

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Kirkpatrick*, 2019 NSPC 56

Date: 20191007

Docket: 8171982

Registry: Windsor

Between:

R.

v.

Kristin Ryan Kirkpatrick

Judge: The Honourable Judge Ronda van der Hoek

Heard: September 11, 2019, in Windsor, Nova Scotia

Decision October 7, 2019

Charge: *5(2) Controlled Drugs and Substances Act*

Counsel: Michael S. Taylor, Q.C., for the crown

Joel E. Pink, Q.C., for Kirkpatrick

By the Court:

[1] Mr. Kristin Ryan Kirkpatrick is before the court for sentencing with respect to one count of possessing cocaine for the purpose of trafficking contrary to section 5(2) of the *Controlled Drugs and Substances Act*.

[2] Mr. Kirkpatrick asks the court to suspend the passing of sentence and impose a three-year period of probation with conditions that include 100 hours of community service. Alternatively, Mr. Pink says if incarceration is required Mr. Kirkpatrick should receive a sentence of 60-90 days in a provincial facility.

[3] The crown submits there are no factors in this case that contribute to consideration of less than a two-year period of incarceration in a federal facility.

[4] Ancillary orders respecting a section 109 *Criminal Code* Prohibition Order for life and a section 487.051 *Criminal Code* DNA order for this secondary designated offence, are essentially agreed to by the parties. I will endorse each one. Counsel will prepare a consent Forfeiture Order, pursuant to section 16 of the *CDSA*, and I will endorse that as well.

Decision:

[5] After careful consideration, I conclude the purposes and principles of sentencing support the imposition of two-year period of incarceration in a federal facility.

[6] These are my reasons for reaching such a conclusion, but first the facts.

Facts:

[7] On November 23, 2017 police arrested Dallas Corbin who was suspected of trafficking cocaine in the Kentville area of Nova Scotia. Mr. Corbin's cellular phone was seized and upon review police located messages from Mr. Kirkpatrick and obtained a warrant to search his residence. Execution of the warrant resulted in police locating a safe in Mr. Kirkpatrick's bedroom closet that contained 83g of cocaine, packaging materials, scales, \$6,750.00 cash and a firearm. Mr. Kirkpatrick had a key to the safe and advised police that \$3,000.00 of the cash located therein belonged to his business.

[8] Mr. Corbin and Mr. Kirkpatrick knew each other for approximately 20 years, had not seen each other since school, did not have a particularly close relationship, and renewed the relationship when they met at a local pub in June 2017. Mr. Corbin informed Mr. Kirkpatrick of his current hardships advising that he needed a place to live. A month later Mr. Corbin contacted Mr. Kirkpatrick asking if he could stay with him at his house until he found a job. Mr. Kirkpatrick allowed Mr. Corbin to reside with him for three weeks before lending money to assist him to move out to a residence in Wolfville.

[9] Evicted in October 2017, Mr. Corbin went to Mr. Kirkpatrick's house bringing the gun and the safe containing cash and cocaine, asking to store it in Mr. Kirkpatrick's bedroom closet. A key was left with Mr. Kirkpatrick and Mr. Corbin took one for himself.

[10] Mr. Kirkpatrick knew Mr. Corbin trafficked in cocaine and was also aware of the contents of the safe. As previously stated, Mr. Kirkpatrick added \$3,000.00 cash from his business to the safe.

[11] When the police arrived at Mr. Kirkpatrick's home, he was cooperative and immediately informed them that he was keeping the drugs for a third party. An *Agreed Statement of Facts* confirmed the police have no evidence that Mr. Kirkpatrick was trafficking in cocaine. Mr. Kirkpatrick's guilt, I am reminded, arises as a result of s. 21(2) of the *Code*- as a party to an offence.

The Personal Circumstances of Mr. Kirkpatrick:

[12] A presentence report dated September 4, 2019 explains that Mr. Kirkpatrick is a 36-year-old male, first offender, divorced with an eight-year-old child. He pled guilty to the offence on the date set for trial following an unsuccessful section 11(b) *Charter* application that I rejected on the basis the few days past eighteen months was insufficient to warrant a hearing (unreported decision [June 6, 2019]).

[13] According to the report, Mr. Kirkpatrick benefited from a typical childhood raised by a caring family. His parents were employed, did not consume alcohol or drugs, and provided their son with the typical antecedents of childhood: opportunities for sports, plenty of friends, and part time work. Mr. Kirkpatrick is described as a child who did not get into trouble very often at home, never got into trouble at school, and followed the rules. He continues to benefit from a close relationship with his parents and his sister.

