Registry.

Reasons for Sentence

[14] At the outset of his written reasons, the judge explained why he did not provide reasons when he pronounced sentence. The decision was based, he said, on several factors:

a) the sentence was exceptional and, as such, required a full, clear and concise explanation;

b) there was a co-accused coming up for sentencing and it would be appropriate to have written reasons available to his counsel; and

c) Mr. Jimenez had travelled from Ontario for the sentencing and, as the sentence was non-custodial and the judge was leaving the next morning for circuit court, it was preferable to permit Mr. Jimenez to return home rather than require him to remain in the Yukon to await a sentencing decision with concurrent reasons.

[15] He also stated:

> [5] I note that pronouncing a decision with an explanation that written Reasons will follow, is not an unusual occurrence in the Yukon. Circumstances at times warrant this practice.

[16] After providing this explanation, the judge reviewed the facts, counsel's submissions and Mr. Jimenez's personal background and rehabilitation efforts. Then he undertook his analysis. He began by noting the primacy of denunciation and deterrence in cases such as this, quoting from *R. v. Holway*, 2003 YKTC 75, *R. v. Naiker*, 2007 YKTC 58 and *R. v. Profeit*, 2009 YKTC 39, where the Court emphasized the importance of deterring drug traffickers from coming to vulnerable, under-resourced northern communities to sell hard drugs. He also quoted from *R. v. Mackay*, 2019 BCSC 1112, where the Court commented on the suffering and misery caused by drug use and the greed and amorality of drug traffickers who seek to profit from that suffering. Nevertheless, he stated, one cannot lose sight of rehabilitation.

[17] The judge cited *R. v. Diedricksen*, 2018 BCCA 336, in support of the foregoing proposition. He noted this Court held in *Diedricksen* that, while custodial sentences are usually necessary to express the gravity of trafficking in hard drugs, this is not always so and, as explained in *R. v. Voong*, 2015 BCCA 285, a suspended sentence can have a deterrent effect by operating as a "Sword of Damocles" hanging over an offender's head. Then he discussed *R. v. Maynard*, 2016 YKTC 51, a case in which he suspended sentence and placed a 21-year-old offender on probation for selling cocaine in a dial-a-dope operation on the basis of "exceptional circumstances". In particular, he noted, in *Maynard* the offender had no criminal record, pleaded guilty, was remorseful, made considerable efforts towards

rehabilitation and had a supportive family who would hold him accountable for his actions.

[18] Against this backdrop, the judge turned to determining an appropriate sentence. He noted first that a 16-year-old was involved in the offence and that, pursuant to s. 10(2)(c) of the *CDSA*, this was an aggravating factor, although he considered Mr. Jimenez's moral culpability attenuated because he was only 18 at the time. He also noted that, unlike the offender in *Maynard*, Mr. Jimenez did not begin his rehabilitative efforts until after he was charged with drug trafficking. However, he stated, sentencing is an individualized process and "exceptional circumstances" are not rigidly defined:

> [55] There is no exhaustive list of criteria for what constitutes such exceptional circumstances that a non-custodial disposition can be imposed for ss. 5(1) or (2) *CDSA* offences. Every case stands on its own merits with its own circumstances related to the offence and the offender. Just because one case has more or different factors than another, whether more or less mitigating or aggravating, does not inexorably therefore lead to a conclusion one way or the other. Sentencing remains at all times an individualized process.

[19] The judge went on to identify several factors that "weighted towards" a custodial disposition and a non-custodial disposition. The former, he said, included the need to emphasize deterrence and denunciation, the profit-driven nature of the offence and the involvement of the 16-year-old; the latter, Mr. Jimenez's guilty plea and lack of criminal record, his positive rehabilitative steps and his future prospects and family support. Balancing the circumstances of the offence and those of Mr. Jimenez with the purposes and principles of sentencing, he concluded that a suspended sentence with a two-year probation order would best meet all objectives of sentencing:

> [59] I find that removing Mr. Jimenez from his present stable and positive rehabilitative structure and supports, in order to bring him back to the Yukon, far from where these structures and supports are readily available, in order to stress denunciation and deterrence would be unjust. It would sacrifice the importance and success to date of his rehabilitation in a manner unfairly disproportionate to the need to emphasize denunciation and deterrence.
>
> [60] When I say "unfairly", I am not just speaking of Mr. Jimenez; I am speaking of being unfair to society and to the importance of preserving the

