

# ONTARIO COURT OF JUSTICE

CITATION: *R. v. Vagenos*, 2024 ONCJ 254

DATE: 2024 05 28

COURT FILE No.: Hamilton 998 23 47104319 & 998 23 47104455

**B E T W E E N :**

**HIS MAJESTY THE KING**

**— AND —**

**CHRIS VAGENOS**

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Before Justice Davin M.K. Garg

Heard on May 2, 2024

Reasons for Sentence released on May 28, 2024

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**Jesse Razaqpur .....counsel for the Crown**  
**Jack Lloyd..... counsel for the offender Chris Vagenos**

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**GARG J.:**

[1] Chris Vagenos broke the law. Less than three weeks later, he broke the law again. He blatantly breached his undertaking by committing the exact same offence, to wit, working as an employee in a store selling magic mushrooms to the public. These reasons explain why I would nonetheless sentence Mr. Vagenos to a conditional discharge.

## **Offences and Facts**

[2] Mr. Vagenos pleaded guilty to two sets of charges that totaled five offences.

July 6, 2023

[3] Mr. Vagenos committed two offences on July 6, 2023: (i) possession of psilocybin (a Schedule III substance) for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*; and (ii) possession of proceeds obtained by crime contrary to s. 355(b) of the *Criminal Code*.

[4] The police executed a search warrant for the store called the Mushroom Cabinet located at 1459 Main Street East in Hamilton. Mr. Vagenos was behind the counter. The police found large quantities of psilocybin in various forms (e.g., chocolates, gummies, pills, unprocessed mushrooms). Some were on display. The store was clearly being used to sell psilocybin to the public. Mr. Vagenos had sold psilocybin to an undercover officer

the day before who was posing as a customer. Over \$1,000 in Canadian cash was located either in the store or in Mr. Vagenos' pockets. Mr. Vagenos was ultimately released on an undertaking that required him to stay 100 metres away from the store.

### July 26, 2023

[5] Mr. Vagenos committed three offences on July 26, 2023: (i) possession of psilocybin (a Schedule III substance) for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*; (ii) possession of proceeds obtained by crime contrary to s. 355(b) of the *Criminal Code*; and (iii) failure to comply with a condition of his undertaking by attending the magic mushroom store contrary to s. 145(4)(a) of the *Criminal Code*.

[6] The police contacted the owner of 1459 Main Street East to advise him of the criminal activities taking place in his building. The owner took steps for the tenants to remove any remaining psilocybin products. He served notice to terminate the lease and gave the police permission to enter the premises.

[7] On July 26, 2023, the police attended the store to check for any controlled substances left inside. They once again saw Mr. Vagenos operating the store from behind the counter. The display cases had been re-stocked to display significant quantities of psilocybin and related products. Upon arrest, the police found over \$1,000 in cash in Mr. Vagenos' wallet. This time Mr. Vagenos was arrested and held for a bail hearing.

### **Positions of the Parties**

[8] The Crown seeks a conditional sentence for 15 months that would include a term of GPS monitoring. The defence seeks a conditional discharge with probation for 2 years. The parties' positions are far apart; the only thing common to them is the word "conditional". And yet, I find that both sentences fall in the available range based on the case law that they provided. This significant gap in the available sentences highlights the individualized assessment that is fundamental to sentencing.

### **Circumstances of the Offender**

[9] Mr. Vagenos is 45 years old. He has no prior criminal record. He has four children. He was raised in Brantford and did not graduate from high school. He has nonetheless worked a variety of jobs throughout his life. He lives in low-income housing in Brantford. He experienced serious sexual abuse as a child that has contributed to ongoing and lifelong mental health challenges. He has been a medical cannabis patient. He finds that psilocybin helps him deal with depression. He holds a strong conviction that psilocybin helps people with their mental health issues.

### **Analysis**

[10] The goal of any sentence under the *Criminal Code* is to protect society, contribute to respect for the law, and help maintain a just, peaceful, and safe society (s. 718). The fundamental principle of sentencing is to impose a sanction that is proportionate to the

gravity of the offence and the offender's degree of responsibility (s. 718.1). This means that the sentence I impose must be tailored to Mr. Vagenos' personal circumstances and the circumstances of the offences that he committed.

[11] The core offences in this case were committed under the *Controlled Drugs and Substances Act*. In addition to the *Criminal Code* principles, the *CDSA* instructs that the fundamental purpose of the sentence imposed is to contribute to the respect for the law and the maintenance of a just, peaceful, and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community (s. 10).