[14] His family members are all shocked by the matter the brings him before this court, and while disappointed they remain supportive. His mother, Yvonne Kirkpatrick, says this was a big wake-up call for her son. She confirms that he has always led a productive life and is a good person who gets along well with everyone. She also advised that he is a responsible person and well-liked by his business customers.

[15] His sister, Amanda Kirkpatrick, has allowed her brother to reside with her since he was charged with the offence. She says they are very close- like best friends, especially so following his separation from his wife five years ago. She notes that her brother always did the right thing while he was growing up, was active in sports, was a role model for her, does not have any issues with substance abuse, anger or his mental health. She confirms that the offence has impacted him, he understands his actions and she believes he will definitely make proper choices in the future. She points out that he is a smart and kind man who looks out for others and is a great asset to his family as well as the community. She believes he understands the seriousness of his actions and will never do such a thing again.

[16] Mr. Kirkpatrick's former spouse Jennifer Dodge was also interviewed for the report. She confirmed that the two began dating at 15 years of age, moved in together at 19, and were married at 27. They divorced five years after their wedding, maintain a good relationship and share custody of their eight-year-old son. Ms. Dodge says she was "blown away" by the charges and stated that he never had any difficulty with illegal substances in the past. She stated that the charge does not fit with the person she knows, explaining that he is not a criminal, that he is an honest person and she hopes the court will take this into consideration. She also hopes the sentencing result does not interfere with his relationship with their son.

[17] Ms. Dodge's parents also maintain a good relationship with him, and his mother-in-law presented a letter that was read to the court. In it she confirms all the positive information that were set out in the presentence report.

[18] Mr. Kirkpatrick's current girlfriend for the past two years, Julie Keanelly, explained that they are taking a break from their relationship until the matter before the court is resolved. She is currently going through a divorce and advised that the offence impacted custody of her children and as a result negatively affected their relationship. She says she has known Mr. Kirkpatrick since she was 14 years old and she says she was never aware of him having substance abuse issues. She says

that she was shocked and in disbelief when he was charged with the offence. She also stated that the charge scared Mr. Kirkpatrick. She says he is a good man and cares about his family, adding that he is also a good businessman who got mixed up with someone with whom he should not have associated.

[19] Mr. Kirkpatrick has a high school education and is the self-employed owner of Leisure Valley Pools and Spas. He honed this business for the past five years and before that always worked in the same industry. Mr. Kirkpatrick enjoys his career and appreciates the opportunity to provide full-time employment to four members of the community including a family member. Mr. Kirkpatrick works approximately 60 hours per week and donates his time in service to the community for projects such as producing splash pads and providing technical support. He also indicated that in the off-season he helps in the community sponsoring kids and a co-ed softball team. He plays on several hockey teams during the winter months and likes to keep busy taking advantage of outdoor activities such as hunting, fishing, camping, and riding dirt bikes and four wheelers. He spends time with his son and benefits from a prosocial group of friends.

[20] Mr. Kirkpatrick describes himself as healthy and very active with no medical conditions requiring prescription medications. He indicates his mental health is good, and he has only interacted with a therapist when his marriage ended so as not to tax his family.

[21] Mr. Kirkpatrick told the author of the presentence report that he first consumed alcohol at 15-years of age. Prior to the offence he consumed one or two beer a couple of times a week. He began using marijuana at 16 years of age and continued to do so until his mid-20's. He experimented with cocaine at the age of 18, used it occasionally with friends in his 20's, and continued to use it infrequently in his 30's, once or twice a year, usually in relation to bachelor parties.

[22] He has never been a heavy drug user, nor has he been in trouble for its use. Mr. Kirkpatrick indicated that since being charged, he has not used any substances. He has also been attending Alcoholics Anonymous and Narcotics Anonymous sessions upon the recommendation of child protective services, no doubt in relation to the children of his girlfriend.

[23] Mr. Kirkpatrick indicated that he would follow any counselling directed by the Court. The probation officer says Mr. Kirkpatrick identified his personal strengths as being friendly, helping others and having a big heart. He also

identified same as weaknesses because it can lead others to take advantage of him because it is hard for him to say no.

