In the Provincial Court of Alberta

Citation: R v HF, 2021 ABPC 68

Date: 20210217
Docket: 180861296P1
Registry: Lethbridge

Between:

Her Majesty the Queen

- and -

HF

Sentencing Judgement of
The Honourable Judge J.N. LeGrandeur

Nature of the Proceedings

[1] HF has elected Provincial Court and entered guilty pleas to two counts under s5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (*CDSA*), being the offence of trafficking. The matter is now before me for sentencing the Offender.

Circumstances of the Offence

[2] This matter involves two sales of cocaine by HF to an undercover police officer. The first occurred on May 10th, 2018, and the second was on May 30th, 2018. Each sale was 3.5 grams of cocaine with a price of $460.00 for each transaction. Prior to May of 2018, Lethbridge Police Service had received confidential source information that certain individuals were trafficking in narcotics in the city through the use of a cell phone, essentially running a dial-a-dope type of an operation.

[3] The Crown did not particularize who those certain individuals were.

[4] Between May 9th and 10th, a police officer, in an undercover capacity via text conversations at telephone number (403) 849-2226, made arrangements with an unknown individual to purchase 3.5 grams of cocaine for $460.00. The designated meeting location was

an apartment complex on the west side of Lethbridge. The police attended the location on the evening of May 10th at 7:19 p.m. where they were directed towards a vehicle. Two unknown individuals were observed in the vehicle by a police officer who entered the rear passenger side and spoke with and dealt with the driver, who was HF.

[5] The transaction was conducted and 3.5 grams of cocaine exchanged for $460.00. The undercover officer asked the driver for a ride to a Macs Convenience store. HF agreed, and during the course of the drive, a conversation was held between HF and the officer, with HF telling the officer that they could make available to him three ounces of cocaine for $2,700.00 per ounce. KF advised, "There is a reason I have four or five hundred customers. I put out good product." and also stated "You'll probably be dealing mostly with Marcel, but he works for me. He's my guy."

[6] On May 30th, the same undercover officer contacted the same telephone number via text messages and made arrangements to complete another transaction described as a ball of cocaine, 3.5 grams, again for $460.00. The officer was directed to attend at a location in south Lethbridge at which the police arrived, set up surveillance and the undercover officer arrived at 5:14 p.m. The Offender and another individual were sitting in the carport of the location the police were directed to. At that point the police officer reminded HF of the conversation about providing three ounces of cocaine at the $2,700.00 per ounce price. HF stated, "That's really close to my cost. In fact it is my cost." followed by, "I only keep an ounce and a half or two on me at any time, so I would just need some notice, like a week." At that point the contemplated transaction was completed, and the 3.5 grams of cocaine exchanged for the $460.00.

[7] Defence counsel, on behalf of the Offender, admitted the aforementioned facts and accepted that this is cocaine trafficking on more than a minimal scale. The Court accepted the plea of guilty to each count under s5(1) of the *CDSA*. A Pre-Sentence Report was ordered and the matter was adjourned for submissions to the 15th day of August, 2019. Thereafter there was a series of adjournments, and given mental health issues referenced in the pre-sentence report, and her gender transitioning process, this Court ordered a psychological report and the matter returned to Court on April 14th, 2020, with a psychological report under date of April 6th, 2020 available at that time.

[8] Defence counsel at some point raised the concern that the impact of the transgender transitioning process HF was undertaking, would affect her circumstances in a correctional facility should she be sentenced to a period of incarceration for the subject offences. It was Defence counsel's concern that she would be treated differently than cisgender offenders as a consequence thereof and would suffer undeserved hardship for no reason other than her transgender circumstance, and that this was a factor to be considered by the Court in any sentence that was to be imposed for the offences before the Court. After a number of further adjournments, this Court heard testimony from Douglas Clark Whillans, the Deputy Director of Security at the Lethbridge Correctional Center, who provided information to the Court as to their assessment process relative to housing of inmates, and discussed the potential or likely impact of HF's transgender circumstances in which she presented by gender identity and gender expression as entirely female, but at this stage of the process still had male genitalia. Mr. Whillans discussed possible alternatives for housing this individual and provided detail as to disciplinary segregation and administrative segregation and the potential or likelihood that HF may end up in administrative segregation for a significant period of any sentence imposed upon her not as a

consequence of conduct, but given her circumstances and created by her transgender circumstance. This evidence will be discussed further as part of Court's sentencing analysis.

Circumstances of the Offender

[9] This Court has the benefit of a thorough Pre-Sentence Report filed August 14th, 2019 as well as a psychological report under date of April 6th, 2020, both of which presented detailed description of HF's life and circumstances.

[10] HF is at this time nearing her 30th birthday. At the time these offences were committed, HF was 27 years old. Her sex as assigned at birth was male and HF was given a male name in expression thereof.

[11] At approximately 16 years of age, HF came more and more to believe that her gender did not match the sex assigned to herself at birth, and in 2016 HF began looking into living openly as a female. At that point HF was married, and had a child, and her gender identity ultimately led to the break up of the marriage. Further detail will be provided later herein.

[12] HF began hormone therapy to alter her sex characteristics so as to better align with HF's believed gender identity. I will discuss this in more detail later in these reasons as well.

[13] I understand that HF is comfortable being addressed as "she" at this stage of the transitioning process, and accordingly any reference to HF throughout this judgment shall use the pronouns "she/her."

