

Citation: *R. v. Aguilera Jimenez*, 2019 YKTC 42

Date: 20190930
Docket: 19-00180
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

DAWSON AGUILERA JIMENEZ

Appearances:
Benjamin J. Eberhard
Luke S. Faught

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] Dawson Aguilera Jimenez has entered a guilty plea to having committed an offence contrary to s. 5(2) of the *Controlled Drugs and Substances Act* (“CDSA”).

[2] The matter came before me for a sentencing hearing at 2:00 p.m. on September 9, 2019. After hearing submissions and considering the matter, I advised counsel that I was prepared to pronounce sentence for Mr. Jimenez immediately, and that I would subsequently provide written Reasons for Sentence providing my rationale for the sentence I was going to impose.

[3] I then sentenced Mr. Jimenez to a suspended sentence and probationary order of two years.

[4] My decision to not immediately provide oral reasons for sentence at the time of pronouncing sentence was premised upon several factors:

- The sentence I was to impose was exceptional for a s. 5(2) offence and, as such, required a full, clear and concise explanation for the sentence imposed that should not be rushed;
- There was a co-accused coming up for sentencing and I felt that it would be appropriate to have written Reasons for Sentence available to counsel conducting that sentencing hearing;
- Mr. Jimenez had travelled from Ontario expressly for the purpose of attending the sentencing hearing and, as I had decided that he was not to receive a custodial disposition, I felt it more appropriate to deal with the actual sentence immediately so that he could leave the Yukon, where the offence was committed, and return to Ontario, where his support structure was, as soon as possible. As I was leaving the following morning for two days of travel for circuit court, followed by another day of travel to a special sitting in a third circuit point, I felt that it was not feasible to have Mr. Jimenez remain in the Yukon awaiting a sentencing decision with contemporaneous reasons for sentence given at the same time.

[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.

[6] There is, of course, an obligation upon any judge who states that written Reasons will subsequently follow to act with due diligence, taking into account other obligations, time constraints and requirements, in providing these Reasons within a reasonable time period.

[7] These are my Reasons for Sentence.

[8] An Agreed Statement of Facts was filed as an Exhibit. It is attached as Appendix A to these Reasons for Sentence (youth's name has been redacted). The facts, (with certain minor grammatical corrections and identification of the youth by initials only), are as follows:

- On June 15, 2018 Dawson Aguilera-Jiminez was a resident of Ontario.
- EMS called the RCMP to report erratic driving.
- Two officers went looking for the car and found it going southbound at Main and Fourth.
- It turned left from Main onto Fourth on a yellow light.
- Cst. Smee activated lights, and the car turned off Fourth into a parking lot just past the RCMP Detachment and parked.
- Cst. Smee approached. Abdullah and M.D. were sitting in the back seat.
- The back windows were tinted and there was movement inside the car.
- The driver briefly restarted the car and moved backwards while Cst. Smee was trying to engage the driver. This was unintentional by Mr. Aguilera.
- Cst. Smee detained Aguilera-Jiminez under MVA but had safety concerns so intended to search all for officer safety.
- Large amounts of cash were found on M.D. and Abdullah (later found to amount to \$1,525 and \$2,060 respectively).
- Cst. Smee had grounds to arrest and did so.
- A more thorough search incident to arrest yielded 9 baggies of crack cocaine and one of powdered cocaine, all on Aguilera-Jiminez.
- One of the phones in the back seat rang repeatedly with calls and texts from people ordering drugs.
- All three suspects were taken to APU after arrest and held overnight.
- The next morning, shortly before 9 am, Abdullah was being taken to the fingerprinting room.

- A baggie containing five individually-wrapped packages of crack cocaine (weighing 2.26 g combined) fell out of his pant leg.
- He tried unsuccessfully to conceal it.
- He was told he would be strip-searched and brought to showers.
- When given a last opportunity to turn over any contraband prior to search, he pulled out a rock of crack cocaine that had been taped to his testicles. The weight of the crack was 53.43 grams.
- He had these drugs on him in the car as well.
- Aguilera-Jimenez was knowingly driving for a dial-a-dope-style operation.

Submissions of Counsel

[9] Crown counsel submitted that an appropriate disposition is that of 15 – 18 months custody. Counsel submits that Mr. Jimenez was operating as a mid-level dealer in a dial-a-dope operation. Pursuant to s. 10(2)(c), it is aggravating that a 16-year-old youth was involved at the time of the arrest.

[10] There is a significant community impact as a result of drug trafficking in the Yukon and deterrence and denunciation are the paramount considerations.