[24] Mr. Kirkpatrick takes full responsibility for the offence, admitting he made a stupid decision to help a former friend. Not surprisingly he regrets his actions and understands that he should have said no.

[25] Mr. Kirkpatrick says he has never done anything like this before and the matter has had a big impact on him and his family. He says it has impacted his business which in turn affects his employees' lives. He stated that he has always led a good life and was a productive member of the community and is known to be a hard-working member who supports local events and programs. He says in the future he will concentrate more on work and he wants to make up for the business losses he has incurred since he was charged with the offence. I am told community awareness of the charge has had an impact on his business. Mr. Kirkpatrick wants to prove he is still the same hard-working business owner he was before he committed the offence. He is worried that if he is unable to work, he will lose his business.

[26] The probation officer described Mr. Kirkpatrick as suitable for community supervision and, should the court decide to do so, suggested conditions to attend for counselling and treatment of a personal nature as well as for substance use.

The Law:

Sentencing Principles

[27] The relevant sentencing provisions that I must consider are found at ss. 718, 718.1 and 718.2 of the *Criminal Code* and s. 10 of the *Controlled Drugs and Substances Act*. They provide the general principles and factors that I must consider in fashioning a sentence that serves to protect the public and contribute to respect for the law and the maintenance of a safe society.

[28] Section 718 instructs me to impose a just sanction that has, as its 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.

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

[30] Section 718.2 requires a court to consider the aggravating and mitigating factors relating to the offence or to the offender and increase or decrease a sentence accordingly; 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.

[31] Section 10 of the *CDSA* incorporates the foregoing principles and requires a sentence encourage treatment of offenders in appropriate circumstances.

[32] Sentencing has an overarching goal of promoting the long-term protection of the public. As a result, I must balance the principles and purposes of sentencing and apply them to the facts and arrive at a fit sentence, not an easy task. Fortunately, case law provides me with guidance as to how I should interpret and balance these principles and guides 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 and the offender who appears before the court. 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 SCC 230 at para. 91-92).

Denunciation and Deterrence

[33] Over the years, the Nova Scotia Court of Appeal has repeatedly stated that denunciation and general deterrence must be the primary considerations when sentencing offenders who traffic in Schedule I drugs. (*R. v. Steeves*, 2007 NSCA 130; *R. v. Butt*, 2010 NSCA 56; *R. v. Scott*, 2013 NSCA 28; *R. v. Oickle*, 2015 NSCA 87; recently reaffirmed in *R. v. Chase*, 2019 NSCA 36). Emphasizing these objectives reflects society's condemnation of these offences and acknowledges the harm they do to communities.

[34] It is useful to quote paragraph 13 of *Butt*:

[13] . . . cocaine has consistently been recognized by this Court as a deadly and devastating drug that ravages lives. Involvement in the cocaine trade, at any level, attracts substantial penalties (see, for example, *R. v. Conway*, 2009 NSCA 95; *R. v. Knickle*, 2009 NSCA 59, *R. v. Steeves*, 2007 NSCA 130; *R. v. Dawe*, 2002 NSCA 147; *R. v. Robins*, [1993] N.S.J. No. 152 (Q.L.) (C.A.); *R. v. Huskins*, [1990] N.S.J. No. 46 (Q.L.) (C.A.); and *R. v. Smith*, [1990] N.S.J. No. 30 (Q.L.) (C.A.)). It is significant that the CDSA classifies cocaine as one of the drugs for which trafficking can attract a life sentence.

Rehabilitation:

[35] Despite the focus on denunciation and general deterrence, rehabilitation continues to be a relevant sentencing objective. Such was confirmed by the Supreme Court of Canada in *R. v. 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)

Proportionality

[36] 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.

[37] Possession of cocaine, a Schedule I drug, for the purpose of trafficking is a very serious offence. It carries a maximum sentence of life imprisonment, cannot be subject to discharge and does not qualify for a conditional sentence order.

[38] The other aspect of proportionality is the degree of responsibility of the offender. I have heard the facts and accept that Mr. Kirkpatrick was essentially providing what is commonly called a “stash house” for the cocaine dealer who found himself homeless at the time. Mr. Kirkpatrick has accepted responsibility for being a party to the offence as a result of his actions. He is remorseful and acknowledges that he should not have taken those drugs for Mr. Corbin. He is not, himself, addicted to drugs; he is a high school graduate; he benefited from an enviable upbringing; he is the father of a young child; and he is a business owner who should have known better than to involve himself in this situation. Deciding to

take the gun as well as the cocaine should have been an indicator to him of the seriousness of the situation.

