

CITATION: R. v. Briscoe, 2019 ONSC 2471
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HER MAJESTY THE QUEEN)
) M. Comiskey and Y. Pressman, for
) the Crown
)
- and -)
)
)
RICHARD BRISCOE) C. Nishio and M. Halfyard, for the
) Accused
)
)
)

REASONS FOR SENTENCE

BARNES J.

INTRODUCTION

[1] After a trial, a jury found Richard Briscoe guilty of possession of cocaine for the purpose of trafficking. After the jury's verdict, Mr. Briscoe re-elected to trial by judge alone and pleaded guilty to one count of failing to comply with his bail conditions. I acceded to a joint submission and sentenced him to 12 months' imprisonment. He received credit for 120 days of pre-trial custody. These are my reasons.

BACKGROUND FACTS

[2] During the early hours of August 16, 2016, Mr. Briscoe was driving westbound and made a left turn at the intersection of Burnhamthorpe Road and Dixie Road in the City of Mississauga. Officer Nehar observed Mr. Briscoe drive into a curb lane and begin to speed, travelling at 75 km/h in a 60 km/h zone.

[3] The police officer stopped the vehicle. Mr. Al-Khaleby was the passenger. Mr. Briscoe did not have a valid driver's licence in his name. He gave a false name and was arrested for obstruction of justice. The police searched Mr. Briscoe and found his health card and \$812 in his pocket. In his vehicle, police found a bag containing a total of 10.15 grams of cocaine packaged in small bags ("baggies"), three bags of marijuana weighing a total of 8.7 grams, two digital scales, three cellphones, and a half-full bottle of vodka.

[4] The jury rejected Mr. Briscoe's explanation for why there was cocaine in the car. He said that he was employed by a drug dealer called Bobby. His job was to collect money owed to Bobby from Bobby's customers. He claimed that he never delivered the drugs; he only collected money owed. He said Bobby told him where to go to collect the money. Thus, he explained, the \$812 found in his pocket was money he had just picked up for Bobby.

[5] Mr. Briscoe said the bag containing the drugs belonged to Mr. Al-Khaleby and he did not know Mr. Al-Khaleby was carrying cocaine in the bag. The jury did not accept his explanation.

MR. BRISCOE'S BACKGROUND

[6] Mr. Briscoe is a heroin addict. He has spent 80 days in pre-trial custody. His heroin addiction has been treated with methadone. He has decided to wean himself off methadone and is experiencing withdrawal symptoms. He was 27 years old at the time of the trial. He was raised in Toronto. He did not graduate from high school; he left in grade 10.

[7] Mr. Briscoe attended two different high schools and five different grade schools, seven different schools in total. His parents divorced when he was two years old. He moved and changed residences frequently. His father has a serious heroin and alcohol addiction. At age 15, Mr. Briscoe's good friend died from a drug overdose and Mr. Briscoe's heavy use of alcohol and cocaine began. At age 16, he went to William Osler Detox to treat a cocaine addiction.

[8] Mr. Briscoe has a lengthy criminal record over a nine-year period. His last sentence was imposed just under 12 months ago. That record includes convictions for simple assaults, property-related crime, and administration of justice offences. His first conviction for a drug offence was for simple possession in 2015. It is not

disputed that each conviction is directly linked to the consumption of cocaine or heroin.

[9] Mr. Briscoe has attended and successfully completed a number of drug treatment programs:

- 1) A 21-day Renaissance treatment program;
- 2) A three-month program at Kettleby Ranch; and
- 3) A six-month program at Teen Challenge.

[10] Despite completing these treatment programs, the scourge of drug addiction always returned. These offences were committed just a few days after he had completed the Teen Challenge Program. In addition, Mr. Briscoe overdosed from the consumption of drugs two days before the offences at issue in these reasons.

[11] Mr. Briscoe addressed the court prior to sentencing. He said that his girlfriend was pregnant. The couple already have one child. He expressed regret for the pain his addiction has caused her and their son and expressed a determination to remain drug free upon the completion of his sentence.

MR. BRISCOE'S DRUG ADDICTION AND CRIMINAL BEHAVIOUR

[12] Mr. Briscoe's background and the circumstances of the offence show how the criminal law and drug treatment intersect.

[13] Section 718 of the *Criminal Code* includes deterrence, denunciation, rehabilitation, reparation to victim and community, accountability and responsibility as sentencing objectives. According to s. 10(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“CDSA”), in the appropriate case, drug treatment can be a sentencing objective. This logically falls under one of the overarching objectives of sentencing – rehabilitation. An example of an appropriate circumstance is where a drug addiction is the reason for the criminal behavior. In addition, drug addiction and drug treatment are mitigating factors in sentencing: *R. v. Barkhouse*, 2017 ONCA 29 at para. 3; *R. v. McDonald*, 2015 ABCA 108.

[14] In crafting the appropriate sentence, the trial judge balances the objectives of sentencing as warranted by the circumstances of the case and the offender: *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43. Such a balancing exercise will invariably result in a determination of which sentencing objective(s) should take precedence in the particular circumstance.

