COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Francis, 2022 ONCA 729
DATE: 20221025
DOCKET: C68219

Feldman, Tulloch and Miller JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Ricardo Francis

Appellant

Dirk Derstine and Laura Remigio, for the appellant

Brendan Gluckman, for the respondent

Heard: March 1, 2022 by video conference

On appeal from the convictions entered by Justice Brian P. O'Marra of the Superior Court of Justice on November 25, 2019, with reasons reported at 2020 ONSC 391, and from sentence imposed on January 7, 2020.

Tulloch J.A.:

I. OVERVIEW

[1] The appellant, Ricardo Francis, was convicted of one count of possessing a loaded firearm, contrary to s. 95(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and two counts of possession of drugs for the purposes of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[2] The appellant was arrested at a vehicle stop pursuant to a valid outstanding warrant at the time. The charges underlying this warrant have since been withdrawn. It is the actions of the police during and after the appellant's arrest that are at issue in this appeal.

[3] At the vehicle stop, the police searched the appellant's car and discovered a significant quantity of hard drugs and a loaded handgun. The appellant was taken to the police station, where a strip search revealed a further quantity of heroin and fentanyl on his person.

[4] The trial judge dismissed the appellant's s. 8 *Charter* application on the basis that the police had lawful grounds to conduct the vehicle and strip searches. The drugs and guns were admitted. In his reasons, the trial judge did not address the appellant's s. 10(b) *Charter* application, nor conduct a s. 24(2) analysis.

[5] At the sentencing hearing, the trial judge imposed a seven-year term of imprisonment, less an agreed credit for pre-sentence custody of four years and one month, resulting in a sentence of 35 months.

[6] The appellant appeals his conviction on the basis that the trial judge erred in: (1) finding there was no s. 8 *Charter* breach; and (2) failing to address his s. 10(b) *Charter* application. The appellant also appeals his sentence on the basis that it is unfit and excessive.

[7] For the reasons that follow, I would dismiss the conviction appeal but allow the sentence appeal.

II. FACTS

1. Arrest and Search of The Appellant's Vehicle

[8] On August 8, 2017, the appellant was driving his vehicle when he was stopped by Officer Ma due to a valid outstanding warrant for his arrest.

[9] The appellant had been suspected of being involved in an earlier shooting in Toronto, during which the police believed he shot another male. As a result, he was subsequently charged for attempted murder and weapons-related offences.

[10] Again, these charges have since been withdrawn, and they do not form the subject matter of this appeal. Rather, it is the actions of the police upon and after the arrest of the appellant that are at issue.

[11] Upon pulling the appellant over, Officer Ma approached the vehicle with his gun drawn and yelled commands at the appellant. The appellant complied. Officer Ma conducted a pat-down search of the appellant. He advised the appellant that he was under arrest for attempted murder.

[12] Officer Jackson then arrived on the scene. At trial, Officer Ma testified that he instructed Officer Jackson to search the vehicle "incident to arrest." However,

Officer Jackson testified that he attended the scene to impound the car, and that he conducted an “inventory search” on his own initiative.

[13] Upon searching the inside of the car, Officer Jackson found a drawstring bag behind the driver’s seat. Inside were two bags of white powder and a satchel. Officer Jackson opened the satchel and saw what appeared to be the butt of a handgun.

[14] At that point, Officer Jackson stopped searching and contacted Officer Ma to seek further directions. Officer Ma told Officer Jackson to stop the search and to seal the vehicle pending a tow.

2. Strip Search at the Police Station

[15] The appellant was subsequently transported to the police station. While at the station, Officer Ma requested a strip search of the appellant based on the nature of the charges and the items found inside the appellant’s vehicle. Sergeant McKee authorized the strip search for those reasons as well as the fact that the appellant would be held for a bail hearing.

[16] The strip search was conducted in the presence of two male officers with the door closed. At no point in time was the appellant completely unclothed. The appellant was asked to remove outer layers of clothing one at a time by himself. The officers searched each article of clothing, then returned it to the appellant for him to put back on.

[17] As Officer Ma searched the pants, the appellant said, “I’ve got more stuff” and pointed to his underwear. Officer Ma asked the appellant to remove his underwear. The appellant did, revealing a bag that contained heroin mixed with fentanyl. Officer Ma then arrested the appellant for possession of the drug.

