SUPREME COURT OF YUKON

Citation: *R. v. Organ-Wood,* 2020 YKSC 28

Date: 20200504
S.C. No.: 19–AP006
Registry: Whitehorse

BETWEEN:

REGINA

APPELLANT

AND

HUNTER YVAN ORGAN-WOOD

RESPONDENT

Before Madam Justice E.M. Campbell

Appearances:
Paul Battin (by telephone) — Counsel for the Appellant
Amy Steele (by telephone) — Counsel for the Respondent

REASONS FOR JUDGMENT

[1] CAMPBELL J. (Oral): This sentence appeal concerns the sentencing judge's decision not to include a condition requiring the respondent, Mr. Organ-Wood, to abstain from the consumption and possession of cannabis as defined by the *Cannabis Act*, S.C. 2018, c. 16, and the Yukon *Cannabis Control and Regulation Act*, S.Y. 2018, c. 4, as part of the 60-day conditional sentence he imposed on the respondent for fleeing from a peace officer and breaching the curfew condition of the recognizance he was bound by at the time.

ISSUES

[2] This appeal raises the following issues:

1. Did the sentencing judge err by not imposing a condition that the respondent abstain from the possession and consumption of cannabis as part of the conditional sentence order he made?
2. Did the sentencing judge err by giving insufficient weight to the objectives of denunciation and deterrence in deciding not to impose the said abstain condition?
3. Does the absence of a condition that the respondent abstain from the possession and consumption of cannabis as part of his 60-day conditional sentence render the sentence unfit?

[3] I am also of the view that a preliminary question with respect to fresh evidence arises in this case. More specifically, does the Whitehorse Correctional Centre's policy on contraband and, more specifically, the fact that inmates in that institution are not allowed to possess and consume cannabis constitute fresh evidence? If so, is that evidence admissible on appeal?

FACTS

[4] The sentencing of the respondent proceeded on the following factual basis. On May 12, 2019, at approximately 3:00 a.m., an RCMP officer parked on the side of the road near the airport noticed an SUV going south on the Alaska Highway at a high rate of speed. The police officer followed the SUV up to a speed of 180 kilometres per hour in order to gain on the vehicle, but the vehicle was too far ahead for the officer to catch up to it.

[5] During that time, the SUV met another police car. The police officer driving that marked vehicle flashed its emergency lights at the SUV. Despite this warning, the vehicle continued its course without stopping or even slowing down. The first police officer continued to chase the SUV at approximately 180 kilometres per hour in an attempt to close in on the vehicle and effect a traffic stop. By that time, the first police officer had activated his police car's emergency equipment. However, the SUV continued its course and turned off the Alaska Highway down the Mount Sima Road, still going at a high rate of speed.

[6] The police later found the SUV stuck on a sandbar in the Mount Sima subdivision. Four individuals were located and arrested at the scene. The respondent was not one of them. The police investigation revealed that the respondent was the driver of the SUV. However, he fled the scene before the vehicle was intercepted by the police.

[7] The respondent was located and arrested at his residence in Whitehorse at around 11:15 p.m. later that day. The respondent requested and was allowed to get some of his belongings before departing with the officers. At that time, he tried to flee from the officers through the back door. However, members of his family convinced him to go with the officers before he went any further.

[8] At the time, Mr. Organ-Wood was subject to a recognizance in relation to other charges. The recognizance included a condition that he remain inside his residence between the hours of 11:00 p.m. and 7:00 a.m. daily. Luckily, nobody was injured as a result of the respondent's conduct.

[9] The respondent pleaded guilty to the offence of fleeing police (s. 320.17 of the *Criminal Code*), and to breaching the curfew condition of his recognizance (s. 145(3) of the *Criminal Code*). He also pleaded guilty to a territorial offence under the *Motor Vehicles Act*, R.S.Y. 2002, c. 153, associated to his driving. The Territorial Crown pointed out during the joint sentencing hearing that the respondent's driving licence was suspended at the time of the events. The respondent was sentenced on these matters on February 10, 2020.