[11] Counsel for Mr. Jimenez submitted that a probationary disposition attached to a suspended sentence would be an appropriate disposition. He notes Mr. Jimenez's guilty plea and acceptance of responsibility, his youth, his lack of any prior criminal record, and the steps Mr. Jimenez has taken since the offence to turn his life around, as well as his future prospects.

Circumstances of Mr. Jimenez

[12] A Pre-Sentence Report (“PSR”), that was prepared in Ontario was provided, as well as letters from Leora Rich and Igor Abinun, both social workers with the Toronto Youth Addictions and Concurrent Disorder Service (“YACDS”).

[13] Mr. Jimenez was born on August 13, 1999. At the time of the offence he was 18 years of age. He was 20 years old at the time of the sentencing hearing.

[14] Mr. Jimenez’s parents are immigrants from Ecuador. He resided with them until he moved to the Yukon in February 2018. After being charged with this offence, Mr. Jimenez was brought into court and, on June 16, released on a recognizance with cash bail. The bail was perfected on June 29 and Mr. Jimenez returned to Ontario to reside with his parents until he returned for the sentencing hearing.

[15] Mr. Jimenez states that his parents have been his only source of positive support. His mother has worked as a general labourer. However, due to her arthritic condition, she struggles to find employment and receives social assistance. His father has maintained steady employment as a professional painter.

[16] Mr. Jimenez has an older half-brother with whom he has a respectful relationship. However, Mr. Jimenez has not disclosed the full details of the nature of this offence because he is afraid that it will cause disappointment and strain between them.

[17] Mr. Jimenez describes his parents as being pro-social and contributive citizens with no prior involvement in the criminal justice system. He states that they have a

loving and respectful relationship. His parents came from a poor country and they provided him with everything they could. His childhood was healthy and he was actively involved in soccer.

[18] Mr. Jimenez points to a significant incident in his life when, in October 2014, his best friend was shot and killed as an innocent bystander. This friend had been a positive factor in Mr. Jimenez's life. Mr. Jimenez's mother stated, weeping, that the death of this friend marked a change in her son's behaviour.

[19] The author of the PSR states that Mr. Jimenez: "...appears to have struggled emotionally after his friend's passing which may have impacted his performance at school, choice of companions and experimentation with drug use...".

[20] Mr. Jimenez was expelled from school in grade 11, which would appear to be at a time after the death of his friend.

[21] He also indicated that he began to purchase and drink rum on a weekly basis when he was 15 years old, although he states that alcohol abuse is currently not an issue for him. He also admits to smoking marijuana daily and at times having used other non-prescribed drugs. He stated that he had quit using all illicit drugs some time back, other than using Xanax one or two times in 2019.

[22] Mr. Abinun indicates that Mr. Jimenez has been attending at YACDS since July 2019 on a weekly basis. He states as follows:

As Dawson's social worker, I have seen Dawson progress well throughout our time together. Dawson is learning about the complexity and intersections of his mental health and substance use issues. Dawson

is working diligently to implement relapse prevention skills into his day-to-day routine to help stabilize his drug use, and transition into the community as a confident, independent young person. For example, Dawson is using cognitive-behaviour therapy to recognize the correlation between his thoughts, emotions, and behaviours. Dawson is identifying triggers, and healthy coping mechanisms to help increase control over his cognitive regulation in order to find new ways to cope with negative thoughts and cravings.

Although Dawson is a young person that faces various systemic barriers, he exhibits the qualities of an individual that can become a leader in his community. Dawson understands that the road to recovery is different for each person. Despite the decisions he has made in life that he regrets, Dawson is putting forward a lot of effort at learning how to forgive his past choices, and move forward in life on a positive note. Dawson has set social, emotional, and academic goals for himself and is carving out a path for his future that will bring him joy and happiness. These goals include, but are not limited to, reconnecting with his family members in a more positive way, establishing healthy relationships built on mutual respect and trust in his community, and exploring post-secondary school options with the hope of entering a professional trade.

[23] He says that he is eager and pleased to continue working with Mr. Jimenez.

[24] Ms. Rich notes that Mr. Jimenez was an active participant in the Connect substance abuse group in the two sessions he had attended by September 4, 2019. This group "...supports young people in understanding their patterns of substance use, facilitating changes and providing strategies for relapse prevention". Mr. Jimenez was noted to be "communicative, respectful and engaged".

[25] Since being released on the Recognizance, Mr. Jimenez has returned to school and received his Ontario Secondary School Diploma, a copy of which was provided to the author of the PSR.

[26] Also provided was a Credit Counselling Summary that indicated Mr. Jimenez had completed 41 hours of community work service.

[27] In addition, Mr. Jimenez obtained employment from August into November 2018 working as a painter with a family friend. From November through January 2019, Mr. Jimenez obtained employment as a delivery assistant for a bottled water company. He anticipates working for this company in the future.

