CITATION: R. v. Doering, 2020 ONSC 5618
COURT FILE NO.: (London) 348/18
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Delivered orally and in writing: September 21, 2020

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	Jason Nicol and Katherine Beaudoin, for the Crown
	)	
– and –	)	
	)	
	)	
	)	
Nicholas Doering	)	
	)	Lucas O'Hara, for the Offender
Offender	)	
	)	
	)	
	)	**HEARD:** January 31, 2020 and September 3, 2020

REASONS FOR SENTENCE

POMERANCE J.:

INTRODUCTION

[1] On November 1, 2019, I found Constable Nicholas Doering guilty of failing to provide the necessaries of life and criminal negligence causing death. The convictions arose from the death of Debra Chrisjohn, an Indigenous woman, who died while in police custody. The verdicts were based on my finding that Cst. Doering failed to obtain necessary medical assistance for Ms. Chrisjohn, and, further, that he lied to other officers about her condition. I determined that Cst. Doering's conduct represented a marked and substantial departure from the standard of care of a reasonable and prudent police officer.

[2] I must now determine the sentence to be imposed on Cst. Doering. There is a dearth of authority directly on point. It is difficult to find another case in which a police officer was found criminally liable for a death in custody, save for a very recent decision hailing from Nova Scotia: see *R. v. Fraser and Gardner*, 2020 NSSC 223. Despite the scarcity of case law, the law offers guidance in the form of basic sentencing principles, relevant statutory provisions, and more general case law.

[3] It is sometimes said that sentencing is an art rather than a science. As noted by the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 58: "It involves a variety of factors that are difficult to define with precision." That does not mean that judges exercise a free hand. The "art" – the discretion inherent in the exercise – is constrained by well-defined rules and principles. Discretion is necessary to ensure that the sentencing is an individual process, carefully tailored to the circumstances before the court. The ultimate goal is a sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1 of the *Criminal Code*, R.S.C. 1985, c. C-46). This, in turn, calls for consideration of several factors. As it was put by Lamer C.J. (as he then was) in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, at para. 91, sentencing is "a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community."

[4] The Crown seeks a term of imprisonment in the upper reformatory range, close to two years. The defence seeks a non-custodial sentence or, in the alternative, a conditional sentence in the range of six to nine months. Having balanced the relevant factors, I am satisfied that the correct sentence falls somewhere in between the positions advanced by counsel. I will explain this in the paragraphs that follow.

PROCEDURAL HISTORY

[5] Counsel made submissions on sentence on January 31, 2020. The sentencing decision was originally scheduled to be delivered on March 16, 2020, and it was completed in

anticipation of that date. However, the COVID-19 pandemic led to a shutdown of regular court operations just prior to the March 16th sentencing date. As a result, the sentencing was postponed.

[6] After partial operations were resumed, a new date was set for the delivery of reasons for sentence. That date was September 21, 2020.

[7] In the interim, there was a change in the law. The Court of Appeal for Ontario released its decision in *R. v. Sharma*, 2020 ONCA 478, declaring certain provisions of the *Criminal Code* to be of no force and effect. The effect of *Sharma* was to revive the conditional sentence as a sentencing option. On September 3, 2020, I heard submissions from counsel on whether a conditional sentence should be imposed in this case.

CONDITIONAL STAY

[8] Counsel agree – and I concur – that the conviction for failing to provide the necessaries of life should be conditionally stayed pursuant to the *Kienapple* principle. Accordingly, while all of the facts are relevant, the sentence will formally attach only to the conviction for criminal negligence causing death.

THE FACTS

[9] The facts of the offences were outlined in considerable detail in my reasons for judgment of November 1, 2019. I do not propose to repeat them here. By way of summary, Debra Chrisjohn died while in police custody. The cause of death was a heart attack induced by ingestion of methamphetamine. She was arrested by the accused, Cst. Nicholas Doering, on an outstanding Ontario Provincial Police ("OPP") warrant. During the time that she was in Cst. Doering's custody, her condition deteriorated. She went from being conscious, physically agitated and verbal to being immobile, non-verbal and unable to stand or walk on her own. Cst. Doering did not obtain medical assistance for Ms. Chrisjohn. When he transferred her to the custody of the OPP, he told the OPP officers that she had been seen by a paramedic, and that her condition had not changed during his interactions with her. These statements were false. She had not been examined by any medical professionals.

Her condition had substantially deteriorated during the time that she was in Cst. Doering's custody. The statements made to OPP officers further reduced the likelihood that Ms. Chrisjohn would get the medical assistance that she so desperately required.

VICTIM IMPACT

[10] The court received victim impact statements from several individuals who knew and loved Ms. Chrisjohn. These individuals have experienced loss and grief in the wake of her death. Ms. Chrisjohn's family members find it difficult to believe that she is gone. They are haunted by the knowledge of how she died, and the fact she was alone, in custody, and in need of medical attention. As her sister Cindy Chrisjohn put it:

> The last moments of my sister's life are etched into my mind and I can constantly hear my sister's last moments and hear her dying breaths and there is nothing more that I want to have been in the police car ride, sitting beside you, and being with you so that you were not alone. When I hear the police car door slam, I imagine it's the sound that rings the end of your life.

[11] The victim impact statements speak not only of Ms. Chrisjohn's death. They paint a picture of who she was in life – a loving mother, sister and friend, who shone light into the lives of others. Ms. Chrisjohn was known for her sense of humour, her generosity, her commitment to helping those around her, and her fervent wish to be there for her children. She was battling the disease of addiction at the time of her death. However, that does not define who she was or how she will be remembered.

CIRCUMSTANCES OF THE OFFENDER

[12] Cst. Doering is, not surprisingly, a first offender. As an officer employed by the London Police Service, he has spent his professional career upholding and enforcing the law. This is the first time that he has been on the other side of the criminal justice system.

[13] Cst. Doering grew up in the Woodstock area and had a fairly normal early childhood. That changed when his father began to abuse alcohol. His teenage years were chaotic, and he did not experience the support of either parent during his formative years. Those circumstances have changed, and he now enjoys positive relationships with both his mother

and his father. Each of his parents wrote letters of support to the court attesting to Cst. Doering's good character, and some of the difficulties that he has experienced. He is involved in a stable relationship with his fiancée Amanda Surridge, who is also highly supportive of him.