[18] In summary, the police seized powdered cocaine, heroin, fentanyl, and phenacetin as well as a loaded gun and ammunition from the appellant.

3. Caution & Post-arrest Statements by the Appellant

[19] Upon being arrested by Officer Ma, the appellant was advised of his right to counsel in regard to the attempted murder charge. However, Officer Ma did not give another caution after discovering the gun and drugs in the appellant’s car.

[20] At the police station, the appellant spoke with duty counsel. After this, the appellant was asked by a detective whether the gun found in his car was the same one used during the shooting incident. The appellant nodded in reply. Later, the appellant told the detective that he was staying at a friend’s apartment located a few blocks from the shooting site.

[21] At trial, the appellant challenged the admissibility of these statements.

III. DECISIONS BELOW

1. *Charter* and Voluntariness *Voir Dire*

[22] The trial judge conducted a blended *voir dire*, addressing both the *Charter* and voluntariness issues. At the end of the *voir dire*, the trial judge excluded both of the appellant's statements, but admitted the drugs and gun seized in the car and during the strip search.

[23] In his subsequent reasons for decision, the trial judge held that Officer Jackson's search of the car was valid and incident to a lawful arrest. Alternatively, the trial judge was satisfied that Officer Jackson's search was a lawful inventory search. The trial judge also found that the appellant's strip search was justified as a search incident to arrest and a custodial safety search. Consequently, the appellant's s. 8 *Charter* right had not been violated.

[24] The trial judge did not provide reasons for his decision to exclude the appellant's post-arrest statements. He also did not conduct a s. 24(2) *Charter* analysis.

2. Sentencing Decision

[25] The trial judge sentenced the appellant to a total of seven years, less an agreed upon amount of pre-sentence credit of four years and one month custody. This resulted in a custodial sentence of 35 months.

[26] In his reasons for sentence, the trial judge emphasized that the prospects for rehabilitation were “very positive”, as the appellant had no prior criminal record, had a “very positive relationship with both his parents”, and was but 23 years old when arrested.

[27] The trial judge noted, however, that there was “a need for denunciation and general deterrence” on the counts before the court. Since this case involved three “very serious charges”, the trial judge concluded that seven years’ imprisonment was warranted by the totality of the circumstances.

IV. ISSUES ON APPEAL

[28] The appellant appeals his conviction on three grounds. First, he submits that the trial judge erred in finding that the vehicle search was a valid search incident to arrest. Second, he submits that the trial judge erred in finding that the strip search was valid and lawful. Third, he argues that the trial judge erred in failing to address his s. 10(b) *Charter* application, and ought to have excluded the evidence of the drugs and gun under s. 24(2) of the *Charter*.

[29] The appellant also seeks to appeal his sentence on the grounds that it is unfit and excessive.

V. ANALYSIS

1. Was the vehicle search a valid search incident to arrest?

(a) Search Incident to Arrest

[30] A search will be lawful if it is authorized by law, if the law itself is reasonable, and the search is conducted in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278.

[31] The common law power of search incident to arrest is an extraordinary one because it requires neither a warrant nor independent reasonable and probable grounds: *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 13. Rather, the right to search arises from the lawful arrest itself: *Caslake*, at para. 13. It follows that if the arrest is later found to be invalid, the search will be also: *Caslake*, at para. 13; *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 27.

[32] In addition to flowing from a lawful arrest, the search must be "truly incidental" to the arrest: *Caslake*, at para. 17. As L'Heureux-Dubé J. stated in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, there are three legitimate purposes for conducting searches incident to arrest. They are: (1) to ensure the safety of the police or the public; (2) to protect evidence from being destroyed by the arrestee or others; and (3) to discover relevant evidence: *Caslake*, at para. 19; *Cloutier*, at p. 186.

[33] The requirement that the search must be “truly incidental” to the arrest involves both a subjective and an objective component. Subjectively, the police must have one of the purposes in mind when conducting the search. Objectively, the police’s belief that the purpose will be served by the search must be a reasonable one: *Caslake*, at para. 19.

[34] In this case, the appellant contends that the subjective component in conducting the search was not met. This is because Officer Jackson attended the scene with the purpose of impounding the car. He did not say that he was instructed to search the car incident to arrest. Rather, he testified that he conducted an inventory search. The appellant cites *Caslake* for the proposition that inventory searches are unlawful, as they do not meet the subjective component required for searches incident to arrest: at paras. 26, 29.

