

SUPREME COURT OF QUEENSLAND

CITATION: *R v Mikula* [2015] QCA 102

PARTIES: **R**
v
MIKULA, Kyell Colin
(applicant)

FILE NO/S: CA No 337 of 2014
SC No 21 of 2014
SC No 52 of 2014

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Townsville – Unreported, 27 November 2014

DELIVERED ON: 16 June 2015

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2015

JUDGES: Margaret McMurdo P and Holmes and Morrison JJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The application for leave to appeal against sentence is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to trafficking dangerous drugs; possession of methylamphetamine; two counts of possession of cannabis; possession of methandienone; possession of testosterone; possession of alprazolam; knowingly possessing money obtained from trafficking in dangerous drugs; receiving stolen property and a number of summary offences – where the applicant was sentenced to four years imprisonment suspended after 16 months with an operational period of four years – where the applicant contends that the trial judge erred in sentencing him on the basis that his level of trafficking was for commercial gain – where the applicant contends that he was a street level dealer and also a heavy drug user and the purpose of his trafficking was to supply himself and his friends and acquaintances with drugs – where the applicant also contends that mitigating factors including his rehabilitation, excellent work history and relative youth warranted an earlier suspension of the sentence – whether the sentence was manifestly excessive

Health (Drugs and Poisons) Regulation 1996 (Qld), s 204

R v Burge [2004] QCA 161, cited

R v Challacombe [2009] QCA 314, cited

R v C'Ward [2014] QCA 15, cited

R v McAway (2008) 191 A Crim R 475; [2008] QCA 401, cited

R v Mullins [2007] QCA 418, cited

R v Taylor [2005] QCA 379, cited

COUNSEL: V Keegan for the applicant
J P Phillips for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MARGARET McMURDO P:** The applicant, Kyell Mikula, pleaded guilty on 16 September 2014 to trafficking in dangerous drugs between 18 March and 15 December 2012 (count 1); possession of methylamphetamine on 14 December 2012 (count 2); possession of cannabis on 14 December 2012 (count 3); possession of methandienone on 14 December 2012 (count 4); possession of testosterone on 14 December 2012 (count 5); possession of alprazolam on 14 December 2012 (count 6); knowingly possessing money obtained from trafficking in dangerous drugs on 14 December 2012 (count 7); receiving stolen property, namely an electronic device, between 11 May and 15 December 2012 (count 8); and possession of cannabis on 10 January 2013 (count 9). He also pleaded guilty to the following summary offences: possession of a Category H weapon; possession of three Category B weapons; possession of five Category M weapons; contravention of a domestic violence order; contravention of a police direction or requirement; two counts of possessing utensils or pipes for use; possessing property suspected of having been used in connection with the commission of a drug offence; two counts of unlawful possession of restricted drugs; and breach of order.
- [2] On 27 November 2014 he was sentenced to four years imprisonment for the trafficking offence and lesser concurrent sentences or convicted without further punishment, for the remaining offences. The sentence was suspended after serving 16 months with an operational period of four years. He has applied for leave to appeal against that sentence on the ground that it is manifestly excessive. In his outline of argument he particularises that ground by contending that the judge wrongly sentenced him on the basis that his level of trafficking was for commercial gain and placed insufficient weight on the mitigating factors.

Antecedents

- [3] The applicant was 22 and 23 years old at the time of his offending and 25 at sentence. He had a minor criminal history. In January 2012 he was fined without conviction for an assortment of minor drug offences. In December that year, he was dealt with without conviction and not further punished for failing to appear in accordance with an undertaking on 7 November 2012.

The facts of the offending

- [4] The facts of his offending were set out in a schedule tendered by the prosecutor at sentence.¹

¹ Exhibit 2.