#### Seriousness of selling psilocybin and its impacts in our community

[12] In support of their respective positions, counsel made submissions about the gravity and societal impacts of selling and consuming psilocybin. This case is not a referendum on the legality of psilocybin and whether it will or ought to be legalized in the future. I understand that some people have been granted an individual exemption under the *CDSA* to possess psilocybin. But the fact remains that psilocybin is an illegal Schedule III substance. There are no approved therapeutic products in Canada containing psilocybin. Consuming psilocybin can result in significant adverse psychological reactions, including anxiety, paranoia, panic, and disorientation. The Crown referred me to examples in the jurisprudence to show how these adverse reactions can lead to horrific, tragic consequences: see *R. v. Sullivan*, 2022 SCC 19 at paras. 20-21; *R. v. Brown*, 2022 SCC 18 at paras. 4-5, 14.

[13] The Crown asked me to take notice of the impact of drug use in the Hamilton community and to factor these impacts into my weighing of the sentencing principles. I acknowledge that drug use has negatively impacted the urban centres of cities and towns across this province, including Hamilton. But psilocybin is not on the same plane as many other controlled substances. The evidence from toxicologist Cara Shepherd explains how psilocybin is generally associated with low physiological toxicity and has not been associated with fatal intoxications. Psilocybin is not to blame for what afflicts Hamilton's urban core. Housing instability, mental unwellness, property crime, and violent tendencies cannot be tied to the consumption of psilocybin. While the jurisprudence provides discrete examples of where psilocybin abuse led to deadly consequences, the same could be said for any number of substances, including alcohol.

[14] Both counsel made reference to how Mr. Vagenos was selling psilocybin in a public-facing storefront instead of through more furtive means. The Crown argued that this "scofflaw" conduct was aggravating; the defence argued that distribution through a storefront is safer and thus mitigating when compared to transactions in a back alley or drug den. While I cannot accept that the method of distribution was mitigating, I also do not see the storefront method as an aggravated form of distribution. Mr. Vagenos was only an employee of the store who did not share in the profits. Even if the owner of the store was a "scofflaw", that descriptor does not suit Mr. Vagenos. Furthermore, a storefront that only sells psilocybin is less harmful to the community than a roving drug dealer who offers psilocybin amongst their panoply of offerings.

[15] Before moving on, I accept the Crown’s argument that Mr. Vagenos does not merit mitigation for his professed motive of wanting to help people. As I understand the defence argument, Mr. Vagenos has benefited from his therapeutic drug use and believed in the remedial powers of psilocybin. I find that Mr. Vagenos could have pursued lawful avenues if his true aim was to help people. And there is no evidence in this case that Mr. Vagenos was selling psilocybin to people with a *CDSA* exemption or legitimate medical needs. The sale to the undercover officer suggests otherwise.

#### Seriousness of breaching the undertaking

[16] I turn to the greatest bar to imposing a conditional discharge: Mr. Vagenos’ decision to breach his undertaking by returning to the store to sell psilocybin. The defence described this aggravating factor as the “elephant in the room”.

[17] The conditions in an undertaking are not recommendations. They must be followed. The condition in this case is not akin to those critiqued by the Supreme Court in *R. v. Zora*, 2020 SCC 14 at para. 76. This condition was clear, appropriate, and directly tied to managing the risk of offending conduct.

[18] Nevertheless, I accept the defence argument that Mr. Vagenos failed to appreciate the seriousness of the undertaking and its conditions until he was arrested and held in custody. While they do not provide an excuse, these circumstances contextualize the breach. Mr. Vagenos had never interacted with the criminal justice system until July 2023. It was not until he was arrested, held overnight for a bail hearing, and then released by a justice of the peace that Mr. Vagenos appreciated the necessity of compliance. That was his wakeup call. When committing the second set of offences, Mr. Vagenos had not even appeared in court on the original set of charges. The solemnity and significance of the criminal justice system had not yet been imprinted on Mr. Vagenos. The gravity of the breach must consider these circumstances along with Mr. Vagenos’ clean record both before July 2023 and following his release on bail.

#### Aggravating and mitigating factors

[19] I have identified the following aggravating factors:

- (1) Mr. Vagenos blatantly breached his undertaking when he returned to work at the store.
- (2) Since Mr. Vagenos was operating a store, the drug trafficking was a frequent and ongoing concern.

[20] I also note that the store was located within a 10-minute walk from Montgomery Park and W.H. Ballard Elementary School.<sup>1</sup> Given the commercial nature of Main Street East and the submissions of counsel, I do not find that the statutory aggravating factor in s. 10(2)(iii) of the *CDSA* is engaged in this case (trafficking near a school, school grounds, or any other public place usually frequented by persons under the age of 18 years).