[14] Cst. Doering has distinguished himself in his career as a police officer. Right after high school, he completed the Police Foundations Program at Fanshawe College in London. He graduated from the program in May 2009 and was hired by London Police Service as a cadet prior to graduation. From March 2009 to April 2011, he served as a cadet, assisting with courthouse and courthouse cells security. In April 2011, he became a constable in the uniform division where he assisted with a number of special projects, including the domestic violence and street gang units. He was an avid consumer of training programs. In April 2017, he was assigned to community foot patrol. He has no history of discipline during his time with the police.

[15] He was described by one colleague who spoke to the author of the pre-sentence report as "a respected colleague who is viewed as being self-motivated, hard working and willing to offer assistance to others." Retired Staff Sergeant Ian Riddell reported that, "His work performance was always at an elevated level compared to his peers"; and that he "always carried himself in a proud and professional manner with the utmost respect for those he served and served along side of."

[16] According to the pre-sentence report, Cst. Doering has volunteered extensively with various organizations, including St. John Ambulance, Tim Horton's Camp Day, and Big Brothers (Woodstock). By all accounts, Cst. Doering has been a productive and contributing member of the London Police Service and the broader London community.

[17] Cst. Doering has struggled with mental health issues, which have worsened as a result of the events in this case. Cst. Doering told the author of the pre-sentence report that he began struggling in the fall of 2016. As he described it, he was having difficulties sleeping, intrusive thoughts, anxiety and panic attacks. In June 2019, he began seeing Dr. Charles Nelson, a registered clinical psychologist. Some of the letters written in support of Cst.

Doering make mention of these challenges. Support is also found in the medical evidence filed on the sentencing hearing. According to a letter penned by Dr. Nelson, Cst. Doering "was principally affected by learning that a suspect in custody on outstanding warrants had later died." Dr. Nelson diagnosed Cst. Doering with Post Traumatic Stress Disorder and Panic Disorder ("PTSD").

[18] Both Dr. Nelson and Dr. Manuela Joannou, the medical director for Project Trauma Support, have opined that incarceration has the potential to exacerbate Cst. Doering's PTSD and other symptoms. Dr. Nelson offered the opinion that those symptoms have also been exacerbated by "the current disposition and findings of guilt."

ANALYSIS

[19] This is a difficult sentencing decision. On the one hand, the sentence must reflect the gravity of the offences, which resulted in a tragic loss of life. At the same time, it must account for the mitigating factors and the negative outcomes already experienced by Cst. Doering. The sentence must recognize the significant harm flowing from the offences; but must not be crushing. It must reflect the need for deterrence and denunciation, but must also recognize the principle of rehabilitation.

[20] I have carefully considered the authorities filed by counsel. Until recently, there were no cases of direct application. There were cases dealing with failing to provide the necessaries of life, but none involved police officers. There were cases dealing with police officers, but none addressed the offences before this court. The recent case of *Fraser and Gardner* bears some similarity to this case. Two special constables were convicted of criminal negligence causing death arising out of the death of a detainee in a prison cell.

[21] The authorities recognize that generally speaking, the crimes before the court allow for a broad range of penalty. Parents who failed to provide medical care for children have been sentenced to anywhere from six months to nine years in custody. Police officers have been given non-custodial terms, and in other cases, have been imprisoned for significant periods. The courts have generally recognized that there is no set range for offences such as criminal

negligence causing death. Penalty depends on the specific facts before the court and their interaction with the principles and purposes of sentencing.

[22] Those principles and purposes are codified in s. 718 of the *Criminal Code* as follows:

> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> **(b)** to deter the offender and other persons from committing offences;
>
> **(c)** to separate offenders from society, where necessary;
>
> **(d)** to assist in rehabilitating offenders;
>
> **(e)** to provide reparations for harm done to victims or to the community; and
>
> **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[23] Several principles of sentencing are engaged in this case. I will discuss them below.

Police Criminality

[24] When a police officer is convicted of crime, the sentence must reflect the special role and authority of police in society. The powers conferred on police require that they be held to a high standard of accountability. I adopt the words of Justice Casey Hill in *R. v. Cook*, 2010 ONSC 5016, at para. 29:

> Police officers, as officials discharging public duties, occupy a special position of trust in the community: *R. v. LeBlanc* (2003), 180 C.C.C. (3d) 265 (N.B.C.A.) at para. 32; *R. v. McClure* (1957), 118 C.C.C. (3d) 192 (Man. C.A.) at 200; *United States v. Rehal*, 940 F. 2d 1, 5 (1st Cir. 1991). "[A] heavy trust and responsibility is placed in the hands of those holding public office or employ": *R. v. Berntson* (2000), 145 C.C.C. (3d) 1 (Sask.

> C.A.) at para. 24 (aff'd [2001] 1 S.C.R. 365, at para. 2). Individuals working in the justice system "owe a duty to the public to uphold the values of that system" (*R. v. Feeney et al.* (2008), 238 C.C.C. (3d) 49 (Ont. C.A.) at para. 5) with the administration of justice "depend[ant] on the fidelity and honesty of the police": *R. v. McClure*, supra, at 200.

[25] It has been recognized that crimes committed by police officers represent a breach of the public trust. It is for this reason that police are "held to a higher standard than would be expected of ordinary citizens", and "the principles of denunciation and general deterrence become magnified" in the sentencing of police: see *R. v. Forcillo*, 2018 ONCA 402, 361 C.C.C. (3d) 161, at paras. 198-99; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 28.

[26] Mr. Nicol for the Crown submits that this case involves an egregious breach of trust. Mr. O'Hara for the offender, disagrees. Mr. O'Hara says that there is no breach of trust here. The offence involved a failure to provide medical care, rather than an intentional criminal act. He argues that Cst. Doering did not set out to exploit or abuse his position as a police officer.

