

SUPREME COURT OF QUEENSLAND

CITATION: *R v Wynyard* [2004] QCA 431

PARTIES: **R**
v
WYNYARD, Gregory John
(applicant)

FILE NO/S: CA No 296 of 2004
SC No 205 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 12 November 2004

DELIVERED AT: Brisbane

HEARING DATE: 12 November 2004

JUDGES: McPherson and Jerrard JJA and Fryberg J
Separate reasons for judgment of each member of the Court, each concurring as to the order made.

ORDER: **Application for leave to appeal against sentence dismissed**

CATCHWORDS: CRIMINAL LAW – Appeal and new trial and inquiry after conviction – Appeal against sentence – Appeal by convicted persons – Applications to reduce sentence – When refused

R v Gasparini, unreported, Chesterman J, SC No 569 of 2003, 14 May 2004

COUNSEL: The appellant appeared on his own behalf
R G Martin for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

FRYBERG J: On 4th August this year Mr Wynyard was sentenced to imprisonment for two and a half years suspended after 12 months for an operational period of three years. He now seeks

leave to appeal against that sentence on the ground that it is manifestly excessive.

Mr Wynyard pleaded guilty to two counts of possessing dangerous drugs. The offences occurred in December 2002. On the second charge which related to a small quantity of cannabis sativa, a conviction was recorded but no further penalty imposed. Unsurprisingly there is no appeal against that sentence and it is unnecessary to refer further to it.

The first count related to possession of 422 tablets containing MDMA the net weight of which exceeded 30 grams. The tablets were found in a rubbish bin in the kitchen when police executed a search warrant at Mr Wynyard's unit at Main Beach. Mr Wynyard told police that he found them when his cat was digging a hole in the front garden the previous night. No scales, customer lists, other plastic bags or large amounts of cash were found.

Mr Wynyard was charged and released on bail. In due course committal proceedings were held and an indictment was presented in this Court on 23 April this year. It does not appear precisely when Mr Wynyard communicated his intention to plead guilty but it was not suggested that it was an early plea.

Mr Wynyard gave evidence before the sentencing Judge. He then admitted, apparently for the first time, that what he told the police was false. He claimed that the true position was that

he had purchased the tablets from a man named "John". He said that he met John while playing poker machines at Southport Surf Lifesaving Club. John gave him one ecstasy tablet because of his depression. That led to a small number of purchases in quantities of one or two, for each of which he paid \$30.

One evening John said he had to travel interstate and he had to get rid of his pills, he could not take them with him; although Mr Wynyard said in cross-examination that John "expected to be back within a week". John offered to sell the 400 tablets for \$3,000. He told John that he did not have that sort of money. John then offered to sell them for \$2,000 and he gave the same response. Finally, John agreed to take \$650 on deposit and the balance some time the next week. Mr Wynyard accepted this because he thought he could get a loan for the balance from a building society.

Then, according to his evidence-in-chief and I quote from the transcript at page 10:

"I had second thoughts over that week of getting into debt for something and being in possession of such a large quantity of pills. You know, I figured they would last me a couple of years at least and I was going to give them back to him and say, 'Well, just keep the \$650 and you know, leave me with whatever you can.'

"Why were you going to give them back?-- Well, I was scared of being caught with so many pills on me because there was the obvious - it would look commercial, like I was trying to sell them if I got caught and so I did have them buried out in the garden where the cat - where I said the cat was digging. So I got them out of that spot

and took them inside the house ready to give them back to him.

When were you proposing to meet up with him again?-- Oh I think it was a Thursday night. I'm sure it was a Thursday night and I got them out of the bin, I think, on the Wednesday night - I mean out of the dirt and put them in the bin on the Wednesday night.

Why did you put them in the bin?-- Well, it'd make it easier to give them back to him for one because if he came 'round, I didn't want to be seen digging in the garden.

I see?-- When I got them out it was late at night so, you know, no one would have noticed me.

Okay?-- And I was going to get back what - what he thought I should give him back, you know, for the money and I went back to the club that night, the night I was supposed to and I think of a Thursday night and he didn't show up and the following morning is when the police came."

In cross-examination Mr Wynyard initially said that he had done the maths of how much the retail value of the drugs was. He said that at \$30 a tablet it would have been \$1,200. When his error was pointed out to him he agreed that at that price, the 430 tablets which he received (he said he had used about eight) would have had a retail value of \$12,900.

He agreed that he had no means of contacting John and John had no means of contacting him other than by going to the surf club and hoping to meet or that John knew his place of work (a point somewhat inconsistent with his evidence that if John came around he did not want to be seen digging in the garden). He said that they had not exchanged addresses or telephone numbers.

He also agreed that it had taken him a long time to save the \$650. He said that he did not tell the police the true story "because of fear of what his friends could do if they found me and fear of admitting that I'd bought a large quantity of drugs." He did not explain how he knew anything about John's friends. He said that he had never sold drugs and would never consider doing so.