[39] I find Mr. Kirkpatrick's degree of responsibility high. By virtue of comparison it is useful to say what he is not. He is not a naïve young person, he is not a battered wife, he was not threatened or coerced, he was not particularly close to the drug dealer, and I am not aware of any hold exerted by him on Mr. Kirkpatrick. Finally, he is not afflicted by mental illness, addiction or any medical ailment that reduced his ability to make pro-social decisions. There is a significant difference between having a big heart that leads to making splash pads for children versus storing cocaine and a gun for a known drug dealer. The former is laudable, the latter simply is not.

Aggravating and Mitigating Factors

[40] Section 718.2 requires me to consider the aggravating and mitigating factors relating to the offence and the offender. I find as follows:

Aggravating Factors

- Nature of substance (cocaine is a Schedule 1 drug);
- He held a significant amount of the drug-83 grams. It is, I believe, commonly known that a gram of cocaine sells for \$100 resulting a possible street value of \$8,300.00;
- A gun was stored along with the drugs;
- He provided a safe place for a drug dealer to store his poison. In a sense, he turned a family home where children attend into a "stash house" (he has a child and his partner has children as well);
- He possessed a key to the safe containing the drugs; and
- He comingled his business funds with the drug money, drugs and the gun.

Mitigating factors:

- He pled guilty, *albeit* at trial following an unsuccessful *Charter* application;

- He is a first-time offender;
- He has demonstrated remorse, embarrassment, shame and an understanding of the effects of drugs in the community;
- He has been bail-compliant in the community;
- He has strong family support as demonstrated by their attendance at court and by the letter filed; and
- There is no suggestion he is part of a gang or criminal enterprise despite being connected to a known drug dealer in this community.

Parity / Range of Sentences

[41] Section 718.2 requires the Court to consider the principle of parity which requires me to examine the range of sentences imposed for possession for the purpose of trafficking Schedule I substances. A long line of cases was provided by the Crown and defence, and I have reviewed them all. For example, our Court of Appeal has 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). Justice Warner sitting in this jurisdiction recently applied that reasoning stating sentences of less than two years of imprisonment are rare (*R. v. Forward*, 2017 NSSC 190).

[42] All that said, I recognize that it has never been the case that a federal penitentiary term is mandatory. There are some circumstances where the principles of sentencing can be satisfied by imposing something less. In such 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 in the past. In support of this proposition, Mr. Pink provided cases where short periods of incarceration and suspended sentences were imposed. I am familiar with all of them as some have formed the foundation for non-custodial sentences I have imposed for offences under the *CDSA* of which I will say more later. (See also: *R. v. Scott*, *supra*; and, *R. v. Howell*, 2013 NSCA 67, *R. v. Chase*, *supra*.)

[43] While I have more often than not found it necessary to impose periods of federal incarceration for offenders convicted of section 5 *CDSA* offences, I will say a word about what is necessary and what is not to move the consideration away

from incarceration. 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 imposing a sentence lower than two years for trafficking cocaine (at para. 53). He reminded sentencing judges that the task 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).

[44] *Scott* and *Chase* stand for the proposition that while it may be rare for a cocaine trafficker to receive a sentence less than a federal penitentiary sentence, where the court properly applies sentencing principles that justify the result, a sentencing judge is not required to make any specific conclusion that the circumstances are exceptional.

[45] Based on the majority decision in *Scott, supra*, reiterated in *Rushton, supra*, the lower end of the range has generally been imposed in cases involving one or more of the following: addictions; a youthful offender; limited or no prior record; relatively small amount of the drug; hope of rehabilitation; status as an aboriginal offender, and an absence of aggravating factors, statutory and otherwise.

[46] As was noted in *R. v. Zachar*, 2018 ONCJ 631, a particularly well-reasoned decision of Green J. of the Ontario Court of Justice, the range across Canada is broad and includes, in some provinces, intermittent sentences or suspended sentences with probation. He included reference to many such cases including: *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.

[47] 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). Such 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”.

[48] Justice Farrar in *R. v. Phinn*, 2015 NSCA 27, referenced *R. v. A.N.*, 2011 NSCA 21, noting:

[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.** ...[emphasis added]

[49] Mr. Pink has asked me to go outside of the range. I am aware that I may do so as long as the sentence I impose is a lawful one 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. ...