[27] I offer three observations on the breach of trust arguments. First, a breach of trust can arise even where there is no deliberate exploitation of authority. Police criminality is, on its face, a violation of the general trust reposed in police to uphold and enforce the law. It is an implicit condition of that trust that police will obey the laws that they are enforcing. Viewed in this light, it is difficult to imagine an offence by a police officer that does not, in some way, breach the public's trust.

[28] Second, the offences in this case could not have been committed by a civilian. Cst. Doering was only in a position to commit the offences because he had the power to detain Ms. Chrisjohn. The public accepts that police can deprive people of liberty, but trusts, as a corollary of that power, that police will keep detainees safe. That specific trust was breached in this case.

[29] While I find a breach of trust, that is not the only reason that the offences are serious. Even beyond that characterization, the crimes carry a significant element of moral blameworthiness. I will turn to that issue now.

Moral Culpability

[30] As with all groups of individuals, the crimes committed by police cover a broad range of conduct, with varying degrees of moral blameworthiness. Moral culpability is high when the crime involves a deliberate leap into criminality, such as when an officer decides to sell drugs, or steal money, or share confidential information. Moral culpability is lower when the crime committed by an officer is incidental to the discharge of a duty related to public safety. The latter situation arose in *R. v. Porto*, 2016 ONSC 7353. There, an officer was convicted of dangerous driving while racing to the scene of an emergency call. As Thomas R.S.J. put it in his reasons for sentence, 2017 ONSC 733, at para. 23:

> This sentencing I find to be particularly difficult. This is a not a driver street racing or swerving in and out of traffic. The gravamen of this offence is disregard for public safety. The reason that this case is so challenging is that this police officer's motive was the protection of public safety. While his motive is not a legal defence, it substantially mitigates moral culpability. Here, unlike most crimes, the officer's conduct had considerable social utility. It became criminal only because he responded in a disproportionate manner.

[31] The conduct of Cst. Doering arguably falls somewhere in between these examples. He did not undertake a premeditated crime. Nor, however, did he act in pursuit of the public interest.

[32] It was argued by the defence that, because Cst. Doering was not subjectively aware of Ms. Chrisjohn's need for medical treatment, his moral blameworthiness is low. However, the criminal law contemplates different types of moral blameworthiness. Penal negligence offences are designed to ensure minimum uniform standards of conduct. The culpability here lies in the failure of Cst. Doering to advert to, and act upon, the risks that would have been obvious to a reasonable and prudent police officer or, indeed, any person who saw Ms. Chrisjohn's condition.

[33] I found as follows in my reasons for judgment, 2019 ONSC 6360, at paras. 97-98:

> I accept that Cst. Doering did not subjectively perceive that Ms. Chrisjohn required medical attention and treatment. This subjective perception is not required to ground liability under s. 215. I have considered to what extent Cst. Doering's state of mind raises a reasonable doubt on the modified objective standard of liability. I have concluded that, in the circumstances of this case, neither Cst. Doering's testimony nor any other evidence is capable of raising a reasonable doubt on this central issue.
>
> Cst. Doering's state of mind does not exculpate. Rather, in failing to advert to the need for medical treatment, he turned a blind eye to risks that would have been apparent to a reasonably prudent police officer. I need not determine the precise point at which the duty to seek medical attention was triggered. I am satisfied that it was clearly engaged by the time that Cst. Doering arrived at the transfer location to meet the OPP. The failure to get medical help at that stage amounted to a failure to provide the necessaries of life and represented a marked departure from the standard of care of a reasonably prudent police officer.

[34] I also said this at para. 110:

> Cst. Doering placed considerable reliance on the information and advice he received from Mr. Hill. Cst. Doering was reasonably entitled to rely on what Mr. Hill had to say at the time he said it. But this was not a permanent medical edict. It was a full 45 minutes later that Cst. Doering reached the transfer point, by which time Ms. Chrisjohn's condition had deteriorated. She was no longer upright in her seat and aggressively moving and yelling. She was prone on the seat, moaning and shaking, and unable to get out of the car on her own. Her condition had changed and it was obvious that she was getting worse, not better.

[35] One item of evidence at trial was very telling. Cst. Doering stopped his cruiser at one point on the way to the transfer location because he could see Ms. Chrisjohn slipping down in her seat in the back of the cruiser. He wanted to check on the situation. What is significant is that he was not wishing to check on Ms. Chrisjohn's wellbeing. He testified that he wanted to make sure that she had not slipped out of her handcuffs because meth users have been known to smash out windows in police cruisers. By that point in the chronology, Cst. Doering should have known that there was cause for concern. If he did not know, the inference is that he did not care enough to know – a state of mind that carries its own moral culpability. Failure to see is blameworthy when it follows a decision not to look.

Misrepresentation to the OPP

[36] Moral blameworthiness is highest in connection with Cst. Doering's statements to the OPP officers. Those statements grounded the finding of guilt on criminal negligence causing death. These statements reflected a wanton and reckless disregard for Ms. Chrisjohn's wellbeing; a marked and substantial departure from the standard of care of a reasonable and prudent police officer. Here, the offence moved beyond acts of omission to acts of commission: deliberate falsehoods passed on to police who had their own duties of care. Why did Cst. Doering do this? It is impossible to know for certain, but there is a logical coherence to the theory that he wanted to ensure that Debra Chrisjohn would be transferred without incident, reducing the likelihood that London Police Service would have to deal with her again. The day before, the OPP had refused to execute the warrant precisely because Ms. Chrisjohn was in the hospital. Ms. Chrisjohn was seen by Cst. Doering as something of a nuisance, as reflected in his radio communications.

[37] The misrepresentations prevented OPP officers from fully appreciating the dire nature of Ms. Chrisjohn's condition. The most tragic consequence of this was the death of Ms. Chrisjohn. Ancillary to that is the fact that the OPP officers themselves became participants in a fatal, yet preventable, event. The testimony at trial revealed that at least one of the officers was deeply affected by these events. While the OPP officers were in a position to make their own observations, Cst. Doering's statements made it less likely that they would appreciate the significance of what they saw. As noted by Mr. Nicol, for the Crown, Cst. Doering's actions breached a duty, not only to Ms. Chrisjohn and the public, but also to the officers executing the OPP warrant.