[14] HF was born in Calgary to a 19-year-old mother who was married to HF's father. She has a younger sister. She has minimal early memories of childhood other than moving frequently between British Columbia and Alberta, often relocating where her father was incarcerated. She describes her childhood as "horrendous". At age six the family was living in Blackie, Alberta, which is where her maternal grandmother lived as well. She recalls attending the principal's office and meeting with a social worker. She and her sister were apprehended that day over allegations of physical abuse, and placed with her grandmother for a short time, and then put into a foster home. From there they went to live with an aunt in Drayton Valley, which placement lasted for a couple of years, until the family requested they be removed from the home. HF asserts that during that period she was physically and sexually abused by her uncle, although she does not believe Child and Family Services were aware of that fact.

[15] She described that she and her sister "bounced" from foster home to foster home, often being placed in different homes, which led to only sporadic contact between them. When she was 15 years of age (2006) while living in Red Deer, HF, who was at this point still presenting her gender as male, in keeping with the sex and gender assigned to her at birth, became friends with SW, who at that point was involved in another relationship. HF was transitioned to independent living by Child and Family Services, and in 2010, HF and SW began a relationship. They moved to Calgary, where HF's mother agreed they could live with her. That lasted for about a year until a disagreement with the mother caused them to move out. They got their own apartment, and in 2014, SW became pregnant. They married in September, 2014, and the child was born in December of 2014. In 2015, they moved to Coalhurst, Alberta, to live with SW's parents; apparently SW wished to be closer to her family.

[16] Shortly thereafter, it became known to SW that HF was considering living openly as a female. This triggered a major disruption in the marriage, as SW had not been told previously of

this desire. SW apparently tried for several months to make the relationship work, but it eventually ended. They maintain a relationship of sorts, but SW has not spoken to HF since May of 2019. She was surprised to learn of the criminal charges.

[17] HF has attended school to Grade 12, indicating she was an average student but did not get along with staff or other students. Given her gender issues, she described herself as "weird" in school.

[18] In 2017, she was seeing her daughter regularly and getting along with SW, but in January she experienced discord in her workplace, and everything seemed to fall apart, at which time she began living a high-risk lifestyle. She and the individual she was involved with at that time ended their relationship, but she continued to involve herself in the drug culture and her criminal lifestyle. After the criminal charges were laid, she reported that she ceased her association with anti-social people and got employed. She reported to the psychologist that up to the point of his report the longest employment she had lasted only five months. She reports having been fired from some jobs for being transgender, but that usually the firing was because of her borderline personality disorder. This Court understands that she is employed at present at a local pizza parlour and has retained that employment for some time.

[19] HF reports as having little support or close friends and she has no relationship with her mother or father or sister; she feared that given their lack of support for her transgender identity would place her at risk mentally. She also fears her father; on their last interaction, he pushed her down a stairway, and refused to allow her to live openly as a female.

[20] HF reported having been diagnosed with Bipolar Personality Disorder, Post Traumatic Stress Disorder, Gender Identity Disorder, and substance abuse disorder. She sees Dr. Patel, a psychiatrist. She has a history of psychiatric hospitalization for suicide ideation and behaviour. She presented on March 11th, 2017, to the emergency department of Chinook Regional Hospital regarding suicidal ideation, and was certified as a patient by Dr. Jillood, psychiatrist. She was described as a 25-year old male wanting to transition to female, struggling with depression, and past traumatic events. She was admitted to hospital but discharged two days later and advised to remain on medication prescribed for her and follow up with her family physician. In October of 2018 she again presented at the emergency department of Chinook Regional Hospital due to ongoing suicidal thoughts. She was seen by a psychiatrist, reported a history of unstable moods with chronic suicidal ideation, and that it had been particularly bad as she was arrested and charged for drug-related offences. Additionally, she had been smoking cannabis daily for the past two years and was having difficulty affording her hormone replacement medication. She was not admitted, but recommended she attend Dialectic Behaviour Therapy programming through the day treatment centre.

[21] In February of 2020 she was brought in to the emergency department by police, reporting being suicidal. Dr. Jillood saw her and described her as suffering from chronic depression with continuous suicidal ideation, but no serious attempts. He believed that her suicidal ideation had to do with her gender identity issues.[1]

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[1] There is an extremely high prevalence of transgender or transsexual people who represent up to 0.5% of the adult population, of suicide ideation and attempts: (Intervenable Factors Associated with Suicide Risk in Transgender Persons: A Respondent Driven Sampling Study in Ontario, Canada; BMC Public Health 15, Article No.: 525(2015).

[22] HF has been seeing Ms. Ander, a mental health therapist, off and on since 2016, primarily for support in the transition from male to female, past trauma, and suicidal ideation.

[23] In terms of her substance abuse, she seldom uses alcohol, but she has been using marijuana daily since age 25. She has used magic mushrooms occasionally since she turned 27 years of age. Ms. Ander related to probation that HF is currently diagnosed with Bipolar Disorder, Post Traumatic Stress Disorder, Attachment Disorder, Gender Identity Disorder, Depression and Substance Abuse Disorder. Ms. Ander believes that the subject is accountable for her behaviours, and will continue to work with her, and acknowledges the subject's attempts at positive change. She is highly concerned about the subject's mental health if incarcerated.

[24] The psychologist's report notes that HF's marked dependency needs and her intense fear of separation from those who provide support push her to be overly compliant with others, and to downplay whatever personal strengths she may have.

[25] The psychologist states:

> An increasing inability to regulate her emotional controls, the feeling of being misunderstood and erratic moodiness all contribute to a growing state of persistent self-criticism and dejection.