[28] Mr. Jimenez also intends to further his education. He hopes to work and save up sufficient funds to attend post-secondary education or otherwise to enroll in college in order to pursue a trades apprenticeship, primarily in the areas of flooring and painting. Mr. Jimenez reports having visited a community agency that assisted him in building a resume.

[29] Mr. Jimenez's parents confirmed the above information and stated that they have raised and encouraged him to live a pro-social life. When Mr. Jimenez received his first pay cheque, his father asked him how that felt being paid for hard work and Mr. Jimenez was positive in his response. His mother states that she and her husband are worried that Mr. Jimenez may start using drugs, although his father says that Mr. Jimenez appears to be fine.

[30] Mr. Jimenez told the author of the PSR that he had distanced himself from negative companions in order to avoid continuing to go down a negative path. He said that he was sorry for having committed this offence.

[31] Mr. Jimenez stated that his parents were experiencing financial hardship and emotional hardship related to his actions and the strain this has caused. They could not afford to travel with him to attend the sentencing hearing and he feels "terrible".

[32] Mr. Jimenez was noted to have had no prior involvement with respect to adult community supervision. There also is no indication that he has not complied with the terms of the Recognizance he has been on since his release from custody on bail June 29, 2018.

[33] The author of the PSR states as follows in the Assessment section:

Based on the subject's attempts at improving his circumstances he appears to be interested in establishing a pro-social future for himself. The subject's parents appear to be supportive and involved in his rehabilitation, however, lack insight on his issues of substance abuse.

The subject appears to have proposed reasonable and realistic plans to achieve his career and education goals. Should the subject receive a period of community supervision, he would be provided with resources in the area of life skills, substance abuse and employment/education services.

Analysis

[34] A conviction for a s. 5(2) *CDSA* offence involving a Schedule 1 substance can attract a sentence as high as life imprisonment. Other than those cases set out in s. 5(3)(a)(i) and (ii), there is no minimum punishment, and a suspended sentence attached to a probation order remains available.

[35] The Crown has stressed the importance of denunciation and deterrence in cases such as this. I agree with the Crown on this point. Generally, in the Yukon, a sentence imposed for trafficking in drugs such as cocaine is going to result in a custodial disposition. Deterrence and denunciation, coupled with the need to protect the public are critical purposes of sentencing in this regard, and tend to be paramount.

[36] Section 10(1) of the *CDSA* speaks to the fundamental purpose of sentencing for drug offences, including a s. 5(2) offence:

Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Part is to contribute to respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances or offenders and acknowledging the harm done to victims and the community.

[37] The trafficking of drugs, or possession of drugs for the purpose of trafficking, such as cocaine, continues to have devastating impact upon individuals, families and communities in the Yukon. The comments of Faulkner J. in *R. v. Holway*, para. 7, remain applicable today:

...Curtis [*R. v. Curtis*, [1984] 2 Y.R. 177 (Y.K.T.C.)] simply points out that northern communities are already struggling with disproportionately high rates of addiction, while scant resources are available to deal with the problem. The last thing we need is more drug traffickers. Courts in the North have quite properly held that they are entitled to take these local conditions into account and have consistently held that deterrent sentences are warranted and that, given our circumstances, the need to maintain a deterrent trumps other sentencing considerations in cases involving trafficking in hard drugs.

[38] In *R. v. Naiker*, 2007 YKTC 58, Faulkner J. stated in para. 7:

Given the nature of the drug trafficked, given the vulnerability of our community, and given the purely commercial nature of Mr. Naiker's activities, denunciation and deterrence must be the primary focus of sentencing. People 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.

[39] In *R. v. Profeit*, 2009 YKTC 39, I referenced favourably these comments in the *Holway* and *Naiker* decisions and in addition stated the following:

24 The paramount sentencing factors in drug trafficking cases are deterrence and denunciation. These principles also apply equally to cases of violence that are related to the drug trade and culture, in particular when connected to the enforcement of drug debts.

25 Trafficking in drugs, and in particular hard drugs such as cocaine, is a crime whose victims can be found far beyond the individuals who become addicted to the drugs. Families can be torn apart by either the loss of the individual to the addiction itself or to the violence that all too often accompanies the drug trade. In Canadian society this violence has found innocent victims on numerous occasions, whether they be extended family members or passers-by caught in the crossfire of the violence.

26 Children suffer immense harm from the effects of addiction in their home, whether this addiction be from pre-natal impact or from physical and/or emotional violence in the homes that they should be safe in. The future of these children and their families is damaged and all of society pays the price.