> safety and security of the public. The extent to which a custodial sentence would denounce this offence and deter others from committing this or similar offences, must be balanced against the potential such a disposition would have to undermine the rehabilitative steps to date that Mr. Jimenez has taken to separate himself from a criminal lifestyle and embark on a positive and pro-social one. I find that a custodial disposition is not in the interests of society, rather it is contrary to it.
>
> [61] Denunciation and deterrence can also be a part of a non-custodial disposition as noted in the law above. Further, if Mr. Jimenez fails to comply with the terms of this non-custodial sentence, he can find himself in the position where this sentence has been revoked and he is re-sentenced. This is the proverbial Sword of Damocles referenced in *Voong*.
>
> [62] In its own way, such a re-sentencing hearing could also serve to get the point across not only to Mr. Jimenez, but to others under the umbrella of a suspended sentence, that compliance with the court-ordered conditions is a serious matter.
>
> [63] In simplest terms: I am not going to remove this youthful offender from where his life is stabilizing and progressing positively, in order to bring him back into the Yukon to spend his time in jail amongst other offenders, the very group with whom he should not be mixing, in order to stress denunciation and deterrence, when the risk of fracturing and undermining his rehabilitative efforts does not warrant it. In my opinion, this would be contrary to the purpose, principles, and objectives of sentencing set out in the *Code*, the *CDSA* and case law. Jail is not necessary in this case and I will not impose it.

[20] The judge concluded his written reasons by repeating the terms he stated on September 9, 2019 when imposing the sentence. Among other conditions, they were that Mr. Jimenez must report and reside as directed by his probation officer, attend programming and perform an additional 40 hours of community work. They also included a requirement that he "not attend at any known place where drug trafficking is known or suspected to occur" and a curfew that applies when he resides in Whitehorse.

On Appeal

[21] Section 726.2 of the *Criminal Code* requires the Court to state the terms of a sentence, and the reasons for it, when imposing the sentence. In its factum, the Crown noted the judge's failure to comply with this requirement when he sentenced Mr. Jimenez and submitted that, as a result, we should not consider the written reasons issued four days after the Notice of Appeal was filed. However, at the hearing of the appeal Crown counsel retreated from this position, conceding that the

written reasons responded to the parties' submissions, stating he did not impugn the judge's integrity and acknowledging we should consider the written reasons. Nevertheless, the Crown asks us to provide guidance on whether and, if so, in what circumstances, a judge need not state reasons when imposing sentence.

[22] Turning to the substance of the appeal, the Crown contends that the suspended sentence imposed by the judge is demonstrably unfit and that a fit sentence is a period of between 15 and 18 months' imprisonment. In particular, the Crown submits, the judge made two errors which led him to impose an unfit sentence. First, he says, the judge erred by overemphasizing Mr. Jimenez's mitigating circumstances, which were not exceptional, and, therefore, he imposed a sentence outside the normal range. Second, he says, the judge erred by failing to apply the principles of denunciation and deterrence or account for aggravating factors and, therefore, he failed to impose a sentence that was proportionate to the gravity of the offence and the moral culpability of the offender.

[23] Counsel for Mr. Jimenez responds that the suspended sentence imposed is fit based on Mr. Jimenez's exceptional circumstances, as that term is explained in *Voong* and other authorities. In support, he emphasizes the numerous factors that convinced the judge he had truly turned his life around and the public would be best protected by a non-custodial sentence. He also submits that the judge applied all sentencing principles and accounted for all aggravating factors in crafting the suspended sentence and probation order. However, if this Court is concerned that the terms are insufficiently deterrent or denunciatory in effect he suggests we strengthen them by lengthening the period of probation or imposing a curfew that also applies when Mr. Jimenez resides in Ontario.

Discussion

Standard of Review

[24] As Justice Fisher stated in *R. v. Quash*, 2019 YKCA 8, judges in the trial courts are uniquely situated to determine appropriate sentences: at para. 26. They are familiar with their own communities and directly involved in the sentencing

process, which is inherently highly individualized. As a result, sentencing judges are granted a wide discretion to fashion sentences that account for the circumstances of the offence, the circumstances of the offender, the moral blameworthiness of the offender and the principles of sentencing, including the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *Voong* at paras. 6–14; s. 718.3, *Criminal Code*.

[25] It follows that appellate courts show great deference in reviewing the determinations of sentencing judges: *Voong* at para. 8. An appellate court may interfere with a sentence only where a material error that impacted the sentence was made or where the sentence is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor: *Quash* at para. 26. However, an appellate court is not entitled to interfere simply because it would have weighed the relevant sentencing objectives and factors differently and imposed a different sentence. It is for the sentencing judge to determine which objectives and factors merit the greatest weight in the particular circumstances of the case in question: *R. v. L.M.*, 2008 SCC 31 at para. 14; *R. v. Nasogaluak*, 2010 SCC 6 at paras. 43 and 46.

[26] In *R. v. Agin*, 2018 BCCA 133, this Court summarized the standard of review that applies on sentence appeals:

> [56] Appellate intervention is justified when an appellate court identifies a material error that has impacted the sentence, in that the sentence would have been different absent the error. The court will then assess the fitness of the sentence by conducting its own sentencing analysis. If the sentence is unfit, the court may vary the sentence and impose a fit sentence.
>
> [57] Where there is no error, or the error had no impact on the sentence, appellate intervention can still be justified if the sentence is demonstrably unfit.