[10] To better understand the sentence imposed on the respondent in this case, it is useful to note that on June 12, 2019, the respondent was found guilty after trial of extortion, kidnapping, as well as break and enter and commit assault. On January 22, 2020, the respondent was sentenced for those offences. The sentencing judge, who was the same judge who sentenced the respondent in this case, noted that another individual was the principal actor in relation to those offences and that the respondent "played more of a supporting role" (*R. v. Organ-Wood*, 2020 YKTC 1, at para. 25).

[11] With respect to the matter for which the respondent was sentenced on January 22, 2020, a pre-sentence report was prepared and filed with the court. The sentencing judge noted, amongst other things, that the accused was a very young man (19 years old). Mr. Organ-Wood was sentenced on each of those offences to concurrent intermittent sentences of 90 days imprisonment, to be followed by a two-year probation. I also note that Mr. Organ-Wood appeared to have a very limited criminal record, if any.

[12] In the matter at hand, the respondent was sentenced to a 60-day conditional sentence, as suggested by Crown and defence, to be served consecutively to the intermittent sentence he had received in the previous matter in order to avoid collapsing

that first sentence and undermining its rehabilitative purpose. The sentencing judge also imposed a one-year driving prohibition.

[13] The judge imposed a number of restrictive conditions which are responsive to the brief submissions made by Crown and defence at the sentencing hearing as part of the conditional sentence he imposed. As a result, when the conditional sentence takes effect, the respondent will be bound by a house arrest condition subject to a number of exceptions. He will also have to abstain from the possession and consumption of alcohol and/or illegal drugs. He will be forbidden from attending any premises whose primary purpose is the sale of alcohol, and he will have to participate in and complete all assessments, counselling, and programming as directed by his conditional sentence supervisor.

[14] The sentencing judge also agreed with the Crown that a number of community work service hours were appropriate in this case. He therefore added, with the apparent assent of the parties, 45 hours of community work to the probation order he had imposed on the respondent in the previous matter. However, the sentencing judge declined to impose, as part of the conditional sentence, a condition that the respondent abstain from the possession and consumption of cannabis.

POSITIONS OF THE PARTIES

[15] In his written and oral submissions on appeal, counsel for the appellant relied on the fact that cannabis is an intoxicant and, like alcohol, is a substance that inmates are prohibited from possessing or consuming at the Whitehorse Correctional Centre ("WCC"). Counsel for the appellant acknowledged that cannabis is no longer considered an illegal drug pursuant to the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19

("*CDSA*"), but argued that the *Cannabis Act* and the Yukon *Cannabis Control and Regulation Act* "make it clear that cannabis is a substance that requires regulation by the state for the safety and protection of the public".

[16] The appellant argued further that "the Yukon legislature understood that cannabis would not be permitted in the WCC when the *Corrections Act, 2009*, S.Y. 2009, c. 3, was brought into effect, and there is no indication that legislative intent has changed".

[17] Counsel for the appellant submitted that a conditional sentence is a jail sentence that an accused is allowed to serve in the community. Accordingly, the appellant submitted that the sentencing judge correctly imposed a condition that the respondent abstain from the possession and consumption of alcohol on the basis that alcohol cannot be consumed at the WCC. Counsel for the appellant submitted that the same legal reasoning applies to cannabis and, on that basis, the judge should have imposed a condition that the respondent abstain from the consumption and possession of cannabis while serving his conditional sentence, as requested by the Crown.

[18] Counsel for the appellant also submitted that the offence of fleeing the police is a serious one, even more so when it involves danger to the public and high rates of speed with passengers on a busy highway.

[19] I pause here to say that as a resident of the Yukon for a good number of years and user of that highway, I am prepared to take judicial notice of the fact that the Alaska Highway is not what one could qualify as a busy highway in the middle of the night, even in the summer, and that I am of the view that the Crown is overstating its case when suggesting otherwise.

[20] Going back to counsel's submissions on appeal, counsel for the appellant also pointed out as aggravating the fact that the respondent committed the offence while his driving licence was suspended and he was out past his curfew in breach of a court order.

