

Judgment 48/2007

Martyn Andrew Noyon – Court of Appeal (Criminal Appeal 374) – 12 December 2007

Possession of Class A Drug with intent to supply – appeal against sentence – drug in the form of Fentanyl patches – how drug in this form is to be related to the Richards guidelines – appeal dismissed

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Criminal 374

The 12th day of December, 2007 before the Hon Michael Jacob Beloff, QC, presiding, Peter David Smith, QC and Sir de Vic Carey

THE LAW OFFICERS OF THE CROWN

- v -

MARTYN ANDREW NOYON

(Appellant)

In the appeal of the above Appellant from the sentence imposed on him by the Royal Court on 3rd September 2007;

THE COURT, having on the 10th day of December, 2007 heard Advocate R. Eeles for the Appellant, and Crown Advocate F. Russell, thereon, and, having GRANTED legal aid, this day GAVE JUDGMENT in the attached terms and DISMISSED the appeal.

C A RODGER

Deputy Registrar of the Court of Appeal

IN THE COURT OF APPEAL GUERNSEY
CRIMINAL DIVISION

In the Matter of an Appeal Against Sentence by

Between

Martyn Andrew NOYON

-v-

Applicant

THE LAW OFFICERS OF THE CROWN

Respondent

**Judgment delivered Wednesday 12th December
2007**

**Before: Mr Michael Beloff QC
Mr Peter Smith QC
Sir de Vic Carey**

CAREY JA

Background

1. This is the judgment of the Court. This Appellant has been granted leave to appeal by the Single Judge. He is represented by Advocate Eeles to whom we extend Legal Aid to cover her preparation and work up to and including today.
2. The Appellant appeared for sentencing before the Deputy Bailiff and ten Jurats on the 3rd September 2007 when he pleaded guilty to a single count of possession on the 20th December 2006 of a Class A drug Fentanyl with the intention to supply to another. The Fentanyl the subject of the charge comprised 18 patches in the form of a gel of a strength of 100 mg
3. The Appellant who was described in the Social Enquiry Report as having "*a protracted and chronic history of substance misuse*" has a long criminal record. For this offence he was sentenced to 4½ years imprisonment to date back to 30th January 2007 from when he was remanded in custody.
4. This is the first time that the Royal Court has had to deal with sentencing in respect of Fentanyl and it is for that reason that the Single Judge has quite properly granted leave to Appeal to this Court, whilst indicating again quite properly to the Appellant that he was not thereby suggesting that the sentence should be reduced.

5. Before the Jurats started to hear the case, the Deputy Bailiff sensibly raised with Counsel the approach to sentencing for Fentanyl patches and Miss Brehaut who has, during her time as an Advocate, represented a great many drug offenders, was representing the Appellant. In her mitigation which she had been good enough to provide to the Royal Court in advance, she had suggested that 18 patches containing this quantity of Fentanyl was clearly towards the very bottom end of the scale and therefore did not attract a starting-point anywhere near those listed in *Richards*.
6. The report of Dr Mortimer is mentioned in this preliminary hearing but was not put before the Jurats. We have looked at that report as clearly it was in the Deputy Bailiff's mind when deciding how to approach sentencing and it is clear that Fentanyl is used clinically in place of Morphine. Its qualities were summed up usefully by Crown Advocate Russell when she presented the facts to the Jurats in the following terms:-

“The drug Fentanyl is a controlled drug of Class A and more specifically a narcotic analgesic, which is only available on prescription through legitimate healthcare sources. It is an exceptionally strong painkiller used for the management of pain during surgery and for persons with chronic to severe pain who are already physically tolerant of opiates. The drug is also used for the management of opiate withdrawal. Fentanyl is available in both liquid form and in patches made of clear plastic, which are applied to the skin; the patches come in varying strengths, the highest dosage being 100 mg.

Patches are referred to within the drug fraternity as “sticks” or “stickies”.

In the local drug using community Fentanyl patches are used in addition to and in place of heroin. An overdose of Fentanyl can result in sudden death through respiratory failure, cardiac arrest, cardiovascular collapse or severe anaphylactic reaction.”

7. In the preliminary hearing before the Deputy Bailiff, Advocate Russell admitted that one could not precisely compare these patches with the Class A drugs that the Court is normally dealing with when applying the *Richards* guidelines. Advocate Russell proffered her conclusion that the Court was dealing with 18 of these patches of a fairly high strength and that the Court might actually be looking in any event, at the lower end of the *Richards* guidelines, which are the same for powder as they are for tablets. This suggestion was taken up by the Deputy Bailiff who acknowledged that Miss Brehaut was arguing this should be dealt with far more leniently than other Class A drugs which came within the lower band of the *Richards* guidelines.
8. The possibility of further expert evidence was canvassed. The Deputy Bailiff however gave his indication that he was prepared to advise the Jurats to deal with this consignment as being in the lower end of the bands for Class A drugs, despite the submissions from Advocate Russell that this particular drug

was very powerful and. it was suggested, at least 80 times stronger than morphine itself.

