SCC File No.: 40956

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

J.W.

Appellant

– and –

HIS MAJESTY THE KING

Respondent

– and –

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PART I: OVERVIEW

1. This case was an opportunity to encourage incremental progress in the treatment of individuals with mental health conditions or cognitive disabilities. Instead, the courts below took a step backward. By recognizing anticipated programming delays as a factor that can extend an otherwise fit sentence, the lower courts ignored the established sentencing rules in *Gardiner*. They ignored the core principles of parity and restraint. And they rolled back hard-earned progress in judicial and societal understandings of disability and mental health. The courts below justified these outcomes with unsupported assumptions that a person's mental health condition or cognitive disability will impede their completion of rehabilitative programming in prison.[1]

2. The lower courts' errors give the Court an opportunity to clarify the law on sentencing people with mental health conditions or cognitive disabilities who need rehabilitative treatment. Anticipated programming time is not a factor that can legitimately extend a custodial sentence. It is impossible to rely on anticipated delays in rehabilitative treatment to extend a sentence in a meaningful and fair way. The lower courts' approach ignores the differential impact of incarceration on individuals with mental health conditions and cognitive disabilities. It opens the door to parity violations and legal inconsistencies arising from programming delays beyond a prisoner's control. Compounding these substantive problems, the lower courts' approach authorizes sentencing based on speculation – not evidence – that a person's condition will slow their completion of rehabilitative programming in custody.

3. The CCLA takes no position on the facts.

PART II: QUESTIONS IN ISSUE

4. The CCLA submits that anticipated programming delays are not a legitimate basis to extend a sentence because:

    a. If sentencing judges consider the sentence-extending effect of anticipated programming delays they would also need, as they do now, to consider the potentially

[1] Reasons for Sentence at para 42.

sentence-mitigating effect of the conditions underlying the delays, creating an unworkable and potentially meaningless sentencing factor; and

b. Extending a sentence based on anticipated programming delays creates legal inconsistencies and violates the parity principle.

5. If this Court rejects the CCLA's position and recognizes anticipated programming delays as a sentence-extending factor, the Court should clarify that there must be evidence-based proof that a person's mental health condition or cognitive disability will affect their progress in rehabilitative programming even when the programming takes place with human rights accommodations required by law and necessary supports. Sentencing judges need evidence, not speculation, to justify extending an otherwise fit sentence.

PART III: STATEMENT OF ARGUMENT

A. Anticipated programming delay would be an unworkable sentence-extending factor because it counteracts the consideration of the differential impact of incarceration for people with mental health conditions or disabilities

6. Anticipated programming delays would be an unworkable and potentially meaningless basis on which to extend a sentence. Unique traits that could cause delays in completing programming *also* increase the harshness of custody for the particular person, requiring a lower sentence to achieve proportionality. As a result, the Court of Appeal's guidance could complicate the sentencing analysis and increase the chances for conjecture and error without meaningfully changing the outcome.

7. Mental health conditions or disabilities can properly *reduce* a sentence because they increase the harshness of incarceration for a particular person.[2] A court must always consider a person's particular traits and vulnerabilities when assessing the fitness of a sentence.[3] A custodial sentence is

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[2] *R. v. Walendzewicz*, 2020 ONSC 57 at paras 37-41; *R. v. Rytel*, 2019 ONSC 5541 at paras 31, 55-56; *R. v. Fraser*, 2007 SKCA 113 at para 35; *R. v. Belcourt*, 2010 ABCA 319 at para 8, citing Clayton Ruby, *Sentencing* (6th ed.) (Markham: Butterworths, 2004) at § 5.246.