[21] Finally, counsel for the appellant submitted that the pre-sentence report, which the sentencing judge was familiar with and referred to during the hearing, indicates that the respondent had been using drugs for a number of years at the time he committed the offences, that it had caused him health problems and was a factor in the other matter for which he was sentenced in January 2020.

[22] Counsel for the appellant submitted that denunciation and deterrence are primary objectives at sentencing for the offence of fleeing police, which is an offence that undermines and erodes the authority of police officers, and that the sentencing judge failed to give proper weight to those principles in refusing to impose a condition that the respondent abstain from the consumption and possession of cannabis. In addition, counsel for the appellant submitted that, without the abstain condition, the sentence fails to promote a sense of responsibility in the offender, who will be permitted to use cannabis for recreational purposes while serving his sentence of imprisonment in the community. This, according to counsel for the appellant, results in an unfit sentence.

[23] Counsel for the respondent did not dispute the fact that the possession and use of cannabis is prohibited at the WCC. She even consented to the Crown using that fact on appeal. However, counsel for the respondent submitted that sentencing judges have broad discretion when determining an appropriate sentence and that appellate courts cannot intervene simply because they would have weighed the relevant factors

differently or believe the sentence to be too lenient or harsh. She added that a condition to abstain from the consumption of drugs, except in accordance with a medical prescription, of alcohol, or of any other intoxicating substance is not mandatory. Instead, it is an optional condition that a sentencing judge may decide to impose as part of a conditional sentence order made pursuant to the *Criminal Code*.

[24] Counsel for the respondent submitted that a conditional sentence order is not completely analogous to a jail sentence in that the accused who is serving his sentence in the community is only partially deprived of his freedom and is not subjected to the same restrictions as inmates. She added that there is no requirement in law that there be parity between inmates serving a jail sentence and offenders serving a conditional sentence.

[25] Counsel for the respondent referred to a number of cases where a condition to abstain from alcohol was imposed on a conditional sentence, but not a condition to abstain from cannabis. She added that there is no nexus between the offence and the consumption of marijuana in this case, as there is no evidence that the respondent was under the influence of any substance at the time he committed the offences. Furthermore, she submitted that the respondent's pre-sentence report, which the sentencing judge was familiar with, indicated that the respondent had a low level of problems associated with drugs, while it was noted that he had some problems related to alcohol abuse.

[26] Regarding the nature of the offence, counsel for the respondent stated that the sentencing judge did acknowledge that this (fleeing police) was a serious offence.

[27] Finally, she submitted that the length of the conditional sentence and its restrictive conditions coupled with the one-year driving prohibition demonstrate that the sentencing judge gave sufficient weight to the principles of denunciation and deterrence, and that he imposed a fit sentence.

THE ISSUE OF FRESH EVIDENCE

[28] In his written submissions and at the hearing of the appeal, counsel for the appellant relied on the fact that the use and possession of cannabis is prohibited at the WCC. Counsel for the respondent consented to the appellant relying on that fact. Counsel for the appellant also referred to the WCC's policy on contraband, which according to the appellant, demonstrates that cannabis is prohibited at the WCC. Considering that the respondent did not dispute the fact that inmates are not permitted to possess or consume cannabis at the correctional centre, the appellant determined that it did not need to file the policy in support of its position. However, as counsel for the respondent did not object to this Court being provided with a copy of the policy, counsel for the appellant provided me with a copy of the WCC's policy, as requested.

[29] After the hearing of the appeal, I requested that the appellant and the respondent provide further submissions on the issue of fresh evidence and more specifically on whether the fact that inmates are prohibited from possessing and using cannabis at the WCC, as per its policy, constitutes fresh evidence on this appeal.

[30] Counsel for the appellant submitted that this fact did not constitute fresh evidence because the respondent had admitted that cannabis was prohibited at the WCC and that this information was properly in evidence before the sentencing judge. According to the appellant, the sentencing judge acknowledged that fact when he

stated: "There will likely be no marijuana ever at a correctional facility here." In the alternative, counsel for the appellant submits that the evidence meets the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 (“*Palmer*”), and should be admitted on this appeal.