[38] The statements to the OPP officers also speak to what Cst. Doering apprehended at that time. If he genuinely believed that Ms. Chrisjohn was just riding out her high, there would be no reason to misrepresent that her condition had not changed over time. The statements to the OPP reflect some awareness by Cst. Doering that Ms. Chrisjohn's condition, left unexplained, would generate concern. The defence urged me not to draw this inference, arguing that there could be other explanations for the misrepresentations. However, I am

hard pressed to understand what the alternatives might be. If the falsity concerned health status, the motive for the falsity likely concerned health status. Cst. Doering had time to weigh his options before arriving at the transfer point. It is open to inference that he made a considered decision to offer false statements to ensure that the transfer was not impeded by medical intervention.

Deterrence

[39] Counsel for Cst. Doering argued that general deterrence and denunciation should not play a prominent role in this case. Mr. O'Hara argued that, because this is the first time a police officer has been convicted for offences of this nature, this is a test case. He drew a comparison to *R. v. J.H.*, 2014 ONSC 2288, in which Trotter J. (as he then was) upheld a conditional discharge and probation for an offender who, through unprotected sexual intercourse, transmitted genital herpes to the complainant without having disclosed his condition. At the time of the offence, the criminality of exposing a sexual partner to herpes, as opposed to HIV, was unclear. As Green J., the original sentencing judge, put it: "in the relatively novel situation that here obtains, a carceral disposition is not essential to achieve Parliament's sentencing objectives" (2012 ONCJ 753, para. 28).

[40] *J.H.* was indeed a test case. Before it was decided, there was uncertainty over whether non-disclosure and transmission of genital herpes was a criminal act. There was no such uncertainty here. The crime of failing to provide the necessaries of life has a long history in Canada. It has long been applied to those who have charge over another human being, often in connection with a failure to obtain medical treatment. While charges are more common in cases of parental neglect, there is nothing startling about the notion that a police officer, in charge of a detainee, could face criminal liability for this conduct. Nor is there anything novel about a charge of criminal negligence where conduct reflects a wanton and reckless disregard for life. Cst. Doering's liability is rooted in the self-evident proposition that all persons are entitled to the most basic necessaries of life. If this is the first time that a police officer has been convicted of such offences, it is not because there has been any doubt about the criminality of the conduct.

[41] It was further argued on behalf of Cst. Doering that the mere fact of conviction is enough to satisfy the need for general deterrence. Police communities are now on notice that they are required to react appropriately to medical emergencies, including medical uncertainties. That may well be the case. Police officers will also know that criminal conviction can lead to loss of employment. Nonetheless, general deterrence has never been exclusively about the likelihood of conviction or the impact of collateral consequences. The chief factor in the general deterrence equation is the sentence imposed and its potential to discourage others from crime. The sentence in this case must convey to those who control the fate of detainees that disregarding, or actively impeding, medical needs will be dealt with strictly by the courts.

Denunciation

[42] Denunciation is the paramount principle of sentencing in this case. As Lamer C.J. put it in *R. v. M. (C.A.)*, 1996 SCC 230, [1996] 1 S.C.R. 500, at para. 81, denunciation is designed to reflect and uphold communal values:

> Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.

[43] In *R. v. Biancofiore*, 35 O.R. (3d) 782, Rosenberg J.A. noted the dual nature of denunciation:

> ...denunciation embraces two different but related concepts. A sentence with a denunciatory component satisfies the community's desire and need to condemn "that particular offender's conduct". A denunciatory sentence can also play a more positive role in a rational and humane sentencing regime by communicating and reinforcing a shared set of values.

[44] Societal values are not static. They shift as the public becomes increasingly conscious of social issues. Sentencing is directly related to the existing needs of society. In *R. v. Willaert*, [1953] O.R. 282 (Ont. C.A.), the Court of Appeal for Ontario made this point,

going on to comment that: "A punishment appropriate to-day might have been quite unacceptable two hundred years ago and probably would be absurd two hundred years hence". Courts will sometimes change sentencing practices to conform to the contemporary view of certain crimes. In *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145, the range of sentence was adjusted to reflect the harm associated with drinking and driving offences. In *R. v. Friesen*, 2020 SCC 9, the Supreme Court of Canada stressed that sentences in child sexual abuse cases must reflect the contemporary understanding of these offences. Social values are also given expression in Code provisions that define certain factors as aggravating.

[45] Recognition of social values does not mean that a criminal sentence should appeal to the masses. Public confidence in justice is not to be confused with popular justice. The sentence must reflect an objective balancing of the relevant legal considerations. The point is simply that the prevailing social milieu is context; a source from which to derive those values calling for affirmation in a denunciatory sentence.

[46] The values at play in this case call for recognition of the sanctity of human life. As it was put in *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, (para. 47):

> One of the most fundamental of our basic code of values is respect for life. Although less morally blameworthy than murder, criminal negligence causing death is still morally culpable behaviour that warrants a response by Parliament dictating that wanton or reckless disregard for the life and safety of others is simply <u>not</u> acceptable. [Emphasis in original.]

[47] Other values are also engaged. The sentence must reflect the need to ensure that all individuals, whatever their personal challenges or personal characteristics, receive a basic level of care. It must reinforce the standard of care requiring police officers to treat all persons in a humane fashion.

[48] The value of human life and the corresponding right of citizens to protection from harm, are entitlements attaching to all citizens, including those who suffer personal challenges, such as drug addiction. I acknowledge, as I did in my reasons for judgment, that police

often face unpredictable and dangerous situations. They must be empowered to protect themselves and the public from persons who, through ingestion of drugs, pose a threat to others. However, the ingestion of drugs can also endanger the drug user, as this case so poignantly illustrates. A person who is in a precarious or uncertain medical state is entitled to treatment, whatever the cause. It is beyond the scope of these reasons to address the science of addiction and the recognition that it is a disease rather than a moral failing. Suffice to say that persons whose medical conditions are self-induced are no less deserving of treatment or care. This is particularly so when such individuals are in police custody and unable to secure such treatment for themselves.

