CITATION: R. v. Theriault, 2020 ONSC 6768
OSHAWA COURT FILE NO.: CR-18-14756
DATE: 20201105

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	Peter Scrutton and Linda Shin, for the Crown
	)	
– and –	)	
	)	
MICHAEL THERIAULT	)	Michael Lacy, Deepa Negandhi and Marcela Ahumada, for Michael Theriault
	)	
	)	**HEARD:** September 25, 2020

REASONS FOR SENTENCE

DI LUCA J.:

[1] It is often observed that sentencing is a trial judge's most difficult task. In this case, the observation is an understatement.

[2] My task in these reasons is to decide what sentence should be imposed on Michael Theriault for the assault he committed on Dafonte Miller.

[3] Mr. Miller is a young Black man. He was assaulted with a metal pipe by Mr. Theriault, a white off-duty police officer. Mr. Miller is the victim and Mr. Theriault is the perpetrator. Both of their lives have been forever changed as a result of the offence. The sentence I impose cannot undo the harm that was occasioned to Mr. Miller, to his family and to the community. The sentence I impose also cannot turn back the clock to let Mr. Theriault avoid the violent encounter with Mr. Miller.

[4] The assault on Mr. Miller was very serious. A metal pole was used to strike Mr. Miller while he was in an acute state of vulnerability. He was badly injured and was trying to get himself help. There is no issue that Mr. Miller has suffered a significant and long-lasting impact as a result of this criminal offence.

[5] Mr. Theriault is a relatively youthful, first-time offender, with a strong family background and community supports. His promising career as a police officer is likely over. His involvement in this matter has been the subject of immense public and media attention.

[6] The trial in this matter took place at a time when the community's concern with race relations is at an all time high. Indeed, it is fair to say that for many members of the community, the tipping point has been reached. The Black community has suffered deep wounds due to years of overt and systemic racism. The broader impact of this crime must be understood within that context.

[7] Sentencing is an exercise of balance anchored in the principle of proportionality. In arriving at a fit sentence, I must consider carefully the facts of the case as proven, including the aggravating and mitigating circumstances. I must also consider a variety of long-standing legal principles, some of which sit in conflict. Lastly, I must consider the available case law that establishes the range of sentences imposed for similar offences committed in similar circumstances. Ultimately, I am required to punish Mr. Theriault in a manner that is fair and just.

[8] Sentencing is not an exercise in vengeance. My role is not to simply "throw the book" at Mr. Theriault because anything less will be seen as a "slap on the wrist". Calls for the imposition of the maximum sentence, even where based on heartfelt sentiments, cannot be permitted to sway the outcome. Sentencing is not done by plebiscite, it is done by the reasoned and balanced application of legal principles to the facts of the case as I have found them.

[9] My role in sentencing Mr. Theriault is also not to place solely upon his shoulders the blame for the sorry history of violent interaction between members of the Black community and the police. While I must consider the broader racialized context within which this offence took place, I must be mindful of the need to punish Mr. Theriault only for the crime he committed and not punish him for crimes committed by others.

[10] That said, my role in sentencing Mr. Theriault is not to grant him blind lenience simply because he is a first offender who has suffered and will continue to suffer significant consequences for his actions apart from whatever sentence I impose. It is trite to recognize that, sometimes, otherwise law-abiding people commit serious criminal offences. While it is an error to fail to recognize the offender's otherwise positive attributes, those attributes cannot overwhelm the process to the point of displacing proportionality. Serious offences warrant serious punishment even when they are committed by otherwise law-abiding people.

[11] Ultimately, as Wagner J. (as he then was) notes in *R. v. Lacasse*, 2015 SCC 64, at para. 3:

> The credibility of the criminal justice system in the eyes of the public depends on the fitness of sentences imposed on offenders. A sentence that is unfit, whether because it is too harsh or too lenient, could cause the public to question the credibility of the system in light of its objectives.

[12] Against this backdrop, I turn to the difficult task of determining a fit and proper sentence.

Facts of the Offence

[13] In assessing the factual basis for the purpose of sentencing, I note that I am sentencing Mr. Theriault for the offence of assault. I am not sentencing him for the offence of aggravated assault and, in particular, I am not sentencing him for unlawfully causing the horrific eye injury that Mr. Miller suffered during his interaction with Mr. Theriault. As indicated in my reasons for judgment, I had a reasonable doubt on the basis of self defence in relation to the portion of the incident which resulted in the eye injury.

[14] Furthermore, while at trial it is only the elements of the offence that must be proven beyond a reasonable doubt, at a sentencing proceeding any particular fact alleged by the Crown to be aggravating must be proven beyond a reasonable doubt. As well, where the defence argues that a particular fact is mitigating, it bears the onus of proving that fact on a balance of probabilities; see s.724(3) of the *Criminal Code*.

[15] My reasons for judgment set out in great detail my factual findings. I will not repeat them here, though I offer the following brief summary for context.

a. At the time of the incident, Mr. Theriault was a trained police officer. He had experience in conducting arrests and was familiar with the relevant training and procedures aimed at safely effecting arrests.

b. The incident involving Mr. Miller and Mr. Theriault commenced late one night when Mr. Theriault and his brother observed Mr. Miller exiting a vehicle parked on their driveway. Mr. Miller and his friends had been "car hopping", in other words stealing items such as loose change and sundries by entering unlocked parked vehicles. The Theriault vehicle was one of the vehicles they entered.

c. Mr. Theriault and his brother gave chase. While there were three young men at the scene, they only chased Mr. Miller.

d. Mr. Theriault chased Mr. Miller for approximately 130 metres. During this chase and subsequent violent encounter, he never identified himself as a police officer or uttered words of arrest. It was only at the end of the incident that Mr. Theriault finally uttered words of arrest. While Mr. Theriault's initial intent was likely to capture and assault Mr. Miller, it was a reasonable possibility that he also wanted to arrest him.

e. The chase ended in the side yard of the Silverthorn residence. Once at the side yard, the encounter became violent. Mr. Miller claimed that Mr. Theriault and his brother beat him with their hands, feet and a metal pole. Mr. Theriault claimed that Mr. Miller used the metal pole to hit Christian Theriault in the head, and then both Michael and Christian Theriault engaged with Mr. Miller, punching him many times until he stopped fighting back. At one point, Mr. Theriault took out his cell phone, ostensibly to call police. He dropped his cell phone as he and Mr. Miller re-engaged. As indicated in my reasons for judgment, credibility issues prevented me from making clear findings as to

what happened during this portion of the incident and as a result, I was left with a reasonable doubt based on self defence.