[31] Counsel for the respondent acknowledged that she did not dispute the fact that cannabis is not permitted at the WCC, nor did she object to this Court being provided with a copy of the WCC's policy on contraband. However, she submitted that even if a party consents to the admission of fresh evidence, the decision on the admissibility of that evidence rests with the appeal court. With respect to the *Palmer* test, counsel for the respondent agrees that the evidence is relevant and credible. However, she submitted that the Crown's failure to act with diligence in introducing the evidence at the sentencing hearing is a factor to take into consideration.

[32] Counsel for the respondent also argued that it is unlikely the evidence would have affected the result in any event, as she submitted that the sentencing judge accepted that cannabis was not allowed at the WCC prior to making his decision. In the alternative, even if the fresh evidence is admitted, counsel for the respondent argues that it is not dispositive of the appeal as the judge properly exercised his discretion and declined to impose an optional condition as part of the conditional sentence he imposed on the respondent.

[33] The first question for me to answer is whether the fact that inmates are prohibited from possessing and using cannabis for recreational purposes at the WCC constitutes fresh evidence on appeal.

[34] Both the appellant and the respondent rely on a passage of the sentencing judge's reasons to submit that this fact was known to the sentencing judge when he imposed his sentence. However, a reading of the full excerpt of the judge's intervention on that topic during the sentencing hearing reveals otherwise. Quoting from the transcript starting at page 11, line 39, this is where the judge decides to impose a condition that the respondent abstain from the possession and consumption of alcohol:

> THE COURT: You will not possess or consume alcohol and/or illegal drugs that have not been prescribed for you by a medical doctor.
>
> This is a jail sentence served in the community. Alcohol is not allowed to be drunk at WCC.
>
> CROWN: Could I ask that anything under the *Cannabis Act* be added to that as well? That's now a legal drug, much like alcohol.
>
> DEFENCE: I would just say, Your Honour, that I don't think we have evidence of marijuana being involved in Mr. Organ-Wood's offences, so I would oppose that.
>
> CROWN: It's a jail sentence, Your Honour. He shouldn't be consuming.
>
> DEFENCE: Generally with conditional sentences I've seen no alcohol. I don't know if I've specifically seen marijuana.
>
> THE COURT: Well —
>
> DEFENCE: I mean, I don't think Mr. Organ-Wood's —
>
> THE COURT: — it used to be an illegal drug, so.
>
> DEFENCE: — advocating for it, but —
>
> CROWN: I think we haven't updated our submissions and our format with respect to the new laws, but it's a legal drug much like alcohol is a legal drug and we put no-alcohol terms on because people are not allowed to consume any substances, legal or otherwise, while serving a jail sentence.
>
> THE COURT: Right. They can smoke cigarettes, though; right?
>
> CROWN: I believe they still can. I hope they can.
>
> THE COURT: At WCC?
>
> THE COURT**: It will be interesting to see how they end up dealing with legal substances like this. But there's no alcohol. There will likely be no marijuana ever at a correctional facility here**.

> I think with all that I have read in the pre-sentence report, it is a meritorious position of the Crown; I think in these circumstances I will leave it at alcohol — just think I will leave it there. Unless the house rules, of course, are different. The house rules govern. [my emphasis]

That is the extent of the conversation, intervention, or statements with respect to cannabis during the sentencing.

[35] This passage clearly demonstrates the judge's uncertainty with respect to the status of cannabis, now a legal substance, at the WCC. The record also demonstrates that Crown counsel requested that the judge consider a condition that the respondent abstain from the possession and consumption of cannabis for the first time while the judge was going through the terms of the conditional sentence he had decided to impose. At the time, Crown counsel asserted that cannabis was prohibited at the WCC, but did not file any evidence or provide further information that would have answered the judge's question in that regard.

[36] I also note that prior to the judge giving his decision, Crown counsel had simply submitted that the respondent be placed on "tight" conditions, and specifically requested that the following conditions be imposed: that the respondent be put on house arrest subject to exceptions, that he perform community service work, and that if the respondent had substance use issues, he be directed to attend counselling.