[15] In circumstances where criminal law and treatment intersect, rehabilitation (treatment) must be a paramount sentencing objective because treatment and improvement of the individual is intricately linked to the probability of recurrence of criminal behaviour. Hence the betterment of the individual is directly linked to the betterment of society.

[16] When criminal law and treatment intersect, the question is not whether treatment of the underlying cause of criminal law should occur, it must. The question is where and how treatment should take place? The importance of other sentencing objectives such as denunciation and deterrence are examples of sentencing objectives which will determine the venue of treatment. So for example, minor offences may attract treatment interventions outside a custodial setting and more serious offences may attract treatment interventions within a custodial setting.

[17] Mr. Briscoe's background reveals a very early break down in familial support (age two); an early life of instability; heavy drug use and addiction by age 15 and multiple drug overdoses. It is reasonable to infer that he has suffered psychological and other trauma from an unstable childhood; life characterized by the tragic loss of people close to him and an early exposure and addiction to drugs. These factors sent him deep into the throes of drug addiction. Community and social institutions' interventions were insufficient to help Mr. Briscoe address his personal trauma and resulting addiction issues. This led to criminal behaviour and the criminal justice system became society's forum for holding him accountable and for deterring him from future criminal behaviour. The link between Mr. Briscoe's drug addiction and his criminal behaviour meant that in seeking to successfully achieve these objectives the criminal justice system has by default

replaced civil and community institutions in efforts to break the link between Mr. Briscoe's drug addiction and criminal behaviour.

[18] The criminal justice system was never intended to be such a forum and is ill-equipped to address such issues on its own. Mr. Briscoe's criminal record provides abundant evidence of this. His ongoing cycle of arrests, convictions, incarceration, release and reoffending resulting in a staggering 32 criminal convictions over an eight-year period is overwhelming evidence of the criminal justice system's inability to effectively address this issue alone.

[19] Mr. Briscoe's circumstance is succinctly captured by this quote, which though describing the plight of persons suffering from mental disorder, nonetheless applies to Mr. Briscoe's status as a heavy drug addict:

Because other community networks or institutions have not effectively treated and supported the mentally ill [drug-addicted]—because community-based safety nets have failed—they enter the criminal justice system, usually involved in minor, nuisance, and quality of life offences. Often, by then, they have other serious problems—such as alcohol or other drug addiction, housing employment and physical health problems—that also have not been addressed. In many instances, the mentally ill or disabled [or drug-addicted] find themselves in criminal justice primarily because of their mental illness [drug addiction] and their inability to connect with or stay in supportive community-based treatments.¹

¹ John S. Goldkamp & Cheryl Irons-Guynn, *Emerging Judicial Strategies for the Mentally ill in the Criminal Caseload: Mental Health Courts* (Washington, DC: U.S. Department of Justice, Bureau of Justice Assistance, April 2000) at p. xv.

[20] Mr. Briscoe's almost immediate return to drug use and criminal behaviour, after completion of three different in-house residential programs, suggests that in his particular circumstance, treatment programs alone have been unable to break the link between drug addiction and his criminal behaviour. The need for closer collaboration between the criminal justice system and community and social institutions providing treatment, as appropriate for his circumstances, is apparent.

[21] It is reasonable to infer that personal tragedies in his personal life have left trauma that must be dealt with in treatments to address addiction, trauma and other related issues. This points to the need for a multidisciplinary collaboration to help Mr. Briscoe break the cycle between drug addiction and criminal behaviour. It is also reasonable to infer, from the reason for Mr. Briscoe's criminal behaviour, that adequate community and social interventions for Mr. Briscoe are those that increase opportunities for effective management of his addiction, trauma and other related issues, thus reducing his criminal behaviour, the harm he does to himself and others and eventually reducing interventions by the criminal justice system or rendering such interventions unnecessary.

[22] The law has not had a neutral impact on Mr. Briscoe's life. It has had an anti-therapeutic impact. Since his first encounter with the law his drug addiction has worsened and the severity of his criminal behaviour has increased. While deterrence and denunciation are paramount sentencing objectives because of the nature of the offence, Mr. Briscoe's personal circumstances mean that treatment

and overall rehabilitation are also paramount sentencing objectives. Mr. Briscoe's situation illustrates that where criminal law and drug treatment intersect, it is extremely important to employ interventions that benefit and rehabilitate the offender because there is a direct correlation between the offender's successful rehabilitation and prevention of future criminal behaviour, and hence the protection of the individual and the public.

[23] It reasonably follows that the law can be applied in a manner that increases prospects for Mr. Briscoe's rehabilitation. In other words, the law can be applied in a manner that maximizes the therapeutic benefits to Mr. Briscoe. Such an approach is compatible with objectives of sentencing and the applicable law. In seeking to craft the appropriate sentence, a basic understanding of the predictor of Mr. Briscoe's criminal behaviour, drug addiction, is appropriate.