[27] A sentence is not necessarily unfit because it falls outside the range of sentences normally imposed for particular offences. Some situations call for a sentence outside the normal range. While courts must pay heed to general sentencing ranges in accordance with the principle of parity, they serve as guidelines, not hard and fast rules for rigid application. If a sentence falls outside the

normal range it may nonetheless be fit provided that the judge determined it in accordance with the principles and objectives of sentencing and accounted for the circumstances of the offence, the offender and the community: *Nasogaluak* at para. 44.

Did the judge err in failing to comply with s. 726.2 of the Criminal Code?

[28] Section 726.2 of the *Criminal Code* imposes a statutory requirement on judges, as a matter of law, to provide reasons when sentencing an offender: *R. v. Guha*, 2012 BCCA 423 at para. 23. Section 726.2 provides:

> When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings.
>
> [Emphasis added.]

[29] In *R. v. Sheppard*, 2002 SCC 26, the Supreme Court of Canada explained that the purpose of s. 726.2 is to facilitate appellate review of sentencing decisions: at para. 20. As this Court has explained, it also affirms that, when a sentence is imposed, both the offender and the community are entitled to know why it was imposed and thus whether the "punishment fits the given crime": *Guha* at para. 22; *R. v. Laidlaw*, 2004 BCCA 355 at para. 5. Further, in a general sense, the duty to give reasons "may be said to be owed to the public rather than the parties to a specific proceeding": *Sheppard* at para. 22. As such, it advances the fundamental purpose of sentencing expressed in s. 718 of the *Criminal Code*, namely, to contribute to respect for the rule of law and the maintenance of a just, peaceful and safe society by imposing just sanctions.

[30] In *R.v. Flahr*, 2009 YKCA 13, Justice Groberman described the purposes of reasons for sentence as follows:

> [11] Reasons for sentence serve a variety of purposes: they ensure that the accused understands why a particular sentence is being imposed – this is essential to make the process a fair one, and may also be important to achieving goals of specific deterrence and rehabilitation. The public is also entitled to know why a particular disposition has been ordered. Public confidence in the judicial system depends on the public being able to understand why particular sentences are imposed. Reasons for sentence also serve as guideposts for those who work within the judicial system and for

> the general public. The principle that similar sentences should be given for similar crimes can only function if courts are able to discern what factors makes cases "similar" and "dissimilar". General deterrence also depends on public understanding of the sentencing process.

[31] Some of these purposes are served equally by oral reasons or written reasons. However, the sentencing process involves an important human element whereby the judge imposes sentence in the presence of the offender and those gathered in open court, some of whom may have been affected by the offence personally: see *R. v. Gates*, 2002 BCCA 128 at paras. 20–22. As a matter of transparency and fairness, all concerned are entitled to know the reasoning that led to the sentence, explained by the decision-maker, immediately and with certainty, in a formal public setting. This is why s. 726.2 requires a judge to "state" the reasons for a sentence "when" imposing sentence.

[32] In *R. v. Blind*, 2008 BCCA 310, the presiding judge imposed a sentence in open court and filed written reasons, but did not read them aloud to those present. Although it was not an issue on appeal, Justice Kirkpatrick said this:

> [19] Before leaving these reasons, I should comment on the fact that contrary to s. 726.2 of the ***Criminal Code***, the sentencing judge, although she stated the terms of the sentence imposed on Mr. Blind to him in open court, did not read her reasons for sentence in his presence. That is obviously contrary to the ***Code*** provision and is a practice that cannot be condoned.

[33] The statutory imperative in s. 726.2 also serves other purposes. For example, time to appeal runs from the date sentence is imposed and an informed decision on whether to appeal requires an understanding of the reasons that led to the sentence. As the Court stated in *R. v. Hannemann*, [2001] O.J. No. 839 (S.C.J.), "litigants must … be in a position of certainty to receive legal advice respecting the exercise of appellate rights": at para. 159. From the Crown's perspective, the need to understand the reasons for a sentence when it is imposed may be pressing because the Crown is obliged to bring on sentence appeals promptly, particularly in cases involving a short term of imprisonment or a non-custodial sentence: *R. v. Frisch; R. v. Pope*, 2013 YKCA 3 at paras. 12–18.

[34] Further, if reasons are not stated when a sentence is imposed and an appeal is filed, a risk arises that written reasons issued later may appear to respond to the appeal rather than articulate the reasoning that led to the determination. In other words, delaying reasons may create an apprehension that they do not reflect the real basis for the sentence. Judges benefit from the presumption of integrity, but when reasons are divorced from the delivery of a decision the presumption may be displaced and the requisite link between the decision and the reasoning that led to it may be broken. In such cases, the appearance of fairness in the administration of justice is compromised: *R. v. Teskey*, 2007 SCC 25.