[37] The record reveals that at no time during the sentencing hearing did defence counsel concede or acknowledge that cannabis possession or use is prohibited at the WCC. Neither can it be reasonably inferred from the transcript that the sentencing judge proceeded on the understanding that cannabis is actually prohibited at the WCC. As a

result, I find that the fact that inmates are prohibited from possessing and consuming cannabis, now a legal substance, at the WCC constitutes fresh evidence on appeal.

[38] I further note that Yukon did not amend its *Corrections Act, 2009*, after cannabis was legalized. As a result, while Yukon enacted legislation such as the *Cannabis Control and Regulation Act* to regulate and establish certain prohibitions with respect to the importation, sale, distribution, possession, purchase, cultivation, propagation, harvesting, and consumption of cannabis and public intoxication in the territory, overall, its legislation and regulations as they now stand do not specifically prohibit the possession and consumption of cannabis at the WCC, as cannabis is no longer included in the list of substances prohibited by the *CDSA*, and Yukon has not adopted regulations under the *Corrections Act, 2009,* that specifically identify cannabis as an illicit drug for the purpose of the *Corrections Act, 2009*.

[39] Alcohol, on the other hand, is specifically listed as an illicit drug under the *Corrections Act, 2009*. (See the definition of the terms "contraband" and "illicit drug" in s. 1 of the *Corrections Act, 2009)*.

[40] However, the *Corrections Act, 2009,* confers upon the WCC's authorized personnel the authority to prohibit any substance or thing that:

> (f) if possessed without prior authorization, any other object or substance that, in the opinion of an authorized person, may threaten the management or operation of, or discipline, security or safety of persons in the correctional centre.

The WCC's policy on contraband purports to do just that with substances considered to be intoxicants such as, counsel for the appellant submits, cannabis. However, the policy adopted by the WCC is not a piece of legislation or regulation. As a result, in this case, the issue regarding the prohibition of cannabis at the WCC is not solely one of legal

interpretation, which would have been a question properly before the Court on appeal. Instead, it is an evidentiary issue that is subject to the test applicable to fresh evidence.

[41] In *R. v. Lévesque*, 2000 SCC 47 ("*Lévesque*"), the Supreme Court of Canada recognized that the sources and types of new evidence admissible on appeal are more flexible with respect to sentence appeal. It also determined that the test set out in *Palmer* governs the admissibility of fresh evidence on sentence appeals. As set out in *Palmer*, due diligence, relevance, credibility, and impact on the result are the four criteria to consider when determining whether to admit fresh evidence on appeal.

[42] In *R. v. Sipos*, 2014 SCC 47, the Supreme Court of Canada summarized the analysis that must be conducted as follows in para. 29:

> [29] . . . Generally, fresh evidence should not be received if it could have been obtained at trial by exercising due diligence, although this criterion is not strictly applied in criminal matters when it would be contrary to the interests of justice to do so. The evidence must be relevant in the sense that it relates to a potentially decisive issue and reasonably worthy of belief. Finally, the evidence, if accepted, must reasonably be expected to have affected the result when considered along with the trial evidence. As Charron J. explained in *R. v. Angelillo*, 2006 SCC 55, . . . at para. 15:
>
> > In accordance with the last three of the *Palmer* criteria, an appellate court can therefore admit evidence only if it is relevant and credible and <u>if it could reasonably be expected to have affected the result had it been adduced at trial together with the other evidence.</u> [Emphasis already added.]

[43] In this case, counsel for the respondent consented to the admission of the fresh evidence as it admitted that inmates are prohibited from possessing and consuming cannabis at the WCC and did not oppose this Court being provided with a copy of the WCC's policy on contraband. However, in *Lévesque*, at para. 32, the Supreme Court of

Canada stated that, ultimately, it is for the appeal court to determine whether the fresh evidence will be admitted on appeal, even if the other party has consented to its admission.

[44] Counsel for the respondent conceded in her submissions that the evidence in this case is relevant and credible; however, she submitted that the criteria of due diligence and impact on the result may not be met.

[45] I will deal first with the issue of due diligence.