[35] The appellant also disputes that Officer Jackson was acting as an agent of Officer Ma when he conducted the search incident to arrest. According to the appellant, Officer Jackson conducted an inventory search on his own initiative. The only reason why he reported back to Officer Ma when he found the bags of cocaine was because Officer Ma was the arresting officer.

[36] I am not persuaded by the appellant’s submissions. I am satisfied that the vehicle search conducted by Officer Jackson was a lawful search incident to the appellant’s arrest.

[37] There was no issue that Officer Ma had lawfully arrested the appellant for attempted murder. After doing so, he asked Officer Jackson to assist. The trial judge made definitive findings of fact that Officer Jackson was acting as Officer Ma's agent when he searched the car. This is evidenced by the fact that Officer Jackson immediately stopped the search when he discovered the drugs and gun, and contacted Officer Ma for further instructions. This finding is owed significant deference by this court, subject to the appellant proving that the trial judge committed a palpable and overriding error. No such error has been shown. In my view, the finding of the trial judge was reasonable in the circumstances, based on the evidence adduced on the *voir dire*.

[38] Furthermore, since Officer Jackson was acting as an agent of Officer Ma, it was Officer Ma's mindset that mattered, not Officer Jackson's. The appellant concedes that Officer Ma had the proper subjective belief for search incident to arrest. Accordingly, as the other elements required for search incident to arrest are not in dispute, the search was legally valid and did not violate the appellant's s. 8 *Charter* rights.

(b) Lawful Inventory Search

[39] Since I have concluded that there was a lawful search incident to arrest, it is unnecessary to determine whether there was a lawful inventory search. However, for completeness, I shall briefly address this point.

[40] The trial judge found that, if the vehicle search could not be classified as a search incident to arrest, then it can be classified as a lawful inventory search. I do not agree.

[41] This court was clear in *R. v. Nicolosi* (1998), 40 O.R. (3d) 417 (C.A.), at para. 32, that the general prohibition established in *Caslake* against inventory searches remains good law. I agree with the appellant that the primary distinguishing factor between this case and *Nicolosi* is the lack of statutory authority for the police to impound the vehicle. Furthermore, it is my view that the exception in *Nicolosi* should not be extended to searches of vehicles without the requisite statutory authority. Such an unbounded expansion of the scope of lawful inventory searches should be avoided.

2. Was the strip search justified?

[42] The appellant submits that the strip search was not necessary because Officer Ma had already conducted a pat-down search of the appellant upon his arrest. The appellant further disputes the trial judge's finding that the duty Sergeant authorized the strip search "based on the particular circumstances of the arrest." The appellant argues that the booking video shows that Officer Ma did not mention the bags of drugs. As such, the strip search was ordered simply because it was a routine practice for individuals charged with violent offences, which cannot satisfy

the reasonable and probable grounds threshold set out in *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679.

[43] In response, the respondent argues that the strip search was both a valid search incident to arrest and custodial safety search. The appellant had been arrested and charged for serious crimes of violence: attempted murder and weapons-related offences. As well, shortly after his arrest, he was asked by Sergeant McKee whether he had contemplated suicide, at which time he paused. In these circumstances, the strip search was justified.

[44] I agree with the respondent that the strip search was both a lawful search incident to arrest and custodial search. My reasoning is as follows.

(a) Strip Search Incident to Arrest

[45] The underlying principles governing a lawful strip search incident to arrest were set out in *Golden*, at para. 99. In order to be constitutionally valid, three conditions must be met. First, the strip search must be conducted incident to a lawful arrest and for the purposes of discovering weapons or evidence related to the arrest. Second, in addition to having reasonable and probable grounds to justify the arrest, there must also be reasonable and probable grounds to justify the strip search. This additional requirement is based on the intrusiveness of the search: a higher degree of justification is required to support the higher degree of

interference with one's dignity and freedom. Finally, the strip search must be carried out in a manner that does not infringe s. 8.

