

**Nom d'utilisateur:** Eugenie Depatie-Pelletier

**Date et heure:** 13 February 2018 23:27:00 EST

**Numéro de tâche:** 61366620

## Document (1)

1. [R. v. Martinez-Mendez, \[2018\] A.J. No. 48](#)

**Client/Cause:** -None-

 [R. v. Martinez-Mendez, \[2018\] A.J. No. 48](#)

Alberta Judgments

Alberta Provincial Court

J.D. Bascom Prov. Ct. J.

January 15, 2018.

Docket: 140238593P1

Registry: Calgary

[2018] A.J. No. 48 | 2018 ABPC 8

Between Her Majesty the Queen, and Juan German Martinez-Mendez

(28 paras.)

## Case Summary

---

**Criminal law — Sentencing — Criminal Code offences — Offences against person and reputation — Assault — Assault — Particular sanctions — Probation — Conditional sentence — Sentencing considerations — Mitigating factors — Rehabilitation — Submissions — Submissions by Crown — Submissions by accused and counsel for accused — No previous record — Guilty plea — Remorse — Addicts — Alcohol — Intoxication at the time of commission of offence — Character evidence — Deportation — Sentencing of accused who pleaded guilty to assault causing bodily harm — Accused attended victim's residence and punched her once in eye — Accused sentenced to an 18-month conditional sentence with probation — Accused's actions were fueled by alcohol and consisted of single punch — Accused had no prior record and conviction would result in deportation, which would result in disproportionate sentence — Conditional discharge was in best interest of accused and was not contrary to public policy.**

Sentencing of an accused who pleaded guilty to assault causing bodily harm. The accused attended the victim's home in an intoxicated state. An argument occurred between the accused and the victim and the accused punched the victim in the eye. The victim's two children were home at the time of the offence and the assault was witnessed by the victim's eight-year-old daughter. Since the incident, the victim suffered from migraine headaches. She also continued to experiencing a watering eye and blurred vision. The accused was 37 years of age with no prior record. He had been in Canada since 2005 as a temporary foreign worker from Mexico. He showed genuine remorse for his actions. Since the time of the offence, the accused had taken steps to deal with his alcohol addiction, and he had been sober for three years. The Crown sought a suspended sentence and 12 months probation. The accused sought a conditional discharge.

HELD: Accused sentenced to an 18-month conditional sentence with probation.

Although there were significant aggravating factors, the accused's actions were fueled by alcohol and consisted of a single punch. He had no prior record and a conviction would result in his deportation. A conviction would therefore result in a sentence that was disproportionate and offend the principle of parity. A conditional discharge was in the best interest of the accused and was not contrary to public policy. Sentence: 18-month conditional sentence with probation for assault -- Criminal Code, s. 267(b).

## **Statutes, Regulations and Rules Cited:**

---

Criminal Code, R.S.C. 1985, c. C-46, s. 267(b), s. 718.2(ii), s. 730

Immigration and Refugee Protection Act, s. 36(2), s. 36(3)(a)

## **Counsel**

---

C. Schulhauser, for the Crown.

B. Harsanyi, for the Accused.

---

### **Reasons for Sentence**

#### **J.D. BASCOM PROV. CT. J.**

1 Juan German Martinez-Mendez is charged:

Count 1: On or about the 1st day of March, 2014, at or near Calgary, Alberta, did, in committing an assault, cause bodily harm to Ashley Marie Desjardins, contrary to section 267(b) of the *Criminal Code of Canada*.

2 The Crown proceeded by way of summary conviction procedure.

3 Agreed Statement of Facts was prepared, read into the record, admitted by the defence, and marked as Exhibit 1.

4 The Agreed Statement of Facts outlined an incident that occurred at the complainant's residence which she shared with her two children. Mr. Martinez-Mendez attended at the home in an intoxicated condition, an argument occurred between the complainant and the offender. Martinez-Mendez punched the complainant in her left eye. The assault was witnessed by the complainant's eight year old daughter. The offender left the home.

5 The complainant had a subconjunctival hemorrhage and contusions to the outer tissue of her eye which manifested itself by a throbbing headache and blurred vision.

6 The complainant attended the Peter Lougheed Hospital the same day as the incident for treatment to the eye.

7 During the sentencing hearing, the complainant testified that since this incident she has suffered from migraine headaches and that her eye continues to be affected by watering and blurred vision. She testified that she had not sought medical treatment for a year and saw a doctor about her migraines in 2014.