- [5] On 14 December 2012 police executed a search warrant at the applicant's home. They detained and cautioned him and invited him to declare any illegal items. He produced a bong, cannabis, a coffee grinder and two glass smoking pipes. He showed them his bedroom off the lounge area and admitted that he was the sole occupier of the house. Police took possession of relevant items before taking him to the watch house and issuing him with a notice to appear.
- [6] On 10 January 2013 police executed a second search warrant at his home and located a number of illegal items. He was again taken to the watch house and issued with a notice to appear.
- [7] On neither occasion did he participate in an interview with police.
- [8] Between 18 March and 15 December 2012 the applicant sent and received messages relating to the supply of methylamphetamine and cannabis. On 14 December police found those drugs in his possession for the purpose of trafficking. He also had possession of scales, a grinder, clip seal plastic bags and a cryovac machine for use in the business. He recorded the amounts of drugs sold and the names of those to whom he sold them in a diary and a note book. The diary contained 17 names and phone numbers. Police found \$1,160 in his possession. Photographs on his camera depicted sums of money in \$50 and \$100 denominations (count 1).
- [9] Police found a glass container of white crystalline substance later analysed as weighing 43.294 grams and containing 1.961 grams of methylamphetamine (count 2).
- [10] Police found green leafy material in a plastic container under the kitchen sink and in a bag in a bedroom cupboard. This was later analysed as cannabis weighing of 105 grams (count 3).
- [11] Police found a 50 millilitre bottle labelled "anadrol". On analysis it was found to contain 45.929 grams of methandienone (count 4).
- [12] Police found a bottle labelled "Sustanon 250" containing about 10 millilitres of a light yellow, oily liquid and a 10 millilitre vial labelled "Shanghai Labs TE250 Testosterone Enanthate." Analysis showed the substances contained testosterone (count 5).
- [13] In a locked safe in the bedroom police found three pink tablets marked "OM/30" on one side and "G" on the other. On analysis they contained oxazepam (count 6).
- [14] Police found \$660 in a black wallet in the bedroom cupboard and \$500 in the locked safe (count 7).
- [15] On 15 April 2012 the complainant in count 8 reported that his Apple ipad was missing from his home. On 14 December 2014, police found it in the locked safe in the main bedroom of the applicant's house (count 8).
- [16] On 10 January 2013 police found a clip seal bag of green material under the applicant's kitchen sink. It was later analysed as containing seven grams of cannabis (count 9).
- [17] The summary offending was committed before the indictable offences. On 6 July 2012 a female aggrieved person obtained a domestic violence protection order against the applicant, which was to be in force until 5 July 2014. He was in court when the order

issued. It required that he be of good behaviour towards the aggrieved; stay away from her residence; and have no contact, direct or indirect with her. At about 9.10 pm on 16 September 2011 she was in her lounge room playing with her daughter when she answered a knock at the door. The applicant was outside. She tried to contact her father and then the police. By the time her father arrived the applicant had left. That evening she received 20 phone calls and four messages from the applicant's mobile phone. Police intercepted the last of those calls.

- [18] On 29 September 2012 the applicant was issued with an identifying particulars notice after being issued with a notice to appear in relation to the offence of breach of domestic violence protection order which required him to attend Townsville police station within seven days. He failed to comply. On 5 October 2012 when police spoke to him, he claimed he forgot. He was issued with a notice to appear in the Townsville Magistrates Court on 17 January 2013.
- [19] On 6 July 2012 another domestic violence protection order was issued in favour of the aggrieved, with the applicant as respondent. It was in force until 5 July 2014. He was in court when it issued. It contained conditions similar to the earlier order. When executing the search warrant on 14 December 2012 police seized and inspected the applicant's mobile phone and found a series of text messages from the applicant to the aggrieved between 6.25 pm on 12 December and 3.12 pm on 14 December 2012.
- [20] Police found a Browning semi-automatic pistol in his garage and three rifles wrapped in towels in a toolbox outside the garage. They found a knuckle duster, a flick knife and two throwing knives on the floor of a bedroom cupboard. They also found items for use, or suspected of having been used, in the commission of a drug offence. In a locked safe in the main bedroom they found some loxalate pills.²
- [21] On 10 January 2013 police found in the applicant's possession items for use in connection with a dangerous drug containing traces of tetrahydrocannabinol, cannabinol or methylamphetamine and 16 white pills containing norgesic.³