[26] He goes on later to say;

> Her low self-esteem and apprehensive fear of loss may lead her to feel increasingly hopeless and to entertain thoughts of suicide.

[27] He also notes that she appears to have experienced a traumatic event that may have involved a threatening situation or serious injury during which she suffered intense fear or pain. The psychologist expresses the opinion that given her history, presentation, personality testing and circumstances leading to this referral, that she meets the following diagnosis:

a. Borderline Personality Disorder - pervasive pattern of instability of interpersonal relationship characterized by alternating extremes of idealization and devaluation, unstable self image markedly impulsivity that is self damaging, recurrent suicidal behaviour and reactivity of mood.

b. Post Traumatic Stress Disorder – mental health condition that is triggered by a terrifying event – either experiencing or witnessing it. Symptoms may include flashbacks, nightmares, severe anxiety, as well as uncontrollable thoughts about the event.

c. Major Depressive Disorder – is a mood disorder that causes a persistent feeling of sadness and loss of interest. Also called Clinical Depression; it affects how you feel, think and behave and can lead to a variety of emotional and physical problems.

[28] He also states that HF is an individual experiencing feelings of isolation and undesirability that are complicated by a tendency to devalue her achievements.

[29] HF has no history of criminal activity. She indicated to the psychologist that she was struggling financially, and started selling marijuana for the individual that she purchased her marijuana from for her own use, and then, in 2018, began selling cocaine for her dealer, and was

arrested in July 2018. She was released on July 20th on a recognizance in the amount of $3,500.00 with no cash deposit, and with a number of conditions including reporting weekly by telephone to the Lethbridge Police Service, and prohibitions from being behind the steering wheel of a motor vehicle, save in certain circumstances. So far as I am aware she has not breached any of the conditions of her release over the past two plus years.

Crown Position

[30] The Crown asserts that this is trafficking on more than a minimal commercial scale with the resultant guideline of a three-year sentence of incarceration, that general deterrence and denunciation are the primary sentencing factors in the circumstances, and that recognizing the guilty plea and no record, a period of two years incarceration is an appropriate and necessary sentence. The Crown notes, in that context, that the conversation had with the undercover officer suggested HF could sell him more sizeable quantities of cocaine.

Defence Position

[31] Counsel for Defence submits that this is a case that is suitable, having regard to the integral circumstances of the Offender, for a suspended sentence. Simply put, he asserts that her traumatic youth, the physical and sexual abuse she suffered, her mental health issues as described herein before and in the psychological report filed, including mental trauma associated with the stress and difficulties associated with just trying to be what she always was, all point to a reduced moral culpability, and a sentence where general deterrence and denunciation are not the primary factors for consideration.

[32] He points out as well in that context, that her ability to deal with an incarcerative situation, given her mental health circumstances, is likely to lead to more damage to her mental health, and greater suffering than is appropriate, and therefore must be considered in the sentencing process.

[33] To that he adds the fact that because of her transgender circumstance she will likely spend a significant, if not most of her incarceration, in administrative segregation, not because of what she has done, but because of who she is. He asserts she will suffer inappropriately and disproportionally because of that, and in essence suggests that being administratively segregated for lengthy periods of time because of her gender circumstances presented at this point in time is a form of discrimination, and offends *Charter* principles, and must be given some consideration as well. He also points out that administrative segregation is likely to exacerbate her mental health issues and create inappropriate trauma in that regard for her.

[34] Overall, he submits that this is an exceptional circumstance, indeed, one which would involve an individual who is not a danger nor likely to re-offend, and considering all the other factors, probation is the least restrictive sanction that is reasonable in the circumstances consistent with the harm done to the community, having regard to the unique individual circumstances of this particular individual.

Sentencing Principles

[35] The fundamental purpose of sentencing set out in the *Criminal Code* is "to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just,

peaceful and safe society": s718. That contribution is to be achieved by "imposing just sanctions" which have one or more of the following objectives:

1. to denounce unlawful conduct;
2. to deter the Offender and other persons from committing offences;
3. to separate Offenders from society, where necessary;
4. to assist in rehabilitating Offenders;
5. to provide reparations for harm done to victims or to the community; and
6. to promote a sense of responsibility in Offenders and acknowledgment of the harm done to victims and to the community.

[36] The fundamental principle of sentencing set out in the *Criminal Code* is proportionality; the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Indeed, this is the only mandatory principle of sentencing. The other principles set out in s718(2) are not mandatory and are assigned no respective weights. It is mandatory, however, that each sentence must meet the fundamental and overarching sentencing principle of proportionality (*R v Brady*, 1998 ABCA 7). It is important to note that not only is the proportionality principle codified in the *Criminal Code*, it has also attained the status of a fundamental principle of justice (See: *Reference re s 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486). The purpose of sentencing as set out in the *Criminal Code* is to impose "just sanctions". A "just sanction" is one that is deserved. A fit sentence in that context is one that is commensurate with the gravity of the offence and the moral blameworthiness of the Offender (*R v CAM*, 1996 SCC 230 (*CAM*)). In *R v Proulx*, 2000 SCC 5 at para 82 (*Proulx*), Chief Justice Lamer repeated that principle stating:

> Proportionality requires an examination of the specific circumstances of both the Offender and the offence so that the "punishment fits the crime".

[37] Disparity in sentencing for similar offences is a natural consequence of the fact the sentence must fit not only the offence, but also the Offender.