Mr Wynyard was aged 42 at the time of the offence. He had been educated to grade 10 and in steady employment for over eight years. He had no relevant criminal history. He was a respected member of the surf club and found his predicament so embarrassing that he had not told his family or his employer of the charges.

Justice Chesterman rejected Mr Wynyard's evidence that he had the drugs for his own use. He inferred that the possession was for a commercial purpose. Nonetheless, he found that Mr Wynyard was "not a criminal in the conventional sense." Mr Wynyard, who is unrepresented, challenges the finding that he had the drug for a commercial purpose, submitting that it was unsafe for the Judge to draw that inference. He refers to his lack of relevant criminal history and the fact that he has never been involved in dealing with dangerous drugs, his good work history and the Judge's finding that he "seemed to have led a quiet life."

He submits that his personal circumstances do not support the inference. He was in regular employment and there was no

evidence of financial distress, nor on the other hand of tainted money. There was no evidence of drug addiction to create a necessity for dealing.

All of these matters were before Justice Chesterman. He made his finding after observing Mr Wynyard in the witness box. The evidence which Mr Wynyard gave rings hollow, even on paper. The Judge had the benefit of seeing him give it. There is no reason to doubt the correctness of his finding.

Mr Wynyard further submits that the sentence is manifestly excessive by comparison with that imposed by the same Judge in the Queen v. Gasparini, 14 May 2004. Justice Chesterman had regard to that decision. Gasparini pleaded guilty to possessing 253 tablets of ecstasy containing a little over 23 grams of MDMA and also to possessing methylamphetamine containing 7.7 grams of pure drug, some was for his own use; the rest was for sale in order to finance his own addiction. The plea was an early plea of guilty and Gasparini had cooperated with the police. He had realised something of the error of his ways and the foolishness of his behaviour and had made a determined effort to become rehabilitated. He had no relevant criminal history. He was aged about 32. He received the same sentence as Mr Wynyard.

Mr Wynyard submits that Gasparini was a more serious case than his. He points out that Gasparini was in possession of methylamphetamine, a schedule 1 drug as well as ecstasy. He submits that Gasparini had \$17,000 in his possession. That

last matter does not help his case. It was ignored in the sentencing process of Gasparini because its origin was contested. He submits that Gasparini had a drug addiction and therefore a reason to be involved in the sale of drugs. That is true but the finding as to purpose was as is set out above. Moreover, the logic cuts two ways. Mr Wynyard had no addiction and therefore no reason to have such a large quantity. He submits that Gasparini and he were not of dissimilar ages. Gasparini was 10 years younger than Mr Wynyard although I note that the sentencing Judge observed in argument that this was "not so very much younger."

One point of difference in the cases is that Gasparini exhibited remorse, had taken some steps toward rehabilitation and had cooperated with police. Mr Wynyard exhibited no remorse and continued to dissemble even in the evidence which he gave on sentence. Apart from his plea of guilty, he gave no indication of a willingness to cooperate in the administration of justice. He had possession of significantly more ecstasy of greater purity than did Gasparini.

In my judgment, Mr Wynyard has not shown the sentence to have been manifestly excessive. I would dismiss the application.

JERRARD JA: I respectfully agree with Justice Fryberg. Mr Wynyard was found in possession of 422 ecstasy tablets with a retail value of \$12,000 and it seems very likely that those would be distributed to others for commercial gain by the

distributor, whether that distributor was to be Mr Wynyard or some other person.

Mr Wynyard provided what were found to be two false explanations for his possession of them and therefore no description of what he was really doing. On the hearing of this application he effectively said the drugs were possessed by him for his personal use being a year's supply at his rate of usage of up to two per day. That really raises a third explanation for his possession.

He submits that he should have been sentenced to no more than six months in actual custody and that the 12 months actual custody imposed is an excessively hard sentence. That 12 months is not manifestly excessive if Mr Wynyard was the person who intended to gain from commercial distribution of those drugs, an available inference and an inference drawn by the learned sentencing Judge. The 12 months could be considered excessive if Mr Wynyard was not to be the vendor of the drugs and was simply minding or keeping them for another person.

A number of the circumstances referred to by Justice Fryberg would have supported that other conclusion, namely that Mr Wynyard was simply minding the drugs, but Mr Wynyard did not tell that story. Instead, he has now offered three quite different explanations, none of which say he was just a minder and in those circumstances it was neither unreasonable nor unfair for the learned Judge by implication to reject that

possibility and to infer instead that the drugs were not for personal use and that Mr Wynyard was to be the person getting the commercial benefit.

Accordingly, his application has to be dismissed.

McPHERSON JA: I agree with the reasons that have been given. The conclusion of commercial purpose in this case rests at least in part on an adverse credibility finding made by his Honour after seeing the applicant give his evidence. There is no basis for challenging or displacing it in this Court and given the conclusion of commercial purpose, the sentence itself is seen to be within established and recognised limits.

I agree that the application must be dismissed. The order will be that the application for leave to appeal against sentence is dismissed.