[49] In this case, police knew Ms. Chrisjohn to be a drug user. This appeared to dominate their perceptions of, and attitudes toward, her. At para. 125 of my reasons for judgment, I said the following about stereotypes and generalized assumptions:

> The evidence in this case suggests that stereotypes and generalized assumptions played a role in the events leading to Ms. Chrisjohn's death. Cst. Doering had definite opinions about how persons on drugs, and persons addicted to drugs, were likely to behave. He had a definite opinion that drug use alone would not be a factor calling for medical intervention. These opinions formed the lens through which he perceived the events in this case. He viewed everything, including signs of medical distress, as nothing more than the stereotypical conduct of a drug user. If Ms. Chrisjohn was aggressive, it was because she was high on methamphetamine. If she was silent and apparently non-compliant, it was because she was high on methamphetamine. If she was lying on the seat, moaning and shaking, she was just "riding out her high." It is not clear what, if any, observations would have prompted Cst. Doering to call EMS. When asked that question in cross-examination, Cst. Doering found it difficult to answer, though he acknowledged that EMS should be called if a drug user is limp and/or unconscious.

[50] I found that the OPP officers engaged in a similar thinking process[1] though their conduct does not bear on Cst. Doering's sentence.

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[1] Referring again to the reasons for judgment:

[51] Stereotypes, by their nature, have a dehumanizing quality. Persons are defined by a single attribute – often in negative terms – to the exclusion of others. Opinions based on stereotype tend to be rigid and unyielding, even in the face of evidence to the contrary. Canadian courts have recognized the pernicious nature of stereotypes based on race and gender. They are no less dangerous when based on other characteristics, such as drug use. Rejection of the use of stereotypes by police agencies is one of the denunciatory objectives to be addressed in this case.

Ms. Chrisjohn's Indigenous Status

[52] Ms. Chrisjohn was an Indigenous woman. At trial, there was no evidence to suggest that Ms. Chrisjohn's Indigenous status was a factor in the commission of the offences. Cst. Doering was never asked whether this factor influenced his perceptions or actions. Such questions do not always illuminate. Racial bias is often subtle and subconscious. It is rarely the subject of frank admission in the witness stand. Be that as it may, there is no evidence to suggest that Cst. Doering was motivated by racial bias.

[53] Even if Ms. Chrisjohn's status did not contribute to the offences, it must be acknowledged. First, Canadian courts have come to recognize that, just as Indigenous offenders are disproportionately represented in Canadian prisons, Indigenous women and girls are disproportionately vulnerable to violence and other forms of mistreatment. They are often the subject of offensive and erroneous stereotyping, including stereotypes relating to alcohol and drug abuse: see the Report of the National Inquiry into Missing and Murdered Indigenous Woman and Girls (*Reclaiming Power and Place: The Final Report of the*

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[128] This interpretation, questionable on its face, becomes inexplicable when one sees the video footage of Ms. Chrisjohn being dragged along the floor into the cell area. She is limp and unmoving. She is unconscious. The evidence is that she was making very little sound. Even the moaning had abated. The EMS paramedics' evidence leads one to believe that her eyes had been open, unblinking, for some time. In this condition, it is hard to imagine that she could be conscious of a command, let alone capable of defying it. The OPP called for EMS, but this was close to 17 minutes after Ms. Chrisjohn arrived at the detachment. Even at that stage, the OPP identified the situation as a non-emergency "no lights and sirens" call. This illustrates the power of the stereotype and its resistance to correction.

National Inquiry into Missing and Murdered Indigenous Women and Girls). On this point, see also *R. v. Barton*, 2019 SCC 33.[2]

[54] Second, Ms. Chrisjohn's Indigenous status is relevant because the death of an Indigenous woman in police custody has an impact beyond the parties in court. Scholars studying similar cases in Australia have observed:

> The adverse impact that deaths in custody have are much broader than the grief and distress experienced by their family and friends. Deaths in custody affect the relationships between custodial officers and those in their care, particularly vulnerable and racialized groups. [Tamara Walsh & Angelene Counter, "Deaths in custody in Australia: a quantitative analysis of coroners' reports" (2019) 31:2 Current Issues in Criminal Justice 159].

[55] Tensions between Indigenous communities and police agencies have been documented by various Canadian courts and tribunals: see, for example, *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025, para 26. The Nunavut Court of Justice commented on the distrust of police agencies by Indigenous women and girls in *R. v. A.M.*, 2020 NUCJ 4, at para. 19:

> In *The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, the Inquiry canvassed some of the reasons why Indigenous women and girls might be reluctant to report violence to the police. The Commissioners wrote:
>
> > During the Truth-Gathering Process, families and survivors talked frankly about their reasons for not reporting violence to the police or not reaching out to the criminal justice system – even in cases where there had been severe acts of violence against them… Jennisha Wilson described how prior negative experiences with police make Indigenous women reluctant to report violence or trafficking: "There is a significant reluctance for Indigenous women, specifically Inuit, to engage

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[2] See also Section 718.04 of the *Criminal Code*, recently enacted, provides that denunciation and deterrence are paramount where a crime involved "abuse of a person who is vulnerable because of personal circumstances, including because the person is Aboriginal and female". Given the timing of this enactment, it does not apply in this case.

> with police because of prior experiences of being seen as a criminal, being blamed, being seen as not a victim, causing it on themselves." (National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, (Ottawa: Government of Canada, 2018) at 628-629.)