[38] In *R v Anderson*, 2014 SCC 41 (*Anderson*), Moldaver J on behalf of the Supreme Court reiterates the aforementioned principle stating at para 21 thereof:

> 21 As LeBel J., for the majority of this Court, stated in *Ipeelee*, "[p]roportionality is the *sine qua non* of a just sanction" and a principle of fundamental justice: paras 36-37. Proportionality means that the sentence must be "proportionate to the both the gravity of the offence and the degree of responsibility of the Offender" (*Ipeelee*, at para 39 (Emphasis deleted); See also s718.1 of the *Code*).

[39] In *R c Lacasse*, 2015 SCC 64 (*Lacasse*), Wagner J on behalf of the majority of the Court stated at paragraph 53:

> Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar

circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s718.2(a) and (b) of the *Criminal Code*.

[40] Gascon J in *Lacasse*, at para 128 reiterated these principles in his dissent:

> The principle of proportionality has a long history as a guiding principle in sentencing, and it has a constitutional dimension: *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206, at para 41: *R v M(CA)*, [1996] 1 SCR 500, at p 530. A person cannot be made to suffer a disproportionate punishment simply to send a message to discourage others from offending: *Nur*, at para 45. As Rosenberg JA wrote in *R v Priest* (1996), 30 OR (3d) 538 (CA), at pp 546-47:
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> > The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular Offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the Offender, and the harm occasioned by the offence. The court must have regard to the aggravating and mitigating factors in the particular case. Careful adherence to the proportionality principle ensures that this Offender is not unjustly dealt with for the sake of the common good. [Footnote omitted.]
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> Although a court can, in pursuit of the objective of general deterrence, impose a harsher sentence in order to send a message with a view to deterring others, the Offender must still deserve that sentence: *R c Pare*, 2011 QCCA 2047; G Renaud, *The Sentencing Code of Canada: Principles and Objectives* (2009), at para. 3.13. If a judge fails to individualize a sentence and to consider the relevant mitigating factors while placing undue emphasis on the circumstances of the offence and the objectives of denunciation and deterrence, all that is done is to punish the crime: *R c Roy*, 2010 QCCA 16, 73 CR (6^{th}) 136 (CA Que). Proportionality requires that a sentence not exceed what is just and appropriate in light of the moral blameworthiness of the Offender and the gravity of the offence. From this perspective, it serves as a limiting principle: *Nasogaluak*, at para 42.

[41] Each sentencing is an individual process whereby the Court seeks to impose a sentence that addresses the two elements of proportionality, that is the circumstances of the offence and the circumstances of the offender, and thereby reach a sentence that fits not only the offence but also the offender. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account (See: *R v Hamilton*, [2004] OJ No 3252 at para 93 (CA)). This proportionality is achieved by a "complex calculus" that is informed by the normative principles set out in the *Criminal Code* in s718 and s718.2 (see *R c LM*, 2008 SCC 31 at paras 17, 21, 22).

[42] In considering the degree of responsibility of the offender, or in other words the moral culpability of the offender, the Court considers the fault component of the offender and any background factors that may bear on the culpability of the offender and which may shed light on his or her level of moral blameworthiness: *Anderson*, at para 21.

[43] An offender's degree of responsibility does not flow inevitably and solely from the gravity of the offence. The gravity of the offence and the moral blameworthiness of the offender are two separate factors, and the principle of proportionality requires that full consideration be given to each of them: *Proulx*, at para 83. As s718.1 provides, "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

[44] The gravity of the offence relates to the harm caused by the offender to the victim as well as to society and its values, and the other aspect of the proportionality principle relates to the offender's moral culpability. This does not just relate to the *mens rea* degree of responsibility of the offender at the time of the commission of the offence, but was intended to include other factors affecting culpability, such as the offender's personal circumstances, mental capacity, or motive for committing the crime (see: *R v Arcand*, 2010 ABCA 363 at paras 58-59; also, *R v Nasogaluak*, 2010 SCC 6 at para 42 (*Nasogaluak*), and *CAM*). The gravity of the crime, although a relevant factor, is not to be considered on its own, but must be considered in conjunction with the offender's degree of responsibility; a factor that is unrelated to the gravity of the offence (*Lacasse*, at para 131).

[45] Although proportionality is the fundamental principle of sentencing, it is not the only principle for consideration. The Court must also consider parity, totality and restraint, which are all principles which must be engaged when determining the appropriate sentence. The principle of restraint is of particular importance where incarceration is a potential disposition. That principle's importance is brought to light by ss718.2(d) and (e):

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> (e) all available sanctions other than imprisonment that are reasonable in the circumstance should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[46] The principle of restraint as it is captured by the 1996 *Criminal Code* amendments codifying sentencing principles is explained by Professor Allan Manson in his text *The Law of Sentencing*, (Toronto: Irwin law, 2001) at 95:

> Restraint means that prison is a sanction of last resort. ... Restraint also means that when considering other sanctions, the sentencing court should seek the least intrusive sentence and the least quantum which will achieve the overall purpose of being an appropriate and just sanction. [footnotes omitted]

[47] In *Nasogaluak*, at para 43, LeBel J commented as follows with respect to the interplay between sentencing objectives in proportionality discussion:

> No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences.

[48] Again, in *Lacasse*, Gascon J, in discussing the issue of general deterrence and prison states at para 132:

> I would also qualify my colleague's statement that the courts have "very few options other than imprisonment" (para 6) for meeting the objectives of general or specific deterrence and denunciation in cases in which they must be emphasized. In my view, the court should not automatically assume that imprisonment is always the preferred sanction for the purposes of meeting these objectives. To do so would be contrary to other sentencing principles. Rather, a court must consider "all available sanctions, other than imprisonment," that are reasonable in the circumstances: s718.2(e); *Gladue*, at para 36.