[46] In my view, all three conditions have been met in the present case. As established above, the appellant's arrest was lawful as it was pursuant to a valid outstanding warrant at the time. I am also satisfied that the police had reasonable and probable grounds to conduct the strip search at the police station. The discovery of a significant quantity of drugs and a loaded handgun in the appellant's car created a lawful basis for the police to search him for weapons or evidence. Furthermore, the search was conducted in a reasonable manner. The police had the appellant remove his own clothes, one layer at a time. At no point during the search did they make physical contact with the appellant. Overall, the police acted in accordance with the guidelines set out in *Golden*.

(b) Custodial Strip Search

[47] I also find that the strip search is justified as a lawful custodial strip search.

[48] Iacobucci and Arbour JJ. in *Golden*, at paras. 96-97, drew a distinction between strip searches incident to arrest and strip searches related to safety issues in a custodial setting. While the former must be limited to searching for weapons or other evidence related to the offence, the latter is not.

[49] A custodial strip search is animated by concerns related to the safety and well-being of the prison population. Where individuals are entering into a prison

environment, there is “a greater need to ensure that they are not concealing weapons or illegal drugs on their person prior to their entry”: *Golden*, at para. 96. Moreover, as this court explained in *R. v. Gerson-Foster*, 2019 ONCA 405, at para. 109, this risk can arise from any prisoner, regardless of why they were arrested. Hence, unlike strip searches incident to arrest, custodial searches are not limited by the “purpose of the arrest.”

[50] In the present case, it was appropriate for the police to conduct a custodial strip search. Given the nature of the charges, it was clear the appellant would be held in custody until his show-cause hearing. Also, in light of the discovery of the gun, it would be dangerous to allow him to enter the prison population without a search of his person.

[51] In addition, during the strip search, the appellant said he had “more stuff”. While this statement came after the strip search was authorized (and therefore cannot go towards reasonable and probable grounds for a search incident to arrest) it further justified the need for a custodial search. It was incumbent on the police officer to ensure the “stuff” the appellant had was not another weapon.

3. Did the Trial Judge err in failing to address the appellant’s s. 10(b) *Charter* application?

[52] As a result of the blended voluntariness and *Charter voir dire*, the trial judge excluded the appellant’s two post-arrest statements (i.e., the head nod and

statement about staying with a friend). However, the trial judge did not give reasons for his decision. On appeal, the parties provide competing interpretations of the trial judge's silence.

[53] The appellant submits that the trial judge implicitly found a s. 10(b) *Charter* breach as Officer Ma failed to give the appellant another caution after discovering the drugs and gun in the car. This failure affected the appellant's ability to be properly advised by duty counsel because counsel was not aware of his change in jeopardy.

[54] The appellant further submits that the trial judge properly excluded the appellant's post-arrest statements on the basis of the s. 10(b) breach. However, they argue that the trial judge ought to have also excluded the drugs and gun found in the car, as this evidence was "obtained in a manner" in relation to the s. 10(b) breach. Consequently, the trial judge erred in failing to conduct a s. 24(2) analysis.

[55] The respondent, on the other hand, submits that there was no s. 10(b) infringement. Furthermore, even if there was a breach it cannot be said that the evidence found in the car was "obtained in a manner" in relation to it. These events were separated by time and context, as the search had concluded multiple hours before the appellant was questioned by the police.

[56] For the purposes of this appeal, I am prepared to assume that there was a s. 10(b) *Charter* violation. I will also assume that the trial judge excluded the

appellant's post-arrest statements because they were obtained from this breach. Despite these assumptions, I would not give effect to the appellant's s. 24(2) arguments, for the reasons that follow.

(a) *Were the drugs and gun found in the car "obtained in a manner" in relation to the s. 10(b) breach?*

[57] Courts have adopted a purposive and generous approach to the meaning of "obtained in a manner": see e.g., *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38; *R. v. Pino*, 2016 ONCA 389, 139 O.R. (3d) 561, at para. 72. The connection between the *Charter* breach and the impugned evidence can be "temporal, contextual, causal, or a combination of the three": *Wittwer*, at para. 21; *R. v. Tim*, 2022 SCC 12, 467 D.L.R. (4th) 389, at para. 78.

[58] In *Pino*, at para. 48, this court held that the generous approach to "obtained in a manner" can cause evidence found prior to a *Charter* breach to be excluded. In that case, Laskin J.A. found that the marijuana plants discovered prior to the s. 10(b) breaches were nonetheless part of the "same transaction or course of conduct": *Pino*, at para. 73. While not causally connected, the evidence and the breaches were temporally and contextually connected vis-à-vis Ms. Pino's arrest: *Pino*, at para. 40.