f. During the violent encounter in the side yard, Mr. Miller sustained a significant eye injury. The injury likely happened towards the end of the encounter in between the homes shortly before Mr. Miller sought help at the Silverthorn residence. The injury would have quickly resulted in profuse bleeding.

g. Once Mr. Miller's eye was injured, he retreated to the Silverthorn residence and moved along the wall towards the front door of the home. He posed no threat at this point. He was obviously significantly injured and obviously in retreat. This would have been known to Mr. Theriault.

h. As Mr. Miller was in retreat, Mr. Theriault retrieved the metal pole that was nearby on the ground. He brandished it at shoulder height with two hands.

i. Once at the door, Mr. Miller was likely shouting "Call 911". Mr. Theriault may also have shouted "Call 911". Mr. Miller was loudly banging on the door trying to get help.

j. Mr. Theriault used the metal pole and struck Mr. Miller in the face from behind, also coming into contact with the front door of the Silverthorn residence. As Mr. Miller's eye had already been injured at that point, I could not conclude that the strike to the face caused any separate or additional injury.

k. Following the strike to the face, Mr. Miller walked to the driveway and surrendered on the hood of a vehicle parked there. During this portion of the incident, Mr. Theriault struck Mr. Miller further times with the pole on his back.

l. Mr. Miller was held on the ground by Mr. Theriault pending arrival of police. Once police arrived, Mr. Miller was handcuffed and searched by Mr. Theriault and then turned over to members of the Durham Region Police Service.

m. Mr. Miller was charged with a number of criminal offences which were ultimately withdrawn by the Crown.

Additional Facts on Sentence

[16] The parties filed an agreed statement of fact at the sentencing hearing which stipulates the following:

a. Mr. Theriault was suspended with pay from his job as a police constable with the Toronto Police Service effective July 17, 2018. If sentenced to jail, his status will change to suspended without pay.

b. The imposition of terms of a probation or conditional sentence order or other collateral consequence that would prevent a person from performing expected

duties as a police constable, may also result in a change in status to suspended without pay. Such terms or collateral consequences may also result in termination of employment.

c. Mr. Theriault faces disciplinary proceedings under the *Police Services Act*. That proceeding has been adjourned pending the outcome of the trial and potentially any related appeals.

d. The findings of this court in relation to the assault are admissible at any such hearing and will amount to professional misconduct. The Toronto Police Service may also choose to issue a new Notice of Hearing based on the court's findings.

e. Mr. Theriault cannot be terminated without a hearing. If he is sentenced to jail, he is expected to lose his job. Even if he is granted a conditional sentence, he may nonetheless lose his job. Sentences not involving jail may attract a range of penalties from a reprimand up to termination.

f. If sentenced to jail, Mr. Theriault's status as a police officer will affect the conditions under which he serves his sentence. The particular impact of an offender's status as a police officer is assessed by correctional staff on a case by case basis. It may result in more limited access to facilities and/or placement within the institution.

Victim Impact Statements

[17] I have the benefit of victim impact statements from Mr. Miller and members of his immediate family. I am mindful that I must consider these statements in concert with the factual findings I made at trial. To the extent that the statements stray beyond my findings, I place no weight on them. I also place no weight on any calls for a maximum or substantial sentence contained therein. Any such comments are beyond the permissible scope of victim impact statements; see *R. v. Gabriel* (1999), 137 C.C.C. (3d) 1 (S.C.J.). Lastly, I am mindful that when properly considered, victim impact statements provide important and potentially aggravating context to the sentencing process. They inform the seriousness of the offence committed and the harm caused. However, they cannot be used to *improperly* aggravate or increase the length of sentence; see *R. v. Taylor*, 2004 CanLII 7199 (ON CA) at para. 42 and *R. v. A.G.*, 2015 ONCA 159.

[18] In his victim impact statement, Mr. Miller explains that when he was standing at the door of the Silverthorn residence trying to get help, he feared that Mr. Theriault was going to kill him using the steel pipe. Mr. Theriault then used the steel pipe to hit him repeatedly. To this day, he is troubled by the fact that these were the actions of a police officer, sworn to serve and protect.

[19] He explains that as a result of the assault, he has become withdrawn and has isolated himself from his friends and family. The assault has robbed him of simple joys in life. He has been unable to gain meaningful employment or return to school. He continues to suffer headaches and finds that he is on edge and bickers about minor things with his family.

[20] Mr. Miller appreciates that this event will forever be part of his life story and he wants it to have meaning. He hopes that none of his Black brothers and sisters will have to go through the same type of event.

[21] Leisha Lewis is Mr. Miller's mother. In her eloquent statement she expresses gratitude to the Black communities across North America who have offered their support during this difficult time. She describes how she raised Mr. Miller to treat people with dignity and respect, and her life lessons regrettably did not prepare Mr. Miller for life as a young Black man. She describes the deep hurt she felt upon discovering that police officers sworn to serve and protect failed to protect Mr. Miller.

[22] Lataijah Lewis is Mr. Miller's sister. She describes her close loving relationship with Mr. Miller and explains the fear and sadness she felt when she learned that he feared for his life. She also describes the sorrow she feels because of how Mr. Miller was treated in this case. She notes the broader impact that this case has had on members of the Black community who were forced to relive the reality that their lives are not valued and respected in the manner that others are.

[23] Lastly, Philip Pearce, Mr. Miller's step-father, describes the nightmares and sleepless nights the family suffers as a result of watching Mr. Miller deal with his pain and suffering. He notes that the lives of the family members have been permanently affected and they will never be the same. He views Mr. Miller's interaction with Mr. Theriault as having parallels to the biblical story of David and Goliath. Lastly, he expresses a hope that this case will help the police and the justice system have a more balanced approach to issues of race.

Community Impact Statements

[24] I have also received and carefully considered two community impact statements; one from the Black Action Defence Committee (BADC) and one from the Canadian Association of Black Lawyers (CABL). In considering these statements, I again remind myself to consider them in concert with facts as I have found them and to disabuse myself of any comments that stray beyond those facts. I also place no weight on comments that question the validity of the process or the verdict. While I have no doubt that these comments are honestly held, they do not assist me in determining the appropriate sentence. That said, I rely on the admissible portions of these statements to assist me in determining the impact of this offence on the community. In this regard, I find that the statements provide valuable and informed context born of lived experience.