[49] At paragraph 133 he goes on to state:

> … A court that emphasizes general deterrence must therefore always be mindful of both the principle of restraint and that of proportionality…

[50] At paragraph 134 he goes on to state:

> …the objective of general and even specific deterrence does not relate exclusively to the severity of a sentence considered in the abstract,„Deterrence can work through conditions tailored to fit the Offender or the circumstances of the Offender, as the … Court noted in *Proulx*: …

[51] In *R v Chowdhury*, 2019 ABCA 205 (*Chowdhury*), the Alberta Court of Appeal, in paragraphs 13 and 14, discuss the objectives of deterrence and denunciation in the proportionality analysis in a similar vein to the statements of Gascon J above, stating:

> [13] Objectives do not govern the sentence. Objectives provide guidance, particularly as to ordinal proportionality (*Arcand* at para 50), assist in identifying a starting point or range and help define a framework for the sentence, but they do not compel a result. It is an error to assume that a certain sentence necessarily follows from the identification of the primary objectives in any particular case. It is over-simplification to assume that the objectives of denunciation and deterrence are only served by severity; conversely, that the objective of rehabilitation is only served by lenience.
>
> [14] The key principle in sentencing is proportionality. A sentence must still be proportionate to the gravity of the offence and the aggrieved responsibility of the Offender. A proportional sentence may be severe or it may be lenient. If a disposition is plainly lacking in proportionality in either direction, that discrepancy cannot be cured or justified by reliance on the punitive demands of an objective.

Discussion and Analysis

[52] As noted aforesaid, the fundamental principle of sentencing is that the sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender: *R v Friesen*, 2020 SCC 9 at para 30 (*Friesen*). Put another way, having regard to the principles of sentencing, the sentence must fit the offence and the offender. It is, as such, an individualized process.

[53] Ordinarily, denunciation and general deterrence are the primary factors involved in sentencing for trafficking in drugs. That fact is explained by the fact that, at least in this

province, the Court of Appeal in *R v Maskill*, 1981 ABCA 50 (*Maskill*) established a guideline of three years ostensibly as a starting point in the consideration of sentences for trafficking drugs at a level of more than minimal commerciality. That, of course, is *prima facie* the situation present here.

[54] The Crown properly asserts *Maskill*, but accepts the fact of a guilty plea with no past criminal record whatsoever as a significant mitigating factor justifying reduction from the starting point of three years to something in the range of two years incarceration.

[55] The Crown agrees that HF's background and mental health issues could be considered, and may justify some further slight reduction, although the Crown suggests that these matters should be dealt with collaterally to the incarcerative sentence, perhaps by ordering counselling as part of a probation order supplementary to the incarcerative sentence. It would appear to me that following that approach would give no recognition of the impact of her mental health issues on her moral culpability.

[56] With respect to the issue of how she will likely serve her time as a factor for consideration in sentencing; Crown counsel asserts that it is up to correctional services to decide how it is served and that it would be speculative for the Court to consider that she will likely serve her sentence in a fashion that imposes hardship and suffering on her as a consequence of who she is as opposed to what she has done.

[57] I disagree with the Crown approach with respect to this last point, and as well do not think that the Crown is giving sufficient weight to her traumatic history and mental health issues in addressing the matter of her moral culpability.

[58] For the reasons described below I am of the view that this is, for lack of a better term, an exceptional situation given the antecedent history of HF, her severe mental health issues, including her gender transition circumstances and the stressors attached thereto, as well as the likely disproportionate consequence to her in terms of her incarceration as a result of her transgender circumstances, that is, her gender identity.

[59] It is my conclusion that in considering all these circumstances, denunciation and deterrence, although important and a necessary consideration for guidance in sentencing, cannot in this case principally compel the sentencing result sought by the Crown. In considering her guilty plea, her previous good character, acceptance of responsibility, her continuing rehabilitative efforts, her good conduct since the commission of the subject offences, her reduced moral culpability as a consequence of her mental health issues, her continued efforts to deal with her mental health issues, the impact on her mental health of an incarcerative sentence and the likely disproportionate sentence she will serve if incarcerated as a consequence of her gender transition, not her conduct, all lead me to the conclusion that a fit and just sentence in the circumstances despite the gravity of the offence is a suspended sentence, subject to a period of probation of two years.

Mental Health

[60] The antecedent trauma and abuse suffered by this Offender as a child and youth and the mental health issues she has experienced and continues to experience are significant to say the least. It is difficult to contemplate the hardship associated with a lifetime characterized by physical and emotional trauma as a child, continued emotional and psychological trauma and

ongoing mental health issues, day to day, year to year, as an adult. I do not think that there is any doubt but that these circumstances contributed at least indirectly to this Offender's criminality and being presented before this Court.

[61] It is common ground that the culpability of an offender is diminished when mental illness can be seen as having likely contributed to the criminality; this is part of the principle of proportionality in sentencing, *R v Belcourt*, 2010 ABCA 319 at paras 7-8; *R v Badhesa*, 2019 BCCA 70 at paras 42, 44.

[62] Likewise, whether the mental health issue arose from the neglect, trauma and abuse experienced by HF as a child, or the mental health issues are organically based, both are factors for consideration with respect to moral culpability.