DRUG ADDICTION

[24] It is not disputed that Mr. Briscoe has a long history of drug addiction. He has addictions to cocaine and heroin and has overdosed on multiple occasions.

Some essential facts about drug addiction include the following:

Drug addiction is a chronic disease characterized by drug seeking and use that is compulsive, or difficult to control, despite harmful consequences.

Brain changes that occur over time with drug use challenge an addicted person's self-control and interfere with their ability to resist intense urges to take drugs. This is why drug addiction is also a relapsing disease.

Relapse is the return to drug use after an attempt to stop. Relapse indicates the need for more or different treatment.

Most drugs affect the brain's reward circuit by flooding it with the chemical messenger dopamine. Surges of dopamine in the reward circuit cause the reinforcement of pleasurable but unhealthy activities, leading people to repeat the behavior again and again.

Over time, the brain adjusts to the excess dopamine, which reduces the high that the person feels compared to the high they felt when first taking the drug—an effect known as tolerance. They might take more of the drug, trying to achieve the same dopamine high.

No single factor can predict whether a person will become addicted to drugs. A combination of genetic, environmental, and developmental factors influences risk for addiction. The more risk factors a person has, the greater the chance that taking drugs can lead to addiction.

Drug addiction is treatable and can be successfully managed.²

WHERE CRIMINAL LAW AND TREATMENT INTERSECT

[25] Mr. Briscoe's first conviction was in 2007. Since then, he has been convicted every year up until 2016. He was convicted for the present offences in 2017. In total, he has been convicted and sentenced for 32 offences such as thefts, robberies, break-and-enters, failure to comply with court orders, assaults, obstructing justice, mischief, and possession of a scheduled substance. Today, he shall be sentenced on two counts of possession of a scheduled drug (cocaine) for the purpose of trafficking.

² National Institute on Drug Abuse, "Understanding Drug Use and Addiction" (June 2018), online: <<https://www.drugabuse.gov/publications/drugfacts/understanding-drug-use-addiction>>.

[26] Each offence has been committed primarily because of the effects of a drug addiction. Sentences imposed include fines, probation, suspended sentence and probation, custodial sentences, and weapons prohibitions.

[27] All of these sentences were imposed to no avail. Mr. Briscoe keeps getting arrested, convicted, sentenced, and released. He re-offends and is re-arrested, thus repeating the cycle over and over again. A revolving door was created by the inability of previous justice and non-justice interventions to effectively address the root cause of his criminal behaviour – his drug addiction.

[28] Mr. Briscoe's circumstance is an example of how criminal law and treatment intersect. Such a circumstance is where a human condition – for example, addiction or mental illness – acts as a precursor to an accused's criminal behaviour or impacts an accused's ability to stand trial. This circumstance necessitates viewing the law through a therapeutic lens.

THE LAW THROUGH A THERAPEUTIC LENS

[29] As noted, in circumstances where criminal law and treatment intersect, rehabilitation (treatment) is a sentencing objective that should have a position of prominence. For example, in this case Richard Briscoe's criminal activity involved spreading havoc in the lives of others by selling them the highly addictive drug cocaine. Under such circumstances, deterrence and denunciation are paramount sentencing principles, however, he is a lower-echelon offender and he committed

this offence to support his own drug habit. Thus, rehabilitation (treatment) is also a prominent sentencing objective.

[30] As I have previously noted, Mr. Briscoe's background, including his drug addiction, personal trauma, treatment history, relapses, multiple overdoses, the connection between his drug addiction and criminal behaviour, and his extensive and recurring history of criminal behaviour, suggests the need for a multidisciplinary approach to effectively manage the underlying cause of his criminal behaviour. Mr. Briscoe provides a classic example of the intersection of criminal law and therapeutic intervention.

[31] Therapeutic jurisprudence provides a conceptual framework for tackling what can be an unwieldy analysis. Therapeutic jurisprudence is an analytical framework that seeks to assess the therapeutic and anti-therapeutic consequences of law and how it is applied. The objective is to "examine the law's therapeutic values and minimize the anti-therapeutic consequences without sacrificing due process or other judicial values."³ Therapeutic jurisprudence:

seeks to use the application of law to produce therapeutic outcomes of accused within the criminal justice system. It is a process based and multidisciplinary approach to law that focuses on the underlying contributors of crime, seeking to address them by implementing effective therapeutic initiatives. It aims to take advantage of the historical underappreciated

³ D.B. Wexler & B.D. Winick, eds, *Law in a Therapeutic Key* (Durham, N.C.: Carolina Academic Press, 1996).

therapeutic potential in law. The law is not neutral – it can be applied in a manner that can benefit the accused [and hence society].⁴

[32] A consequence of this theoretical framework has been a solution-focused or problem-solving approach to justice and judging. This approach is aptly described as follows:

A problem-solving approach to justice and judging proposes applying the tools of the behavioral sciences in Canada's courtrooms, indeed, throughout the justice system, to make the justice system more relevant and effective for all parties involved. It addresses the "complex, often overlapping, and sometimes intractable social and personal issues" – such as addiction, poverty, impaired emotional or anger-management skills, limited literacy, cognitive impairments (including fetal alcohol spectrum disorder), mental illness, or abuse – that underlie human causes of crime and criminal behavior. It takes a non-adversarial, team approach to court processes, one that broadens the focus beyond the straight application of the law to give consideration to its effects on the stakeholders, including the offender, victims, their wider community, and the court itself. Success in the courtroom is measured less by compliance, or by the effective clearing of dockets, and more by therapeutic outcomes and the degree to which the underlying problems are remediated. In so doing the problem-solving approach aims to address the "revolving door" system that recycles repeat offenders through the criminal justice system.⁵

[33] The problem-solving approach has spurred the establishment of problem-solving courts (also referred to as specialized or solution-focused courts) which

⁴ R.D.Schneider, H.Y. Bloom & M. Heerema, *Mental Health Courts – Decriminalizing the Mentally Ill*, (Toronto: Irwin Law, 2007), at p.65.

⁵ National Judicial Institute, "Problem Solving in Canada's Courtrooms. A Guide to Therapeutic Justice" (September 2011), online (pdf): <<https://www.nji-inm.ca/index.cfm/publications/problem-solving-in-canada-s-courtrooms-a-guide-to-therapeutic-justice-2nd-edition/?langSwitch=en>>, at p. 2.

focus on issues such as drug addiction, mental health, domestic violence, and the like.

[34] The term “problem-solving court” is used to describe a court which seeks:

[A] more comprehensive resolution of the legal problem by resolving underlying issues such as substance abuse, intimate partner violence, mental health issues and other offending-related issues. While there are differences in principles and practices between these courts, they share a common goal in seeking to promote positive behavioral change in participants in their programs.⁶

[35] The problem-solving approach is not limited to problem-solving courts. Problem-solving strategies can be used where appropriate in regular court practice. Under the therapeutic jurisprudence framework, problem-solving strategies are utilized without sacrificing traditional approaches reflecting the protection of rights in the *Canadian Charter of Rights and Freedoms* and recognition of legal rules, values, and principles. A problem-solving approach may not always be appropriate. The activity under consideration determines whether either a traditional approach, the problem-solving approach, or some combination of both is appropriate. A description of the difference between these two approaches is instructive.

⁶ Michael King, “Should Problem Solving Courts be Solution-Focused Courts?” (2010) Monash University Faculty of Law Legal Studies Research Paper No. 2010/15 at p. 1.

[36] Under the traditional approach:

- 1) The goal is the resolution of the dispute;
- 2) The focus is on a legal outcome; and
- 3) An adversarial process is used.

[37] Under the problem-solving approach:

- 1) The goal is the resolution of the underlying problem;
- 2) The focus is on a therapeutic outcome; and
- 3) A collaborative process is utilized.⁷

[38] Using the traditional approach, the trier of fact (the jury) has resolved this case on its merits. The jury has determined what happened. The jury concluded that the Crown has proven beyond a reasonable doubt that Mr. Briscoe was in possession of cocaine for the purpose of trafficking. I must now determine what to do about his criminal conduct. The activity under consideration is sentencing. The relevant facts show that this is a circumstance where justice and treatment intersect. This is an appropriate juncture to adopt a problem-solving approach. The

⁷ See Appendix A for the full comparative chart.

objective of this approach is to find a solution to the underlying cause of his criminal behaviour – drug addiction.

[39] Mr. Briscoe has a history of heavy drug abuse. He also has 32 criminal convictions, and has followed the pattern of arrest, conviction, incarceration and release on an annual basis since 2007. He frequently returns to criminal behaviour despite the successful completion of three in-house residential treatment programs and multiple custodial sentences. It is apparent that a closer collaboration between law and treatment is warranted.

[40] Section 720(2) of the *Criminal Code* permits the delay of sentencing, with the consent of the Attorney General and the offender, to enable participation in a “treatment program approved by the province under the supervision of the court”. Participation in such programs is voluntary. Completion of such treatment programs can result in a mitigation of sentence or some other favourable disposition of the case. A treatment program that satisfies the s. 720(2) criterion is the problem-solving court called Drug Treatment Court. Sections 10(4) and (5) of the *Controlled Drugs and Substances Act* recognize the existence of Drug Treatment Courts.

[41] Drug Treatment Courts are designed to combine the legal process with treatment processes. The primary objectives are to achieve the holistic rehabilitation of the drug-addicted offender or participant, reduce crime, reduce

harm to the individual and society, enhance the quality of life of the participant, enhance the ability of the participant to make productive contributions to society, save taxpayers money, and increase public safety.