[50] Mr. Pink reviewed the recent decisions in this jurisdiction that he argues support a sentence of less than the federal sentence sought by the crown. The Crown says they are distinguishable and I agree.

[51] In *R. v. Saldanha*, 2018 NSSC 169, the court referenced *Scott* at paragraph 108 wherein Justice Saunders suggested some examples of the type of factors that he thought might persuade a court to conclude that an offender had “exceptional circumstances”. They included: the offence being a single one-time event; it being completely out of character and an aberration in the life of the offender for which great pain had been taken to make amends.

[52] I cannot say that this case assists in moving the bar from a period of federal incarceration for Mr. Kirkpatrick. Storage does not represent, in my opinion, the type of one off suggested in *Scott*; instead by its nature it is an ongoing situation. Likewise, Mr. Kirkpatrick is a past user of cocaine and made no great pains to make amends following the charge. He was always a community volunteer as I understand the presentence report. His life carried on as usual.

[53] In *Saldanha, supra*, the court identified an offence triggered by some significant trauma, crisis or personal hardship, an offender who took significant steps to reform his behaviour and made remarkable progress in his own rehabilitation, thereby managing by all accounts to turn his life around.

[54] Mr. Kirkpatrick was not motivated to offend as a result of trauma, crisis or personal hardship and took no steps to overcome same. Instead, and to his credit I will add, he has recognized an error in judgement.

[55] *Saldanha* also suggests the grave hardship that a lengthy period of incarceration may mean and the impact of such on dependents should all be considered; as well, deteriorating health due to a serious illness that likely could not be properly treated in prison. Mr. Kirkpatrick by comparison is a healthy adult male unafflicted by addiction or illness. His child will be supported by his mother.

[56] I am also asked to consider *Christmas, Casey, Rushton* (a youthful, remorseful petty retailer who possessed cocaine, methamphetamine and cannabis for the purposes of trafficking was placed on a three-year suspended sentence) and *Chase*. Those cases are distinguishable because of *Gladue* factors, youth, addiction and small amount of drug, rehabilitation of addiction and an absence of the aggravating factor- a gun. Mr. Kirkpatrick is an adult, a significant amount of drug was present and a gun was stored along with the drugs. I do not accept that the people mentioned, and in particular Rushton had factors at play that were worse than Mr. Kirkpatrick. For the reasons I have already set out and will say more of, there is nothing to move this court from considering the fitness of a federal period of incarceration. As the Crown says, *Chase, supra*, reconfirmed that nothing has changed regarding the principles of sentencing in these matters and two years remains a “normal” sentence for this offence.

[57] *R. v. Morrison*, 2019 NSPC 38, was also provided to the court. Judge Peter Ross in a carefully considered decision, imposed an eight-month period of incarceration for a low-end retailer found in possession of 60 grams of cocaine. Mr. Morrison plead guilty, his PSR was positive, his family support strong, and since being charged he had engaged in commendable conduct in the community. The cocaine was valued at \$100 per gram - \$6,000.00. The case did not engage s. 5(3) *CDSA* factors. He was a user himself and claimed grief as a factor triggering his own use. He had a long and varied work history and his family asserted that he had disavowed the drug scene, taken on volunteer work and maintained employment.

[58] In rejecting the request for a suspended sentence, Judge Ross considered recent reported decisions from the bench wherein such had been imposed and distinguished Mr. Morrison's situation noting his plea was not early, he was found with a greater quantity of drugs than in comparator cases - *Rushton* 6 grams of cocaine, *Casey* 0.23 grams of crack cocaine, *Saldanha* approximately 8 grams and *Provo* 0.67 grams. Judge Ross rejected the reasoning in *R. v. Kleykens*, 2019 NSPC 28, as a comparator case and while not distinguishable on its facts, he was persuaded not to use it as a comparator to Mr. Morrison. I understand *Kleykens* is currently under appeal.

[59] Judge Ross agreed that calls for leniency are understandable but must be tempered by an awareness of the destructive effects of hard drugs. He concluded a significant period of incarceration was required and the strong mitigating factors served to reduce an otherwise appropriate two-year sentence to eight months and probation, taking into account, *inter alia*, the significant amount of cocaine seized, and Mr. Morrison's daily involvement in purchasing and distributing a Schedule 1 drug.