[46] It is clear that the WCC's policy on the prohibition of cannabis existed at the time of the sentencing hearing and that the Crown could have easily obtained it and provided it to the sentencing judge to answer his question. The Crown could have also sought confirmation of that fact through an affidavit from the WCC's personnel or even admission from the defence to that effect. The Crown could have also requested a brief recess to address the judge's question, even though the Crown's decision to wait until the judge was imposing conditions on the conditional sentence to request the abstention from cannabis clause did not leave much room for even a brief adjournment to that effect. Clearly, this evidence could have been adduced at the sentencing hearing.

[47] However, in *Lévesque*, at para. 15, the Supreme Court of Canada reiterated that due diligence is only one of the factors to consider in determining the admissibility of the proposed fresh evidence. The Court went on to reiterate that the absence of due diligence:

> 15 . . . particularly in criminal cases, should be assessed in light of other circumstances. In other words, failure to meet the due diligence criterion should not be used to deny admission of fresh evidence on appeal if that evidence is compelling and it is in the interests of justice to admit it.

[48] However, due diligence must still be given due weight. Crown or defence should not consider an appeal proceeding as a way to bolster their case. As Doherty J.A. stated in *R. v. M.(P.S.)* (1992), 77 C.C.C. (3d) 402, as quoted by the Supreme Court of Canada in *Lévesque,* at para. 19:

> 19 . . .
>
> > While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed . . . .
> >
> > The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.

[49] I find that the WCC's policy on cannabis is evidence of a compelling nature when establishing the restrictions it imposes on offenders incarcerated within its walls. I will come back to the issue of whether it is in the interest of justice to admit this evidence

after I consider the last criterion of the *Palmer* test, which is whether the evidence could reasonably be expected to have affected the result.

[50] Considering that at least part of the sentencing judge's reasons to impose a condition that the respondent abstain from the possession and consumption of alcohol was that alcohol cannot be consumed at the WCC, evidence that the prohibition also applies to cannabis could reasonably be expected to have affected the judge's decision with respect to the abstain condition requested by the Crown. I am therefore of the view that this factor is met.

[51] Finally, considering the unchallenged nature of the evidence, the fact that the respondent consented to its admission on appeal and the fact that it brings clarity with respect to the status of cannabis at the WCC, I find that it is in the interest of justice to admit the fresh evidence on appeal.

[52] I will now address the appellant's grounds of appeal.

THE STANDARD OF REVIEW

[53] It is not disputed that an appellate court may intervene if

(i) the sentencing judge erred in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor, and that error impacted the sentence; or

(ii) the judge imposed a sentence that is demonstrably unfit (*R. v. Lacasse*, 2015 SCC 64, at paras. 43 – 44, as interpreted in *R. v. Joe,* 2017 YKCA 13, at para. 34).

FIRST GROUND OF APPEAL

[54] I will now address the first ground of appeal, which is whether the sentencing judge erred when he declined to impose a condition that the respondent abstain from the possession and consumption of cannabis for recreational purposes.

[55] The pre-sentence report, which the sentencing judge was aware of and referred to at the sentencing hearing, clearly indicates that the respondent had, in the recent past and for a number of years, struggled with both alcohol and drug abuse, and that there was a connection between his substance abuse, which affected his behaviour, and his troubles with the law. Cannabis was one of those substances.

[56] The pre-sentence report also indicates that the respondent requested to attend and successfully completed the 12-session Substance Abuse Management Program in July 2019. However, the respondent's score of one on the Problems Related to Drinking Scale (“PRD”) suggested to the author of the report that the respondent still had some problems related to alcohol abuse. The respondent's score of two on the Drug Abuse Screening Test (“DAST”) suggested to the author of the report that the respondent had a low level of problems associated with drugs.

[57] The author also reported that the respondent indicated to her that he had used cocaine on one occasion and used marijuana for recreational purposes over the past year. As for his consumption of alcohol, the respondent told the author of the report that he had significantly reduced his consumption of alcohol and only drank beer as a result, as hard liquor made him angry. According to the report, the respondent's issues with alcohol and drugs, including cannabis, appeared to be somewhat under control.

Nonetheless, the results of the tests indicate that the respondent was displaying some problems with alcohol and drugs, including cannabis, at approximately the same level.