[3] See e.g. *R. v. Smith (Edward Dewey)*, [1987] 1 SCR 1045 at 1072. See also *R. v. Matthews*, 2020 ONSC 5459 at para 44: "A sentencing judge must not simply look at the length of a sentence, but also to the conditions under which it is served and what effect the sentence will have on the offender in

the imposition of suffering on an individual; in turn, suffering is a dual function of sentence duration and an individual's unique circumstances and traits.[4] Sentencing judges can consider a wide range of information in finding that a given term of custody will have a disproportionate impact on a person with a mental health condition or cognitive disability.[5] In determining a proportionate sentence courts treat physical and mental health conditions the same way. Both can increase suffering in prison.[6]

8. Against this existing legal backdrop, recognizing anticipated programming delays as a sentence-extending factor would multiply the opportunities for speculation and inequities without meaningfully changing a sentencing outcome. The traits that could cause delays in completing institutional programming will *also* increase the burden of a given sentence on a given person. The same factual basis – a person's mental health conditions or cognitive disabilities – would support the sentence-*shortening* factor of the heightened impact of incarceration and the sentence-*extending* factor of additional time necessary to complete rehabilitative programming. The sentencing judge must consider both sides of the coin. However, in the absence of reliable evidence about a person's capacities and the conditions inside prisons, the sentencing judge will not be able to make any findings related to institutional programming at all without speculation. It is best to leave the timing and implementation of programming to the boots on the ground: treatment staff and service providers working in Canada's prisons who have the training and experience to best run their own programs.

9. Even if the parties supply reliable evidence, the sentencing judge must respect the principle of restraint. The added impact of custody on individuals with mental health conditions or cognitive disabilities will ordinarily neutralize any sentencing-lengthening consideration of programming delays. This is because a person with a mental health condition or cognitive disability will suffer more in prison for the same reasons it may take them longer to complete their mandated programming. Except in rare cases, applying the principle of restraint requires courts to assume that the increased

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order to assess whether the sentence would have a more significant impact on the offender because of his or her unique circumstances."

[4] *R. v. M.W.*, 2020 ONSC 3513 at para 49.

[5] Even if the Crown disputes the mitigating impact of a person's unique traits, the defence only needs to prove it on a balance of probabilities: *Criminal Code*, s. 724(3). There is no requirement for psychiatric evidence: see e.g. *R. v. Walendzewicz*, 2020 ONSC 57 at paras 37-41.

[6] *R. v. Rytel*, 2019 ONSC 5541 at para 56.

harshness of custody due to mental health conditions and cognitive disabilities outweighs any need for more time to complete rehabilitative programming – even if the Crown proves such a need. As a result, the sentence-extending factor authorized by the Court of Appeal – anticipated programming delays – should not tangibly impact a sentence in the vast majority of cases.

B. The lower courts' approach would create a legal inconsistency regarding the impact of program availability and violate the parity principle

10. Recognizing anticipated programming delays as a factor that could extend a sentence would also lead to a legal inconsistency in sentencing law regarding the availability of programming in custody and create sentencing incongruities that undermine the parity principle. On both points, from a civil liberties perspective, the lower courts' reasoning ignores the state's responsibility to provide and fund rehabilitative programming in prison and therefore overlooks the role that state policy decisions and resource constraints would play in extending sentences based on anticipated programming delays. The state cannot rely on its own parsimony to argue for longer sentences.

11. First, accepting anticipated programming time as a sentence-*extending* factor sends mixed messages about the effect of programming availability on the severity of custody. Courts recognize that the lack or scarcity of rehabilitative programming in pretrial remand *increases* the harshness of presentence custody and justifies higher credit at sentencing.[7] But under the lower courts' approach, this same factor – programming shortages and delays – could also *extend* a person's post-conviction sentence because of anticipated delays in completing the work. Treatment scarcity should never be aggravating and can only be mitigating: the availability or unavailability of programming is beyond a person's control and irrelevant to their moral blameworthiness.

12. Second, the lower courts' approach undermines the parity principle. Parity requires a framework that assigns like sentences to like cases unless there is a relevant reason not to do so.[8] The time it takes a person to complete programming depends in part on systemic factors such as the availability of staff and resources, prison populations, and the diligence of other prisoners ahead in

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[7] See e.g. *R. v. Stonefish*, 2012 MBCA 116 at para 44. As the Appellant points out at paragraph 39 of his Factum, the sentencing judge's justification for the lengthy federal sentence rested in part on the unavailability of the necessary programming during the Appellant's presentence custody.