The submissions at sentence

- [22] The prosecutor at sentence by way of comparable cases relied upon *R v Taylor*⁴ and *R v Challacombe*⁵ and *R v McAway*.⁶
- [23] Defence counsel at sentence tendered a psychological report from Ms Suzy Dormer who interviewed the applicant for two hours on 31 October 2014 and for 45 minutes on 1 November 2014. He told her that he came from a supportive family and achieved well at school, leaving in Year 11 to take up a plumbing apprenticeship which he successfully completed. He began smoking marijuana at school and continued using it until 2012. He had not smoked marijuana for the past 18 months. Once he was charged with these offences he gave up all drugs and concentrated on working hard and keeping busy. When he was 18 years old he formed a significant relationship with a young woman who was emotionally unstable and had a young child. They led a chaotic lifestyle which was the background to his offending. He told Ms Dormer that he did not make any money from his drug dealing and even had to sell his bikes

² Restricted drugs under s 204 *Health (Drugs and Poisons) Regulation* 1996 (Qld).

³ Above.

⁴ [2005] QCA 379.

⁵ [2009] QCA 314.

⁶ [2008] QCA 401.

and other items to cover his costs. He lost everything including one of his much loved dogs. His mother had to pay his rent. His future hope was to get permanent work, keep his head down and pay back the money he owed.

- [24] Ms Dormer considered the applicant a hard-working and intelligent young man who, at a highly anxious time in his life, was involved in a dysfunctional and destructive relationship which led him to act outside his normal behaviours and values. At the time of his offending he appeared to be acting under the psychological condition known as Learned Helplessness. This causes a person to feel completely powerless to change their circumstances for the better. It can lead to depression, low self-esteem and the loss of any initiative or determination to make necessary lifestyle changes. He was not thinking in an organised and structured fashion. At sentence he was anxious, genuinely remorseful, depressed about his situation and aghast at his offending behaviour. He had extricated himself from the destructive personal relationship. He would benefit from counselling. He did not have any indications of clinical psychopathology or disorders. Recidivism was unlikely given that he has not used illicit drugs since 2013, the destructive personal relationship had ended and the offending was out of character.
- [25] Defence counsel submitted that although the applicant would have to serve a period of actual custody, this period should be less than otherwise because of his demonstrated rehabilitation over the two years since the offending. He tendered references imploring the applicant's positive character traits and supporting the contentions that the offending was out of character and that the applicant had an excellent work ethic. One reference was from his employer at the time of sentence. The applicant had participated in random drug and alcohol testing, all of which had returned negative results.
- [26] Defence counsel emphasised that the drugs found in the applicant's possession were of a very low grade of purity and that his level of trafficking was relatively low, occurring when he was living a dysfunctional lifestyle. His prior and subsequent good history showed the offending was out of character. He predominantly sold the drugs to a fairly close-knit circle of friends and acquaintances. After referring to *R v Mullins*⁷ and *R v C'Ward*⁸ as well as *Challacombe* and *McAway*, and emphasising the applicant's relative youth, plea of guilty, relatively minor criminal history and demonstrated rehabilitation, defence counsel submitted that a head sentence of no more than four years imprisonment should be imposed with suspension rather than a parole eligibility date at an early time. Defence counsel asked the judge to reflect the mitigating features by reducing both the head sentence and the amount of time required to be served before release. When the judge asked what leniency was called for, counsel responded that a head sentence no higher than four years was appropriate, noting that sentence imposed in *McAway* was at the top end of the range.

The judge's reasons for sentence

- [27] In sentencing the applicant, the judge referred to the seriousness of his conduct. This could not be explained away by his youth or his unhappy dysfunctional relationship. The judge took into account the applicant's excellent work references and his demonstrated rehabilitation over the two years since the offending, as well as his plea of guilty which demonstrated some indication of remorse. He was, however, trafficking over a fairly extensive period in a cocktail of drugs including the Schedule 1 drug methylamphetamine.