[63] In this case the Crown asserts doubt as to whether there was a causal connection between her mental health issues and the drug trafficking. It cannot of course be said that her mental health and childhood trauma led her directly to becoming a drug trafficker. It is not necessary that be shown in such a direct manner. Mental illness may reduce an Offender's moral culpability when it indirectly contributes to the commission of an offence; *R v Williams,* 2019 BCCA 295 at para 36. It is sufficient if the mental health issues contribute to the commission of the offence: *R v Ayorech*, 2012 ABCA 82 at para 10 (*Avorech*).

[64] In conjunction with her childhood trauma and her mental problems, this Offender at the time was in the midst of gender transition from her assigned sex and gender to what she in fact was – a female, which added another level of stress and emotional weight to her life with the psychological issues that attach to such a process, including suicidal ideation.

[65] HF's psychological profile show her as having marked dependency needs and an intense fear of separation from those who provide support. She turned to the LGBTQ2 community for support that led her to cannabis use and becoming part of a social group that led to selling marijuana for the person she bought from herself for her own use, and then ultimately selling cocaine, although she did not use that drug. She was, as the report suggests, over-compliant and followed what was asked of her rather than lose it.

[66] Overall, I cannot help but infer that her mental health issues, antecedent trauma, and the circumstances of gender transition all contributed to the position she got herself into and the criminal acts she committed. It was not inevitable, but in the circumstances, that is what happened. Her mental health left her susceptible to some form of inappropriate and unlawful conduct, and that is what came to fruition. She is, I believe, distinguishable from the ordinary offender who is fully accountable for his or her conduct; *R v Resler*, 2011 ABCA 67 at paras 9-10, and accordingly, general deterrence is a less weighty consideration as the Offender's circumstance and mental illness make this Offender an inappropriate medium for making an example to others: *Belcourt*, at para 218.

[67] Collateral to that point, mental illness is also a factor to consider in the context of sentencing, in particular, whether the mental health issues and the accordant vulnerability of the Offender because of the same, make the effect of imprisonment disproportionately severe for the subject Offender: *Ayorech*, at para 13.

[68] In this case, her mental health therapist specifically notes a high concern for HF's mental health if incarcerated, indicating that if she is to be incarcerated she should be placed in some sort of a mental health dedicated environment.

[69] The psychological report also notes the potential to be housed in isolation if incarcerated given her transgender circumstance. That is likely to exacerbate her already fragile mental state and cause more hardship: *R v Prystay*, 2019 ABQB 8 at para 76 (*Prystay*).

Circumstances of Incarceration

[70] In conjunction with Defence counsel's assertion that HF's gender transition process, in which she currently demonstrates as female in all respects save for genitalia, if incarcerated, will result in the likelihood of her serving her sentence primarily in administrative segregation, which is a form of isolation for 23 hours per day. She would have access to some programming, but not in conjunction with other inmates. This, he asserts, would occur as a result of the fact that as a female she cannot be housed with males, and with the current physical circumstance of still having male genitalia she cannot be properly housed with female inmates. She is left with administrative segregation not because of what she has done but because of her gender circumstance.

[71] This Court heard evidence, as noted aforesaid, from Mr. Whillans, the Director of Security at the Lethbridge Correctional Centre (LCC). He explained that the intake process sees an assessment done with respect to each person and their needs and circumstances; i.e. are they male or female, do they have medical issues, gang issues, incompatibility issues, etc., and then they try and find an appropriate place for them having regard to their safety, the safety of other inmates, the safety of the institution and the safety of the correctional officers.

[72] He indicates that in dealing with transgender individuals they are very careful because there are complex issues regarding their circumstances in the correctional system. He advised that a lot of times they are placed in segregation until they see if they can work them into the system. He described how someone who appears female would not be put in a male ward, and they would have to be very careful about putting a biological male into a female unit even though they appear female. He stated that they try and make things work, but if they cannot achieve that, then the individual is placed in administrative lockup, and they are basically segregated. He acknowledged that a person's gender identity is secondary to the security of the institution.

[73] He cited three possible options; first, the person is segregated as described, second, the person gets moved to Fort Saskatchewan Institution, where they have a transgender unit and third, they get "lucky" so to speak, and have another transgender individual that the Offender is compatible with and they house them together. He only talked about having dealt with one transgender person at LCC, so the likelihood of option three coming to fruition is remote at best.

[74] Mr. Whillans gave no indication as to whether it was a likely or a real possibility that this Offender could be moved to Fort Saskatchewan.

[75] Mr. Whillans acknowledged that a transgender person is likely going to be experiencing a larger amount of segregation than a person who is biologically male or female. He indicated that they would have to expect to be locked up more than others. He acknowledged as well that transgender people get treated differently than other individuals, but likens that to gang members victimizing someone and having to do segregation because of it, or someone incarcerated for sexual offence related charges where other inmates know about it, they can expect to be doing more segregation. These two examples are however not based on segregation because of gender expression, but upon actions and conduct. Administrative segregation was described as probably

23 hours per day with one hour for exercise and showering; the Offender would get canteen, and radio and television, if available, but only by themselves. That person could do some programming available, but again, only on an individual basis.

[76] On the evidence before me I am satisfied on balance that any sentence of incarceration imposed upon this individual will be primarily served in administrative segregation (AS) given her gender identity and expression as described aforesaid. It is more likely than not that she will serve the majority of any incarcerative sentence imposed in administrative segregation. It is not necessary that she prove this beyond a reasonable doubt but only meet a balance of probability standard; *R v Parkin*, 2017 ABQB 336 at para 23. Although there is apparently some possibility that she could end up on the Transgender Unit at the Fort Saskatchewan Institution, there is no suggestion in the evidence that is anything more than a possibility. Again, this form of segregation is not a punitive response to conduct or action while in jail or because the person is a gang member or a sex offender that needs to be segregated from the general population, but rather because of this person's gender transition circumstance.