[35] Announcing a decision "with reasons to follow" is permissible for trial rulings and verdicts in the interests of achieving trial efficiency, although the practice can be risky. In *Teskey*, the Supreme Court of Canada was asked to decide whether a provincial appellate court should have considered written reasons issued long after a guilty verdict was announced and a Notice to Appeal was filed. A majority of the Court concluded that a reasonable person would apprehend the written reasons did not reflect the real basis for the convictions and that, therefore, they should not have been considered. Drawing on *Teskey*, in *R. v. Desmond*, 2020 NSCA 1, the Nova Scotia Court of Appeal recently declined to consider written reasons for sentence filed after a Notice of Appeal for similar reasons.

[36] In this case, the written reasons plainly reflect the real basis for the sentence. They respond to the parties' submissions at the hearing, they were filed shortly after the Notice of Appeal and their delayed delivery was due to the exigent circumstances that prevailed. Mr. Jimenez benefited from the opportunity to return to Ontario immediately, Crown counsel did not object and the written reasons are helpfully clear and comprehensive. Given these circumstances, at the hearing of the appeal we asked whether it was possible for the parties to waive compliance with the requirements of s. 726.2.

[37] Crown counsel responded that the requirements of s. 726.2 cannot be waived in light of its mandatory language. However, he suggested that in exigent circumstances such as these the court could state brief oral reasons when imposing

sentence and issue fuller written reasons later on. For his part, counsel for Mr. Jimenez noted that procedural requirements in the *Criminal Code* are often waived with the consent of counsel and submitted that waiver of the requirements of s. 726.2 should be permitted.

[38] As a general rule, a party is entitled to waive a statutory provision enacted entirely for his or her benefit. However, waiver of a statutory provision in which there is a substantial public interest may not be permissible. In *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1315–1316, Justice Wilson stated:

> In *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41, Lamer J. enunciated at p. 48 the general rule as to the circumstances in which waiver can take place:
>
> > Some procedural requirements are enacted for the protection of the rights of one of the parties, Crown and accused, and others for both. A party may waive a procedural requirement enacted for his benefit, the concurrence of both being required when enacted for both.
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> …
>
> Waiver may not be permitted of statutory provisions in which there is a substantial public interest. For example, in *Korponay*, *supra*, Lamer J. noted at p. 48 that paramount to the accused's right to waive procedural provisions for re-election was the right of the trial judge to further the requirements of the judicial process:
>
> > Paramount to such a right is that of the trial judge to require compliance notwithstanding a desire to waive, he being the ultimate judge of what procedural safeguards need nevertheless be respected in order to protect the certainty and the integrity of the judicial process.

[39] In my view, there is a substantial public interest in requiring compliance with s. 726.2 regardless of whether the parties consent to its waiver. As I have explained, the statutory imperative that the terms of a sentence and the reasons for it shall be stated when a sentence is imposed does not just benefit the offender and the Crown. It also benefits interested others and the public generally, and it protects the certainty and the integrity of the judicial process. For these reasons, I conclude that compliance with the requirements of s. 726.2 cannot be waived.

[40] Nor, in my view, should a judge state brief oral reasons when imposing sentence and issue comprehensive written reasons later. This would result in two separate sets of sentencing reasons being produced, which, in turn, may undermine certainty and finality, cause confusion as to which are the "real" reasons and create the risk of apparent *ex post facto* justification. These concerns all arose in *Desmond*, where the judge delivered oral reasons when imposing sentence and, after a Notice of Appeal was filed, issued written reasons that substantively supplemented those previously delivered orally. In declining to consider the written reasons, Justice Scanlan stated:

> [17] A judge has the right to make limited editorial corrections. This is not a second chance to fill in any obligatory blanks that were missed the first time around. The changes in the March 12, 2019 [written] version were changes of substance, filling in the analytical parts that were absent from the oral decision.
>
> [18] Parties to criminal proceedings are entitled to finality in decisions. Those decisions are the ones on which they base future strategy, including whether to advance an appeal. It would undermine the administration of justice if decisions could be altered in substance, especially after a Notice of Appeal has been filed.
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> …
>
> [20] In this case, the *Code* sets out the analytical requirements. The oral decision does not reflect the judge did the necessary analysis. For her to fill in the necessary blanks after a Notice of Appeal was filed, no matter how well intentioned, places courts in a difficult position in terms of the administration of justice. The participants and observers may well question the fairness of the process if they perceived, rightly or not, that the written reasons might be an attempt to patch a previous error.

[41] While compliance with s. 726.2 cannot be waived, its precise requirements in a given case may depend on the nature of the issues for determination. For example, in dangerous offender proceedings sentencing reasons often include copious inclusions of text from expert reports and references to evidence and, by agreement, the judge's reasoning may be stated aloud in open court with comprehensive written reasons filed concurrently: see *R. v. Funk*, 2014 BCSC 383; *R. v. Jeurissen*, 2014 BCSC 1718. In other words, I do not agree with the statement in *R. v. B.S.B.*, 2008 BCSC 1526 that s. 726.2, as interpreted in *Blind*, always requires that "every word of [a judge's] long and complicated sentence rulings must

be read to the accused": at para. 4. Further, s. 726.2 does not prevent a judge from editing oral reasons, within proper limits. What is clear, however, is that the reasons for a sentence, as well as its terms, must be stated orally in open court when the sentence is imposed, not at a later date or in another form.