27 I am not going to attempt to compare the effects of drug trafficking in the Yukon to other communities south of us. These communities no doubt experience serious harm from the effects of the drug trade....

28 While rehabilitation of the offender is always an important sentencing consideration, it will, other than in exceptional circumstances, often involving drug treatment court participation such as the Yukon Community Wellness Court, take a back seat to deterrence and denunciation.

[40] In *R. v. Mackay*, 2019 BCSC 1112, Fitzpatrick J. stated:

25 The suffering and misery caused by drug use in our communities is well known. Canadian and, in particular, B.C. courts have duly acknowledged this harm in sentencing offences of this type.

26 The Crown refers to the comments found in *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982 at paras. 85-91, as to the prevalence of drugs and drug crimes in Canada. Those comments remain as relevant, if not more relevant, at this time, particularly as to the specific harm arising from drugs and drug trafficking:

(2) Drugs and Crime

[85] Drug offences such as possession and trafficking are only part of the link between the drug trade and criminality. There is an established connection between heavy drug use and crimes motivated by the need to finance a drug habit (*Juristat*, vol. 14, No. 6, 1994, at p. 5). A Canadian survey of federal inmates showed that 40 percent of men were drug users and half of those had engaged in criminal activity to get drugs. For women, the ratio is even greater: 25 percent of female inmates in Canada committed their crimes solely to obtain drugs (*ibid.*, p. 12).

[86] In addition, the illegal drug trade is known to involve violence as a means of resolving disputes and maintaining discipline (*ibid.*, p. 9). In 1996, 56 homicides, that is to say one in ten, were reported by police to be drug-related; this was said to be similar to averages for other years (*Juristat*, vol. 17, No. 9, 1997, at p. 10).

[87] Finally, it is well established that the consumption of licit and illicit drugs increases the rate of criminality generally, not just offences directly related to drugs. Among a sample of federal male inmates, over half were under the influence of alcohol or other drugs when they committed at least one of their crimes (*Juristat*, vol. 14, *supra*, at p. 11). Seventy-one percent of those of those who had consumed drugs said they would not have committed the crime if they had not taken the drugs (*ibid.*, p. 12). Thus, as might be expected, U.S. research indicates that drug abusers are more likely to be re-arrested than non-abusers (Bureau of Justice Statistics, *Drugs and Crime Facts, 1994*, at p. 26). Furthermore, research indicates that from 30 to 50 percent of those convicted of drug offences re-offend (*ibid.*; Canadian Centre for Justice Statistics, *An Examination of Recidivism in Relation to Offence Histories and Offender Profiles* (1993), at p. 21).

[88] In the face of all of this evidence, it is impossible to underestimate the harm that is done to Canadian society in the form of criminal activity, often violent, by the trafficking of illicit drugs. Unfortunately, there are also other costs associated with illicit drug trafficking and use, which reflect the widespread harm caused by these activities.

(3) Social and Economic Costs of Illicit Drug Use

[89] The costs to society of drug abuse and trafficking in illicit drugs are at least significant if not staggering. They include direct costs such as health care and law enforcement, and indirect costs of lost productivity.

[90] In Canada, the total cost to society of substance abuse has been estimated to be \$18.45 billion annually (Canadian Centre on Substance Abuse, *The Costs of Substance Abuse in Canada: Highlights* (1996), at p. 2). Of this amount, the cost flowing from illicit drugs is \$1.4 billion (McKenzie, *supra*, at p. 227). In 1992 there were 732 deaths, 7,095 hospitalizations and 58,571 hospital days in Canada attributable to illicit drugs (*ibid.*, p. 91). Mortality from illicit drugs is less than for alcohol and tobacco, but tends to involve

younger victims (*Costs of Substance Abuse in Canada, supra*, at p. 6).

[91] These significant and often tragic consequences serve to emphasize that the harm caused by trafficking in illicit drugs is very properly a matter of grave concern in Canada, as it is throughout the world.

27 The drug scourge in our communities since 1998 has continued, if not increased, at this time. These types of crimes are even more egregious where it arises from the greed and amoral behavior of drug traffickers who only seek to profit from the misery and suffering endured by drug users, accompanied by significant risks to the user, sometimes death. Trafficking is often both a cause and effect of drug use as some people get involved to feed their own addictions.

28 As was noted in *Pushpanathan*, drug trafficking brings other ills to the community such as violence...

[41] Further, in *R. v. Diedrickson*, 2018 BCCA 336, at para. 43, the Court stated:

...trafficking in hard drugs is a serious offence. Denunciation and deterrence are important principles in sentencing for drug trafficking.