[59] Similarly, in the present case, I find that the drugs and gun were "obtained in a manner" in relation to the s. 10(b) breach. While the breach did not cause the discovery of the evidence in the car, both events flowed from the same transaction – the appellant's arrest. There is a sufficient temporal and contextual connection to trigger s. 24(2).

(b) *Should the drugs and guns be excluded?*

[60] In my view, the admission of the evidence would not bring the administration of justice into disrepute.

(i) First *Grant* Factor: Nature of Police Conduct

[61] The first *Grant* factor considers the nature of the police conduct and whether it involves misconduct from which the court should seek to disassociate itself: *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 22; *R. v. Grant*, 2009 SCC 32; [2009] 2 S.C.R. 353, at para. 124.

[62] The appellant asserts that the police's failure to provide a secondary caution prior to questioning him was demonstrative of a general lack of knowledge and respect towards his *Charter* rights. I agree that the police's inadvertence cannot be equated with good faith. However, I am not convinced that this error falls on the egregious end of the spectrum.

[63] In my view, the breach was technical in nature. The appellant had initially been arrested for attempted manslaughter and firearm charges – these were serious and violent crimes for which he received a caution from Officer Ma. The subsequent charges of: (1) possession of drugs for the purposes of trafficking; and (2) possession of another firearm, were less serious than the charges at first instance. Thus, while it was wrong for the police to omit the second caution, their provision of an initial caution reduced the severity of the misconduct.

[64] Furthermore, I note that the appellant was properly given the opportunity to speak to counsel without delay at the police station. This indicates that the failure to provide a second caution was an isolated incident.

(ii) Second *Grant* Factor: Impact of the Breach on the *Charter*-protected Rights of the Individual

[65] The second factor calls for an evaluation of "the extent to which the breach actually undermined the interests protected by the right infringed": *Grant*, at para. 76. In the present case, this factor favors exclusion.

[66] The purpose of the s. 10(b) right is "to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights": *R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 21; *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43. Access to legal advice ensures that an individual

who is under control of the state and in a situation of legal jeopardy “is able to make a choice to speak to the police investigators that is both free and informed”: *Taylor*, at para. 21; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, at para. 25.

[67] In this case, the appellant was deprived of the opportunity to access counsel following an increase in jeopardy. This could have had a serious impact on his *Charter*-protected interests, as duty counsel was unable to advise the appellant of his rights in light of the new charges.

(iii) Third *Grant* Factor: Societal Interest in Adjudication on the Merits

[68] This factor favours admission. The drugs and gun are reliable, and their discovery lies at the heart of the Crown’s case. Excluding them would damage the repute of the justice system.

(iv) Balancing the Factors

[69] While the police undermined the appellant’s *Charter*-protected interests by failing to provide a second caution, this error was not done in bad faith. In addition, the evidence obtained from the *Charter* breach are highly reliable and essential to the Crown’s case. Balancing all the *Grant* factors, I am satisfied that the admission of drugs and gun will not bring the administration of justice into disrepute. Indeed, the trial judge proceeded to admit the evidence, and I find no error in his decision.

4. Appeal of Sentence

[70] An appellate court is entitled to vary a sentence if it is found to be demonstrably unfit, or if the sentencing judge made an error in principle that had an impact on the sentence: *R. v. Friesen*, 2020 SCC 9, 444 D.L.R. (4th) 1, at paras. 25-26; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11, 41 and 44.

[71] The appellant was sentenced to a total of seven years, less the agreed credit for pre-sentence custody of four years and one month. This resulted in a period of incarceration of 35 months.

[72] The appellant seeks leave to appeal his sentence. If leave is granted, he asks that the original sentence be vacated, and a new sentence of five years be imposed. The appellant submits that the trial judge committed several errors in principle which would justify this court's intervention.

[73] First, the appellant submits the trial judge erred by not considering the principle of restraint, as the appellant was a 23-year-old first-time offender who should have been given the shortest sentence possible within the factual circumstances of the case.

[74] Second, the appellant submits that the trial judge overemphasized the principles of deterrence and denunciation and underemphasized the principle of rehabilitation. The appellant submits that while the trial judge acknowledged that

the appellant had a very positive prospect for rehabilitation, he did not explain why the defence's position of a five-year custodial sentence was not appropriate. Rather, the trial judge focused on deterrence and denunciation as overriding factors without meaningfully addressing the mitigating factors.