[42] A court is a Drug Treatment Court if it has these thirteen key components:

A close partnership between treatment entities and the Court resulting in the creation of a multidisciplinary team;

A non-adversarial and team approach is adopted;

Eligible offenders are identified early;

A comprehensive assessment plan is in place and holistic treatment strategies are implemented. It is a best practice for assessment and treatment strategies to have the capability to identify the applicable issues; provide direct treatment for such issues or have the capability to make referrals to other community partners to facilitate such treatment. It is a best practice to include anti-criminal thinking strategies on the menu of holistic rehabilitation interventions;

Random Urine Testing is utilised to monitor treatment progress;

[Therapeutically-informed] Sanctions and Incentives are utilized to encourage program compliance [and to encourage and support participants in their efforts to engage in meaningful, productive behavior changes to successfully manage their drug addiction];

There is ongoing Judicial supervision and one on one interaction between the Judge and program participant;

Evaluation processes are in place to improve program processes and demonstrate outcomes;

Interdisciplinary Training among team members is encouraged and implemented;

Community Partnerships to enhance effectiveness are utilized. It is a best practice to develop linkages with community agencies to facilitate access to holistic wraparound services such as mental health treatment;

specialized addiction treatments; housing; continuing education; anti-criminal thinking; parenting; employment etc.

Case Management strategies to ensure effective delivery and coordination of treatment and court processes are in place;

Program flexibility to ensure that the needs of target populations and program participants continue to be served at an optimal level. It is imperative and a best practice for program delivery strategies to account for the significant differences between adults and adolescents;

After Care processes to promote ongoing success after program completion are in place.⁸

[43] As noted, one of the circumstances where a problem-solving approach is most suited is where criminal law and treatment intersect. This approach is not confined to a problem-solving court like Mental Health Court or a Drug Treatment Court, etc. It can be applied as part of regular courtroom practice. As I have already explained, on consent, as part of regular sentencing proceedings, the court may invoke s. 720(2) of the *Code* and suspend sentencing for Mr. Briscoe to participate in a province-approved and court-supervised program.

[44] The nature of the underlying causes of Mr. Briscoe's criminal behaviour suggest that the intervention of a multidisciplinary team is appropriate. A sentencing court could determine the nature and extent of its supervision of the agreed treatment, preferably with input from the multidisciplinary team. The

⁸ The Honourable Justice Kofi Barnes, Tanya Connors, Joanne Humphrey, Annie Schachar & Paulette Walker, eds., *People Places and Things: Inspirational Voices from Canada's Drug Treatment Courts* (Victoria, BC: Friesen Press, 2017), at pp. vii-viii; see also *Informal Expert Working Group on Drug Treatment Court*, UNODC, 1999, UN Doc V.00-59222 (E) 1 at p. 17.

problem-solving approach is applied within the context of a component of the traditional approach – the existing legal framework which I discuss below.

LEGAL FRAMEWORK

[45] The purpose of sentencing is to denounce and deter unlawful conduct; separate offenders from society when necessary; assist in rehabilitating offenders; provide reparations for harm done; and to promote a sense of responsibility in offenders and an “acknowledgement of the harm done to victims or to the community”: *Criminal Code*, s. 718. Additional and overlapping sentencing objectives for drug offenders are “to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community”: *CDSA*, s. 10(1).

[46] Sentencing is a balancing exercise and it falls to the sentencing judge to determine which principle of sentencing should be paramount in all the circumstances: *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43.

[47] A court may, “after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a treatment program approved by the province under the supervision of the court, such as an addiction treatment program or a domestic violence counselling program”: *Criminal Code*, s. 720(2); see also *CDSA*, s. 10(4).

[48] Any sentence imposed “must be proportionate to the gravity of the offence and the degree of responsibility of the offender”: *Criminal Code*, s. 718.1. The court must consider mitigating and aggravating factors relating to the circumstances of the offence and the offender: *Criminal Code*, s. 718.2(a).

[49] Drug addiction and participation in a drug treatment program are relevant considerations, particularly in circumstances where drug addiction is the reason for the criminal behaviour. Participation in a drug treatment court program, even if unsuccessful, is a relevant consideration in sentencing: *R. v. McDonald*, 2015 ABCA 108. In that case, Mr. McDonald was a drug addict with a lengthy criminal record with mostly property-related offences committed in order to support a cocaine habit. He attended Drug Treatment Court for 23 consecutive weeks until he was in a bus accident and sustained significant injuries. Thereafter, he attended a number of Drug Treatment Court sessions and then stopped. He was ultimately terminated from the Drug Treatment Court program and eventually sentenced. The Alberta Court of Appeal concluded that there “is no principled basis for disallowing credit [for time spent in drug treatment] in the proper case”: at para. 5. The court in *McDonald* ultimately concluded that it did not have sufficient information on Drug Treatment Courts to decide “whether it was possible or desirable to define with greater precision how sentencing judges ought to address the effect of an offender’s performance in a drug treatment program where, for whatever reason,

the offender's participation is terminated before completion": *McDonald*, at para. 38.