[42] Although there can be no question as to the importance of stressing deterrence and denunciation in sentencing offenders involved in the trafficking in hard drugs, one cannot lose sight of the importance of rehabilitation, and sentences can be imposed that have the effect of recognizing and stressing denunciation and deterrence while still encouraging rehabilitation.

[43] In *Diedrickson*, the Court went on to state in the following paragraphs:

[44] While a custodial sentence will usually be required to express the gravity of trafficking in hard drugs, a non-custodial sentence can meet the principles of denunciation and deterrence.

[45] Section 731 of the *Code* provides for non-custodial sentences in these terms:

731. (1) Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

- (a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order ...

[46] Justice Bennett explained the nature of suspended sentences and their utility in dealing with some drug offenders in *Voong* [*R. v. Voong*, 2015 BCCA 285]:

[19] Where no minimum sentence is required, the *Criminal Code* permits a court to suspend the passing of a sentence, rather than impose a sentence (s. 731(1)(a)), and to place a person on probation for a maximum of three years (s. 732.2(2)(b)). If an offender who is on probation is convicted of an offence, the suspension of the sentence may be revoked and the offender may be brought back before the court for sentencing. At that point, the judge may impose any sentence that could have been imposed at the time the sentence was suspended (s. 732.2(5)(d)).

...

[37] A probation order has primarily a rehabilitative objective, however, as the statutory terms refer to the purposes of "protecting society" and "reintegration into the community", it is not limited to this objective.

[38] What is required for the imposition of an optional condition in a probation order is a "nexus between the offender, the protection of the community and his reintegration into the community" (*R. v. Shoker*, 2006 SCC 44 at para. 13).

[39] A suspended sentence has been found to have a deterrent effect in some cases. Because a breach of the probation order can result in a revocation and sentencing on the original offence, it has been referred to as the "Sword of Damocles" hanging over the offender's head. ...

[47] Indeed, in *Voong*, three of the four suspended sentences imposed by sentencing judges for drug trafficking offences were affirmed in this Court, based on the individual circumstances of the offenders.

[48] For example, Mr. Voong, one of the four appellants in the *Voong* appeal, had been caught selling drugs and pleaded guilty to possession for the purpose of trafficking cocaine. He had a criminal record, including a prior conviction for two counts of possession for the purpose of

trafficking a narcotic. He had a long history of drug use and was selling drugs to support his habit. After his arrest, he had successfully completed a drug treatment program.

[49] This Court framed the question as "whether a prison sentence is necessary in order to satisfy the principles of denunciation and deterrence" (para. 72) and concluded that it was not. The suspended sentence was affirmed.

[50] In other cases, of course, custodial sentences have been considered to be necessary to reflect a proportionate balance in the mitigating and aggravating factors relevant to a just sentence. As the sentencing judge pointed out, sentencing is always an individualized process.

[44] In *R. v. Maynard*, 2016 YKTC 51, I imposed a suspended sentence attached to 20 months of probation on a 21-year-old offender, (19 at the time of the offence), with no prior criminal record, for a s. 5(1) *CDSA* offence. Mr. Maynard was involved in a dial-a-dope operation and had participated in at least two transactions involving the trafficking of cocaine to an undercover police officer.

[45] Mr. Maynard was not charged with the s. 5(2) offence until approximately six months after it was committed. In that six month period, however, without being aware that charges were forthcoming, Mr. Maynard had separated himself from involvement in the drug trade, obtained employment and had embarked on a pro-social life pathway.

[46] In sentencing Mr. Maynard I stated as follows:

65 Clearly, in sentencing Mr. Maynard for his trafficking offence, I must consider the important role of denunciation and deterrence, both specific and general. It is clear from the case law that drug trafficking is an extremely serious offence with devastating consequences on individuals, their families and their communities. In sentencing trafficking offenders, and in particular when hard drugs such as cocaine are the nature of the drug, sentencing judges must ensure that the sentence imposed reflects the seriousness of this offence and societies denunciation of it.

66 I am mindful of the Purpose and Principles of sentencing set out in ss. 718 through 718.2 of the *Code*. Section 718 and 718.2(e) state:

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;
- (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.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

...

- (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.

67 The reasonableness of a non-custodial disposition needs to be balanced against the harm done to victims and the community. As stated, the harm caused by the drug trade is considerable. That is why denunciation and deterrence are the leading principles in sentencing offenders convicted of trafficking in drugs, in particular hard drugs like cocaine. There is a balancing in determining an appropriate sentence, and the law is clear that denunciation and deterrence do not necessarily require a custodial disposition.

[47] I further stated, in applying these factors to Mr. Maynard:

+70 Outside of the circumstances of the offence itself, there is little in the way of aggravating circumstances in this case. There is much in the way of mitigation.