[77] Crown counsel asserts that this is a matter for Corrections Services and not part of the sentencing process. In most cases I would agree with that fact, but administrative segregation carries with it factors that create greater hardship than would be the case for general population housing. Again, in this case, that hardship is visited upon HF because of her gender circumstance, not her conduct. It is not the fact that she is transgender that gives her some entitlement to special consideration in sentencing, it is the fact that her gender condition places her in administrative segregation and the consequences of that are to be considered with respect to sentencing. Neither is this a matter of choice. She cannot be required to choose entry into male or female general population that would force her to deny her circumstance and essentially say "too bad for you that you have to suffer greater penal hardship than if you were in general population".

[78] In the *Prystay* case, Madam Justice Pentelechuk considered the nature of administrative segregation in a Federal penal circumstance as it relates to the issue of credit for pre-trial custody on a sentencing. In that case she took notice of other cases, in particular *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 (*BCCL*), including some of the expert evidence accepted in that proceeding. The *Prystay* case involves the Edmonton Remand Centre and Federal rules, however I am satisfied that there is little to distinguish administrative segregation in the Federal situation as it existed at that time with administrative segregation in the Provincial correctional system, so Justice Pentelechuk's comments on that issue have, in my view, equal application to the issue of administrative segregation as it may apply in this case, and which accordingly would apply to HF if she is incarcerated.

[79] Justice Pentelechuk describes general population inmates as normally having up to 11 hours of common area time when not confined to their cell. They are free to socialize with others in the common area. General population inmates can access television, radio, and outdoor yard activities. They can access academic and life skill programming dealing with addictions, anger management, parenting, health and wellness and release planning, which programming is delivered in a classroom situation: *Prystay*, at paras 23, 24.

[80] At page 26 Justice Pentelechuk states:

> [26] While any time served in remand is considered "hard time," time served in disciplinary or administrative segregation is particularly oppressive. It is defined

> by severe restrictions placed on an inmate's mobility, activity and meaningful human contact.

[81] Justice Pentelechuk goes on to note that;

> Although administrative segregation is purportedly not a punishment and that segregated inmates have the same rights and privileges as other inmates that inmates in either form of segregation (AS or Disciplinary Segregation (DS)) are confined to their cell 23 hours per day, they get two half hour blocks outside the cell to shower, exercise, watch television, use the phone. They are usually alone during this time.

[82] In ERC they have no access to outside activities; *Prystay*, at paras 28-30.

[83] I believe the aforementioned circumstances at LCC are comparable, if not identical.

[84] Justice Pentelechuk cites the conclusion of Leask J in *BCCL* that inmates in AS are confined without meaningful human contact, and as currently practiced in Canada, AS conforms to the definition of solitary confinement found in the *Mandela Rules*; *Prystay*, at para 40. At paragraph 46 Justice Pentelechuk concludes;

> The essential characteristics of both forms of segregation are severe restriction on mobility, activity and the virtual elimination of meaningful human contact. Regardless of the name, both forms of segregation are a form of solitary confinement and are contraindicated to a successful return to GP and the outside community. As summarized in *BCCL* at para 330:
>
> > I have no hesitation in concluding that rather than prepare inmates for their return to the general population, prolonged placements in segregation have the opposite effect of making them more dangerous both within the institutions' walls and in the community outside.

[85] Mr. Whillans indicated in his evidence that absent another option being available, HF would likely serve most of her sentence in AS.

[86] The effect of the indefinite nature of AS on an inmate is described in *Prystay*, at paras 52-54:

> [52] We have known for more than 20 years that the indefinite nature of AS is particularly challenging for inmates. In her 1996 report of the *Commission of* Inquiry into certain events at the Prison for Women in Kingston, Justice Arbour severely criticized conditions in segregation in federal institutions. She noted, at page 81:
>
> > The most objectionable feature of this lengthy detention in segregation was its indefiniteness. The absence of any release plan in the early stages made it impossible for the segregated inmates to determine when, and through what effort on their part, they could bring an end to that ordeal. This indefinite hardship would have the most demoralizing effect and, if for that reason alone, there may well have to be a cap placed on all forms of administrative segregation.

> [53] Twenty-two years later, the debate continued in *BCCL*. Echoing the conclusions of Justice Arbour, Leask J, at para 159, concludes that for many inmates, the worst part of AS is its indefinite nature, and the uncertainty of not knowing when they will be released.
>
> [54] In *BCCL,* various reports prepared by the Office of the Correctional Investigator (OCI) were heavily relied on. For the most part, the government witnesses accepted the statistics and facts reflected in the reports, but the court in any event concluded the reports were admissible under the principled approach to hearsay, noting that the correctional investigator is not a compellable witness under the *CCRA*.

[87] Dealing with the issue of the psychological impact of AS on an inmate, Justice Pentelechuk, at para 76, again quotes Leask J with approval at para 247 of the *BCCL* case, wherein he concluded that inmates subject to AS are at significant risk of serious psychological harm:

> In find as a fact that administrative segregation as enacted by s. 31 of the CCRA is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide. Some of the specific harms include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior. The risks of these harms are intensified in the case of mentally ill inmates. However, all inmates subject to segregation are subject to the risk of harm to some degree.

[88] At paragraph 78 she again relies on the experts in *BCCL* stating that they agreed that inmates with inherent vulnerabilities, such as existing mental health issues are more likely to be adversely impacted by AS and that AS can cause or exacerbate mental health issues.