[42] In most cases, the requirements of s. 726.2 can be met reasonably easily. Reasons for sentence are not usually lengthy and, where necessary, an adjournment to facilitate their preparation will cause little, if any, difficulty for anyone concerned. On occasion, however, exigent circumstances may render compliance unusually challenging or inconvenient. Nevertheless, the proper administration of justice trumps challenge and convenience and non-compliance with s. 726.2 is not an available option.

[43] For all of these reasons, I would find that the judge erred in failing to comply with the requirements of s. 726.2 of the *Criminal Code* by not stating his reasons when he imposed the sentence on Mr. Jimenez. However, I would also find that this error had no material impact on the fairness of the proceedings.

[44] That said, I turn now to consider the sentence.

Statutory Framework

[45] Section 718 of the *Criminal Code* sets out the fundamental purposes and objectives of sentencing:

> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and

> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[46] Section 718.1 provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Section 718.2 requires consideration of specified principles:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
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> …
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
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> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> (e) 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, with particular attention to the circumstances of Aboriginal offenders.

[47] The *CDSA* also deals with the purpose and principles of sentencing. Section 10 provides, in relevant part:

> 10 (1) Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.
>
> 10 (2) If a person is convicted of a designated substance offence for which the court is not required to impose a minimum punishment, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person
>
> …
>
> (c) used the services of a person under the age of eighteen years to commit, or involved such a person in the commission of, the offence.

[48] Cocaine is a substance listed in Schedule 1 of the *CDSA*. Trafficking in cocaine is an indictable offence that is punishable by up to life imprisonment. In the

circumstances of this case, it is not subject to a mandatory minimum punishment. Accordingly, the possible sentences extend from a suspended sentence to a sentence of imprisonment for life.

Cocaine Trafficking and Dial-a-Dope Operations

[49] Cocaine is a highly addictive drug that inflicts untold misery on users, those in their orbit and society generally. It destroys lives, tears families apart and damages communities. For all of these reasons, trafficking in cocaine is considered a serious offence which should attract significant consequences. Doing so in a dial-a-dope operation increases the seriousness of the offence and is treated as an aggravating factor for purposes of sentencing: *R. v. Lloyd*, 2016 SCC 13 at para. 26; *R. v. Crompton*, 2009 YKSC 16 at para. 11; *Diedricksen* at para. 10.

[50] Dial-a-dope operations involve ordering illicit drugs by phone for delivery, which facilitates access for purchasers and enables the drug trade to infiltrate communities. Such operations require, among other things, forethought and planning, drug suppliers and equipment, including cell phones and delivery vehicles: *R. v. Dickey*, 2016 BCCA 177 at para. 28. As Justice Henderson explained in *R. v. Franklin*, 2001 BCSC 706 at para. 20, dial-a-dope operations increase the availability of hard drugs because they allow anyone interested, including adolescents, to purchase them without venturing beyond the comfort and safety of suburban locations. They also allow drug dealers to profit handsomely with relative ease, leaving a trail of destruction in their wake.

[51] For vulnerable northern communities, dial-a-dope operations can be particularly insidious and destructive. In *R. v. Holway*, 2003 YKTC 75 at para. 7, Judge Faulkner noted that northern communities already struggle with disproportionally high rates of addiction and scant resources to deal with the problems they ensue. In *R. v. Naiker*, 2007 YKTC 58, he remarked that “[p]eople who get it into their heads to come into our community to sell drugs must know they will not be welcomed when they end up before the courts”: at para. 7. Unsurprisingly, Yukon judges have consistently held that general deterrence and denunciation are the primary principles for consideration when sentencing dial-a-

dope drug traffickers: see, for example, *R. v. Hale*, 2007 YKTC 79; *R. v. Johnson*, 2011 YKTC 11; *R. v. Brisson*, 2013 YKTC 15.

[52] In *Voong*, Justice Bennett highlighted the fundamental importance of general deterrence and denunciation in sentencing in the context of dial-a-dope operations. She identified the normal range of sentence for a first offence dial-a-dope trafficker as "between six to nine months' incarceration, and upwards to eighteen months in some cases, absent exceptional circumstances": at para. 44. She went on to explain that circumstances which justify a non-custodial sentence in this context are rare, but they might include a combination of factors such as no criminal record, significant rehabilitative steps and a genuinely remorseful attitude. She also noted that, in some cases, a suspended sentence accompanied by a probation order might achieve deterrence and denunciation as well as rehabilitation:

> [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.) [hereinafter *Saunders*] 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).
>
> …
>
> [59] In summary, absent exceptional circumstances, the sentence for a first offence or with a minimal criminal record, dial-a-dope drug seller will be in the range of six to eighteen months imprisonment, depending on the aggravating circumstances. Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. <u>This is a non-exhaustive list</u>, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. <u>There must be something that would lead a sentencing judge to conclude that</u>

> the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.
>
> [Italic emphasis in original; underline emphasis added.]