71 I find that exceptional circumstances are present in this case. Mr. Maynard is clearly remorseful for his actions, not only as evidenced by his guilty plea but also by his actions. He began his steps towards rehabilitation with considerable effort and diligence long before he was charged with the commission of this offence. He has continued in these efforts. He has not only obtained employment, he has excelled in this employment. He has a supportive family and friends that, in my opinion, have in the past and going forward are prepared not only to continue to provide their support but to hold Mr. Maynard accountable for his actions. I believe that Mr. Maynard has separated himself from his past involvement with the drug trade and is on a very positive track moving forwards. The protection of the public in this case is best served by recognizing the efforts Mr. Maynard has made and imposing a sentence that allows Mr. Maynard to continue on the path he started of his own initiative and with his family's and friend's support.

[48] Finally, in *Maynard*, after noting how the Court in *Voong* dealt with the appeals for each of the four offenders that had been involved in dial-a-dope operations, I further reference the decision of the Court as follows:

52 The Court points out in para. 21 and 22:

21 Suspended sentences were imposed in drug trafficking cases before CSOs became available in 1996 (introduced by the *Act to amend the Criminal Code (sentencing) and other Acts in consequences thereof*, S.C. 1995, c. 22). A suspended sentence is still a sentencing option in law in the cases at bar, as there is, at this time, no minimum sentence for the offences at issue.

22 Where a suspended sentence was imposed in drug trafficking offences prior to the availability of a CSO, there was always an indication of exceptional mitigating circumstances. For example, in *R. v. Harding*, [1977] B.C.J. No. 839 (C.A.), this Court dismissed a Crown appeal and upheld a suspended sentence with three years' probation with strict conditions, for a heroin addict who sold

four caps of heroin. She had made significant steps towards overcoming her heroin addiction, and the majority concluded they should not interfere with the carefully reasoned sentence. The majority found that the trial judge had recognized that deterrence was of foremost importance but concluded that in the circumstances of the case before him, rehabilitation was worth the effort. The trial judge was alive to the fact that he could sentence her if his expectations of rehabilitation were not born out, and she breached the probation order.

53 The Court states, in regard to the deterrent effect of a suspended sentence and probation, as follows, in paras 39-43:

39 A suspended sentence has been found to have a deterrent effect in some cases. Because a breach of the probation order can result in a revocation and sentencing on the original offence, it has been referred to as the "*Sword of Damocles*" hanging over the offender's head. For example, in *R. v. Saunders*, [1993] B.C.J. No. 2887 (C.A.) at para. 11, Southin J.A. said:

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

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

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

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

43 The statutory phrase "protection of the public" now found in the *Criminal Code* gives a broad discretion to sentencing judges to impose conditions (see *Shoker* at para. 3). The public is protected

when a former criminal is rehabilitated and deterred from committing more crimes (see *R. v. Grady* (1971), 5 N.S.R. (2d) 264 at 266). It is also protected when other offenders are deterred by the sentence imposed. Thus, imposing conditions for the protection of the community may have a deterrent and denunciatory effect in addition to a rehabilitative effect. Put another way, a condition need not be punitive in nature in order to achieve deterrence or denunciation. In *D.E.S.M.* (and affirmed in *R. v. Sidhu* (1998), 129 C.C.C. (3d) 26 (B.C.C.A.)), this Court concluded that "home confinement" was an appropriate term of a probation order for the purpose of the maintenance of rehabilitation. The court concluded, at p. 381:

It should not be thought that home confinement, if we may call it that, should readily be substituted for regular imprisonment. Such a disposition is suitable, in our judgment, only where very special circumstances are present such as where the accused demonstrates that he has rehabilitated himself prior to arrest, where he is not a danger to anyone, where others are dependent upon him, and where there are no factors that make it necessary in the public interest that punishment should be by conventional imprisonment.

[Emphasis added.]

54 The Court states in regard to range of sentence for dial-a-dope traffickers as follows in paras 44-46:

44 What then is the range of sentence for dial-a-dope traffickers? We know the statutory range is from a suspended sentence to life imprisonment. We also know, from an abundance of cases decided by this Court, that the normal range of sentence for a first offence dial-a-dope drug trafficker is between six to nine months incarceration, and upwards to eighteen months in some cases, absent exceptional circumstances. A brief review of some of the cases will demonstrate this range.

45 The exceptional circumstances must engage principles of sentencing to a degree sufficient to overcome the application of the main principles of deterrence and denunciation by way of a prison sentence.