[58] On the other hand, there was no evidence that the respondent was under the influence of drugs or alcohol when he committed the offences before the court.

[59] However, the personal circumstances of the offender related to his substance abuse issues certainly supported the judge's decision to impose a condition that he abstain from the possession and consumption of alcohol as part of his conditional sentence.

[60] The fact that the possession and consumption of alcohol is prohibited at the WCC further supported the judge's decision to include such condition as the respondent was sentenced to serve a period of imprisonment in the community. However, this is not to say that a condition to abstain from alcohol and/or other substances, such as cannabis, is always warranted as part of a conditional sentence order simply because inmates serving their sentence in a correctional facility are prohibited from possession and using those substances.

[61] The *Criminal Code* prescribes that a condition that an offender abstain from the possession and consumption of drugs and/or alcohol as part of a conditional sentence is optional, not mandatory. Furthermore, in *R. v. Proulx*, 2000 SCC 5 (“*Proulx*”), the Supreme Court of Canada stated that sentencing judges have considerable discretion in imposing conditions on a conditional sentence. The imposition of an optional condition as part of a conditional sentence, such as an abstain clause, therefore depends on a number of factors. From para. 117 of *Proulx*, those factors include that "punitive conditions such as house arrest should be the norm, not the exception" but also that

"conditions must be tailored to fit the particular circumstances of the offender and the offence". There are also other factors mentioned at para. 117 of *Proulx*.

[62] In *R. v. Lacasse*, 2015 SCC 64, the Supreme Court of Canada reminded judges sitting on appeal that sentencing judges have a broad discretion in crafting a sentence they consider appropriate within the limits established by law. As such, appeal courts may not and should not intervene lightly.

[63] In this case, it is clear from the transcript that the uncertainty that remained at the sentencing hearing with respect to the status of cannabis, now a legal substance, at the WCC was the determining factor in the sentencing judge's decision to decline to impose an abstain condition with respect to cannabis. The judge's comment about the fact that the Crown's position was meritorious in light of the pre-sentence report, and the specific question he asked about the use of cannabis at the WCC, which was left unanswered, led him to err on the side of caution in declining to impose the condition requested by the Crown. While the judge indicated that it is likely that marijuana would never be permitted at the WCC, it is telling that he started his intervention by saying that "It will be interesting to see how they end up dealing with legal substances like this."

[64] In the absence of evidence, the sentencing judge acted logically in declining to impose the optional condition requested by the Crown on the basis of assumptions. However, the evidence that was not adduced at the sentencing hearing which confirms that the use and possession of cannabis is prohibited at the WCC is now properly before me. Considering the fact that the respondent displayed about the same level of problems with drugs such as cannabis as he did with alcohol, that there was no proven nexus between the offences before the court and the offender's consumption or

possession of alcohol or drugs including cannabis, and that we now know that the possession and use of both substances, which are legal, are prohibited at the WCC, I find that it would be an error, based on the particular circumstances of this case and the personal circumstances of the offender, to impose a condition that the respondent abstain from the possession and consumption of alcohol and decline to impose the same condition with respect to cannabis without any further reasons. The same reasoning applies to the condition that the respondent not attend any known places where the primary purpose is the sale of cannabis.

[65] I pause here to note, though, that I find that the sentencing judge's reasons were commensurate to the brief submissions that were made by counsel for Crown and defence in this case.

CONCLUSION

[66] Based on my finding that there was an error, I would therefore allow the Crown's appeal on that basis and vary the respondent's sentence to include the following terms as part of the conditional sentence order.

1. Mr. Organ-Wood must not possess or consume any substances as identified by the *Cannabis Act* as, amended, or the Yukon *Cannabis Control and Regulation Act*, as amended, except in accordance with a medical prescription.
2. Mr. Organ-Wood must not attend any premises whose primary purpose is the sale of substances identified in the *Cannabis Act* or the Yukon *Cannabis Control and Regulation Act*.

[67] As I have granted the appeal on the first ground raised by the appellant, I will not address the other grounds it raised in support of its appeal.

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CAMPBELL J.