[25] BADC is a non-profit entity whose primary purpose is to work towards the elimination of racism and the attainment of a fair and just system of justice in the Province of Ontario and throughout Canada. Its membership is comprised of individuals who have expertise and experience in the area of human rights, equality and social justice. Its membership also includes individuals who have been victims of racism and racially motivated violence and abuse.

[26] Over the years, BADC has played and continues to play an instrumental role in the development and implementation of public policy, race relations and police accountability.

It has contributed to several ground-breaking reports on race related issues and has worked tirelessly in bringing much needed attention to issues of race and inequality in the public sector.

[27] In its community impact statement, BADC advises that this case has caused an outpouring of emotion, anger, outrage, and disbelief amongst members of the Black community. It further submits that this case has eroded the trust that members of the Black community have towards the police, and has caused members of the community to fear the very police "whom are expected to serve and protect" the community. BADC also notes that this case is a further example of the trauma that has been inflicted on the Black community and notes that the trauma will take generations and possibly centuries to heal.

[28] On a poignant note, the writer of the BADC community impact statement also acknowledges that the Theriault family, who have sat in court and observed the proceedings, are also victims who have suffered as a result of the offence.

[29] CABL is a national network of law professionals committed to supporting and reinvesting in Canada's Black community. Part of CABL's mandate is to advocate on behalf of Black Canadians and fight against all forms of anti-Black racism in Canadian institutions.

[30] CABL's very helpful community impact statement notes that members of the Black community have a history of distrust towards the police "as they tend to be over-policed and suffer at the hands of the law". They cite statistics that confirm that Black people are over-represented in use of force cases, shootings, deadly encounters and deaths caused by police shootings. They also note that there is a large disparity between the rates of police use of force with members of the Black community when compared with members of the white community, and even when compared with other racialized groups.

[31] CABL submits that the violent treatment of Black community members at the hands of the police is "becoming a growingly undeniable phenomenon". The undeniable phenomenon is a lived reality for many Black Canadians, and it results in a feeling that Black lives are devalued by the system.

[32] According to CABL, the events that unfolded between Mr. Theriault and Mr. Miller have further sowed the seeds of distrust between the Black community and the police. They note that a tone of victim blaming was struck in this case and that this tone is typical despite the fact that the Black community is Canada's most victimized population. They further note that this case is perceived as yet another example of a Black life being devalued "to the point of being seen as unhuman by the police".

[33] CABL concludes its submission by explaining that this offence reinforces the Black community's fear of police and also does a disservice to the hard-working police officers who are trying to build trust with the Black community, a community they are sworn to serve and protect.

Circumstances of the Offender

[34] Mr. Theriault is a relatively youthful first offender. He was 24 years of age when he committed the offence and he is now 28 years of age. He is unmarried and has no dependents. He grew up in a loving and supportive household and continues to have the support of his family, many of whom sat through the entire court process.

[35] Mr. Theriault completed high school with honours, attended university with two scholarships and then decided to become a police officer, following in his father's footsteps. Mr. Theriault was first hired as a parking enforcement officer and then as a police constable. After approximately three years on the job, Mr. Theriault's performance was reviewed and he was promoted to first class constable.

[36] Mr. Theriault remains employed as police constable with the Toronto Police Service, though the viability of the employment is contingent on the outcome of this matter. Unsurprisingly given his employment, he has no criminal record, nor has he ever been charged with an offence. He also has an unblemished history as a police officer. He has never been the subject of a disciplinary proceeding or even a public complaint.

[37] A book of letters in support were filed at the sentencing hearing. These letters unanimously describe Mr. Theriault in glowing terms. He is a respected member of the community who is generous with his time and gives back to the community. He is engaged in community activities, including coaching children's soccer. He is mature, soft spoken, courteous and has a strong work ethic. The letters support the view that the offence is out of character and is not reflective of the entirety of who he really is.

[38] In his statement before the court, Mr. Theriault spoke eloquently about his decision to become a police officer and how he pursued this career hoping to make a positive contribution to the community. He also acknowledged that police officers are not above the law, rather they are entrusted to enforce laws in a fair and even-handed manner without prejudice and without abusing power.

[39] Mr. Theriault apologized to Mr. Miller and to Mr. Miller's family. He acknowledged reading the victim impact statements and noted that he did not wish to minimize the feelings expressed therein. He noted that while the case would impact both he and Mr. Miller, the permanent injury to Mr. Miller was far more devastating than anything else.

[40] Mr. Theriault also acknowledged that this case has affected many lives in the community and noted that if he could go back in time, he would have avoided any confrontation with Mr. Miller.

The Principles of Sentencing

[41] The objectives of sentencing long recognized at common law have been codified in s.718 of the *Code*. They are: the protection of society and the maintenance of a just, peaceful and safe society through the denunciation of unlawful conduct and harm done to the victims and the community; deterrence, both general and specific; the separation of the offender from society where necessary; rehabilitation; reparation for harm done to the victims or the community;

and promotion of a sense of responsibility in offenders and acknowledgement of the harm done.

[42] Section 718.1 provides that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Crafting a proportionate sentence is a delicate task; see *R. v. M.* (*C.A.*), [1996] 1 S.C.R. 500 at para. 91. Properly understood, proportionality requires that the more serious an offence and/or the greater the offender's degree of moral culpability, the more significant the sentence imposed; see *R. v. Lacasse*, *supra*, at para. 12. The assessment of proportionality is based on an assessment of the individual offender and the particulars of the offence committed.

[43] Section 718.2(a) provides that a sentence should be increased or decreased to account for any aggravating and mitigating circumstances. Section 718.2(b) establishes a principle of parity which is also used as a measure of proportionality. It requires that a sentence be similar to those imposed on similar offenders in similar circumstances.

[44] Section 718.2(d) and (e) codify the principle of restraint. These sections require that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate and that all available sanctions other than imprisonment should be first considered. The principle of restraint is important especially when dealing with relatively youthful first offenders; see *R. v. Batisse*, 2009 ONCA 114 and *R. v. Priest* (1996), 30 O.R. (3d) 538 (Ont. C.A.). However, this principle is often given less weight when the offence committed is a serious violent offence.

Sentencing in Cases of Police Violence

(i) The Implicit Breach of Trust

[45] The courts have recognized that when sentencing police officers convicted of committing crimes, the sentence must reflect the special position that police officers occupy in society; see *R. v. Doering*, 2020 ONSC 5618 at para. 23 and *R. v. Cook*, 2010 5016 ONSC 5016, at para. 29. As my colleague Pomerance J. notes in *Doering*, *supra*, at para. 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.198-199; *R. v. Ferguson*, 2008 SCC 6, [2008] S.C.R. 96 at para. 28.