[60] As mentioned, I have recently sentenced three individuals to non-custodial sentences for offences under section 5 of the *CDSA*.

[61] *R. v. Nicholson* (unreported, [November 26, 2018] (Crown appeal from sentence abandoned): Mr. Nicholson possessed approximately 1900 methamphetamine pills for the purpose of trafficking. His relevant *Gladue* factors, serious long-term drug addiction, some of the pills intended for his own use, finally beating his addiction through significant, sustained rehabilitative efforts, resulted in a non-custodial sentence.

[62] *R. v. Wilcox* (unreported, [February 7, 2019]): An elderly first offender afflicted by a variety of medical conditions gave to a friend a number of pills from her own oxycodone script and received a suspended sentence and three years of probation.

[63] *R. v. Ward* (unreported [June 17, 2019]): A middle aged first offender with a long-term addiction to pills, pestered by two fellow addicts relented and gave them two pills. The two men suffered an adverse reaction that required emergency medical intervention. Mr. Ward received a "shocking wake up call" and immediately addressed his own long-term addiction through sustained and intensive therapy and engaged in laudable efforts to assist other addicts in his community. He was supported by a significant number of community members

including his employers and recipients of his recovery focused support. His sentence was suspended and he was placed on probation for three years with significant community service hours.

[64] The Crown, aware of my local decisions as well as those raised by Mr. Pink, says all are distinguishable from Mr. Kirkpatrick's situation. I agree.

Reasonable Alternatives to Custody

[65] That said, I must consider reasonable alternatives to custody. An offender should not be deprived of liberty, if there are less restrictive sanctions that are appropriate in the circumstances and that are available other than imprisonment. They must be reasonable in the circumstances and consistent with the harm done to victims or to the community and should be considered for all offenders.

[66] I recognize that Mr. Kirkpatrick is before the court as a first offender at 36 years of age. I am aware that he used cocaine in the past, having experimented with it at a young age and continuing in his 30s while the father of a young child. He was fully aware that the drug is illegal. One would have to be living in a closet not to know that cocaine has a drastic impact on the state of our society. Drug addiction is a serious problem and those people who would possess for the purpose of trafficking in drugs provide opportunities for people in our community to have access to that drug. There are obviously people in this community who had access to that drug when they were very, young and access set them off on the course of criminality and incarceration. There are also people in our community who consume these drugs for a long time, and it can take a great deal of effort to break free from addictions, as outlined in the various cases I have mentioned.

[67] In order for people to have drugs there must be people in the community to provide drugs. In order for people in the community to provide drugs they have to have a place to store drugs that keeps them off the radar of police investigations. It is not surprising that people like you Mr. Kirkpatrick become the people who have to hide the drugs for people in the community who, for whatever reason, cannot put drugs in a place where they can keep them safe. Mr. Corbin obviously felt the best place to keep his drugs was at your house, possibly because you are somebody who had good standing in the community and were without a criminal record. The problem that I have Mr. Kirkpatrick is when I take into account all the circumstances and conduct the balancing I am required to do, I note you did benefit from a good reputation and I measure that against the fact that you were an

occasional user of the very drug that Mr. Corbin stored in your house. I also must consider the fact a weapon was involved in the storage. I also consider that you comingled your cash with the drug money and the drugs. I do accept that you are not a trafficker in the community however by providing Mr. Corbin a place to store his drugs you are responsible for allowing those drugs to have access to people in our community.

[68] Since hearing your sentencing submissions, I balanced and carefully considered the facts of this case, the contents of the PSR, and reviewed the case law, including the cases that persuaded other courts that a period of incarceration was not necessary. I cannot agree that the cases referred to me are equivalent to your case before me. All of those cases involved factors that swayed courts in the circumstances to determine that a period of incarceration was not appropriate or to impose a low period. Unfortunately when I consider the circumstances here it is important to denounce what you did and it is very important to send a strong message of deterrence to other people in the community that one cannot open their home to a drug dealer's stash of poison that is intended to be distributed among the youth and drug addicts in our community.

[69] I am satisfied that a period of federal incarceration is necessary to meet the sentencing principles applicable in this case- denunciation and general deterrence require nothing less.

[70] I would have considered a sentence of 27 months appropriate, however considering the mitigating factors I impose a sentence of two years plus a day to be served in a federal facility.

Judgement accordingly

Ronda van der Hoek