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72-year-old given 2-years plus a day for cocaine trafficking

Poor health, COVID-19 vulnerability and deportation risk outweighed by negative pre-sentence report



Sergio Karas

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Despite poor health, COVID-19 vulnerability and sure deportation, the Ontario Superior Court has given a 72-year-old a two-year-plus-one-day federal-penitentiary sentence for cocaine trafficking.

In 2015, after police executed a search warrant at his home, Barry Matthews was found with 700 grams of cocaine and \$2,475 in cash. He was charged with possession for the purpose of trafficking and possession of money obtained by commission of an offence. Justice Patrick Smith of the Ontario Superior Court found Matthews guilty on both counts.

On sentencing, Matthews argued that exceptional and collateral circumstances called for a suspended sentence and probation. Matthews came to Canada from England as a child, is not a citizen and risks deportation. His conviction renders him inadmissible to Canada and any sentence longer than six months would make him ineligible to appeal his removal order.

When he asked for it, a suspended sentence was unavailable because of the Safe Streets and Communities Act, passed in 2012 by the Government of then Prime Minister Stephen Harper. The Act amended the Criminal Code to deny conditional sentences to all offences for which the maximum sentence is 10 years or more. Matthews' contravention of s.5(2) of the Controlled Drugs and Substances Act carries a maximum sentence of life.

That changed with the Court of Appeal decision in *R. v. Sharma*, when the restriction on conditional sentences was found to be contrary to ss. 7 and 15 of the Charter. While the requested conditional sentence was now available, the Crown argued that "ample caselaw" support a sentence of at least three years.

Prior to Sharma, courts were reducing sentences regularly to prevent those convicted from losing their right to appeal a removal order, says Immigration lawyer Sergio Karas. R. Pham, 2013 SCC 15 instructed judges to consider the immigration consequences that would result from a jail sentence.

"And citizens started to say, wait a second, wait a second. I'm a citizen and being given a year and this guy is getting six months for the same offense. That doesn't seem right," says Karas.

Addressing Pham, Smith said: "A sentencing judge must not simply look at the length of a sentence, but also to the conditions under which it is served and what effect the sentence will have on the offender in order to assess whether the sentence would have a more significant impact on the offender because of his or her unique."

Matthews argued his immigration status means a sentence of that length will have a more significant impact than if the same was given to another offender.

"It's clear that Justice Smith took into account the factors that the Supreme Court of Canada and its decision of R. v. Pham, set out as being important with respect to immigration consequences," says Brian Heller, a criminal defence lawyer at Heller Rubel in Toronto who was not involved in the case.

"When crafting a sentence, Pham made it clear that adverse immigration consequences are a factor to be considered. But those consequences can't dominate the sentencing process."

Smith listed a number of mitigating factors under consideration in Matthews' case. He is 72 years old, with health issues that could be seriously jeopardized by "the high incidence of COVID-19" in the prison system. He would also be deported back to England, where he has no connections, no

employment opportunities and no medical or social benefits. His pre-sentence report included the testimony of a friend who said he was a severe alcoholic.

But Matthews also had glaring aggravating factors. The pre-sentence report said he demonstrated no remorse, regretted only that he got caught and experienced no moral dilemma about selling cocaine. Matthews also had a prior drug trafficking conviction in 1980.

Smith's review of caselaw found sentences for trafficking cocaine range from six months to more than six years. Criminal history, quantity and whether the accused is addicted to cocaine or trafficking merely for financial gain played a factor in sentence length.

Matthews relied on *R. v. McGill*, 2016 ONCJ 138 to ask for a three-year suspended sentence. But McGill's circumstances were "much different" said Smith. McGill showed remorse, was an addict in recovery, had a troubled upbringing and, as an Indigenous offender, the judge gave effect to the Gladue factors.

Aside from a lack of remorse, a purely commercial interest in the cocaine and lack of awareness to the detrimental societal impact of cocaine abuse, Matthews had also refused offers of help for his alcoholism, showing an unlikely prospect for rehabilitation. Smith sentenced Matthews to two years plus one day.

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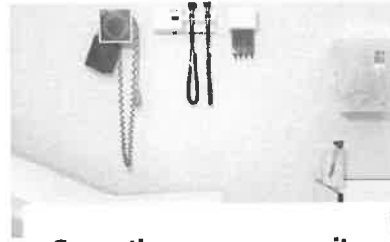
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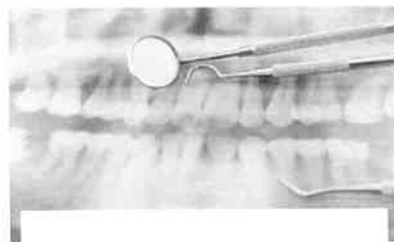
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