[46] Simply stated, the police are sworn and duty bound to serve and protect all members of the community. In order to perform this function, the police are granted a great deal of trust and power. However, this trust and power gives rise to a corresponding duty to uphold the law and values of the community. When a police officer commits a criminal offence, he or she also breaches the community's trust. This generally means that the sentence imposed on a

police officer will be more severe than that imposed on an ordinary person who commits the same crime; see *R. v. Forcillo*, 2015 ONCA 259 at para. 133.

[47] The fact that an offence is committed by an "off-duty" police officer does not automatically alter this principle. A police officer remains a police officer even when off-duty. While an offence committed by an off-duty police officer in a manner wholly unrelated to the performance of an officer's official duties may lessen the weight given to the inherent breach of the community's trust, the same may not apply where an off-duty police officer purports to act in a policing or quasi-policing capacity or function. Ultimately, it is a question of degree which depends on the specific facts of the case; see *R. v. Auger* (1973), 5 N.S.R. (2d) 151 (N.S.S.C. App. Div.), *R. v. Cusack* (1978), 41 C.C.C. (2d) 379 (N.S.S.C.App. Div.), and *R. v. Blackburn*, [2004] O.J. No. 1527 (C.A.) at paras. 22-24.

(ii) Assessing the Need for Denunciation

[48] The criminal law and sentences imposed by due process under the criminal law reflect a shared set of communal values; see *R. v. M.* (*C.A.*), *supra*, at para. 81. Denunciation is the process by which these values are communicated to the public broadly and to offenders specifically. When a court imposes a sentence, it denounces the offender's conduct and sends the message that a violation of shared communal values will not be tolerated.

[49] Denunciation is closely related to the concept of deterrence. By imposing a denunciatory sentence, the court also seeks to deter the specific offender and other like-minded individuals from committing similar offences. While the need for denunciation and deterrence varies depending on the type of offence, it is often heightened in cases where the type of offence under consideration is an offence generally committed by otherwise law-abiding people. It is those people who are most likely deterred by stiff sentences; see *R. v. Lacasse, supra*, at para. 73.

[50] The shared set of communal values which give rise to the need for denunciation are not fixed in time. As my colleague Pomerance J. aptly notes in *Doering, supra*, at paras. 44-45:

> 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 CanLII 107 (ON CA), [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), 1985 CanLII 115 (ON CA), 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.

> 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.

[51] Much like social values regarding drunk driving, sexual assault against women, and sexual offences involving children have changed over time, so too have societal values regarding offences committed by police officers against racialized minorities.

[52] Equality is a fundamental social value. It is a value premised on dignity and respect for human life. Equality is also enshrined in s. 15 of the *Canadian Charter of Rights and Freedoms*. It is a principle we use to define what our country stands for.

[53] As a matter of context, there is no issue that the Black community has suffered a history of inequality as a result of both overt and systemic racism. That racism has infected the relationship between the police and the Black community; see Ontario Human Rights Commission, "A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service", August 2020 and S. Wortley, A. Laniyonu, and E. Laming, "Use of force by the Toronto Police Service: Final Report," Ontario Human Rights Commission, 2020.

[54] This context is also reflected in the community impact statements filed in this matter. These statements demonstrate the impact that this type of offence has on the community. That impact is mirrored on an individual level in the various victim impact statements also filed in this matter.

[55] This context is important. It explains *why* this type of offence is so damaging to our shared societal fabric. It also sets the foundation for an informed consideration of the need for denunciation.

[56] In my view, the need for denunciation in this case must be calibrated in accordance with a current understanding of the deep and widespread impact caused by offences committed by police officers against racialized minorities, particularly the Black community. These are offences that shatter a community's trust in the system. They serve as a constant reminder of the presence of systemic racism. They prevent the healing that is required to move forward because they demonstrate that true equality is not yet within reach.

[57] Based on the foregoing, I conclude that this type of offence requires a heightened degree of denunciation. In stating this, I remain mindful of the need to maintain proportionality. While the sentence I impose must reflect the need for denunciation, the sentence must ultimately remain proportionate to the gravity of the offence and the offender's degree of moral responsibility. The gravity of the offence must be assessed against the contextual backdrop, however, the sentence imposed cannot be disproportionate in an attempt to right past societal or systemic failings.

The Positions of the Parties

[58] The Crown argues that the circumstances of this offence warrant a jail sentence in the range of 12 to 15 months, followed by 12 months probation. The Crown argues that denunciation and general deterrence are the primary sentencing principles that govern the determination of a fit sentence. The Crown also seeks the following ancillary orders; a s. 110 weapons prohibition order for 5 years (half the available maximum), a non-communication order relating to Mr. Miller or his family, and a DNA order.

[59] The defence argues that an absolute or conditional discharge is appropriate. In the alternative, the defence urges a suspended sentence or a conditional sentence of imprisonment. The defence argues that to sentence Mr. Theriault to real jail would be contrary to principle and precedent. The defence opposes a weapons prohibition order and also opposes the DNA order.

Analysis and Findings

(i) The Range of Sentence

[60] The principle of parity in sentencing is very important as it contributes to the overall goal of proportionality. The range of sentence imposed in similar cases provides a useful measure for assessing parity and therefore determining a fit sentence.

[61] Since sentencing is an inherently individualized process, there are times where sentence ranges are difficult to determine or are ultimately too broad to offer any meaningful guidance. Even where a useful range can be discerned, it is only one factor to be considered in determining a fit sentence. A sentence range should *not* be viewed as a fixed set of goal posts.

[62] Despite the presence of a discernible range of sentence, the considerations of a particular case may warrant a departure above or below that range. Ultimately, in view of the individualized nature of the sentencing process, a sentence that is either above or below the range may nonetheless amount to a proportionate sentence; see *R. v. Lacasse, supra,* at paras. 57-60 and *R. v. Friesen*, 2019 SCC 9 at paras. 35-37.

[63] The Crown argues that in view of the particular factual matrix in this case, there is no applicable range of sentence that can be discerned from the case law. The Crown notes that the offence of assault captures a very broad range of conduct and that sentencing is an inherently individualized exercise. Lastly, the Crown argues that even if a range could be extrapolated, the presence of particularly aggravating features justifies a departure from the range.