[53] *Voong* involved four Crown appeals in which each respondent pleaded guilty to trafficking drugs or possession of drugs for the purpose of trafficking in a dial-a-dope operation and the sentencing judge suspended the passing of sentence. Justice Bennett reviewed the salient facts and concluded that three of the four involved exceptional circumstances. In particular: Mr. Voong, a 40-year-old drug addict with a dated criminal record and an anxiety disorder, sold drugs to support his habit but, after he was charged, engaged successfully in a treatment program; Ms. Charlton, a 28-year-old drug addict with a long criminal record and mental health issues, acted as a courier for dial-a-dope operation, but received treatment after being charged and took "meaningful, practical and successful steps to leave her life of crime"; and Mr. Galang, a 22-year-old with no criminal record and a steady work history sold drugs to an undercover officer through a dial-a-dope operation to help a friend, entered an early guilty plea and accepted responsibility for his actions. In all three cases the suspended sentence was upheld, although the one-year probation period in Mr. Galang's case was considered insufficiently deterrent and denunciatory in effect so this Court increased it and added a curfew.

[54] As Justice Harris explained in *R. v. Padda*, 2019 BCCA 351, the term "exceptional circumstances" is simply a shorthand means of describing the kinds of circumstances which justify going outside a normal sentencing range in order to craft an appropriate individualised proportionate sentence: at para. 36. Since *Voong* was decided, the kinds of circumstances which may lead to such a result in the dial-a-dope context have been considered repeatedly in British Columbia and the Yukon. For example, in *R v. Wong*, 2016 BCSC 1568, the offender was 18 when he engaged in four dial-a-dope transactions and 21 when he was sentenced, he pleaded guilty, was remorseful and had no criminal record or substance abuse problem. Despite the profit-driven nature of the offence, the sentencing judge

concluded there were exceptional circumstances, and, citing *Voong*, suspended the passing of sentence and imposed a three-year period of probation:

> [33] But Mr. Wong has completely changed his life around and that, it seems to me, meets that factor in *Voong*. Mr. Wong has gainful employment. Mr. Wong has shown remorse, he has acknowledged the harm done to his family and I think to his community by his offending conduct, and I say to his community because he has done some volunteer work, to his credit.
>
> [34] In my view, the public is better protected here by not exposing Mr. Wong to the sort of people he is going to meet if he goes to jail. They are likely the kind of people that led him astray in the first place. The public will also be better served if Mr. Wong continues along the path he now is on, being a useful and productive member of society ...

[55] Like the judge in *Wong*, the sentencing judge in this case drew on *Voong* in finding exceptional circumstances sufficient to justify a non-custodial sentence. He also drew on *Maynard* and *Diedricksen*, both of which concerned dial-a-dope cocaine trafficking and included some of the factors discussed in *Voong*. In *Maynard*, the offender was 19 when he sold cocaine to an undercover officer and 21 when he was sentenced, he entered a guilty plea, stopped using drugs before he was charged and was subject to strict bail conditions. In *Diedricksen*, the first-time offender facilitated a dial-a-dope transaction, but did not sell the drugs, pleaded guilty, was gainfully employed and took active steps to address his substance abuse issues. In both cases, the court concluded the circumstances were sufficiently exceptional to justify a suspended sentence.

[56] In summary, dial-a-dope trafficking in cocaine is a serious offence for which deterrence and denunciation are the primary sentencing principles for consideration. In the absence of exceptional circumstances, which are rare, the normal range of sentence for a first time dial-a-dope drug trafficker is imprisonment for a period of between six to eighteen months, depending on the aggravating and mitigating factors. The term “exceptional circumstances” describes the kinds of circumstances which justify going outside the normal sentencing range in order to craft an appropriate individualised proportionate sentence. While there are no exhaustive criteria, they may include a constellation of factors such as no criminal record, significant rehabilitative steps, gainful employment, genuine remorse and an

appreciation of the harm done to society. Most importantly, to qualify as exceptional in the dial-a-dope context the circumstances must show that an offender has genuinely turned away from crime and that the public is best protected by a non-custodial sentence.

Did the judge err by overemphasizing Mr. Jimenez's mitigating, but not exceptional, circumstances?

[57] Crown counsel contends that Mr. Jimenez's circumstances were insufficiently exceptional to warrant a departure from the normal sentencing range for a first time dial-a-dope cocaine trafficker. In particular, he says, successful rehabilitation alone does not constitute exceptional circumstances, as that term is used in *Voong*. However, in his submission, in crafting the sentence the judge focused unduly on Mr. Jimenez's positive rehabilitative steps, future prospects and desire to return home to Ontario. In doing so, he says, the judge erred by overemphasizing the mitigating factors and treating them as analogous to those in *Voong*, *Maynard* and *Diedricksen*, which they were not.