9. Miss Brehaut, having heard what the Deputy Bailiff had to say, took instructions and appeared in the afternoon to accept the basis of the approach that the Deputy Bailiff was indicating he would adopt when discussing the matter with the Jurats and to mitigate on that basis.
10. The trial proceeded and, as is apparent, the offence was possession with intent to supply to others and that was conceded on behalf of the Appellant, evidence of the extent of the Appellants supplying activity being gleaned from a number of his mobile phone text messages which referred to “*stickies*”, which is, as has been indicated, the colloquial name for Fentanyl patches.

The Appellant’s Case

11. The Appellant is now represented by Advocate Eeles who seeks to go beyond the way in which Advocate Brehaut dealt with this matter at trial. She wishes to re-open the sentencing approach to Fentanyl and suggests that the *Richards* guidelines should have no application here. She also seeks to compare the way in which this case was disposed of with the disposal of a case involving the importation of Methadone which had recently been dealt with by the Royal Court - *Jonathon Richards* (no. 16 of 2007 - 4th September 2007).
12. Her submissions were considered by the Bailiff sitting as a Single Judge and in an expanded note of why leave was being granted, he made a number of requests of the Crown to provide this Court with further information concerning Fentanyl.

The Further Submissions of the Appellant and the Crown before this Court

13. Miss Eeles, before this Court, has two complaints about the sentence. Firstly, she says that Fentanyl falls outside the *Richards* guidelines and secondly that the starting point of 7 years was manifestly excessive. Crown Advocate Russell has put in a helpful skeleton, dealing with many of the issues raised by the Bailiff and annexing a report from the States Pharmacist. She also has made some enquiries in Jersey and appends a number of alarming reports of people dying there as a result of overdosing on Fentanyl. In the Pharmacist’s Report there are to be found answers to a number of questions put to him by Miss Eeles. From her submissions it seems clear that the main thrust of her argument is that the amount of Fentanyl contained in the 18 patches discovered in the possession of the Appellant weighed only 0.3 of a gram. Indeed the guidelines in *Richards* for Class A Drugs are silent on amounts of less than one gram but this omission may be for no other reason than the fact that amounts of known Class A Drugs weighing less than one gram have up to the present time been regarded as not justifying a charge for drug trafficking, which engages the jurisdiction of the Royal Court rather than simple possession which would be dealt with in the Magistrate’s Court – if indeed it is in ordinary circumstances of sufficient quantity to form the basis of a charge. In Mrs Russell’s submissions there is also included firstly a statement from WPS Sylvester concerning the experience of the Guernsey Police with Fentonyl abuse and for an extract from the legislation of New South Wales

(based we may reasonably assume on expert research) which equates 0.0025 of Fentanyl with one gram of heroin.

The Conclusions of this Court

14. The material produced by Crown Advocate Russell and her submissions thereon have been a great help and in an ideal world would have been before the sentencing Court. However, this material reinforces the correctness of the approach adopted by the Jurats under the guidance of the Deputy Bailiff, namely that this offence should in principle be treated no less severely than any other offence of possession of a small quantity of a Class A drug with intent to supply. Although in *Richards* this Court shied away from value as a significant factor in sentencing, it is clear from the statement of Sergeant Sylvester that there is a market value for these patches and that the value of what was seized from the Appellant is not insignificant. In view of the high risk of overdose, if this drug is misused, the Court is not impressed with arguments that this consignment is of a trifling amount, which should fall outside *Richards*.

15. In this Courts view, trafficking in this particular drug, which it would appear, only enters the illicit market when those who are prescribed the drug for genuine medical reasons, choose to make money out of selling a drug that has lawfully been prescribed for them, is as serious, if not more serious than trafficking in other class A drugs of similar quantity. We are concerned solely with the facts of this case and the issue as to whether the sentence imposed on this Appellant is too high in the circumstances. It is to be hoped that with a tightening in the practices of those who prescribe these medications the opportunities for those of a like mind to this Appellant to establish an illicit trade in what appear to be originally prescription drugs may lessen. In regard to this Appeal this Court finds no fault in the approach of the Royal Court in selecting a starting point of seven years in the case of this Appellant and finishing up with a sentence of 4 ½ years after discount for plea and other mitigation. This Appeal is therefore dismissed.