[56] Similar comments were made by the British Columbia Human Rights Tribunal in *Campbell v. Vancouver Police* Board *(No. 4)*, 2019 BCHRT 275, at paras. 111-112:

> Today, Indigenous peoples are both over and under-policed: *Le* at para. 97. They are overrepresented in the prison system: TRC Report at p. 170. Indigenous women and girls in particular have been victimized and ignored by the police: Carol Martin and Harsha Walia, "Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside" (Downtown Eastside Women's Centre, 2019) [**Red Women Rising**]. As a result, many Indigenous people do not trust the police and do not trust that they are safe with the police: OHRC, *Paying the Price: The Human Cost of Racial Profiling (2017),* at pp. 22 ff; Le at para. 95; Liqun Cao, "Aboriginal People and Confidence in the Police", (2014) Canadian Journal of Criminology and Criminal Justice 504. The UBCIC described the perception that many Indigenous people have of the police: "the police will not protect us, … our children are not safe should the police approach them, and … our presence in public space might draw the attention of the police and therefore pose a safety risk to us".
>
> None of this is controversial. The Vancouver Police Department itself has recognized the fear and lack of trust which pervade its relationship with Indigenous people: "Breaking Barriers Building Bridges: Vancouver Police Department's Initiatives with Indigenous Peoples" (March 2018) [**Breaking Barriers Report**].

[57] These passages set a social context for this case. They are not about the London Police Service or any persons involved in this case. However, they describe the realities experienced by some Indigenous communities in Canada and the prism through which those communities might perceive the death of Ms. Chrisjohn. Ms. Chrisjohn died in police custody because she was not provided with the most basic level of care. This has the

potential to reinforce the belief amongst Indigenous peoples that police are not their protectors, but rather, persons to be protected from.

[58] This does not translate into a harsher penalty for Cst. Doering. The sentencing of an individual offender is not the place to right society's wrongs. Cst. Doering must not be penalized for the acts of others, or for systemic failings that have generated racism and discrimination. Yet, just as it would be wrong to punish Cst. Doering for societal failings, so too would it be wrong to ignore the broader context. Truth is the precursor to reconciliation and the courts have a responsibility to speak that truth. In this respect, I am guided by the words of Moldaver J. in *Barton*, at para. 199:

> In short, when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done."
>
> With this in mind, in my view, our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons — and in particular Indigenous women and sex workers — head-on. Turning a blind eye to these biases, prejudices, and stereotypes is not an answer.

Mitigation and Rehabilitation

[59] I will now turn to the mitigating factors, the principle of rehabilitation, and the extent to which Cst. Doering has already experienced punitive consequences.

[60] The events in question have changed the trajectory of Cst. Doering's life. He went from being a young officer with a bright future in policing to a man with uncertain prospects, having lost the right to pursue his chosen vocation. Prior to these offences, Cst. Doering diligently served the public in his role as a police officer. He has no prior history of wrongdoing. This is the first and, presumably, the last time that Cst. Doering will face the court as an offender. Specific deterrence is not a concern. Cst. Doering's past contributions to the community and the attestations of his good character are important mitigating factors in the sentencing equation.

[61] The events of this case, and the resulting court proceedings, have taken a significant toll on Cst. Doering's well being. He has been diagnosed with PTSD. One can imagine that the prospect of conviction and the resulting personal consequences have themselves caused enormous anxiety for Cst. Doering. It is difficult to determine the extent to which his conditions relate to death of Ms. Chrisjohn, as distinct from fear of his own fate. These events occurred in 2016. Cst. Doering first sought counselling in 2019, over two years after the event and just five months before the trial commenced.

[62] New material filed on September 3, 2020 indicates that Cst. Doering was, at the time of the incident, deeply affected by the death of Ms. Chrisjohn. I accept that he is extremely remorseful for his actions. Cst. Doering appeared very stoic throughout the trial, exhibiting little affect during his testimony. I attached no weight to this observation in my trial decision and attach no weight to it now. Demeanour is often misleading. Police officers are trained to appear professional when giving courtroom testimony. During the sentencing hearing, Cst. Doering's countenance was different. He was visibly emotive. When given the opportunity to address the court, he directed his remarks to Ms. Chrisjohn's family. His words appeared genuine and heartfelt, accompanied by some degree of anguish. Cst. Doering has to live with the knowledge that his actions led to the death of another human being. That reality is likely more punishing than any sentence this court could ever impose.

[63] Cst. Doering has experienced a number of adverse consequences as a result of the findings of guilt. I am advised that imposition of a prison sentence will cause him to lose his employment with the London Police Service. He has lost his status within the community and has been the subject of national media attention and social media commentary, some of it vitriolic in nature.

[64] The collateral effects of this process should properly reduce the sentence imposed: see *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496. However, shame and disgrace suffered by public officials in the conviction and sentencing process should not be over-emphasized in determining a fit penalty. Similarly, the inevitable loss of employment does not trump a pressing need for denunciation and deterrence: see *Cook*, at para. 42. As noted by Mr. Nicol, it would be wrong to impose a more lenient sentence on a person who has lost status

than on a person who, in committing the same crime, had no status to lose. Moreover, Cst. Doering's status as a police officer dictates more rather than less accountability for his actions. The collateral consequences of this proceeding are not a substitute for a fit sentence, but they do play a role in determining what a fit sentence should be.

Sentencing Option: Suspended Sentence

[65] The defence argues that Cst. Doering is entitled to a suspended sentence with probationary terms. In this regard, Mr. O'Hara referred to the recent decision of Coady J. in *Fraser and Gardner*. Justice Coady did impose suspended sentences in that case, however, he also took pains to distinguish the facts before him from those in this case. He noted that the circumstances here – including the misrepresentation to the OPP – were far more aggravating. I agree with Coady J. that, while the two cases have some superficial similarity, they are fundamentally different when it comes to the principles governing that sentence equation.

[66] A suspended sentence would utterly fail to reflect the principles of general deterrence and denunciation, the loss of life, and the moral culpability of the conduct in this case. In *Lacasse*, the Supreme Court of Canada observed, at para. 6 that, "in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society."

[67] At the time *Lacasse* was decided, the conditional sentence was still in hibernation. It is not clear whether the court's reference to imprisonment included imprisonment served in the community. I will now turn to the question of whether a conditional sentence is an appropriate disposition in the circumstances of this case.