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<sup>1</sup> Both counsel invited me to look at Google Maps to ascertain the location of the store and its distance from relevant places in the neighbourhood.

[21] I have identified the following mitigating factors:

- (1) Mr. Vagenos comes before the court without a criminal record.
- (2) Mr. Vagenos pleaded guilty. He took full responsibility for his conduct. I accept that he is remorseful. It was evident on his face during the proceedings. However, I would not characterize this an early guilty plea.
- (3) The guilty plea saves court time in a busy jurisdiction, although it does come in the face of a seemingly strong Crown case.
- (4) After the initial breach of his undertaking, Mr. Vagenos complied with his release order.
- (5) Mr. Vagenos is employed and working two jobs. He is apparently working over 70 hours per week.
- (6) Mr. Vagenos is confronting mental health challenges that could be related to the sexual abuse he endured as a child.
- (7) The defence filed character references that speak fondly of Mr. Vagenos and his positive attributes. He appears to be a devoted family man.

[22] I find Mr. Vagenos' motivations for committing the crimes to be a neutral factor. He was selling controlled substances to make money. But he was not motivated by greed. Mr. Vagenos was only an employee of the operation and was apparently making \$20/hour. He liked the job for its flexible hours. I am told that he went back in violation of his undertaking because he needed to make ends meet.

A conditional discharge is not contrary to the public interest

[23] The sentence that I impose must denounce the offending conduct, deter the public from selling psilocybin, deter Mr. Vagenos from committing crimes, promote a sense of responsibility, and assist Mr. Vagenos in his rehabilitation. In this case, a sentence that emphasizes Mr. Vagenos' rehabilitation will protect society by ensuring that he stays on a law-abiding path: see *R. v. Sydor*, 2024 ONCJ 215 at para. 15.

[24] I am satisfied that a conditional discharge can achieve the relevant sentencing principles: see *Sydor* at paras. 14-17. Section 718.2(e) of the *Criminal Code* directs me to consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the community. And section 718.2(d) directs that an offender should not be deprived of their liberty if less restrictive sanctions may be appropriate in the circumstances.

[25] A conditional discharge is in the best interests of Mr. Vagenos and is not contrary to the public interest (s. 730(1)).

[26] First, Mr. Vagenos has been specifically deterred. He spent two actual days in pre-sentence custody after his arrest on the second set of charges. He has since secured legal employment outside the space of psilocybin. He has no criminal record and had no

issues complying with his court-issued release order. A conditional discharge will also continue to specifically deter Mr. Vagenos. If Mr. Vagenos breaches the order or commits a new offence, the Crown could seek to revoke the discharge and have Mr. Vagenos convicted and sentenced pursuant to s. 730(4) of the *Criminal Code*.

[27] Second, a conditional discharge can achieve general deterrence: see *R. v. Hayes*, [1999] O.J. No. 938 at para. 32. Serious facts are not an automatic bar to a discharge: *R. v. Angelov*, 2013 ONCJ 117 at para. 12. The offences committed in this case are not sufficiently grave to eliminate the imposition of a conditional discharge.

[28] Third, this court must denounce the specific conduct of Mr. Vagenos and not drug trafficking at large. Parliament has categorized controlled substances into schedules for a reason. Unlike Schedule I or II substances, trafficking a Schedule III substance is a hybrid offence that carries a maximum sentence of 18 months when prosecuted by summary conviction. A conditional discharge achieves the requisite level of denunciation.

[29] Fourth, a discharge is appropriate because these offences are “out of character” and bear some connection to the “mental turmoil” that Mr. Vagenos was experiencing in his life: *R. v. Taylor* (1975), 24 C.C.C. (2d) 551 at 552.

[30] Fifth, the value of registering a conviction is outweighed by the potential detriment that a conviction could have on Mr. Vagenos’ employment prospects. Steady, lawful employment with the potential for promotion is crucial to Mr. Vagenos’ rehabilitation. The probation order that accompanies the discharge will be geared to supporting his ongoing rehabilitation.