[50] In addition, in *R. v. Barkhouse*, 2017 ONCA 29, the trial judge treated the failure of the accused to fulfil a drug treatment program as an aggravating factor. The Court of Appeal held that was an error. The court noted, at para. 3:

We agree with duty counsel that the sentencing judge erred in principle in treating as an aggravating factor the circumstances that led to [the accused's] ejection from the Drug Treatment Court program, and in particular that he lied to the court and those involved in the program. While his successful completion of the program, or even as the sentencing judge noted, his efforts to comply with the program, might have worked in mitigation of his sentence, he ought not to have been sentenced more severely because he did not fully engage in and in fact lied in the course of the program. [Emphasis added.]

[51] The nature and attributes of the underlying precursor to criminal behavior is a relevant factor in determining what constitutes successful participation in a drug treatment program. Drug addiction is chronic and relapse is a common characteristic of addiction treatment. This means that a more nuanced approach to defining success in drug addiction treatment is required. This fact is acknowledged in *McDonald*, at paras. 36 and 37:

Total success is ideal. But partial or temporary success is not the same as absolute failure. The reality is that those addicted to drugs may relapse, more than once. In fact, most drug treatment programs recognize this. Therefore, they typically provide for graduated sanctions in an attempt to motivate the offender to avoid further breaches or failures: see Natasha Bakht, "Problem Solving Courts as Agents of Change" (2006) 50 Crim LQ 224 at 231-232.

Thus, if the failure that led to termination was not based on a lack of genuine participation, then the mitigating effect of the attempt to achieve the program goals should not be disregarded. Its weight in sentencing will depend on the context. Sadly, many addictions are very durable and extremely challenging. This is especially so where the addiction is long-standing. Inability to manage is not identical to ability to manipulate. Further, while abstinence long term will always be the supreme measure of success for drug treatment programs, it is not the only one. Success may also include other harm reduction measures such as decreased drug use and decreased crime. These too constitute steps in the right direction which support further treatment efforts even after a setback.

[52] Thus, a contextual approach should be adopted in assessing how much credit to give to participation in a drug treatment program. Some factors to consider include: 1) the objectives of the treatment program; 2) the treatment model and philosophy; 3) expected treatment milestones for participants; 4) duration of the treatment program; 4) how success is defined and measured; 5) how failure is defined and measured; 6) the reason(s) for the participant's participation in treatment; 7) the duration of the participation in treatment; 8) the addiction and other relevant biographical history of the participant; 9) the participant's performance history in treatment; 9) an assessment of whether the participant's performance constitutes a success, failure, or both when measured in accordance criminal activity, quality of life, treatment, or other relevant indices; and, 10) reasons and consequences for termination or completion. The decision of how much credit to give is discretionary.

[53] The general sentencing range for possession of multiple grams of cocaine for the purpose of trafficking is between six months to two years less a day: *R. v.*

Woolcock, [2002] O.J. No. 4927 (C.A.), at para. 15. In that case, Mr. Woolcock was convicted, after a jury trial, of possession of 5.3 grams of crack cocaine for the purpose of trafficking, possessing proceeds of crime, and possessing marijuana. He was 53 years old and had two prior drug convictions for which he had received 30 days' imprisonment. The Court of Appeal reduced the trial sentence of two years less a day to 15 months.

[54] In *R. v. Ahmed*, 2016 ONCA 831, Mr. Ahmed pleaded guilty to conspiracy to traffic cocaine. The total weight of the cocaine was 28 grams. He had one prior conviction for possession of cocaine for the purpose of trafficking and two prior convictions for possession of cocaine. He had an ongoing relationship with a criminal organization but was not a member. He was no longer affiliated with his negative peer group and he had relocated to Calgary to work at his father's business. A trial sentence of two years was upheld by the Court of Appeal for Ontario.

[55] In *R. v. Speziale*, 2011 ONCA 580, 107 O.R. (3d) 447, Mr. Speziale was convicted by a jury of possession of cocaine for the purpose of trafficking and one count each of possession of cocaine and possession of ecstasy. He was 29 years old at the time of sentencing and an addict who regularly attended Narcotics Anonymous.

[56] Mr. Speziale had a long criminal record, which included offences relating to possession of Schedule II and III drugs, assault, property-related offences, administration of justice charges, and possession of a prohibited weapon. The longest custodial term he had served was 45 days. He was 25 years old with a grade 9 education. The weight of the cocaine was 14.87 grams and there were 6.5 ecstasy tablets. The Court of Appeal reduced a five-year sentence to 14 months' and nine days' imprisonment.

[57] In *R. v. Mangal*, [2009] O.J. No. 1373 (Sup. Ct.), Mr. Mangal was convicted for trafficking in cocaine and for possession of 9.16 grams of cocaine for the purpose of trafficking. He was 22 years old at the time of sentencing and had no criminal record. He had been working on his real estate license since his arrest. Neighborhood influences led him to illicit drugs. On arrest, \$1,255 and a cell phone were seized. He pled guilty and was sentenced to 12 months.