[58] In support of this submission, Crown counsel argues that the offenders in *Voong* were drug addicts or debtors who dealt in small amounts of drugs and took substantial steps to address their substance abuse issues, the offender in *Diedricksen* was not a drug seller and the offender in *Maynard* was bound by restrictive bail terms and began his rehabilitation prior to being charged with drug trafficking. However, in contrast, Mr. Jimenez was not a drug addict, his offence was profit-driven, and he undertook rehabilitative steps and counselling only after he was charged. In addition, he says, Mr. Jimenez was not bound by restrictive bail terms, his offence involved a 16-year-old and it appears that he came to the Yukon to sell drugs.

[59] I am not persuaded by these submissions.

[60] Nothing in the record shows that Mr. Jimenez came to the Yukon to sell drugs and the judge made no such finding. Mr. Jimenez met his co-accused after his arrival and when the judge asked him why he chose Whitehorse his answer was

ambiguous at best. While remote northern communities are especially vulnerable to the damage wrought by drug-trafficking and local conditions may be considered when a sentence is crafted, in my view if the Crown alleges that a particular offender targeted a particular community for a criminal purpose that allegation must be proven or admitted to be relied upon as an aggravating circumstance. I see no basis for doing so in this case.

[61] Nor do I see error in the judge's consideration of the mitigating factors or his conclusion that Mr. Jimenez's circumstances were sufficiently exceptional to justify a non-custodial sentence. As the judge recognized, sentencing is a highly individualized process, normal sentencing ranges are guidelines only and, while helpful, comparator cases inevitably include differing features. For example, he noted that, unlike Mr. Jimenez, the offender in *Maynard* took pre-charge rehabilitative steps and his offence did not involve a 16-year-old, which he identified as a distinctively aggravating factor in this case. However, he also noted there are no exhaustive criteria for exceptional circumstances and listed the many mitigating factors for consideration, namely, Mr. Jimenez's guilty plea, youth and lack of a criminal record, separation from negative peers, positive rehabilitative steps and family support, positive future prospects and demonstrated ability to comply with court-ordered conditions. Some of these mitigating factors were absent in *Voong*, but suspended sentences were nevertheless upheld on appeal.

[62] Most importantly, when balancing the objectives of sentencing and the circumstances of the case the judge asked himself two key questions: i) did the circumstances, considered overall, show that Mr. Jimenez had genuinely turned away from crime? and ii) did the circumstances, considered overall, show that the public would be best protected by a non-custodial sentence? His answer to both questions was an unequivocal yes. Accordingly, he concluded, Mr. Jimenez's circumstances were sufficiently exceptional to justify a sentence falling outside the normal range.

[63] Contrary to the Crown's submission, the judge did not focus solely on Mr. Jimenez's successful rehabilitation in reaching his conclusion. Rather, he

considered all the circumstances, weighed the mitigating and aggravating factors and found that Mr. Jimenez's rehabilitative efforts would be undermined by a custodial sentence, which would endanger, not protect, society. This was an entirely appropriate concern. As Justice Wood pointed out in *R. v. Preston* (1990), 47 B.C.L.R. (2d) 273 (C.A.), the object of the criminal justice system is the protection of society, which is permanently protected when an offender's rehabilitation is sustained in the future. Bearing this object in mind, the judge determined that, on balance, it was undesirable to endanger society by removing this youthful first-time offender from his stable home environment, jailing him with other offenders and thus placing his ongoing rehabilitation at unnecessary risk.

[64] The judge was in a privileged position to make this determination. In my view, he did not overemphasize the mitigating factors in making it and his conclusion was available on the record and the relevant authorities. It is entitled to appellate deference.

[65] It follows that I would not accede to this ground of appeal.

Did the judge err by failing to apply the applicable principles of sentencing in the Code and the CDSA?

[66] Crown counsel also contends that the judge erred by failing to apply the principles of denunciation and deterrence or account for aggravating factors in crafting the sentence. In his submission, although a suspended sentence *can* achieve deterrence, in these circumstances it did not. In particular, he says, the probation conditions are minimal and, in any event, because Mr. Jimenez resides in Ontario it is unlikely he would be returned to the Yukon and held accountable should he breach them. In other words, there is no "Sword of Damocles" hanging over Mr. Jimenez's head by virtue of the suspended sentence. In addition, he says, the profit-driven nature of the offence and statutorily aggravating fact that a 16-year-old was involved are not reflected in the sentence. Further, the sentence has little, if any, denunciatory effect, he says, because the curfew applies only when Mr. Jimenez is in the Yukon, where he does not reside.