[64] The defence disagrees and argues that a range of sentence is readily discernible. In its written submissions, the defence has submitted a variety of sentencing ranges which it argues assist in ascertaining a range of sentence for this offence. First, the defence examines cases involving first time offenders who commit the offence of aggravated assault, including *R. v. Rochetta,* 2016 ONCA 577; *R. v. Hudson*, 2020 ONCA 557 and *R. v. Tourville*, 2011 ONSC 1677. On the basis of these authorities as well as those set out in the chart found at p. 37-39

of the defence sentence submissions, the defence argues that aggravated assault sentences for first offenders range from a suspended sentence (exceptionally) to mid/upper reformatory sentences. The defence notes that the Crown's request for a jail sentence in the range of 12-15 months falls within the range of sentence typically seen when first offenders commit aggravated assault. I agree with the defence that the range of sentence proposed by the Crown appears, at first blush, to be more closely related to sentences imposed for aggravated assault. That said, I note that none of the cases cited in establishing that range involve police officers.

[65] The defence next argues that the range of sentence for assaults prosecuted by indictment ranges from conditional discharges to 4 years imprisonment. However, the defence points to the chart at Appendix B of its submissions to suggest that the usual sentence for assault prosecuted by indictment is a non-custodial sentence, and even where custody is imposed it tends to be in the intermittent range in the absence of particularly aggravating features and/or prior criminal records.

[66] Next, the defence refers to a series of charts found at p. 40-59 of its submissions detailing instances where police officers (both on-duty and off-duty) received absolute/conditional discharges, suspended sentences or fines for offences of assault and assault cause bodily harm.

[67] The defence argues that when these various sentencing ranges are viewed in concert, the appropriate sentence in this case ranges from an absolute or conditional discharge to a suspended sentence, and at worst a conditional sentence of imprisonment.

[68] In my view, the cases provided do not greatly assist in determining a range of sentence for the type of offence committed in this case. While I accept that police officers have received non-custodial sentences for assaultive conduct, I note that many of these cases are dated and occurred in a different social context. Many also involve the mitigation of a guilty plea and/or factual scenarios that are significantly less serious than the facts in this case. I also find the range of sentences imposed in cases of assault for non-police officers to be of limited use in guiding the imposition of sentence in this case. Lastly, in terms of sentences imposed for aggravated assaults committed by non-police officers, I note that had those offences been committed by police officers, the sentences would likely have been higher. That said, I note the defence point that I should guard against imposing a sentence for the offence that Mr. Theriault was acquitted of, namely the aggravated assault in relation to the eye injury.

[69] In attempting to determine the range, I find that cases involving police assaults on prisoners provide meaningful comparative assistance. The Court of Appeal for Ontario has on more than one occasion noted that this type of offence usually requires a sentence of incarceration; see *R. v. Feeney*, 2008 ONCA 756; *R. v. Byrne*, 2009 ONCA 134; *R. v. Hudd*, 1999 CanLII 1734 (ON CA); and *R. v. Preston*, [2005] O.J. No. 6450 (O.C.J.), aff'd [2008] O.J. No. 5136 (C.A.). Other appellate courts have reached the same conclusion; see *R. v. Nixon* (1991), 63 C.C.C. (3d) 428 (B.C.C.A.) at p. 6; *R. v. Cusack*, *supra*; and *R. v. Bottrell* (*No. 2*) (1981), 62 C.C.C. (2d) 45 (B.C.C.A.).

[70] I acknowledge that this case does not involve an assault on a prisoner who is in police custody, and that this serves as a distinguishing feature from the line of authority described

above. Prisoners in police custody are in a particularly vulnerable position in that they are confined and at the mercy of their keepers. I am, nonetheless, of the view that the nature of the harm underpinning the need for a jail sentence in those cases is not absent in this case. Mr. Theriault testified that his intention was to apprehend Mr. Miller and hold him for the Durham Police. After the initial violent altercation, Mr. Miller was in an acutely vulnerable position. He was badly injured. He was not presenting any threat. He was in retreat. He was attempting to get help. He was then struck in the face with a metal pole. This was an act of gratuitous violence on a person who was vulnerable and in a position that is similar to a confined and defenseless prisoner.

[71] In terms of quantum of sentence, again, the cases provided do not greatly assist in discerning a range, but I note the sentences imposed in the following cases offer some broad guidance: *R. v. Van Buskirk*, 2012 (Ont. C.J., unreported per Ebbs J.) – 5 months jail for assault causing bodily harm; *R. v. Higgins*, 2010 (Ont.C.J., unreported per Favret J.) – 90 days jail for assault cause bodily harm; *R. v. Preston*, 2004 (Ont.C.J., unreported per Wilkie J.) – 30 days jail for assault; *R. v. Feeney*, 2008 ONCA 756 – 30-60 days jail in addition to conditional sentences of 45-90 days already served; and, *R. v. Byrne*, 2009 ONCA 134 – 90 days jail intermittent for assault.

[72] I consider *R. v. Nixon, supra*, wherein the British Columbia Court of Appeal upheld a 9-month jail sentence for a police officer who was supervising a number of other police officers who committed an aggravated assault on a prisoner. I recognize that there are distinguishing features including the officer's role as a supervisor, the fact that the officers who committed the physical act were never identified and the fact that the offence involved an injury sufficient to support a finding of aggravated assault. The court noted that the gratuitous use of force on a defenceless prisoner "is as reprehensible a crime in a free and democratic society as one can imagine". This message, delivered almost 30 years ago, remains as pressing today as it was then.

[73] I also consider *R. v. Thomas, supra*, wherein Code J., sitting as a summary conviction appeal judge, reduced a 90-day jail sentence to a suspended sentence and probation for an off-duty police officer convicted of assault causing bodily harm in relation to the arrest of a motorist. In his reasons, Code J. took no issue with the trial judge's finding that a 90-day jail sentence was within the appropriate range for the offence committed. In this regard, Code J. noted that was a case that involved an initial lawful arrest that required some force, but became unlawful because of considerable force applied in response to considerable provocation. He also noted that the Crown submitted that the case was not as serious as an assault on a prisoner, and that therefore jail was not the only appropriate sentence. Nonetheless, Code J. only interfered with the sentence because of what he found were "exceptional" mitigating personal circumstances that warranted a departure below the range of sentences placed before him.

[74] Lastly, I also note that in *R. v. Doering, supra*, a very recent and thoughtful decision, Pomerance J. imposed a 12-month jail sentence on a police officer convicted of criminal negligence causing death in relation to the preventable death of an Indigenous woman in police custody. While the conduct in that case is very different as it did not involve any form

of assault, the case does have other contextual similarities and engages a discussion of many of the same sentencing principles applicable in this case.