[8] *R. v. Friesen*, 2020 SCC 9 at paras 30-33.

line. Those systemic factors may fluctuate over time in ways that are unpredictable and beyond the control of the person facing sentence and the courts. The approach of the sentencing judge and Court of Appeal leaves open the possibility that similarly placed individuals will receive longer sentences during times of austerity or overcrowding in the correctional system than they or other individuals would receive when adequate resources and staffing are available. The result is the possibility of unlike sentences for like offenders and offences – violating the principle of parity.

13. The disparities may compound over time for repeat offenders whose mental health conditions or cognitive disabilities bring them into regular contact with the justice system. Recognizing programming time as a sentence-extending factor could have the unintended effect of exaggerating the seriousness of a person's criminal record. Sentencing judges regularly refer to the length of an individual's past sentences as a proxy for the gravity of their antecedents. Under the lower courts' approach, sentencing judges may extend the duration of a sentence to account for anticipated programming delays, making the offence appear more serious to future sentencing judges who may have limited information.

14. The lower courts' approach opens the door to absurd and inconsistent outcomes for similarly-placed offenders: shortening a sentence for a person who is anticipated to breeze through correctional treatment; lengthening or shortening sentences based on the peculiar staffing availabilities of the Correctional Service Canada region in which the person will serve their sentence; or leaving a sentence unchanged based on an assumption that a person with a mental health condition or disability would be motivated to complete correctional treatment quickly in order to improve their chances for parole. Further, the courts below and the Crowns on appeal show little faith in the diligence and sensitivity of correctional programming staff, social workers, and parole officers. The logic of the decisions below rests on the unsupported assumption that correctional treatment moves at a constant pace and that staff will be unwilling or unable to provide extra support or earlier program dates for people who may take longer to complete the work. The lower courts endorse a speculation-based sentencing regime that will produce inconsistent sentences for similarly placed offenders based on circumstances beyond their control and irrelevant to the principles of sentencing.

C. There must be proof of any factors justifying a longer sentence

15. The CCLA's position is that recognizing anticipated programming delays as a legitimate sentence-extending factor violates established sentencing principles and creates inequities for those living with mental health conditions and cognitive disabilities. However, if the Court rejects the CCLA's position and approves anticipated programming delays as a sentence-extending factor, the Court must still maintain an evidentiary standard that gives effect to the principle of restraint. Restraint is meaningless without a sentencing framework that requires *proof* to lengthen a sentence. Since *Gardiner* this Court has recognized the need for reliable proof of aggravating factors because of the impact of sentencing on a person's liberty interests.[9] In *Gardiner*, this Court held that the Crown must prove aggravating factors beyond a reasonable doubt: "the facts which justify the sanction are no less important than the facts which justify the conviction [and] both should be subject to the same burden of proof."[10] As with any other factor on which the Crown relies to justify a longer sentence, prevailing sentencing law requires an evidentiary basis for finding that an individual's mental health conditions or cognitive disabilities will impede their timely completion of programming.[11] A person should receive a sentence no longer than the one that reliable evidence shows they need or deserve.

16. The CCLA offers the following considerations if the Court recognizes anticipated programming delays as a sentence-extending factor. First, the Crown would need to tender case-specific evidence about the person facing sentence *and* correctional conditions in order for sentencing judges to reliably consider anticipated programming delays as a factor that could extend a sentence. The common law and statutory principle of restraint requires sentencing judges to identify the least restrictive alternative.[12] As a result, sentencing judges cannot rely on potentially flawed assumptions

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[9] *R. v. Gardiner*, [1982] 2 SCR 368 at 414.
[10] *R. v. Gardiner*, [1982] 2 SCR 368 at 415.
[11] Particularly in cases like the Appellant's, there is no meaningful distinction between "true" aggravating factors under *Gardiner* and personal or systemic factors justifying a longer sentence: here, the necessity of "targeted treatment" in custody depended in large part on the seriousness of the Appellant's offence.
[12] *Criminal Code*, s. 718.2(d). *Williams v. R.*, 2020 NBCA 59 at para 9: "Simply stated, a sentencing judge should impose the least restrictive sanction which is appropriate given the circumstances of the case and having regard to the overall purpose and principles of sentencing. All other sanctions should be considered before imprisonment is imposed."

about the availability of rehabilitative programming in custody or a defendant's aptitude for it. In the context of programming timing, a sentencing judge must determine the shortest sentence that will achieve the protection of the public through custodial treatment if such treatment is necessary.