46 For example, in *R. v. Preston* (1990), 47 B.C.L.R. (2d) 273 a five-justice division of this Court examined the general principles of sentencing in the context of possession of heroin offences by a

long-time heroin addict, with a lengthy criminal record. Ms. Preston had made substantial efforts at rehabilitation. Wood J.A., speaking for the Court, said, at 281:

The object of the entire criminal justice system, of course, is the protection of society, and I say at once that if incarceration is the only way of protecting society from a particular offender, then transitory and expensive though it may be, that form of protection must be invoked. But where, as in this case, the danger to society results from the potential of an addict to commit offences to support her habit, and it appears to the court that there is a reasonable chance that she may succeed in an attempt to control her addiction, then it becomes necessary to consider the ultimate benefit to society if that chance becomes a reality.

With respect, that benefit seems obvious. If the chance for rehabilitation becomes a reality, society will be permanently protected from the danger which the offender otherwise presents in the fashion described above. As well, the cost associated with her frequent incarceration will be avoided.

55 After reviewing a number of cases, the Court summarizes the principles as follows in para. 59-63:

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. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that 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.

60 A CSO was considered a sentence of imprisonment because of the strict and punitive conditions that could be imposed. As we have seen above, a suspended sentence can attract similar strict conditions, but only if they are aimed at protection of the public and reintegration of the offender into society. Rehabilitation clearly plays a significant role in both of those conditions.

61 A suspended sentence can achieve a deterrent effect, as noted above, as well as a denunciatory effect. And, as Esson J.A. stated in *Chang*, the fact of being arrested, tried and convicted, can also address these principles. In other words, the stigma of being a convicted drug trafficker and the consequences of that conviction--for example, restricted ability to travel outside of Canada and exclusion from many forms of employment--may also play a deterrent effect.

62 Thus, while it is an error to simply substitute a suspended sentence for a CSO, as they are not governed by the same principles, that does not end the inquiry into whether these non-custodial sentences are fit.

63 The issue then for each of these appeals becomes whether there were sufficient exceptional circumstances to justify going outside the normal range of sentence and imposing a non-custodial sentence. In each case, the sentencing judge concluded that there were exceptional circumstances.

Application to Mr. Jimenez

[49] I am aware that the facts of this case involve a 16-year-old youth. The Crown has stated that he is not relying on s. 5(3)(a)(ii)(C) of the *CDSA* which states that there is a two-year minimum sentence for such cases. (I note that this provision was declared unconstitutional in the case of *R. v. Dickey*, 2016 BCCA 177.)

[50] I am also aware that s. 10(2)(c) of the *CDSA* makes it an aggravating circumstance if the offender:

Used the services of a person under the age of 18 years to commit, or involved such a person in, the commission of the offence.

[51] There was the involvement of a 16-year-old youth in this case. In considering the extent to which this aggravates the offence, I must keep in mind that I am dealing with an 18-year-old offender. The moral culpability and hence the extent of the aggravation is not uniform; there is a difference between an offender in his 20's or 30's who involves a youth in the commission of an offence and an 18 year old such as Mr. Jimenez who is only approximately two years older than the youth.

[52] This nonetheless remains an aggravating factor in sentencing Mr. Jimenez and distinguishes the circumstances of this offence from *Maynard*.

[53] Another distinguishing factor in *Maynard* were the pro-active steps Mr. Maynard had taken prior to even being charged with the commission of the offence. This showed a clear will and intent on the part of Mr. Maynard to embark on a pro-social lifestyle without the motivation of an upcoming sentencing hearing to drive him. It is perhaps one of the better indicators of true remorse for one's actions: a voluntary turning away and re-direction unmotivated by external factors. True remorse is measured in actions, not in words.

[54] Mr. Jimenez cannot claim such a pro-active turning away. His direction does not appear to have been changed until he was charged and facing the consequences for his criminal actions.

[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.

[56] The factors that are weighted towards a custodial disposition for Mr. Jimenez are as follows:

- The need to stress deterrence and denunciation;
- The nature of the s. 5(2) offence, including the fact that it was primarily profit and not addict driven; and
- Mr. Jimenez's role in the offence, including his participation in involving the 16-year-old youth.

[57] The factors that are mitigating, and therefore more weighted towards a non-custodial disposition are as follows:

- The guilty plea and acceptance of responsibility;
- Mr. Jimenez's youth and lack of a criminal record;
- His decision, followed by steps taken, to separate himself from negative peer associations;
- The positive rehabilitative steps Mr. Jimenez has taken since being charged with respect to education, employment and counselling;
- His family background and his re-connecting with his parental support;
- His future prospects which are considered to be reasonable and realistic; and
- His demonstrated ability to comply with court-ordered conditions since his release on bail.

[58] In imposing sentence, I must balance all of the above circumstances of the offence and Mr. Jimenez with the purpose, principles and objectives of sentencing as set out in the *Code* and the *CDSA*. I must bear in mind the aggravating and mitigating factors. I must treat Mr. Jimenez as the individual he is and sentence him accordingly with all of the above in mind.