Sentencing Option: Conditional Sentence

General principles

[68] Section 742.1 of the *Criminal Code* provides:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

- **(a)** the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
- **(b)** the offence is not an offence punishable by a minimum term of imprisonment;
- **(c)** the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
- **(d)** the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
- **(e)** the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that
    - **(i)** resulted in bodily harm,
    - **(ii)** involved the import, export, trafficking or production of drugs, or
    - **(iii)** involved the use of a weapon; and
- **(f)** the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
    - **(i)** section 144 (prison breach),
    - **(ii)** section 264 (criminal harassment),
    - **(iii)** section 271 (sexual assault),
    - **(iv)** section 279 (kidnapping),
    - **(v)** section 279.02 (trafficking in persons — material benefit),
    - **(vi)** section 281 (abduction of person under fourteen),
    - **(vii)** section 333.1 (motor vehicle theft),
    - **(viii)** paragraph 334(a) (theft over $5000),

- **(ix)** paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),
- **(x)** section 349 (being unlawfully in a dwelling-house), and
- **(xi)** section 435 (arson for fraudulent purpose).

[69] In *Sharma*, the Court of Appeal for Ontario struck down as unconstitutional ss.742.1(c) and 742.1(e)(ii). This had the effect of removing the statutory barrier to a conditional sentence in this case.

[70] The Crown acknowledges that Cst. Doering's sentence is properly less than two years, and that a community sentence would not endanger the community. The controversy pivots on the question whether a conditional sentence "would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2". It is common ground that the paramount sentencing objectives in this case are deterrence and denunciation. The defence, while acknowledging this, argues that those principles can be meaningfully addressed by a conditional sentence. The Crown argues that nothing short of real jail can meet the deterrent and denunciatory imperatives in this case.

[71] In *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, the Supreme Court of Canada affirmed that no crime is *per se* ineligible for a conditional sentence. The conditional sentence can be punitive, despite the fact that it is served in the community. Restrictive conditions such as house arrest can, in many cases, address the need for deterrence and denunciation. A conditional sentence is often of longer duration than a jail term would be, and the offender does not benefit from earned remission.

[72] Nonetheless, a sentence of real jail remains a harsher penalty than a sentence served in the community. The conditional sentence is an intermediate option that bridges the gap between a suspended sentence and a jail term.

[73] While theoretically available for any crime (subject to statutory bars), there are some crimes that rarely attract a conditional sentence. These include drug importation and financial crimes involving a breach of trust. What is it that distinguishes those crimes?

How does one determine whether deterrence and denunciation can be adequately addressed through a conditional sentence?

[74] The answer lies in the court's assessment of the gravity of the offence and the circumstances of its commission. While there is no bright line rule, the court must assess the degree to which punitive objectives are paramount. As it was put in *R. v. Proulx*, at para. 114: "Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction". The court explained, at paras. 113-116:

> In sum, in determining whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing, sentencing judges should consider which sentencing objectives figure most prominently in the factual circumstances of the particular case before them. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the Code). This list is not exhaustive.
>
> Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a [page121] conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.
>
> Finally, it bears pointing out that a conditional sentence may be imposed even in circumstances where there are aggravating circumstances relating to the offence or the offender. Aggravating circumstances will obviously increase the need for denunciation and deterrence. However, it would be a

> mistake to rule out the possibility of a conditional sentence ab initio simply because aggravating factors are present. I repeat that each case must be considered individually.
>
> Sentencing judges will frequently be confronted with situations in which some objectives militate in favour of a conditional sentence, whereas others favour incarceration. In those cases, the trial judge will be called upon to weigh the various objectives in fashioning a fit sentence. As La Forest J. stated in R v. Lyons, [1987] 2 S.C.R. 309, at p. 329, "[i]n a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender". There is no easy test or formula that the judge can apply in weighing these factors. Much will depend on the good judgment and wisdom of sentencing judges, whom Parliament vested with considerable discretion in making these determinations pursuant to s. 718.3.

[75] I have determined that a conditional sentence is not a fit disposition in the circumstances of this case. I will explain why in the reasons that follow.

Application to this Case

[76] This case calls for a sentence of real jail. Nothing short of that can reflect the gravity of the offences in this case. The sentence imposed by court must denounce, in the strongest terms, the conduct of the offender, and the resulting harm. It must reinforce the societal values that were breached: the sanctity of human life, the right of all persons to a minimum standard of care, and the duty of police to treat all persons in their custody with respect and humanity.

[77] The message conveyed by a conditional sentence would be the wrong message. Conditional sentences can be punitive; they can express punitive objectives, and they are often longer than jail terms, but jail is still the more significant penalty. Jail must not be lightly imposed. It is the sanction of last resort, only to be invoked when other dispositions are inadequate. When it is the proper choice, a jail sentence conveys a message – to the offender and to the community at large – about the gravity of the crimes and the harm that has ensued. It is a mechanism for the expression of denunciation. In this case, it is the only mechanism that can adequately convey that objective.

[78] Cst. Doering demonstrated a wanton and reckless disregard for Ms. Chrisjohn's life. He failed to obtain necessary medical treatment; he ignored the gross deterioration of her condition; and he lied about her condition to the OPP, making it even less likely that her life would be saved. The essence of culpability lies in Cst. Doering's devaluation of Ms. Chrisjohn's life. The sentence must convey the irrefutable message that Ms. Chrisjohn's life was valued and valuable. The measure of a life can never be quantified. Nor is that the objective of a criminal sentence. The point is that, in some cases, loss of life will, practically and symbolically, command the most significant form of penalty. This is one of those cases.

[79] As an aside, some might think it anomalous for Cst Doering to benefit from a sentencing option that was enacted and revived in order to remediate the disadvantage experienced by Indigenous women. In *Sharma*, the Court of Appeal observed:

> Aboriginal offenders start from a place of substantive inequality in the criminal justice system. The overincarceration of Aboriginal people is one of the manifestations of that substantive inequality, which prompted Parliament to create the community-based conditional sentence and direct sentencing judges to consider that sanction, along with all others that do not involve imprisonment, when determining an appropriate punishment for Aboriginal offenders. The conditional sentence is one means of redressing the substantive inequality of Aboriginal people in sentencing. It is certainly the case that conditional sentences are available to all offenders, not just Aboriginal offenders. However, the legislative history and jurisprudence demonstrate that conditional sentences take on a unique significance in the context of Aboriginal offenders by conferring the added benefit of remedying systemic overincarceration. By removing that remedial sentencing option, the impact of the impugned provisions is to create a distinction between Aboriginal and non-Aboriginal offenders based on race.