17. Courts are ill-equipped to make independent assessments of a person's capacities for engaging in and completing programming without evidence. Similarly, the future availability of rehabilitative programming in custody is outside the proper scope of judicial notice – particularly when the sentencing judge may not know where the person will serve their sentence. In the absence of evidence, the worst and most arbitrary option would be to assume delays in programming. This assumption could increase sentences across the board and replicate the effects of the legal error of considering an "aggravating" circumstance that is present in every case.[13] Extending a deprivation of liberty requires proof, not speculation.

18. Relying on assumptions about anticipated programming time to extend a sentence is inconsistent with established sentencing law. At a minimum, a court should require (a) evidence from lay or expert witnesses about the impact of a person's mental health condition or cognitive disability on the schedule for their completion of mandatory treatment, with specific reference to the format and content of the programming and (b) evidence from correctional authorities about the current timelines for programming availability and the capacity of programming staff to accommodate people who have mental health conditions or cognitive disabilities. To extend a sentence, this Court should require the Crown to prove that a person's mental health condition or cognitive disability creates a *substantial likelihood* that they would not be able to complete necessary rehabilitative programming during an otherwise fit sentence.[14] To give effect to the principle of restraint, the Court must assume – unless the Crown can prove otherwise – that (a) the defendant is reasonably co-operative and motivated to

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[13] *R. v. Johnston*, 2011 NLCA 56 at paras 18-20.

[14] Courts cannot use an otherwise neutral factor to extend a sentence except in the "very unusual circumstances" where it indicates a *substantial likelihood* of future dangerousness, including by making it less likely that a person will achieve genuine rehabilitation through custodial treatment: see e.g. *R. v. Valentini*, (1999) 132 C.C.C. (3d) 262 at 296 (Ont. C.A.); *Nash v. R.*, 2009 NBCA 7 at paras 29-42.

engage in treatment and (b) the available programs, delivered with human rights accommodations and necessary supports, will be reasonably effective in meeting rehabilitative goals.

19. Appropriately, it would be a high bar for the Crown to show a substantial likelihood that a person's mental health condition or cognitive disability would prevent them from completing rehabilitative treatment in the course of an otherwise fit sentence. The CCLA expects it would extend and complicate a sentencing proceeding for the Crown to obtain and tender the evidence it needs to meet the threshold. Increased complexity will beget inequity: if a defendant wishes to introduce rebuttal evidence on these issues, the CCLA expects such evidence may be costly and time-consuming to procure and therefore less available to people who are poor or who failed to obtain bail. A sentencing factor that would be difficult or impossible to apply fairly without a major increase in the resources and court time necessary for sentencing is not a good sentencing factor to recognize. The impracticalities and inequities of sentencing based on anticipated program delays weighs strongly against recognizing it as a sentence-extending factor in the first place.

PART IV: SUBMISSIONS ON COSTS

20. The CCLA does not seek costs and asks that no costs be ordered against it.

PART V: ORDER SOUGHT

21. The CCLA takes no position on the disposition of this appeal.

PART VI: SEALING, CONFIDENTIALITY, OR PUBLICATION ORDERS

22. There is a publication ban under s. 486.4 of the *Criminal Code*.

ALL OF WHICH is respectfully submitted this 15th day of August, 2024.

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PART VII: TABLE OF AUTHORITIES

Legislation

Criminal Code, RSC 1985, c C-46

s. 718.2(d) – English Version / version francaise

s. 724(3) – English Version / version francaise

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