[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.

[64] Therefore, I sentence Mr. Jimenez to a suspended sentence attached to a probation order for a period of two years. The terms of the probation order are as follows:

1. You will keep the peace and be of good behaviour.
2. You will appear before the court when required to do so by the court.
3. You will notify your probation officer in advance of any change of name or address, and promptly of any change in employment or occupation.
4. You will have no contact directly or indirectly or communication in any way with the two co-accused, Ayub Abdullah and M.D.

5. You will also have no contact directly or indirectly or communication in any way with individuals involved in the drug trade as identified to you in writing by your probation officer.

6. You will not attend at any known place where drug trafficking is known or suspected to occur.

7. You will report to your probation officer immediately, and thereafter, when and in the manner directed by your probation officer.

8. You will reside as directed by your probation officer, abide by the rules of the residence, and not change that residence without the prior written permission of your probation officer.

9. At such times as your residence is in Whitehorse, you are to abide by a curfew by being inside your residence or on your property between 10 p.m. and 6 a.m. daily, except with the prior written permission of your probation officer. You must answer the door or the telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition.

10. You are not to possess or consume illegal drugs that have not been prescribed for you by a medical doctor.

11. You are to attend and actively participate in all assessment and counselling programs as directed by your probation officer, and complete them to the satisfaction of your probation officer, for the following issues:

- substance abuse,
- alcohol abuse,
- psychological issues,
- any other issues identified by your probation officer,
- and provide consents to release information to your probation officer regarding your participation in any program you have been directed to do pursuant to this condition.

12. You have performed over 40 hours of community work. This is an offence against the community. In addition to what you have done voluntarily, you will perform a further 40 hours of community service as directed by your probation officer or such other person as your probation officer may designate. This community service is to be completed no later than 45 days before the end of this order. Any hours spent in programming may be applied to community service at the discretion of your probation officer.

13. You are to participate in such educational or life skills programming as directed by your probation officer and provide your probation officer with consents to release information in relation to your participation in any programs you may have been directed to do pursuant to this condition.

14. You are to make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts.

15. You are not to be in possession of more than one cell phone, smart phone, or other mobile electronic communications device that accesses the Internet. You are entitled to have a computer in addition to any of the above devices. Any such device — cell phone, smart phone, or other mobile electronic device — in your possession must be registered in your name.

[65] There will be the mandatory s. 109 firearms prohibition for the period of 10 years.

[66] As I said in *Maynard*, due to the nature of this offence and the minimally intrusiveness nature of a DNA order, I will make a direction that you provide a sample of your DNA as this is a secondary designated offence.

COZENS T.C.J.

Appendix A

R v Dawson Aguilera-Jiminez
Information #18-00180

AGREED STATEMENT OF FACTS

- On June 15, 2018 **Dawson Aguilera-Jiminez** was a resident of Ontario
- EMS called RCMP to report erratic driving
- Two officers went looking for car, found it going southbound at Main and Fourth
- it turned left from Main onto Fourth on a yellow light
- Cst Smee activated lights, car turned off Fourth into a parking lot just past the RCMP Detachment and parked
- Smee approached. **Abdullah and [redacted]** were sitting in the back seat
- back windows were tinted and there was movement inside the car
- Driver briefly restarted car and moved backwards while Smee was trying to engage driver. This was unintentional by Mr. Aguilera.
- Smee detained **Aguilera-Jiminez** under MVA but had safety concerns so intended to search all for officer safety.
- Large amounts of cash found on **[redacted] and Abdullah** (later found to amount to \$1525 and \$2060 respectively)
- Smee had grounds to arrest and did so
- A more thorough search incident to arrest yielded 9 baggies of crack cocaine and one of powdered cocaine, all on **Aguilera-Jiminez**
- one of the phones in back seat rang repeatedly with calls and texts from people ordering drugs
- All 3 taken to APU after arrest, held overnight
- the next morning, shortly before 9 am, **Abdullah** was being taken to the fingerprinting room
- a baggie containing five individually-wrapped packages of crack cocaine (weighing 2.26g combined) fell out of his pant leg
- he tried unsuccessfully to conceal it
- was told he would be strip-searched and brought to showers
- when given a last opportunity to turn over any contraband prior to search, he pulled out a rock of crack cocaine that had been taped to his testicles. The weight of the crack was 53.43 grams.
- He had these drugs on him in the car as well.

Aguilera-Jimenez was knowingly driving for a dial-a-dope-style operation.

I admit all these facts are true.



DAWSON AGUILEA-JIMINEZ

April 16, 2019