8 The medical records, Exhibit 2, which were generated on or about the time of the assault, do not provide any information concerning migraine headaches. In Dr. Chow's letter of March 2, 2014, he describes the complainant suffering "blunt trauma to the left eye" which caused "contusion of the left lower eyelid, left ocular subconjunctival

hemorrhage and left commotio retinae". Although Dr. Chow referred the complainant to the Rockyview General Hospital Urgent Eye Clinic, Exhibit 2 does not provide any follow-up diagnosis or prognosis.

**9** From the nature of the injury, the medical reports and the testimony of the complainant, I conclude that the injury fits the definition of bodily harm. As mentioned in argument, I cannot conclude that such injury caused the subsequent migraine headaches as described by the complainant. It is clear from the evidence of the complainant that she is still affected by this particular injury but has not sought medical attention for a year.

**10** The offender, Juan Martinez-Mendez, is 37 years of age, from Mexico and has no prior criminal record. He has been in Canada since 2005 as a temporary foreign worker. Details of his background are outlined in Exhibit 4, a Presentence Report.

**11** The Crown takes a position the Mr. Martinez-Mendez should receive a suspended sentence and probation for a period of 12 months. The Defence position is similar in nature however Mr. Harsanyi argues that the offender should receive a conditional discharge with a period of probation.

**12** The only issue to determine in this particular case is whether a conditional discharge is an appropriate penalty for domestic assault.

**13** The Crown points out that deterrence and denunciation are primary principles in sentencing in the cases of domestic assault. The Crown points to two aggravating features, that being, s. 718.2(ii) of the *Criminal Code* as well as the assault took place in front of the complaint's eight year old daughter.

**14** Section 730 of the *Criminal Code* outlines requirements that are necessary before the Court exercises its discretion to grant a discharge.

**15** As stated in *R v Elsharawy* (1997), 119 CCC (3d) 565 (Nfld CA), followed in *R v Edmunds* (2012), 288 CCC (3d) 164 (Nfld CA):

3 For the Court to exercise its discretion to grant a discharge under s. 730 of the *Criminal Code*, the Court must consider that that type of disposition is: (i) in the best interests of the accused: and (ii) not contrary to the public interest. The first condition presupposes that the accused is a person of good character, usually without previous conviction or discharge, that he does not require personal deterrence or rehabilitation and that a criminal conviction may have significant adverse repercussions. The second condition involves a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law. See *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (BCCA) and *R. v. Waters* (1990), 54 C.C.C. (3d) 40 (Sask. QB).

**16** When it comes to issues of discharge, the Court is bound by *R v MacFarlane*, 1976 CarswellAlta 45 (*MacFarlane*), in which the Alberta Court of Appeal stated the following:

14 In consideration of the exercise of the discretion to grant an absolute or conditional Discharge, we emphasize that it is quite impossible to lay down rules which would cover the myriad of situations which may appear before a Judge confronted with the task of appropriate sentence in any given case. We are of the opinion, however, that the following are some of the relevant factors which must be considered in every case.

15 Firstly, there is the nature of the offence. While it is to be borne in mind that the Section may be used in respect of any offence other than one for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life, or by death, one must nevertheless be concerned with the seriousness of the offence, and it would seem appropriate that the more serious the offence, the

less frequent would be the use of a Discharge in sentencing. It would, for instance, be a most exceptional case where a crime involving violence would be dealt with by an order of Discharge.

16 Secondly, one has to consider the prevalence of the particular offence as it may exist in the community from time to time.

17 Thirdly, one must consider whether an Accused stood to make some personal gain at the expense of others, as distinct from some activity which might be in the nature of a prank or in respect of which his motives were other than self-interest.

18 Fourthly, where the offence is relating to property, as here, the value of the property destroyed or stolen must be relevant. The theft of a ball-point pen would not ordinarily be regarded as seriously as the theft of a colour television set.

19 Fifthly, we think that it is relevant to consider whether the crime was committed as a matter of impulse, and in the face of unexpected opportunity, or whether it was calculated.

20 Sixthly, we think it relevant to consider whether the circumstance that an Accused has committed the offence is something which should be a matter of record so that members of the public may have the opportunity of being aware of the fact that that Accused had committed the offence in question. Theft from an employer would, in most cases, involving as it does a breach of trust, not warrant a Discharge, as it may be thought that prospective employers should have the means of knowing something about the character of the prospective employee. Even here there may be exceptional circumstances, such as a falling-out, or a civil dispute about money which did not amount to colour of right, but which might result in the offence being in the nature of a technical one.