[58] In *R. v. Williams*, 2010 ONSC 184, after a judge-alone trial, Mr. Williams was convicted for trafficking in crack cocaine and possession of 5.5 grams of crack cocaine for the purpose of trafficking. He was 26 years old at the time of sentencing and had no criminal record. He was a high school dropout. Mr. Williams was sentenced to nine months' imprisonment, followed by 12 months' probation.

[59] In *R. v. Harrison*, 2009 ONCA 386, Mr. Harrison was found guilty after a trial of possession of cocaine for the purpose of trafficking and trafficking in

cocaine. He has no criminal record. The total weight of drugs seized was 8.95 grams of crack cocaine. The Court of Appeal reduced a sentence of 12 months' custody to 8.5 months' custody.

POSITIONS OF THE PARTIES

[60] The Crown and defence counsel present a joint submission – a global sentence of 12 months minus pre-trial custody of 120 days. The Crown seeks a forfeiture order for the items seized, a DNA order, and a weapons prohibition pursuant to s. 109 of the *Criminal Code* for 10 years.

DISCUSSION / ANALYSIS

[61] The joint submission put forth by counsel accounts for the link between Mr. Briscoe's drug addiction and the offences for which he must be sentenced, however, the proposed sentence does not include strategies to manage Mr. Briscoe's drug addiction. In this case his rehabilitation is one of the paramount objectives of sentencing. At this point, it is Mr. Briscoe's wish to serve his sentence and manage his drug addiction on his own.

[62] It is appropriate for trial a trial judge to address issues germane to the matter the court must decide even if not raised by the parties, however, there are limits. The Ontario Court of Appeal addresses this issue in *R v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.) at paras. 66-676 as follows:

No one suggests that a trial judge is obliged to remain passive during the sentencing phase of the criminal process. Trial judges can, and sometimes must,

assume an active role in the course of a sentencing proceeding. Section 723(3) of the Criminal Code provides that a court may, on its own motion, require the production of evidence that "would assist in the determination of the appropriate sentence". Quite apart from that statutory power, the case law has long recognized that where a trial judge is required by law to consider a factor in determining the appropriate sentence and counsel has not provided the information necessary to properly consider that factor, the court can, on its own initiative, make the necessary inquiries and obtain the necessary evidence.

Recognition that a trial judge can go beyond the issues and evidence produced by the parties on sentencing where necessary to ensure the imposition of a fit sentence does not mean that the trial judge's power is without limits or that it will be routinely exercised. In considering both the limits of the power and the limits of the exercise of the power, it is wise to bear in mind that the criminal process, including the sentencing phase, is basically adversarial. Usually, the parties are the active participants in the process and the judge serves as a neutral, passive arbiter. Generally speaking, it is left to the parties to choose the issues, stake out their positions and decide what evidence to present in support of those positions. The trial judge's role is to listen, clarify where necessary and, ultimately, evaluate the merits of the competing cases presented by the parties. [Citations removed.]

[63] The appropriate sentence in this case has been determined in accordance with the limits set in *Hamilton*. The link between Mr. Briscoe's drug addiction and the offences for which he will be sentenced, the correlation between drug addiction and the convictions on his criminal record and drug addiction as a mitigating factor in sentence, were matters raised by the parties. The deleterious impacts of addiction and the effects of addiction on crime are not in dispute and considerations of the impacts of an accused's opportunities for drug addiction treatment, the nature and duration of such treatment, participation history and the results of drug addiction are not new concepts in the law of sentencing.

[64] The aggravating factors in this case include the quantum of drugs, 10.5 grams, which is significant. It was packaged for sale. Over \$800 and digital scales

were found on Mr. Briscoe – another indicia that the possession was for the purpose of sale. Mr. Briscoe committed these offences while on probation. He was selling cocaine, a dangerous and insidious drug, which wreaks havoc on the lives and families of addicted persons.

[65] In mitigation, it is not disputed that Mr. Briscoe is addicted to drugs and that he was working for someone else. He is an addict trafficker on the lower end of the street drug trafficking hierarchy. His activities were driven by multiple purposes: commercial purposes and an insatiable need to support his heavy drug habit. After these offences, Mr. Briscoe elected not to participate in a Drug Treatment Court or any other court-supervised program, and therefore shall not receive credit for such activity.

[66] Mr. Briscoe is a relatively youthful offender at 27 years old. He has a supportive relationship with his girlfriend. He dropped out of high school in grade 10. He was a foster child who lived at several foster homes. His addictions and drug use intensified when a close friend died of a drug overdose. At age 16, he tried to overcome his drug addiction by attending a detox center for alcohol and cocaine abusers and addicts.

[67] Mr. Briscoe's father has struggled with a heroin and alcohol addiction. Mr. Briscoe first became addicted to cocaine. He then became addicted to heroin. From 2007 to 2016, Mr. Briscoe has been convicted of 32 different criminal

offences. These offences include mischief, property and administration of justice offences, assaults, and robbery. All of these offences were committed as a result of his drug addiction.

