

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Smith* [2016] QCA 330

PARTIES: **R**  
**v**  
**SMITH, Wayne Robert**  
(applicant)

FILE NO/S: CA No 279 of 2016  
DC No 1658 of 2016  
DC No 1819 of 2016

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane – Date of Sentence: 30 September 2016

DELIVERED ON: 9 December 2016

DELIVERED AT: Brisbane

HEARING DATE: 2 December 2016

JUDGES: Fraser and Philippides and Philip McMurdo JJA  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to two years imprisonment with parole release date fixed after four months upon his plea of guilty to a number of offences including two counts of the supply of methylamphetamine – where between being released from imprisonment for other offences and being sentenced for the subject offences the applicant moved to Tasmania, resided with his parents and took steps towards his rehabilitation – where the applicant contends an immediately suspended sentence was more appropriate because it would allow him to return to Tasmania and continue with his rehabilitation – whether the sentence was manifestly excessive

COUNSEL: The applicant appeared on his own behalf  
T A Fuller QC for the respondent

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

- [1] **FRASER JA:** I agree with the order proposed by Philip McMurdo JA and his Honour's reasons, including the expression of hope that the transfer of the applicant's parole to Tasmania can be progressed before the applicant is released on 30 January 2017. As the sentencing judge evidently considered, the evidence strongly suggests that a transfer of the applicant's parole to Tasmania would be more likely to promote his rehabilitation than would occur if he is required to reside in Queensland.
- [2] **PHILIPPIDES JA:** I agree with the reasons of Philip McMurdo JA and the order proposed by his Honour.
- [3] **PHILIP McMURDO JA:** On 30 September 2016 the applicant pleaded guilty in the District Court to a number of drug offences committed over three days in August 2015, the most serious of which were two counts of the supply of the dangerous drug methylamphetamine. He was also sentenced, again on his plea of guilty, to an offence of assaulting or obstructing police committed within the same period. There were in all a total of eight counts, for which he received concurrent terms the highest being terms of two years' imprisonment for those counts of the supply of methylamphetamine. His parole release date was fixed at 30 January 2017. There was no presentence custody.
- [4] He applies for leave to appeal against those sentences upon the ground, as stated in his filed application for leave to appeal, that "the sentence" was manifestly excessive. The outcome which he seeks is that his sentences would be immediately suspended, so that he could return to Tasmania where he lived during this year until he was imprisoned under these orders. He makes no challenge to the head sentences.
- [5] The applicant was aged 33 years at the time of these offences and 34 years when sentenced. He has a criminal history dating back to 1999. His previous drug offending was relatively minor, consisting of offences of the possession of drugs, utensils or pipes for which he received non-custodial sentences. It also includes an offence of common assault and wounding for which he was sentenced in November 2007 to 18 months' imprisonment, suspended after four months, and offences committed in 2010 which included one of grievous bodily harm for which he was sentenced to six years' imprisonment. Under that six year term, he was released on parole in 2011 and was still on parole when he committed the subject offences in August 2015. During his parole period he was tested for drugs 15 times but with no adverse results. When he committed these offences he was required to serve the balance of his six year term which expired on 15 January 2016.
- [6] The facts of the offences, according to an agreed statement at the hearing, were as follows. On 23 August 2015, police executed a search warrant at the applicant's residence in Brisbane where they found a clip-seal bag of white crystals weighing 1.231 grams, which was later found to contain methylamphetamine. His possession of this drug was for a commercial purpose, in that at least some of it was to be sold to others. If sold in 0.1 gram quantities, the methylamphetamine was worth \$600 to \$1,800. Police also found two glass pipes used to smoke methylamphetamine, digital scales, clip-seal plastic bags and two boxes which contained 109 pipes that could be used to smoke methylamphetamine. The offence of assaulting or obstructing police was committed when the applicant disobeyed directions from police during the search, struggling with and yelling abuse at them. Police then conducted an analysis of the applicant's mobile phone and found text messages evidencing certain transactions of the supply of drugs.