[75] The respondent notes that the trial judge repeatedly emphasized the appellant's positive prospects for rehabilitation. He appropriately weighed the need to denounce the appellant's conduct with the appellant's particular circumstances. Ultimately, the trial judge imposed a sentence at the lower end of the range for similar offenders.

[76] For the reasons below, I would grant leave to appeal the appellant's sentence and vary the sentence imposed to one of five-years' imprisonment.

(a) Overemphasis on Deterrence and Denunciation

[77] I am not satisfied that the trial judge overemphasized the principles of deterrence and denunciation. While he may not have apportioned the same weight to each principle that the appellant may have wanted, the trial judge did consider these principles and repeatedly emphasized the appellant's positive prospects for rehabilitation. Moreover, given the facts of this case and the seriousness of these offences, the trial judge did not err in principle in holding that "general deterrence and denunciation are the overriding, but not exclusive considerations".

[78] Accordingly, this ground does not warrant this court's intervention.

(b) Principle of Restraint

[79] I am, however, satisfied that there is merit to the appellant's concern about the trial judge's failure to consider and apply the principle of restraint.

[80] This court has repeatedly emphasized the critical role that the principle of restraint plays when sentencing a youthful, first-time offender: see e.g., *R. v. Borde* (2003), 63 O.R. (3d) 417 (C.A.), at para. 36; *R. v. Disher*, 2020 ONCA 710, 153 O.R. (3d) 88, at para. 59; *R. v. Desir*, 2021 ONCA 486, at para. 31. While the objectives of denunciation and deterrence must be given adequate weight, they should rarely be the sole determinants of the length of a first penitentiary sentence: *Borde*, at para. 36. Where an offender is young and has never served a period of incarceration, the shortest sentence possible ought to be imposed: *Borde*, at para. 36; *Desir*, at para. 31; *Disher*, at para. 59.

[81] Though the trial judge was not required to expressly identify the principle of restraint, his reasons, read as a whole, indicate that he did not consider the principle at all. The trial judge recognized that the appellant is "a young man with no criminal record." However, apart from making passing references to these factors, the trial judge did not engage with them in his analysis. He did not turn his mind to whether the appellant's proposed sentence of five years would satisfy the principle of restraint. This error impacted the appellant's sentence imposed and justifies appellate intervention.

[82] It now falls to this court to "perform its own sentencing analysis to determine a fit sentence": *Friesen*, at para. 27*; Lacasse*, at para. 43. The court must "apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range": *Friesen*, at para. 27. In doing so, the court "will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle": *Friesen*, at para. 28.

[83] To begin, there is a need to deter and denounce the appellant's serious crimes. Drug trafficking offences and possession of a firearm call for a significant sentence. However, there are also several mitigating factors, which I will canvass below.

[84] The trial judge recognized that the appellant grew up in a violent neighbourhood with "rampant drug use and criminal behavior." Furthermore, the trial judge notes that "unfortunately, as Mr. Francis grew up, he lost friends, friends who died in his neighbourhood to street violence." This social context evidence is a mitigating factor which should be considered.

[85] The appellant's "very positive" rehabilitative prospects are also a key mitigating factor. The trial judge recognized that, despite suffering depression and anxiety while in custody, the appellant has proactively taken steps to improve himself and prepare for his eventual release. The appellant also has a strong and

supportive network of family, friends, and community workers who believe in his potential for good.

[86] Finally, as discussed above, the appellant is a young man with no prior criminal record. Applying the principle of restraint and other sentencing principles to the circumstances of the offence and the offender as described by the trial judge, I am satisfied that a five-year sentence would be a fit sentence.

VI. CONCLUSION

[87] For the reasons set out above, I would dismiss the conviction appeal.

[88] I would grant leave to appeal the sentence and allow the sentence appeal. I would vacate the sentence imposed by the trial judge and substitute a sentence of five years' custody. Less the agreed credit for pre-sentence custody of four years and one month, this would result in a sentence of 11 months.

Released: October 25, 2022 "K.F."

"M. Tulloch J.A."
"I agree. K. Feldman J.A."
"I agree. B.W. Miller J.A."