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Mental Illness and Sentencing: Blaming the Mentally Ill for their Lack of Cooperation with Inadequate Treatment in R v Maier

By: Glen Luther, Q.C. and Dr. Mansfield Mela

Case Commented On: *R v Maier,* 2015 ABCA 59

Mental illness presents a difficult issue for the sentencing judge. The *Criminal Code,* RSC 1985, c C-46 requires that in sentencing an accused a court must apply the fundamental principle of sentencing, contained in s. 718.1, which requires that:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

In sentencing a mentally ill offender who has been convicted of an offence a judge must decide on the degree of responsibility of the offender and balance that against the gravity of the offence. It is clear of course that many mentally ill individuals are in fact guilty of the offence they committed as the provisions of s.16 of the *Code* relating to criminal responsibility are very narrow and exempt only the rare individual from being seen as having committed their crime. How then do we sentence the guilty but mentally ill offender and how do we decide how responsible they are for the offending behaviour?

In *R v Maier,* 2015 ABCA 59, the Alberta Court of Appeal recently was faced with sentencing a mentally ill accused for spitting in the face of a volunteer care worker in a fit of anger after the accused was asked to leave the shelter in which he was living as a result of an apparent dispute with another resident. Before the Trial Judge Mr. Maier had pled guilty to common assault and two counts of failure to appear. The Crown informed the Judge that the accused was a carrier of the HIV and Hep-C viruses which was accepted by the accused. The Trial Judge sentenced Mr. Maier to 24 months in jail on the assault and 30 days concurrent on each of the two fail to appear charges. On appeal it was proven and accepted by the Crown that the accused was not a carrier of either virus they had alleged at trial and that at the time of one of the two failure to appear charges that the accused was actually in custody and thus not guilty of that count. The Appeal Court, in acknowledging these errors, decided it needed to sentence the accused afresh.

The Court of Appeal divided 2-1 on the appropriate sentence to be imposed with the majority imposing a sentence of 20 months imprisonment for the offence of common assault. On its face, this was a very harsh sentence in the circumstances and one which was, according to the accused's counsel and Mr. Justice O'Ferrall, in dissent, outside the range of sentence normally imposed for such conduct. Indeed, in reviewing the case law involving spitting at law

enforcement officers, where the accused does not suffer from one of the listed diseases, it is clear that the range of sentence across the country is somewhere in the range of 1 month to 12 months. In *R v Ali,* 2006 ABQB 805 at para 31, Justice Lee gave a range of one to six months for spitting on a police officer. In *R v Beaudin*, 2012 ONCA 615, the Ontario Court of Appeal imposed a sentence of 12 months where the offender had a horrible record with many prior violent offences, including prior assaults on police. Finally in *R v Cantell,* 2003 SKCA 53, the Saskatchewan Court of Appeal imposed a 9 month sentence where the offender was drunk and spit at police and had 78 prior convictions on his record.

In *Maier*, the majority, based largely on the accused's extensive prior record, went even beyond the 18 months sought by Crown Counsel. Mr. Justice MacDonald, with whom Madam Justice Veldhuis agreed, noted that the accused had previously been given 18 months on his last assault conviction. The majority then applied the "jump" principle and imposed the 20 month sentence (at para 42). They did so despite the fresh evidence that the accused suffered from, largely untreated, schizophrenia at the time of the offence. That is, they sentenced an accused with a severe mental health condition to 20 months in jail for spitting at a care worker because of his serious prior record and despite the above sentencing case law.

It is our view that the majority misunderstands the mental illness in question and is, in fact, punishing the accused for being mentally ill, all the while failing to appreciate or acknowledge that the criminal record of the accused shows that both the criminal justice system and the health system have been totally inept at changing this accused's behaviour or in protecting the public. This result reminds us of British Columbia Judge Trueman's wise statement concerning those being sentenced while living with Fetal Alcohol Spectrum Disorder in *R v Harris,* 2002 BCPC 0033, at para 167:

> The cognitively challenged are before our courts in unknown numbers. We prosecute them again and again and again. We sentence them again and again and again. We imprison them again and again and again. They commit crimes again and again and again. We wonder why they do not change. The wonder of it all is that we do not change.

Indeed in a series of cases cited by the majority it appears the Alberta Court of Appeal has made it a principle of sentencing that only where the mentally ill accused has shown a pattern of following his or her prescribed treatment that the mental illness can properly be characterized as a mitigating factor in sentencing. On the other hand, where the accused has not followed the suggested treatment the mental illness becomes immaterial to sentencing or at worst an aggravating factor. In the latter situation the Court says something like what was said by the majority here (at para 40):

> The appellant has in the past had the opportunity to comply with treatment and has consistently refused to do so. That being so, in our view, the mental health issue in this case is not a mitigating factor.

Our point is that the failure to "comply with treatment" is in many of these cases part of the very illness under consideration. To fail to realize that the denial of the presence of the illness on the part of the offender is in fact of a symptom thereof is to deny the presence of the illness.