- [7] The sentencing judge accepted the submission of the prosecutor that the applicant's dealing "was not at the absolute base level", the quantities being supplied being "more than one-use quantities". Although the possession of 109 pipes suggested an intention by the applicant to continue to supply drugs, his Honour correctly observed that he was to be sentenced only for what occurred, namely four supplies over two days with "a commercial aspect". Two of those four counts involved the supply of methylamphetamine and the others, the supply of gamma hydroxybutyric acid.
- [8] Upon the expiry of his six year term at the beginning of this year, the applicant was released on bail and moved to Tasmania, where in the next nine months until the sentence hearing, he made significant progress towards his rehabilitation. He enjoyed the support of his parents who reside in Tasmania. He participated in Narcotics Anonymous and a letter from that organisation, attesting to his participation in its weekly meetings, was before the sentencing judge. He enrolled with the Tasmanian TAFE where he obtained a Certificate in Employment and Training. He enrolled online with the University of Tasmania, completing a subject towards a Diploma of University Studies (Health Sciences). He tendered to the sentencing judge the favourable result of a urine test which was conducted in early September. And there was also tendered a letter from his then employer, showing that he was in full time work with a tree maintenance contractor.
- [9] In his sentencing reasons, the judge referred to the applicant's progress in Tasmania and then said:

"I find your sentencing to be acutely difficult. I've been referred to a number of cases which satisfy me that the appropriate head sentence is two years' imprisonment. The real question is whether there's anything to gain by your return to custody or whether, indeed, it would be simply out of range not to return you to custody. You have such a poor record. But, on the other hand, you haven't committed a drug offence until these ones, since 2004. Mr Carlton submitted that if I were to release you immediately on parole you would take steps to transfer that to Tasmania, and during the break Ms Hedges confirmed that that, of course, can be done. Whether you're received on parole in Tasmania is a matter for a Tasmanian office.

Now, I'm asked to take into account your steps towards rehabilitation and the fact that you're living with your parents, your study and your employment and your general change of attitude, and I do. The question that remains is whether the protection of the community requires that you not be placed on a suspended sentence. I think, with respect, that that is right, that there's a real issue there. If the circumstances don't suit you well, there's a real danger of your relapsing into drug use, and that could lead to further drug offending as well, possibly, violent offending. So although it's finely balanced, I tend not to conclude that you should enjoy a suspended sentence, although there's utility in you returning straight to Tasmania. That leaves me really with the only other option, which is to impose a sentence with a short period of actual custody during which I trust you will apply to transfer your parole to Tasmania."

- [10] After imposing the sentences and fixing the parole release date at 30 January next, his Honour said:

“That’s four months, within which time I trust you can make a successful application to transfer to Tasmania.”

- [11] In the course of submissions, the sentencing judge was told that there was a means by which a Queensland offender could serve his parole period in Tasmania, but that it would be within the discretion of the relevant Tasmanian authority to decide whether to accept the applicant and this process of the interstate transfer of parole could take some months. The prosecutor said that she was informed that if the applicant was imprisoned for a short period of time, his application for the interstate transfer of parole could be progressed before his release.
- [12] The legislation which provides for this interstate transfer of this parole is the *Parole Orders (Transfer) Act 1984 (Qld)* and the *Parole Orders (Transfer) Act 1983 (Tas)*. The transfer would require the favourable exercise of the discretion of the relevant minister under each statute. As the sentencing judge accepted, the applicant’s rehabilitation would be best facilitated by his being paroled in Tasmania. But the terms of the relevant legislation support the prosecutor’s statement that an interstate transfer could not be assured and that a decision could take some months.
- [13] I go then to whether there was any error by the sentencing judge. The head sentences of two years’ imprisonment could not be considered excessive. They were conceded to be proper terms in the submissions of the applicant’s counsel to the sentencing judge. As already noted, the applicant makes no complaint about the head sentences.
- [14] Nor were these sentences excessive for the fact that the applicant was required to serve four months of the terms in custody. The collection of mitigating circumstances, most importantly the applicant’s pleas of guilty and his creditable steps towards rehabilitation, did not require the judge to impose non-custodial sentences. These were offences of the supply of a Schedule 1 drug for a commercial purpose and the applicant was not without a serious criminal history.
- [15] His Honour carefully considered the alternative of a suspended sentence but concluded that the protection of the community required that the applicant be released on parole, rather than being unsupervised. Having regard to the applicant’s criminal history and use of drugs, that view was reasonably open.
- [16] In the passage from his Honour’s reasons which I have set out above, there was no distinct consideration given to the alternative of suspending the sentences after four months. But especially when read with the comments of the sentencing judge in the course of the submissions, it is sufficiently clear from the reasons that his Honour decided against *any* order for release without some supervision.
- [17] In his submissions to this court, the applicant referred to the progress or otherwise of his attempts to transfer his parole to Tasmania. He has been told by Corrective Services that his application will not be considered by the relevant Queensland authority pending the determination of this application for leave to appeal. When he was told this, the applicant was minded to abandon this application. But he was then advised of its hearing date. With this court’s disposition of the application it is to be hoped that the transfer of his parole, which would further advance his rehabilitation, can be progressed ahead of his release on 30 January next.

#### *Conclusion and order*

- [18] There was no error in these sentences. I would order that the application for leave to appeal be refused.