(ii) Aggravating and Mitigating Factors

[75] Strictly speaking, aggravating and mitigating circumstances are features of a case that inform the assessment of the seriousness of the offence and the level of the offender's responsibility. At times, however, factors relating to an offender's personal circumstances are described as "aggravating" or "mitigating" even though they do not relate directly to the seriousness of the offence or the offender's degree of responsibility. These factors, nonetheless, warrant consideration in determining an individualized sentence that meets the principle of parity; see *R. v. Suter*, 2018 SCC 34, at para. 48.

[76] I find the following to be aggravating circumstances in this case:

a. Mr. Theriault is a trained police constable who had experience in effecting arrests. He acknowledged that conducting arrests was the "bread and butter" of his policing career. He had training on use of force and also on effecting safe arrests. He completely failed to follow his training.

b. I find that the commission of this offence is a breach of the public's trust. While this is not an offence that could only have been committed by virtue of Mr. Theriault's status as a police officer, it was an offence in which Mr. Theriault was essentially acting in a police capacity. His stated purpose in chasing Mr. Miller was to detain and/or arrest him, despite only articulating this purpose at the very end of the encounter. Even when uniformed Durham police officers arrived on scene, it was Mr. Theriault who placed handcuffs on Mr. Miller and then searched him prior to medical assistance being offered. Mr. Theriault did not specifically abuse his position as a police officer in order to commit the offence. However, the offence was not divorced from his role as a police officer and it resulted in a breach of the trust reposed in him as a police officer sworn to serve and protect while upholding the law.

c. The assault was occasioned on a victim who was in an acute state of vulnerability. Mr. Miller was badly injured. His eyeball was ruptured, and he was bleeding profusely. He moved along the wall of the Silverthorn residence, presumably because his eyesight was impaired and he was feeling his way. He went to get help by calling out and banging on the front door of the Silverthorn residence. He was afraid for his life. While Mr. Theriault would not have known the extent of the injury to Mr. Miller's eye, it would have been obvious that Mr. Miller was injured and bleeding. More importantly, it would have been obvious that he was in retreat, seeking help and he posed no threat whatsoever.

d. Mr. Theriault used a metal pole as a weapon in assaulting Mr. Miller. I reject the defence submission that it is unfair to consider the use of a weapon as an

aggravating factor.[1] I understand that the Crown initially charged Mr. Theriault with both aggravated assault and assault with weapon, and that following committal the Crown drafted the indictment omitting the charge of assault with a weapon. However, the Crown theory was always that Mr. Theriault used the metal pole, in addition to his feet and fists, to assault and inflict injuries on Mr. Miller. The case was vigorously defended on this basis and at no time did the Crown abandon the allegation that Mr. Theriault wielded the metal pole. I see no unfairness in relying on the use of the metal pole as aggravating in these circumstances.

e. I find that the strike to Mr. Miller's face involved a significant amount of force. It involved a two-handed strike with a metal pole held above the shoulders. It struck Mr. Miller in the face and also left a gouge in the glass of the front door at the Silverthorn residence. I decline to find that the assault was minor because it resulted in no injury. As indicated in my reasons, I was not satisfied as a matter of legal causation that the assault caused any injury given the fact that by the time of the strike to the face with the metal pole, Mr. Miller had already suffered the devastating eye injury. However, I did not make a positive finding that the nature of the force used was such that it caused no injury. In this regard, I accept the Crown's submission that the fact that no injury was proven was a matter of fortuity and not calibration. Nonetheless, when I consider the aggravating nature of the amount of force used, I remain mindful that no additional or separate injury was proven.

[77] I decline to find that Mr. Theriault's initial intent in chasing Mr. Miller is an aggravating factor. As indicated in my reasons, I was satisfied that his intent was likely to capture and assault Mr. Miller. This finding falls short of proof beyond a reasonable doubt which is required in order for the fact to be considered aggravating.

[78] I find the following to be mitigating factors:

a. Mr. Theriault is a youthful, first offender. He has strong family and community supports. The offence is out of character both in terms of his personal life and his professional antecedents. He has strong rehabilitative potential and likely poses a low risk of future re-offence.

b. There has been significant negative publicity. As set out in the application record that was filed in support of the challenge for cause application[2], Mr. Theriault has been vilified in the press, on social media and elsewhere. To a large extent, the early coverage and publicity related to a narrative that was disproven in court. That narrative, which had Mr. Theriault approach Mr. Miller and question his presence in the neighbourhood and then chase and beat

[1] Section 725(1)(c) of the *Code* grants a discretion to consider "any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge". See *R. v. Larche*, 2006 SCC 56.
[2] Following a re-election to a judge alone trial, the application was abandoned.

him "out of the blue" was proven to be demonstrably false at trial, yet it is a narrative that will be forever associated with Mr. Theriault.

c. Mr. Theriault's career as a police officer is likely over. While I find this to be mitigating in terms of Mr. Theriault's personal circumstances, it is only minimally so. The Supreme Court has recognized that where collateral consequences are directly linked to the nature of an offence, the mitigating effect is greatly diminished; see *R. v. Suter*, *supra*, at para. 49, and see also *R. v. Sevigny*, 2019 ABPC 81 at para. 29 and *R. v. Doering*, *supra*, at para. 64.

d. I accept that if Mr. Theriault is sentenced to jail, any time spent in jail will likely result in greater restrictions of his liberty and potentially put him at risk. The anticipated conditions of incarceration are properly considered in mitigation of punishment; see *R. v. Cook*, 2010 ONSC 5016 at para. 43, *R. v. Robinson*, 2015 BCSC 1535 and *R. v. Rudge*, 2014 ONSC 241.

[79] I decline to find that the self defence context of the earlier interaction is a mitigating factor. As indicated in my reasons for judgment, I had a reasonable doubt on the basis of self defence in relation to the earlier portion of the interaction. In other words, the Crown failed to prove beyond a reasonable doubt that Mr. Theriault was not acting in lawful self defence during this portion of the interaction. I did not, however, find on a balance of probabilities that Mr. Theriault was acting in self defence. Quite the opposite, I found that he was probably *not* acting in self defence and instead was simply beating Mr. Miller.

[80] As a result, I am not satisfied to the requisite standard that the self defence nature of the initial interaction should serve as a mitigating circumstance. However, and to state the obvious, the fact that Mr. Theriault was probably not acting in self defence, also cannot serve as an aggravating circumstance.