⁷ [2007] QCA 418.

⁸ [2014] QCA 15.

The amount of drugs trafficked was unclear but he was certainly trafficking for a commercial reward. His offending invoked principles of denunciation and personal and general deterrence. His Honour accepted that the applicant's demonstrated rehabilitation warranted a partially suspended sentence rather than a parole recommendation. The applicant's criminal history involved breaches of domestic violence orders and possession of weapons. His Honour then imposed the sentence of imprisonment of four years on the most serious offence, trafficking (count 1), with concurrent sentences or convictions without further punishment on the remaining offences, suspending the imprisonment after 16 months with an operational period of four years.

The applicant's contentions

- [28] Counsel for the applicant now emphasises that the offence concerned possession of the relatively modest amount of 43.294 grams of methylamphetamine with a calculated weight of 1.961 grams and possession of 105 grams of cannabis. There was no evidence of the estimated price of the drugs involved in the trafficking, nor of what the applicant may have sold them for. The evidence suggested he was a street level dealer. The figures in the applicant's diary did not support the judge's finding that the trafficking was for commercial reward. *Taylor* and *McAway* were more serious instances of trafficking than the present case in that their motivation was for commercial gain. The applicant was a heavy user of drugs and his trafficking was mainly to supply friends and acquaintances and to support his own drug use.
- [29] The applicant's present counsel emphasises the applicant's rehabilitation over the past two years and his toxic relationship at the time of his offending, something confirmed in the reference from the applicant's aunt who was a solicitor and senior associate in a law firm. He was well regarded by his past and present employers who were aware of his offending. Whilst the four year head sentence was not manifestly excessive, the combined mitigating factors warranted a much earlier suspension of the sentence after nine to 12 months rather than 16 months, as in *R v Burge*.⁹

Conclusion

- [30] The notes in the applicant's diary contained more than 17 names and phone numbers and recorded amounts ranging from \$50 to five figure amounts. It was unclear which related to cannabis and which to methylamphetamine but the judge was entitled to find that the applicant was clearly engaged in trafficking those drugs for commercial reward. This was not inconsistent with him being in debt when arrested by police so that ultimately he did not profit from his illegal business. Nor was it inconsistent with him supplying acquaintances and having a heavy personal drugs use. This conclusion was supported by the applicant's guilty plea, the tendered schedule of facts, the notes in his diary and the submissions made on his behalf by experienced counsel. The applicant's contention that the judge erred in finding he was trafficking for commercial gain is not made out.
- [31] His trafficking over a nine month period was broadly comparable in seriousness to that in *McAway* where a five year sentence with parole eligibility after 18 months was imposed, and *Taylor* where a five year sentence suspended after two years with an operational period of five years was imposed.

⁹ [2004] QCA 161.

- [32] It is true that in the present case there were many mitigating features. The applicant was relatively young when he offended and did so at a time when he was in a dysfunctional relationship and living a lifestyle which was atypical. He had a loving upbringing and since his arrest he stopped taking drugs, obtained employment and rehabilitated. He has an excellent work history, a supportive and caring family and has been drug free since his arrest. He has made commendable efforts at rehabilitation, cooperated with the authorities and pleaded guilty at an early time. A review of the cases relied on by the parties as comparable suggests the appropriate range in this case was a head sentence of between three and four years with parole eligibility at or slightly earlier than one third. The sentence imposed was at the top end of that range in light of the mitigating features. Although a more lenient penalty could have been imposed, the applicant has not demonstrated that the sentence was manifestly excessive.
- [33] It follows that the application for leave to appeal against sentence must be refused.
- [34] **HOLMES JA:** I agree with the reasons of Margaret McMurdo P and the order she proposes.
- [35] **MORRISON JA:** I have had the advantage of reading the draft reasons of McMurdo P. I agree with those reasons and the order her Honour proposes.