[68] On the day he committed the offence of robbery in 2014, Mr. Briscoe overdosed twice. On each occasion, as his counsel describes, he was “revived from the dead”. Between 2014 and 2015, Mr. Briscoe attended and completed three different in-house residential treatment programs.

[69] Mr. Briscoe overdosed on drugs two days before the charges for which I am sentencing him. He has experienced heroin withdrawal symptoms while in custody. He was given methadone to assist with the withdrawals. Mr. Briscoe, over time, has successfully weaned himself off methadone.

[70] The link between Mr. Briscoe’s drug addiction and criminal behaviour is obvious. It is exemplified by the revolving door nature of the offences, arrests, prosecutions, convictions, incarceration, release, reoffending, arrests, etc. The cycle has continued unabated between 2007 and 2016. In fact, after his arrest on the charges before this court, he was charged and convicted of simple possession.

[71] I take judicial notice of the havoc caused to individuals, families, and society by highly addictive drugs such as cocaine. Denunciation and deterrence are primary sentencing objectives in circumstances where offenders seek to profit from the sale of such drugs, which have significant deleterious effects on humanity.

The jury was satisfied that Mr. Briscoe is a drug dealer. It is not disputed that he is a lower echelon operative. The overwhelming evidence of his significant drug addiction and its inextricable link to his criminal behavior indicate that this is an appropriate case which, on balance, rehabilitation is also an important sentencing objective.

[72] This is one of those circumstances, referred to in s. 10(1) of the CDSA, where “encouraging rehabilitation, and treatment” should be considered as an additional objective of sentencing. The fact that Mr. Briscoe did not participate in the Drug Treatment Court does not preclude me from adopting a problem-solving approach to address his drug addiction in an effort to reduce the likelihood of future criminal behavior.

[73] Considering the aggravating and mitigating factors in the context of the appropriate sentencing ranges established by case law, I conclude that the joint custodial disposition of 12 months, as proposed by counsel, is appropriate.

[74] Given the inextricable link between drug addiction and Mr. Briscoe’s ongoing criminal behavior, a probation order may seem beneficial; however, the psychological and relapsing effects of drug addiction, without the structure and support offered by a program such as a Drug Treatment Court, suggests Mr. Briscoe’s prospects for complying with such an order may be poor. This is where the joint submission put forth is lacking. There is no plan in place to address

Mr. Briscoe's drug addiction. Section 720(2) could be explored to delay sentencing for Mr. Briscoe to complete a provincially-approved treatment program. For this to be available, both parties must consent.

[75] Another option is to proceed with sentencing for Mr. Briscoe to participate in an in-custody drug treatment program followed by an after-care treatment program once out of custody. None of these options seem feasible at this time. Mr. Briscoe has chosen to explore treatment on his own after his release from custody. It will be up to Mr. Briscoe to enroll in a treatment program, if one is available, while serving his sentence and when he is out of custody. Mr. Briscoe's history suggests that a successful treatment program for him is one that provides him with structure, accountability, support, and ongoing after-care support after the formal part of the treatment program is over.

[76] Under these circumstances, the joint submission will not bring the administration of justice into disrepute, nor is it contrary to the public interest. It is also consistent with similar cases involving similar offenders and offences. Thus, 12 months' custody for each count is appropriate in all of the circumstances. Mr. Briscoe has spent 80 days in pre-trial custody. On consent, he shall receive credit of 1:5 to 1, for an effective total of 4 months (120 days). Thus, he has eight months remaining on each sentence. Each sentence is to be served concurrently.

[77] The items seized shall be forfeited. A DNA sample shall be taken and there shall be a weapons prohibition pursuant to s. 109 of the *Criminal Code*, for 10 years.

- The term word “meet” in the original release has been replace by the word “intersect.

Barnes J.

Re released: February 10,2021.

APPENDIX A

TRADITIONAL AND PROBLEM SOLVING APPROACHES: A COMPARISON⁹

Traditional approach	Problem-solving approach
The goal is the resolution of the dispute	The goal is the resolution of the underlying problem
The focus is on a legal outcome	The focus is on a therapeutic outcome
Uses an adversarial process	Uses a collaborative process
Claim-or-case-orientated	People-oriented
Rights-based	Interest-or-needs-based
Emphasizes adjudication	Emphasizes post-adjudication and alternative dispute resolution
Interpretation and application of law	Interpretation and application of social science
Judge acts as an arbiter	Judge acts as a coach

⁹ National Judicial Institute, *supra* note 3 at 4.

Backward-looking	Forward-looking
Precedent-based	Planning-based
Few participants and stakeholders	Many participants and stakeholders
Individualistic	Interdependent
Legalistic	Commonsensical
Formal	Informal
Efficient	Effective
Success is measured by compliance	Success is measured by remediation of underlying problem

CITATION: R. v. Briscoe, 2019 ONSC 2471
COURT FILE NO.: CRIMJ(F)1603/16
DATE: 20190418

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

– and –

RICHARD BRISCOE

REASONS FOR SENTENCE

Barnes J.

Released: April 18, 2019