[67] In support of his submissions, Crown counsel emphasizes the serious nature and negative impacts of dial-a-dope operations, particularly for struggling northern communities. For these reasons, he says, Yukon jurisprudence has long recognized denunciation and deterrence as the primary sentencing principles for application in cases of this kind. He also emphasizes the *Code* and *CDSA* provisions that require sentencing judges to account for these principles and for aggravating factors such as the involvement of a person under the age of 18 in the commission of an offence when imposing sentences (s. 718, *Code*; ss. 10(1) and 10(2)(c), *CDSA*). However, he argues, the judge erred by citing, but not applying, these important principles and factors in this case.

[68] I cannot agree.

[69] The judge dealt at length with the primacy of denunciation and deterrence in dial-a-dope cases, particularly those involving vulnerable, under-resourced northern communities such as Whitehorse. Nevertheless, he decided that a suspended sentence would have a denunciatory and deterrent effect, personally and generally, by operating as "the proverbial Sword of Damocles" over Mr. Jimenez's head in the event of a breach. I do not accept the Crown's bald assertion that inter-jurisdictional cooperation is unlikely or unreliable, particularly as no such submission was made to the judge and no such evidence was presented. Although, as explained below, I consider the effect of the probation order insufficiently denunciatory and deterrent in some respects to render the sentence fit overall, I am not persuaded that, in crafting it, the judge failed to apply the principles of denunciation and deterrence.

[70] Nor am I persuaded that the judge failed to account for the aggravating factors. He expressly listed the profit-driven nature of the offence and the involvement of a 16-year-old as aggravating factors that weighed in favour of a custodial disposition. As to the latter, he also found Mr. Jimenez's moral culpability was attenuated because he was only 18 years old when he committed the offence with the 16-year-old. In my view, the Crown's real complaint is not that the judge failed to consider or account for the aggravating factors. Rather, the complaint is that the judge assigned them insufficient weight.

[71] As I have explained, it is not for this Court to weigh the relevant sentencing objectives and factors differently than the sentencing judge did and impose a different sentence. A sentencing judge has a wide discretion as to which objectives and factors merit the most weight in the particular circumstances of a case and he or she is best-placed fully to understand and assess the case. For this reason, the determination of the sentencing judge is entitled to appellate deference.

[72] I would not give effect to this ground of appeal.

Is the sentence demonstrably unfit?

[73] I have concluded the judge made no material error that impacted the sentence. Nevertheless, as stated in *Agin*, appellate intervention can still be justified if a sentence is demonstrably unfit. In my view, bearing in mind the judge's error-free finding of exceptional circumstances, the principled basis upon which he determined the sentence and the comparator jurisprudence, the suspended sentence is not demonstrably unfit and I would not interfere with this aspect of the sentence. However, taking into account the serious nature of dial-a-dope offences and the fundamental importance of the principles of denunciation and deterrence, I consider the period of probation and curfew condition imposed insufficiently denunciatory and deterrent in effect to comport with the proportionality principle and thus to render the sentence fit overall. In addition, I consider condition 6 insufficiently clear and enforceable to stand.

[74] The terms of a probation order must be clear and capable of implementation or enforcement to be effective: *R. v. Morris*, 2004 BCCA 305 at paras. 76, 82. As noted, condition 6 of the probation order provides that Mr. Jimenez is not to attend "at any known place where drug trafficking is known or suspected to occur". In my view, this condition is plainly too vague to be enforceable, especially, though not exclusively, in a large metropolitan area such as Toronto. The enforceability problem becomes particularly apparent when one recalls that a primary evil of dial-a-dope operations is their capacity to spread drug trafficking into virtually any location, including suburban homes. For this reason, I would strike condition 6 of the probation order.

[75] As also noted, the probation order lasts for a two-year period. While I accept that, as the judge stated, the suspended sentence operates as a “Sword of Damocles” over Mr. Jimenez’s head, in my view it does not do so for long enough to render the sentence sufficiently denunciatory and deterrent in effect to be proportionate and fit. Therefore, I would increase the period of probation to three years.

[76] Finally, condition 9 requires Mr. Jimenez to be inside his residence or on his property between 10 p.m. and 6 a.m. daily except with the permission of his probation officer when, but only when, he resides in Whitehorse. I agree with Crown counsel that this narrowly circumscribed curfew has very limited denunciatory effect, which also compromises the fitness of the sentence. Accordingly, I would remove the geographic limitation from the curfew condition and order that it remain in force until June 30, 2020.

Conclusion

[77] I would grant leave to appeal and allow the appeal to the extent of increasing the period of probation to three years, striking condition 6 and varying condition 9 to remove the geographic limitation from the curfew and provide that the curfew remains in force until June 30, 2020. Mr. Jimenez has 14 days to make such arrangements through the Court of Appeal Registry as are required to enter into the new probation order.

“The Honourable Madam Justice Dickson”

I AGREE:

“The Honourable Madam Justice Saunders”

I AGREE:

“The Honourable Mr. Justice Harris”