Mr. Justice O' Ferrall dissented and would have sentenced the accused to time served (8 months). He notes in his judgment that there is a sort of chicken and egg problem in such cases. Mr. Maier's record of 79 convictions including 11 assaults, 12 failures to attend court and 10

failures to comply with court orders was described by the Trial Judge as "bordering on ridiculous" (at para 6). It appears that Maier's schizophrenia likely preceded all of these offences.

To punish a mentally ill offender over and over again for failing to follow court orders, including failures to appear in court, is to sentence an accused for being mentally ill. To not be concerned that a person's mental health condition is causing him to be belligerent to those around him is to ignore the very reason he is before the court. One wonders what is ridiculous, the offender's criminal record or the continued insistence of courts that the accused must learn a lesson, and a jail sentence be imposed, to show deterrence. If it was not clear all along, it should be clear to this Court that this sentence is unlikely to deter this accused or any other like-placed accused.

One is forced to ask what steps the health or justice system of Alberta has taken to ensure that Mr. Maier received treatment for his schizophrenia? There are of course Community Treatment orders under Alberta law. Has one been tried for this accused? There are injections that can be given for treating mental illnesses which are much more easily policed and which endure for weeks. Has this been tried in Mr. Maier's case? Has Mr. Maier received treatment or motivational interviewing designed to create awareness of his condition and understanding of why he must take his medications? The Court was provided with a discharge summary from a doctor at the Peter Lougheed hospital which suggested the accused had consistently been uncooperative with the treatment prescribed but also that he had been out of touch with the hospital for three years. The report apparently added that during those three years Mr. Maier fared well without the services. It appears that much of that time he may have been imprisoned, which is not noted by the majority. Certainly it appears the Court had inadequate information to determine why and whether Mr. Maier had been treated and how. No psychiatric assessment or complete history was provided to Court – the *Criminal Code* does not allow for a psychiatric assessment to be ordered for sentencing purposes despite calls by many for such a change to be brought into force (e.g. The Canadian Bar Association has made calls for changes to the *Criminal Code* to allow assessment at least for FASD. Also see here). Yet in this case it appears that both the Trial Judge and the Court of Appeal imposed a particularly harsh sentence on Mr. Maier in the absence of adequate information about his medical history and his past history of treatment.

The Supreme Court in *Starson v Swayze,* 2003 SCC 32, decided that competent accused are within their rights to refuse treatment, especially in the case of psychoactive medications routinely prescribed to individuals with schizophrenia. These drugs have significant side-effects, lethargy and weight gain being often cited. There are, in fact, many other reasons why some patients will refuse treatment – fear of being poisoned, lack of insight, paranoid delusions, and more importantly a lack of motivation appears in some individuals suffering from schizophrenia. We suggest that to say Maier's illness was not a mitigating factor because he was not complying with treatment fails to understand that the origin of that lack of cooperation is the very disease from which the Court accepts the accused is suffering. Surely we can understand that the treatment of those with this illness requires compassion and skill. Sometimes it requires force. In no way can it be therapeutically required that we imprison a person to teach them a lesson.

This man will be back, in the absence of adequate treatment for his condition, and it seems the criminal justice system is unwilling or unable to attempt to ensure the necessary treatment is provided. Justice O'Ferrall, in dissent, would have at least tacked on probation with a condition that the accused take his medication (at para 61). While this man's conduct is criminal, his lack

of treatment would appear to be equally so. Thoughtful judges agree that their role is to protect the public. With decisions like that in *Maier*, that is only very temporarily so, i.e. while he is incarcerated. It is suggested that until the courts accept responsibility to attempt to ensure people with Mr. Maier's mental health conditions become engaged in their treatment we will continually be confronted with obstinate mentally ill offenders who we will pretend we are punishing. In fact we are at the same time ignoring that there are steps we might take to protect the public in the longer term but are unwilling to take. Therapeutic jurisprudential approaches to mental health provide hope to prevent future offending by such individuals. In those that are dangerous, surely it is incumbent on courts to take charge of managing a treatment plan to protect public safety but also to attempt to improve Mr. Maier's life. It is also incumbent on the criminal courts to carefully assess such cases. What happened before His Honour Judge Wilkins at trial appears to show undue haste on the part of both the Crown and the defence. The facts of this case show that if the lawyers and the court do not handle these cases thoughtfully, with a view to attempting to make real change in these accuseds' lives, no one else will. Indeed, one cannot end this discussion without noting that so far Mr. Maier's offending would appear to be more of a nuisance than anything else. He has not killed anyone but one wonders whether our continued incarceration of him without treatment will mean that he may eventually do so. We can then pretend that would be his own fault for not learning from his previous punishments but that will be little consolation to the victim of that crime. Our job, those of us who are not mentally ill, surely should be to take responsibility early so as to attempt to rectify the tragedy of his illness and to protect his future victims.