**17** As noted in *MacFarlane*, it would be "most exceptional case where a crime involving violence would be dealt with by an order of discharge." That being said, there are a number of authorities from the Court of Queen's Bench where discharges were granted in cases of assault. Some examples are *R v TS*, [1999 ABQB 990](#), *R v Adams*, [2009 ABQB 160](#); *R v DED*, [2007 ABQB 508](#) and *R v Dunn*, [2013 ABQB 181](#). In addition to the Queen's Bench decisions there are a number of Provincial Court decisions where discharges were granted, examples are *R v Serafinchon*, [2009 ABPC 308](#) and *R v Aymont*, [2008 ABPC 285](#).

**18** In *R v Teclesenbet*, [2009 ABCA 389](#), the Court of Appeal overturned a discharge where the offender after trial was convicted of assault causing bodily harm. The Crown had proceeded by way of indictment. A presentence report indicated that the offender minimized the seriousness of the offence and justified his actions.

**19** In *R v Vail-Paris*, [2014 ABPC 42](#), Judge Fradsham at para 35 reviews the law on conditional discharges in cases involving violence.

**20** At para 40 Judge Fradsham stated: "Despite the fact that discharges can and are granted for violent offences, Courts have cautioned that it must be an "exceptional" case to warrant granting a discharge for a crime of violence."

**21** Mr. Martinez-Mendez has no prior criminal record and according to the presentence report he showed genuine remorse for his actions and how it affected the complainant. The offence occurred when the offender was intoxicated; he has taken positive steps to deal with his alcohol addiction, and has been sober for 3 years. In addition to the positive presentence report, there are letters of reference in support of Mr. Martinez-Mendez.

**22** Defence points out that Mr. Martinez-Mendez is a foreign national in Canada on a temporary foreign workers visa. Pursuant to s. 36(2) of the *Immigration and Refugee Protection Act*, Mr. Martinez-Mendez is inadmissible on grounds of criminality if he is convicted of an offence punishable by way of indictment. Section 36(3)(a) of that *Act* deems all hybrid offences to be indictable, even if prosecuted summarily. These sections indicate that the offender may be liable for deportation if a conviction is registered.

**23** The decision of *R v Croteau*, [2015 ABPC 142](#) (*Croteau*), presented a similar issue involving admittance to the United States.

**24** Judge Rosborough does a complete review of the authorities concerning collateral sentencing issues. At para 52 of *Croteau*, Judge Rosborough stated:

"The collateral immigration consequence in this case is relevant as flowing from the objective of rehabilitation and the principle of parity. It ought to be taken into account when considering an individualized sentence. While both a suspended sentence with probation and a conditional discharge with probation can serve the objective of rehabilitation, the collateral immigration consequence at play in this instance would negatively impact the principle of parity. That consequence militates in favour of granting a discharge."

**25** In *R v Sinclair*, [2016 ABPC 209](#), Judge Semenuk in granting a conditional discharge for a charge of assault with a weapon stated the following at para 34:

As in all sentencing cases, the ultimate disposition for an offender must reflect the fundamental purpose and all the principles of sentencing provided for in Section 718 of the *Criminal Code*. The sentence must be in accordance with the fundamental principle of proportionality found in Section 718.1 of the *Code*. **Arcand, Pham, Lacasse**. As well, the sentence must account for any relevant aggravating and mitigating circumstances tailored to fit the individual before the Court. "Individualized" sentencing as opposed to "tariff" sentencing, has been approved by the Supreme Court of Canada, in *R. v. McDonnell*, [\[1997\] 1 S.C.R. 948](#) and *R. v. Proulx (2000)*, [140 CCC \(3d\) 449](#). Finally, in accordance with Section 718.2(b) (c)(d) and (e) of the *Code*, there should be parity in sentencing similar offenders for similar offences; a global sentence should not be excessive; the least restrictive sentence should be imposed; and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

**26** Although there are significant aggravating factors Mr. Martinez-Mendez's actions were fueled by alcohol and consisted of a single punch followed by him exiting the residence. He has no prior criminal record and a conviction will trigger the collateral immigration consequences which would result in his deportation. A conviction would result in a disproportionate sentence and offend the principles of parity.

**27** I conclude that a conditional discharge would be in the best interest of Mr. Martinez-Mendez and not contrary to public policy.

**28** There will be a conditional discharge for a period of 18 months and during that period of time Mr. Martinez-Mendez will be on probation. I will hear submissions from counsel on the probationary conditions.

Dated at the City of Calgary, Alberta this 15th day of January, 2018.

J.D. BASCOM PROV. CT. J.