

# In the Court of Appeal for the Northwest Territories

**Citation:** *R v Bernarde*, 2018 NWTCA 7

**Date:** 20181105  
**Docket:** A1-AP-2018-000006  
**Registry:** Yellowknife

**Between:**

**Her Majesty the Queen**

Respondent

- and -

**Cameron Bernarde**

Appellant

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**The Court:**

**The Honourable Mr. Justice Peter Costigan  
The Honourable Madam Justice Barbara Lea Veldhuis  
The Honourable Mr. Justice Thomas W. Wakeling**

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## **Memorandum of Judgment**

Appeal from the Sentence by  
The Honourable Madam Justice L.A. Charbonneau  
Dated the 26th day of March, 2018  
(2018 NWTSC 22, 2018 NWTSC 27; Docket S-1-CR-2017-000029)

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## Memorandum of Judgment

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### **The Court:**

[1] The appellant pled guilty to a charge of robbery. Section 344(1)(a.1) of the *Criminal Code* mandates a minimum sentence of four years given a firearm was used in the commission of the offence. He challenged the constitutionality of this sentence before the sentencing judge, which application was dismissed. He now appeals to this Court alleging a number of errors in the sentencing judge's assessment of the fit sentence and her conclusion on whether the mandatory minimum sentence was grossly disproportionate. For the reasons that follow, we dismiss the appeal.

### **Background**

[2] On the evening before the offence was committed, the appellant had been drinking with his friends. In the early morning hours, he left his friend's house, retrieved a firearm from his house and went to a gas bar. He entered the gas bar carrying the firearm, wearing a hoodie over his head and something covering his face. He pointed the firearm at the cashier and demanded money from the till and a nearby ATM. The cashier gave him approximately \$200. The offence was captured on security cameras and the appellant was quickly identified and arrested the same day. He gave a warned statement to the police admitting to the robbery.

[3] At sentencing, the judge was provided with a significant amount of information about the appellant's circumstances, including: two pre-sentence reports detailing his dysfunctional home environment growing up, which was plagued by substance abuse and assault; medical and other documents describing his Fetal Alcohol Spectrum Disorder (FASD) diagnosis and associated global developmental delays, which suggest that the appellant has the cognitive capabilities of a nine-year old; his employment history and family situation; and his criminal record dating back to 2008, which included a number of convictions for property-related offences, breaches of court orders and his most recent conviction for sexual assault. The appellant was still on probation when he committed the robbery.

[4] The sentencing judge issued an oral decision as well as detailed written reasons on the constitutional challenge. Within the written decision, she set out the framework for a challenge to s. 12 of the *Charter*, which included assessing the fit sentence, having regard to the sentencing principles and objectives, and then considering whether the mandatory minimum was grossly disproportionate to that fit and proportionate sentence.

### **Standard of Review**

[5] The parties agree on the applicable standards of review. The sentencing judge's determination of the fit and proportionate sentence is reviewable on a deferential standard of

review, while the question of whether the mandatory minimum penalty was grossly disproportionate is reviewable on the standard of correctness.

### **Analysis**

[6] The appellant has not identified any error in the sentencing judge's reasons or in the result she reached. She correctly set out the tests, considered the applicable authorities, sentencing principles and objectives, and thoroughly assessed and weighed the numerous factors in arriving at the fit and proportionate sentence. She analyzed the appellant's FASD diagnosis through the framework established by the Alberta Court of Appeal in *R v Ramsay*, 2012 ABCA 257, 536 AR 174. She noted the reduced moral culpability of such offenders and the reduced weight to be accorded to general deterrence and denunciation. She also balanced the objective seriousness of the offence. Next, she considered other similar cases and the starting point for unsophisticated robberies of vulnerable people such as unprotected commercial outlets as developed in *R v Johnas*, 1982 ABCA 331, 41 AR 183 and *R v Welsh*, [1991] 110 AR 219, [1991] AJ No 44 (QL) (CA). Reviewing aggravating factors, she noted that the appellant had used a firearm, covered his face, and pointed the firearm at the cashier, which demonstrated a level of planning. He also had a criminal record, although she acknowledged that his FASD diagnosis made the record less aggravating. Under mitigating factors, she noted his guilty plea, his remorse, his FASD diagnosis, his background as an Aboriginal offender and the principles from *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 and *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433. She concluded that a fit sentence was three years.

[7] In determining whether the mandatory minimum was grossly disproportionate, the sentencing judge reviewed the factors in *R v Morrissey*, 2000 SCC 39, [2000] 2 SCR 90 including the gravity of the offence, circumstances of the offender, actual effects of the punishment on the offender, penological goals and sentencing principles that underlie the mandatory minimum, a comparison of punishments for similar crimes, as well as guidance set out in *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 and *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773. She was aware that none of the previous cases upholding the mandatory minimum penalty had considered the situation of offenders living with FASD or of Aboriginal offenders where the principles in *Gladue* and *Ipeelee* applied. After weighing all the factors, she found the mandatory minimum of four years' incarceration to be very harsh in these circumstances, but it did not reach the threshold of grossly disproportionate. She dismissed the application and sentenced the appellant to four years in jail.

[8] Contrary to the appellant's submissions, the sentencing judge did not overemphasize or underemphasize any one factor, objective or principle. The appellant's FASD diagnosis and sentencing principles specific to Aboriginal offenders factored appropriately into her assessment of the appellant's moral blameworthiness and the fit sentence. So too did the firearm and the appellant's criminal record.

[9] There is also no issue with the parity of the three-year sentence. The comparator cases that the appellant relies upon to suggest that a fit sentence was two years of jail or less are distinguishable as very few involve robbery with a firearm.

[10] Finally, the appellant did not raise a hypothetical situation before the sentencing judge and it was not an error for her to fail to pose and consider one herself. We decline to consider a hypothetical for the first time on appeal.

[11] Leave to appeal the sentence is granted and the appeal is dismissed.

Appeal heard on October 23, 2018

Memorandum filed at Yellowknife, Northwest Territories  
this      day of                      , 2018

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Costigan J.A.

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Veldhuis J.A.

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Wakeling J.A.

**Appearances:**

B.W. Green  
for the Respondent

R.H. Clements  
for the Appellant

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