[80] The court, at para. 93, went on to note the particular plight of Indigenous women, stating that "the legacies of colonialism and racism are connected to Indigenous women's participation in drug crimes" and that drug crimes are "survival crimes" in this context.

[81] This case is the flip side of *Sharma*. Here, a vulnerable Indigenous woman was the victim rather than the offender, criminalized, at least initially, because of her drug use. The

conduct in this case reflects the type of mischief sought to be redressed by the conditional sentence. This does not itself bar a conditional sentence for Cst. Doering. The conditional sentence is available to all offenders, not just those of Indigenous heritage. The court in *Sharma* found a s. 7 violation as well as a violation of s. 15. Nonetheless, the reasoning in *Sharma*, applied to these facts, yields an irony which, while not a legal principle, tends to confirm the legal conclusion that a conditional sentence is not appropriate.

COVID-19

[82] Mr. O'Hara argued that concern over COVID-19, and the increased risk of transmission in jails, militates against incarceration. I am sympathetic to concerns about the risk of transmission of the virus in custodial settings, where physical distancing is invariably more difficult. I took judicial notice of such risk factors in *R. v. Hearns*, 2020 ONSC 2365, finding that they could, in some cases, reduce the length of the sentence to be served. However, I also ruled in *Hearns* that the pandemic does not operate as a "get out of jail free card". While it may result in a reduction of sentence, it cannot make an unfit sentence fit. It permits some deviation from proportionality, but cannot sanction that which is truly disproportionate.

[83] While COVID-19 is a serious consideration, it has not produced a moratorium on incarceration. Nor would such a result be feasible or desirable. The information note filed by the Crown reveals that Ontario institutions have taken very seriously their obligation to protect the health of persons in custody. I must presume that those efforts will continue. The virus is likely to increase restrictions on liberty within institutions, in order to keep people safe. Cst. Doering will also face protective restrictions given his former position in law enforcement. Whether a function of the virus, or Cst. Doering's status, restrictive measures increase the punitive impact of incarceration. This warrants a reduction in sentence, but does not take it out of the custodial context.

Mental Health Issues

[84] Cst. Doering's treating psychologist is of the view that incarceration will significantly exacerbate Cst. Doering's current conditions. Cst. Doering's current challenges must be

carefully considered. It is appropriate that the sentencing process be tempered by a measure of compassion or mercy: see *R. v. Zaher*, 2017 ONSC 582, aff'd 2019 ONCA 59. I have great compassion for Cst. Doering's condition. However, it does not, in the global balance, override those factors that call for incarceration.

[85] The position of the defence, as expressed by Dr. Nelson, is that Cst. Doering needs to continue counselling and treatment in order to ensure that his condition does not deteriorate further. According to Dr. Nelson, PTSD can be difficult to treat or reverse if it reaches a certain level of severity. However, in advocating against a jail sentence, Dr. Nelson did not appear to contemplate that treatment is available for persons in in custody. The choice is not between therapy in the community and no therapy at all. I must assume that, like other offenders, Cst. Doering will have access to counselling and other resources within the institutional setting. It may be that technological tools, such as video conferencing platforms, can facilitate counselling with persons outside the institution. The court has the power to make recommendations to correctional officials about the conditions of incarceration. While such recommendations are not binding on institutional officials, I would hope and expect that they would be given serious weight. I would hope and expect that prison officials would be sensitive to the health needs of this offender, as they are others, and would take the steps necessary to ensure his well being. Those steps could well include consideration by parole authorities in the event that Cst. Doering were to experience a further decline in his health status.

Sentence Option: Jail

[86] What should the duration of the sentence be?

[87] The Crown initially argued that a term of maximum reformatory or minimum penitentiary should be imposed. When counsel re-attended in court on September 3, 2020, Mr. Nicol fairly acknowledged that two years would be the quantum from which the court would deduct time to account for mitigating factors and collateral consequences. The Crown did not propose a specific figure, leaving it to the court to determine how much reduction is appropriate.

[88] I need not determine whether I agree that two years is the place to begin the analysis. I do know that the end point is less than two years. A sentence in the range of two years would fail to adequately reflect the various mitigating factors in this case. It would fail to account for the restrictive conditions in which Cst. Doering will serve his custodial term, both because of his status and the COVID-19 precautions. A sentence of that duration would fail to account the fragility of Cst. Doering's psychological health.

[89] I find that an appropriate sentence is one of 12 months in custody.

[90] I recommend to the correctional authorities in this case that Cst. Doering be placed in a facility where he has access to meaningful psychological counselling and support. While my recommendation does not bind correctional officials, I implore the authorities to ensure that all appropriate medical and psychological treatment is made available to Cst. Doering. I ask that there be careful assessment of the extent to which his health difficulties might require special measures to ensure his wellbeing.

[91] A section 109 order will be imposed for a period of 10 years.

[92] The Crown requested that a sample of DNA be taken for the DNA data bank. Criminal negligence is a secondary designated offence. Curiously, manslaughter, which is in many respects the equivalent of criminal negligence causing death is a primary designated offence. While it is difficult to explain that disparity, the *Criminal Code* does confer upon me discretion in this case. Having considered the factors in s. 487.051(3), I am satisfied that this is one of the rare cases in which a DNA order would serve little to no benefit to the administration of justice. There is no need to deter Cst. Doering from future crime, and there is no reason to believe him responsible for past crime. In the absence of any apparent reason to impact on his privacy and security of the person, I decline to make the order.

[93] I direct that Cst. Doering surrender into custody within 24 hours of this decision.

[94] I want to commend all counsel for their assistance, and for discharging their duties with sensitivity and professionalism.

Renee M. Pomerance
Justice

Released Orally and in writing: September 21, 2020

CITATION: R. v. Doering, 2020 ONSC 5618
COURT FILE NO.: (London) 348/18

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

Nicholas Doering

Offender

REASONS FOR SENTENCE

Pomerance J.

Released: Orally and in writing – September 21, 2020