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Wilful Blindness and the Contradictions of Sentencing

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Case Commented On: *R v Giroux*, 2018 ABCA 56 (CanLII)

Sentencing is a notoriously self-contradictory component of the criminal process. On the one hand, it allows judges freedom from many of the oft-restrictive rules of evidence that govern the trial itself, giving them the flexibility to take into account aspects of the individual accused's circumstances and history, often in favor of leniency within the very broad statutory ranges where the facts urge it. On the other, the rule of law requires a degree of consistency across sentences, and for particularly serious cases a trial judge's broad discretion is limited by mandatory minimums created by Parliament. Furthermore, section 718 and related provisions of the *Criminal Code*, RSC 1985, c C-46, specify principles that must govern sentencing, codifying the various accepted theoretical purposes of criminal punishment, particularly denunciation, deterrence and rehabilitation. Often, these principles directly contradict one another when applied to the facts of a particular case: it is easy to imagine, for example, how the goal of rehabilitating the offender may urge a very different sentence from the goal of denouncing particularly serious conduct. Furthermore, case law construing these statutory sentencing provisions imposes further constraints on lower courts. Due, however, to the difficulties in navigating these choppy legal waters, sentencing judges typically receive a high degree of deference as they have the closest view of the facts before them and the testimony of the accused, victims, and other relevant witnesses. Indeed, a court of appeal may disturb a sentence only where: 1) the sentence reflects an error of principle; or 2) the sentence is demonstrably unfit (see *R v Cowan*, 2012 ABCA 199 (CanLII) at para 14). Finally, after *R v Gladue*, [1999] 1 S.C.R. 688, 1999 CanLII 679 (SCC), Parliament amended section 718(e) of the *Code* to require that sentencing judges take into account the particular circumstances of Aboriginal defendants in considering alternatives to incarceration.

In *R v Giroux* the Alberta Court of Appeal considered a Crown appeal from a sentence which brought these numerous contradictions of the sentencing process into clear view. The accused, Lisa Giroux, was a 26-year-old Aboriginal mother of two children, who had no criminal record and was in the process of completing her high school diploma (at para 4). She was arrested after police stopped the car in which she was a passenger, the driver of which had been caught selling cocaine to an undercover officer and was, herself, subsequently sentenced to 33 months in prison for trafficking. Ms. Giroux was found to have three ounces of cocaine—with a street value of about $8,400—in her purse (at para 3). She pled guilty to possession of cocaine for the purposes of trafficking, though the Crown did not contest that, while she knew it was a controlled substance, she did not know it was cocaine, and that she had no expectation of financial compensation for carrying it (at para 3). In other words, it appears she was carrying it as a favor and no evidence suggested that she herself was planning to deal it.

The court below had sentenced Ms. Giroux to three months in prison. This was a significant departure from the three-year starting point for "commercial" trafficking, defined by the Alberta Court of Appeal in *R v Maskell*, 1981 ABCA 50 (CanLII) at para 50. In the reasons for judgment, Judge Paul observed that the accused

> . . . was in possession without any apparent planning or premeditation, she made no financial gain, she intended to make no financial gain, she had no direct knowledge of the quantity, or even that it was cocaine, she was not motivated by greed, as a calculating profiteer, her offence is possession for the purposes of trafficking by way of transportation of the illicit substance only as a favour to an acquaintance. (at para 10)

While the Crown presented several questions in its appeal, the dispositive one was whether Judge Paul erred in concluding that Ms. Giroux's actions did not attract the guideline sentence because they were not commercial in nature owing to her lack of anticipated financial gain and/or her lack of knowledge of the exact nature or amount of the drugs in her purse (at para 7).

Writing for the majority, Justices McDonald and Bielby held that Judge Paul had indeed so erred and that the three-month sentence was thus demonstrably unfit (at para 28). In so holding the Court stated that Alberta precedent is clear on the fact that lack of financial motivation does not, alone, mean that trafficking is not "commercial" where it is clear from the sheer quantity of drugs that its ultimate purpose is to be distributed for sale (at para 15, citing *R v Marshall*, 2012 ABCA 160 (CanLII) at paras 8-9). The Court notes that lack of financial incentive may indeed reduce an offender's moral culpability—a factor relevant to the flexible use of discretion enjoyed by sentencing judges. Yet, that fact does not exempt "trafficking as a favour to a friend" from being commercial trafficking—a hard line established by clear precedent (at para 16). As a result, the Court imposed a nine-month sentence instead—using the three-year minimum as a starting point and otherwise accepting the sentencing judge's other reasons for departing downward, including *Gladue* factors, the accused's lack of criminal record, and the lessened moral culpability due to the lack of greed motive.

In restoring the three-year starting point, the Court engaged the concept of wilful blindness, a form of mens rea long understood to substitute for the accused's knowledge of a prohibited act, in offences where knowledge is an element that must be proven by the Crown beyond a reasonable doubt. In cases where an accused has a strong suspicion that she is doing something illegal and avoids obtaining the last piece of knowledge necessary to confirm that suspicion she is deemed to have knowledge. There are obvious policy reasons for this rule: if all accomplices to criminal behavior avoid responsibility by remaining deliberately ignorant, much criminal conduct—particularly related to the drug trade—would go unpunished. The penal purpose of deterrence would be defeated otherwise. That said, in a sentencing context the role of wilful blindness is less clear. Ms. Giroux had pled to the full offence of trafficking—the issue was not whether she was guilty of the relevant state of mind but, rather, whether her lack of knowledge in fact should be mitigating enough such that a court could appropriately use its discretion to reduce the sentence.

Indeed, in this case Justice Crighton dissented, finding that the majority's analysis on wilful blindness should not have substituted for the sentencing judge's finding of fact. She noted that

the Crown had conceded that Giroux's transport of that quantity of cocaine was enough to establish possession for the purposes of trafficking, but not that the trafficking was of a commercial nature (at para 44). According to Justice Crighton,

> It is not disputed that she was wilfully blind to the nature and quantity of the drugs she carried, but the sentencing judge did not find that to have reduced her moral culpability or that it was mitigating as the Crown contends. Rather, it is implicit from his reasons that he found that her behaviour was, along with her lack of financial gain or expectation of gain, and the absence of a criminal record, some evidence supporting a finding that she was not a drug courier, but instead had made a very poor decision on one occasion for which she would receive a gaol sentence. (at para 44)

In the absence of other evidence, Justice Crighton concluded, the lower court's sentence should have been left undisturbed.

The two opinions in this case make it an exemplar of the ongoing challenges in developing and applying principles of sentencing. On the one hand, we operate in a system where nearly all cases get resolved by plea bargaining and sentencing determinations can therefore so easily undermine, as a pragmatic matter, the agreed-upon definitions of offences and their attendant consequences. Yet on the other, the traditional deference to sentencing courts derives from the idea that the fact-finding body has the best opportunity to do equitable justice. Neither the majority nor the dissent in *Giroux* is plainly wrong. The split reflects, instead, the inherent contradictions in what we want from the sentencing process in the first place.

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