[81] Instead, I will use the evidence in relation to the initial portion of the encounter to provide context to what happened afterwards. In other words, in assessing the seriousness of the offence and the degree of Mr. Theriault's moral responsibility, I must consider the context in which this offence arose. On this basis, I consider that Mr. Theriault and Mr. Miller were involved in a violent encounter moments before Mr. Miller proceeded to seek assistance at the door of the Silverthorn residence. During this encounter, it is possible that Mr. Miller first wielded the pipe and it is also possible that Mr. Miller hit Christian Theriault in the head with the pipe causing a concussion. During the latter part of this initial encounter, Mr. Miller suffered a significant eye injury and stopped engaging with Mr. Theriault. Mr. Miller then moved along the wall of the Silverthorn residence and went to seek help at the front door.

[82] I must also consider that during some point in the altercation between Mr. Theriault and Mr. Miller, Mr. Theriault took out his cell phone in an ostensible effort to call police. That effort was interrupted when Mr. Theriault dropped his phone and re-engaged with Mr. Miller. I must also consider my finding that Mr. Theriault was possibly also calling out for someone to call 911 as the parties approached the front door of the Silverthorn residence. This evidence is difficult to catalogue as specifically aggravating or mitigating. While it is mitigating that Mr. Theriault was trying to ostensibly call police during the encounter and

may have also been shouting "Call 911" once at the Silverthorn front door, that mitigation is dramatically undermined by Mr. Theriault's subsequent use of the metal pipe to strike Mr. Miller in the face.

(iii) Assessing the Seriousness of the Offence and the Degree of Mr. Theriault's Moral Responsibility

[83] As indicated at the outset, this is a very serious offence. An acutely vulnerable young Black man was hit in the face with a metal pole while he was seriously injured, posed no threat and was actively seeking help. He was struck further times as he moved towards a parked vehicle where he surrendered himself. The perpetrator of the offence is an off-duty white police officer who had received training on the use of force and arrest procedure. While the Crown does not allege that the assault was racially motivated, the racialized context within which the offence took place cannot be ignored.

[84] The offence remains very serious even though it followed a violent altercation that was not proven to be unlawful based on a reasonable doubt about self defence. Police officers are trained to exercise restraint, to tolerate danger and abuse and to withstand provocation; see *R. v. Thomas*, 2012 ONSC 6652 (S.C.J.), at para. 51. To be clear, this is not a case where in the course of self defence an accused simply went too far. This is a case where after any reasonably possible threat had abated, the accused armed himself with a weapon and struck the injured and retreating victim.

[85] The impact of the offence on Mr. Miller also supports a finding that the offence is serious. While Mr. Miller's principal injury to his eyeball was not found to be caused unlawfully, the strikes to the face and back with the metal pole would have caused additional emotional suffering that is long-lasting. The nature of the offence, including the emotional consequences, has also had a significant and prolonged impact on members of Mr. Miller's family and the community at large.

[86] Mr. Theriault's degree of moral responsibility for this offence is high. He armed himself with a weapon and approached Mr. Miller who was obviously injured, in retreat and seeking help. He then struck him in the face and then later used the pole to strike Mr. Miller in the back on more than one occasion. The assault was gratuitous and violent. This high degree of moral responsibility is modestly moderated by the fact that this incident was preceded by a violent encounter that did not result in any criminal liability. I say this only to note that the assault would have demonstrated an even higher degree of moral responsibility if it had not been preceded by the altercation that took place. Lastly, it is also modestly moderated by the fact that Mr. Theriault did undertake some efforts to call police during the altercation and possibly later during the events at the Silverthorn's front door. Nonetheless, viewing the incident as a whole and in context, I am satisfied that Mr. Theriault's degree of moral responsibility remains high.

(iv) The Appropriate Blend of Sentencing Principles

[87] This is a case that calls for a strong denunciatory message. The court must denounce the conduct in the clearest terms possible.

[88] This case also calls for a sentence that emphasizes general deterrence. The sentence imposed needs to deter others from committing similar offences.

[89] In view of Mr. Theriault's personal circumstance and strong rehabilitative potential, I am satisfied that specific deterrence is not an issue that needs to be addressed. Mr. Theriault has expressed remorse and has accepted a degree of responsibility. He has shown empathy towards his victim. When coupled with the consequences that have been and will be visited upon him, I am satisfied that he presents a low risk of re-offence.

[90] The absence of a need for specific deterrence and the presence of a strong rehabilitative potential serve to moderate the sentence which would otherwise be imposed based only on principles of denunciation and general deterrence.

(v) Assessing the Available Sentencing Options

[91] The offence of assault prosecuted by indictment has a maximum sentence of 5 years. There is no minimum sentence. By operation of sections 730 and 742.1 of the *Code*, both a discharge and a conditional sentence of imprisonment are available sentencing options. Notwithstanding the jurisdictional availability of these sentencing options, the real issue is whether these sentencing options are suitable in view of the clear need for denunciation and deterrence that presents itself in this case.

[92] In *R. v. Lacasse, supra*, at para. 6, Wagner J., as he then was, explained:

> While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as 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.

[93] When I consider the context in which this offence was committed, I conclude that nothing short of a jail sentence will suffice to adequately denounce the offence and to offer the requisite degree of deterrence. A conditional or absolute discharge is manifestly contrary to the public interest in these circumstances. It risks trivializing the offence and undermining public confidence in the administration of justice.

[94] The next issue I consider is whether this would be an appropriate case to permit Mr. Theriault to serve a conditional sentence of imprisonment, in other words, to serve his jail sentence in the community.

[95] A conditional jail sentence is not simply an enhanced form of probation. It is a sentence that can significantly restrict an offender's liberty. As such, it has a punitive effect, albeit on a lesser scale than a sentence served in an actual jail.

[96] The conditions and length of a conditional sentence can also be varied in accordance with the particular needs of a case. In some instances, the conditions and length of a conditional sentence can take on a more rehabilitative or restorative bent and in others, they can be more

denunciatory or deterring. Nonetheless, regardless of the conditions or the length, a conditional jail sentence is almost invariably viewed as a less punitive option than jail.

[97] The core question in this case is whether a conditional sentence of imprisonment is consistent with the operative and paramount sentencing principles of denunciation and general deterrence. In other words, would a conditional sentence of imprisonment be a proportionate sentence in view of the seriousness of the offence and the degree of Mr. Theriault's moral responsibility; see *R. v. Proulx*, 2000 SCC 5 at paras. 113-116 and *R. v. Doering, supra*, at paras. 71-75.