[89] There is no doubt in my mind that any extended stay in AS by HF will exacerbate her mental health circumstances.

[90] In *Prystay*, Justice Pentelechuk, given her findings, considered that in that case the accused's extensive stay in AS was cruel and unusual punishment contrary to s12 of the *Charter*. Recognizing the unusual severity of extended AS, she sentenced the accused by crediting his time in AS at 3.75 times for each day he spent therein. In the end, given the appropriate sentence of 1,764 days, after credit at 3.75 for 363 days in AS and credit at 1.5 for 219 days in GP he was left only to serve 77 days.

[91] The case before this Court is not a pre-trial credit case, nor does Defence counsel claim for *Charter* relief. In any event, the *Charter* value of fairness is always part of any process be it at trial or sentencing. The point of *Prystay* is to illustrate the hardships that AS places upon inmates therein as opposed to general population inmates and in this case those hardships will likely be visited upon HF as I have repeatedly said because of her gender transition circumstance, not because she is deserving of punishment or segregation for some action on her part. In that context, it must be noted that her gender circumstances are protected by s15 of the *Charter* from discriminatory action. The extended hardship, suffering and potential mental

health consequences is a likely consequence of her probable administrative segregation are part of her individual circumstances to be considered in the proportionality assessment in sentencing. I see no reason why it should not be a factor for consideration in sentencing in this case.

[92] In *Nasogaluak*, Lebel J noted that the fundamental purpose of sentencing under s718 of the *Criminal Code* is that of contributing to respect for the law and the maintenance of a just, peaceful, and safe society (*Nasogaluak*, at para 49). He states that this sentencing purpose "must be understood as providing scope for sentencing judges to consider not only the actions of the Offender but also those of the state actors" (*Nasogaluak*, at para 49).

[93] In the recent decision of *R v Sheppard*, 2020 ABCA 455 (*Sheppard*), the court discussed whether prolonged administrative segregation could be considered as a mitigating factor in sentencing apart from any pre-trial credit the offender may have pursuant to s719 of the *Criminal Code*. Justice O'Ferrall, after a thorough review of the law, and in particular the *Nasogaluak* decision, determined that it may so be considered. He concluded that the imposition of prolonged administrative segregation may properly be considered "state misconduct" as that term was used in *Nasogaluak* (*Sheppard*, at para 55).

[94] The majority of the *Sheppard* court, although not disagreeing with the principle, determined that the accused in that case was not deserving of such mitigation given his exercise of discretion as to where he wanted to be. The majority acknowledged that *Nasogaluak* and *R v Summers*, 2014 SCC 26 (SCC) had opened the door to consider state misconduct as a mitigating factor in sentencing above and beyond s719(3.1).

[95] The case before this Court is not a case involving pre-trial custody, but that does not change the nature of administrative segregation, nor the hardships or impacts it will likely impose upon this Offender. These are consistent either in a pre-trial or post-trial context. The difference in the circumstances is, of course, that in this case it is being considered as a sentencing factor on the basis that this Offender is likely to suffer its hardships over more than a short term should incarceration of any length be imposed. It is my conclusion that in this case, administrative segregation is a probable hardship, with all its consequences, that this Offender will suffer. That is a reasonable inference to draw, and proper to consider in the determination of a fit and just sentence. To ignore the probability of her hardships, having regard to this Offender and her particular individuality would be unfair, and it is not likely that the Offender would be capable of prosecuting any claim for a remedy after she has endured that hardship. This is an unusual situation, but one that cannot be ignored.

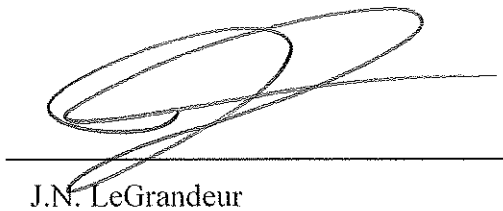
[96] When I consider all the circumstances of this matter, the gravity of the offence, the circumstances of its commission, the circumstances of the Offender, her previous good character, her guilty plea, remorse and acceptance of her responsibility, her mental health issues and the mental health issues associated with her gender transition and the potential impact of her gender transition on her incarceration, the added hardship and suffering that will be brought on thereby including the enhanced risk to her mental health as well as her rehabilitative aspects, her commitment to continuing her mental health therapy, and the minimal risk that she would ever commit such a serious offence again, I find that this is an exceptional circumstance where despite the seriousness of the offence, a proportional fit and just sentence, which will continue her rehabilitation and not threaten her physical and mental well-being and what she has achieved so far calls for a non-incarcerative sentence, and I suspend the passing of her sentence for a period of two years subject to a Probation Order. General deterrence and denunciation on these facts

will not be sacrificed by granting a suspended sentence. The probationary period and terms serves to adequately denounce and deter in the circumstances and demands accountability and reflection on her participation in this offence. Denunciation and deterrence need not be severe in all circumstances to be a just and fair sentence.

[97] This is not to say that no person who is in a transgender situation with accompanying mental health issues related thereto or otherwise should never go to jail, that of course depends upon all the circumstances. It does not represent in and of itself a "get out of jail" free card.

[98] With respect to the conditions of probation I seek counsel's advice thereupon before I specify the same.

Heard on the 22nd Day of December, 2020.
Dated at the City of Lethbridge, Alberta this 17th day of February, 2021.



J.N. LeGrandeur
A Judge of the Provincial Court of Alberta

Appearances:

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For the Crown

W. Hlady
For the Accused