[31] Finally, the Crown encouraged me to sentence Mr. Vagenos in accordance with the sentence imposed in *R. v. Jeaurond*, 2019 ONSC 374. The offender in that case was sentenced to eight months imprisonment less pre-sentence custody for the possession of psilocybin for the purpose of trafficking. She was also sentenced to three months concurrent for firearms offences that bordered on the regulatory. The drugs and firearms were found in her home. I am satisfied that the case before me is sufficiently different and calls for a different sentence: see *R. v. Nasogaluak*, 2010 SCC 6 at para. 44; *R. v. Lacasse*, 2015 SCC 64, at paras. 57-58. Mr. Vagenos pleaded guilty less than a year after committing his offences, while the offender in *Jeaurond* waited over three years. Even though the firearms offences in *Jeaurond* were not particularly serious, the judge still found that storing a large quantity of psilocybin next to ten long guns was an aggravating factor (paras. 27, 83-84). In addition, the offender in *Jeaurond* may have received a less severe sentence if a conditional sentence had been available at the time. In short, I do not view the offences committed by Mr. Vagenos to be as severe as how they were described in *Jeaurond* (paras. 80, 90). Using the range that applies when psilocybin is being trafficked alongside other drugs like cocaine and oxycodone does not reflect the specific operation and moral blameworthiness of this case.

#### The sentence respects the parity principle

[32] On May 23, 2024, Camara J. sentenced Matthew Ferguson, the owner/manager of this same store, to a 12-month conditional sentence. The distinctions between the cases of Mr. Ferguson and Mr. Vagenos justify their distinct sentences. Mr. Ferguson has

a higher degree of moral blameworthiness. He hired staff and directed their tasks. His remuneration was presumably not limited to an hourly wage. I have also found that emphasizing Mr. Vagenos' rehabilitation will best honour the sentencing principles and serve to protect society in the long run. Finally, while Mr. Ferguson received an objectively stiffer sentence, he will be subject to community supervision for 12 months. Mr. Vagenos will be supervised for 30 months. When considering the sentences as a whole, their disparity is appropriate and consistent with the parity principle.

### **Disposition**

[33] I order that Mr. Vagenos be discharged on the conditions prescribed in a probation order. This sentence is concurrent on all counts. The probation order will run for 30 months on the following terms. The length of the order, along with the terms, are not designed to punish Mr. Vagenos for breaching his undertaking. Rather, the breach joins with Mr. Vagenos' circumstances to establish the importance of structure when fashioning a rehabilitative sentence:

- (1) Keep the peace and be of good behaviour.
- (2) Appear before the court when required to do so by the court.
- (3) Notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.
- (4) Report in person or by telephone to a probation officer within two working days and after that at all times and places as directed by the probation officer or any person authorized by the probation officer to assist in your supervision.
- (5) Your reporting condition ends when you have satisfied your probation officer that you have:
  - (a) completed all your community service hours; and
  - (b) completed all your counselling.
- (6) Cooperate with your probation officer. You must sign any releases necessary to permit the probation officer to monitor your compliance and you must provide proof of compliance with any condition of this order to your probation officer on request.
- (7) Attend and actively participate in all assessment, counselling, or rehabilitative programs as directed by the probation officer and complete them to the satisfaction of the probation officer, including but not limited to programs for: substance abuse; psychiatric or psychological issues, and stress management.
- (8) Provide proof of your attendance and completion of any assessments, counselling, or rehabilitative programs as directed.

(9) Perform 180 hours of community service work on a rate and schedule to be directed by the probation officer, but the hours must be completed within 18 months of the start date to this order.<sup>2</sup>

(10) Make reasonable efforts to seek and maintain suitable work and provide proof of same as required by the probation officer.<sup>3</sup>

(11) Do not seek or maintain employment in any business or organization that sells psilocybin in any form to members of the public.

[34] I impose a weapons prohibition under s. 109(1) of the *Criminal Code*. Mr. Vagenos is prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, or prohibited ammunition for life, and any other firearm or any cross-bow, restricted weapon, ammunition, or explosive substance for 10 years.

[35] I am satisfied that a DNA order serves the best interests of the administration of justice: see *R. v. F. (P.R.)*, 57 O.R. (3d) 475, 2001 CanLII 21168 at para. 25. Section 5(2) of the *CDSA* creates a secondary designated offence. Although I do not expect Mr. Vagenos to return before the courts, the offences involved repeated criminal conduct and the intrusion into his privacy is minimal.

[36] Mr. Vagenos will be given time to pay the victim surcharges.

[37] I thank both counsel for their thorough and helpful submissions.

Released: May 28, 2024

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Signed: Justice Davin M.K. Garg

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<sup>2</sup> I impose community service hours to ensure that Mr. Vagenos follows a lawful path to help others and give back to the community.

<sup>3</sup> I find that gainful employment is important to Mr. Vagenos' successful rehabilitation.