[98] In my view, a conditional jail sentence is not appropriate in this case. As I have explained, this is a case that requires a very strong denunciatory message. That message can only be sent by a term of real jail. In this regard, I adopt the insightful comments of Pomerance J. in *R. v. Doering, supra*, at para. 77, wherein she states:

> 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.

[99] Mr. Theriault committed a gratuitous and violent offence on a vulnerable victim who posed no threat. The fact that Mr. Theriault committed this offence despite his training and position as police officer makes the offence all the more serious. An offence committed in these circumstances undermines societal values of dignity and equality. It undermines the trust that the community, particularly the Black community, places in police officers. It must be denounced in the clearest terms.

[100] I turn next to determining the appropriate length of sentence. The sentence I impose needs to clearly and properly denounce this offence. It must deter other like-minded individuals who are inclined to commit this type of offence. It must also recognize Mr. Theriault's personal circumstances, including his positive rehabilitative prospects, the collateral consequences of conviction and sentence and the difficulties he will face once incarcerated.

[101] When I consider the circumstances of the offence committed in *R. v. Doering, supra*, I conclude that the sentence in this case should be lower. Doering was convicted of criminal negligence causing death involving the preventable custodial death of an Indigenous woman. The breach of trust in that case was significant as was Doering's degree of moral responsibility.

[102] However, when I consider cases that resulted in sentences of 30 days to 5 months in jail, I am not satisfied that a similar sentence in this case would adequately reflect the denunciation required in the context of this case.

[103] In saying this, I wish to make clear that I do not view the sentences of between 30 days and 5 months jail to be a clearly articulated "range" of sentence for this type of case. However, even if I am wrong on this point, this is the type of case as discussed in *Friesen* and *Lacasse*, *supra*, where a departure from the range is appropriate given the specific need for denunciation presented by the particular facts of this offence and the context in which it was committed.

[104] Having considered the sentencing cases provided in concert with the aggravating and mitigating circumstances present, Mr. Theriault's personal circumstances, and the impact that this offence has had on the victim and the community, I conclude that a sentence of 9 months in jail is required in order to adequately denounce the offence committed and deter other like-minded individuals from engaging in the same sort of conduct. This sentence reflects the seriousness of the offence committed and Mr. Theriault's degree of moral responsibility. It also recognizes that Mr. Theriault has a strong rehabilitative potential and is not in need of specific deterrence. The sentence is substantial, but not crushing.

[105] In addition to the jail sentence, I also impose a period of probation for 12 months on statutory terms. Apart from an initial reporting to probation services, there will be no further reporting. The probation order will contain a term prohibiting direct or indirect communication with Mr. Miller or members of Mr. Miller's family, except through counsel.

(vi) Ancillary Orders

[106] The Crown seeks both a DNA order under s. 487.051(3) of the *Code* and a weapons prohibition order under s. 110 of the *Code*. The defence is opposed to both.

[107] In terms of the DNA order, I note that this is a secondary designated offence and as such, I must consider whether it is in the best interests of the administration of justice to require Mr. Theriault to provide a sample of his DNA. In this regard, the burden is on the Crown to establish that the order is warranted.

[108] The DNA provisions have a broad scope and purpose that is not limited to the individual offender; see *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), at para. 22. The purposes include deterring repeat offenders and promoting the safety of the community. While I am satisfied that Mr. Theriault presents a low risk of re-offence, a risk of re-offence is not a pre-requisite to making a DNA order; see *R. v. Durham,* 2007 BCCA 190, at paras. 11-12.

[109] Mr. Theriault was found guilty of assault, but I was satisfied that he committed assault using a weapon. I note that the offence of assault with a weapon is a primary designated offence under the DNA provisions, which would result in a presumptive DNA order. In view of the conviction for assault simpliciter, I must consider this matter as a discretionary secondary designated offence. However, in doing so, I consider that it was Parliament's intent to classify assaults with a weapon as primary designated offences.

[110] On the whole, I am satisfied that a DNA order is appropriate. This was a serious violent offence committed on a complete stranger using a weapon. A DNA order in these circumstances serves to promote public safety and is minimally intrusive on Mr. Theriault's privacy rights.

[111] I turn next to the weapons prohibition order. I note that the Crown is seeking an order of 5 years in duration, which is half the maximum of 10 years available under s. 110 of the *Code*. The order is discretionary and requires that I consider whether the order is desirable in the interests of the safety of the person or of any other person.

[112] I note that a weapons prohibition order would have been mandatory if Mr. Theriault had been convicted of assault with a weapon. Again, while the order is discretionary, in view of the conviction for assault it remains appropriate to consider the fact that Parliament saw fit to make a weapons prohibition order mandatory for offences that capture the same conduct as the conduct in this case.

[113] I also consider that Mr. Theriault is employed as a police officer and is therefore required to carry a firearm as part of his duties. In some cases, the nature of employment may be a significant factor militating against the imposition of a weapons prohibition order. In this case, it is not. First, in view of the jail sentence, it is likely that Mr. Theriault's employment as a police officer will come to an end and he will no longer need to be licensed to carry a firearm. Further, on the facts of this case, despite his weapons training, he used a metal pole to strike Mr. Miller in the face and elsewhere on his body. In short, a weapons prohibition order is warranted as a matter of public safety.

[114] There will also be a non-communication order under s. 743.21(1) of the *Code* prohibiting direct or indirect communication with Mr. Miller or members of Mr. Miller's family, except through legal counsel, for the period of time that Mr. Theriault is serving his jail sentence.

Conclusion

[115] Mr. Theriault, please stand. For the offence of assault committed against Mr. Miller I sentence you to 9 months in jail. Following completion of your jail sentence, you will be placed on probation for a period of 12 months. There will be a DNA order requiring you to provide a sample of your DNA. There will also be a weapons prohibition order for 5 years, as well as a non-communication order.

[116] Mr. Theriault, you committed a serious violent offence that will have a long-lasting impact on many people, including you, your family, the community, and most of all, Mr. Miller and his family. I urge you to bear this in mind as you serve your sentence. I also urge you to remember that even though this is the low point of your life, your life should not be defined solely by what happened here. Once this matter is behind you, I urge you to continue as a productive and contributing member of society.

[117] To Mr. Miller and Mr. Miller's family, I wish you well in your healing process. I have no doubt that the impact of this case will take years to heal and I hope you find strength, peace

and solace to move forward in a positive way.

Justice J. Di Luca

Released: November 5, 2020

CITATION: R. v. Theriault, 2020 ONSC 5784

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

MICHAEL THERIAULT

REASONS FOR SENTENCE

Justice J. Di Luca

Released: November 5, 2020