

[2] To cope, Mr Doyle began drinking heavily on the weekends. He also used MDMA. To fund his drug use, he began dealing the drug to friends, including other members of the military.

[3] Mr Doyle pleaded guilty to one charge of possession of MDMA for the purpose of supply.¹ He applied for a discharge without conviction.² The Crown did not oppose his application.³ On 16 June 2021, Judge Northwood refused to discharge Mr Doyle.⁴ He was convicted and sentenced to five months' community detention and nine months' supervision.⁵

[4] Mr Doyle now appeals the Judge's refusal.

The offending

[5] On 19 June 2020, the police executed a search warrant at Mr Doyle's home address in Palmerston North. A drug detection dog indicated the presence of controlled drugs in two bedrooms.

[6] The police first searched Mr Doyle's bedroom. There they located \$2,070 in cash (predominantly in \$50 denominations), a tick list and a set of electronic scales.

[7] The police then searched the second bedroom. They found two zip-lock plastic bags containing a total of 28.94 grams of MDMA; another seven zip-lock bags together containing 10.53 grams of MDMA; a number of empty zip-lock bags; a white dinner plate with a rolled up \$50 note and another set of electronic scales on it; and a small white dish containing MDMA residue.

[8] It was common ground the drugs and paraphernalia found at the address belonged to Mr Doyle.

¹ Misuse of Drugs Act 1975, s 6(1)(f) and (2)(b). Maximum penalty of 14 years' imprisonment.

² Sentencing Act 2002, ss 106–107.

³ In a memorandum dated 30 April 2021 the Crown Prosecutor considered that “without formally consenting to the application, the Crown considers Mr Doyle's application is properly made out on the merits”.

⁴ *R v Doyle* [2021] NZDC 9995.

⁵ *R v Doyle* [2021] NZDC 22864.

Legal principles — discharge without conviction

[9] If a person pleads guilty to an offence, the court may, instead of imposing a sentence, direct that the offender be discharged.⁶ The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.⁷

[10] In *Z (CA447/2012) v R*, this Court set out a three-stage test to be applied by the courts when considering applications for a discharge without conviction:⁸

That is: when considering the gravity of the offence, the court should consider all the aggravating and mitigating factors relating to the offending and the offender; the court should then identify the direct and indirect consequences of conviction for the offender and consider whether those consequences are out of all proportion to the gravity of the offence; if the court determines that they are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although, as this Court said in *Blythe*, it will be a rare case where a court will refuse to grant a discharge in such circumstances).

(Footnote omitted.)

District Court decision

[11] Judge Northwood began by assessing the gravity of Mr Doyle's offending.⁹ He considered that Mr Doyle's offending was commercial in nature.¹⁰ He further considered it an aggravating factor that he was selling MDMA to military personnel.¹¹ However, the seriousness of the offending was mitigated to some extent by Mr Doyle's early guilty plea, youth, loss of career in the army, efforts to rehabilitate, and the effect of parallel, but independent, proceedings in the military jurisdiction.¹² Taking those factors into account, the Judge assessed the gravity of Mr Doyle's offending as moderate.¹³

⁶ Sentencing Act, s 106(1).

⁷ Section 107.

⁸ *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 at [27], citing *A (CA747/2010) v R* [2011] NZCA 328; and *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620.

⁹ *R v Doyle*, above n 4, at [9].

¹⁰ At [13].

¹¹ At [13].

¹² At [11] and [14].

¹³ At [14].

[12] The Judge then turned to the consequences of conviction. He noted that when considering loss of employment, it is typically “necessary to point to some acute repercussion personal to the offender which may result in a consequence wholly disproportionate to the seriousness of the offence”.¹⁴ While the Judge accepted that Mr Doyle’s youth was a factor, he did not accept that Mr Doyle had no transferrable skills.¹⁵ There was no particular career choice which a conviction would impede.¹⁶ The Judge continued that this was “not a case of issues with travel or known restrictions on professional registration”.¹⁷

[13] The Judge concluded that the generic risk on Mr Doyle’s employment prospects was not out of all proportion to the moderate gravity of his offending.¹⁸ Mr Doyle was accordingly convicted¹⁹ and sentenced.²⁰

Approach on appeal

[14] An appeal against the refusal to grant a discharge without conviction is an appeal against both conviction and sentence.²¹ In *Jackson v R*, this Court observed that:²²

... the principled basis for determining an appeal against a discharge without conviction is to establish that a miscarriage of justice has occurred by virtue of a material error by the sentencing judge in entering a conviction. That is because a trial includes a proceeding in which the appellant has pleaded guilty. Alternatively, it can be said that a miscarriage of justice has occurred “for any reason” if the Judge has erred in applying the principles for discharging an offender without conviction found in s 107 of the Sentencing Act.

[15] The threshold test in s 107 is not a matter of discretion, but rather a matter of fact requiring judicial assessment, which can be subject to appeal on normal appellate

¹⁴ At [15].

¹⁵ At [25].

¹⁶ At [15] and [27].

¹⁷ At [27].

¹⁸ At [28]–[29].

¹⁹ At [30].

²⁰ *R v Doyle*, above n 5.

²¹ *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [7]–[9].

²² At [12].

principles.²³ The court's discretion to discharge without conviction under s 106 arises and exists only if the court is satisfied that the s 107 threshold has been met.²⁴

Did the Judge overstate the gravity of Mr Doyle's offending?

[16] Mr Mulgan, for Mr Doyle, submitted that the Judge overstated the gravity of Mr Doyle's offending. He said that Mr Doyle offended in circumstances of exceptional personal upheaval. The NZDF compounded his emotional distress in failing to appropriately manage the issue. Mr Mulgan submitted that these circumstances, in combination with Mr Doyle's youth, mitigate the seriousness of his offending.

[17] Ms Davies, for the Crown, submitted that the Judge correctly categorised Mr Doyle's offending as of moderate gravity. She submitted that his offending was not at the lowest end of the possession for supply scale given the quantity of drugs found in Mr Doyle's possession and the indicia of commerciality. She argued that drug dealing is serious offending as it is a conscious choice to offend rather than a momentary action.

[18] The starting point in assessing the gravity of Mr Doyle's offending is the quantity of MDMA involved. The police found approximately 40 grams of MDMA at his address. As noted by the Judge, this indicates that there was a degree of commerciality to Mr Doyle's offending. While he is properly characterised as a street-level dealer, his offending is more serious than that at the lowest end of the scale — for example, a person peddling a few grams of MDMA (quantities which are below the five-gram threshold of the presumption of supply).²⁵ In contrast, his offending is considerably less serious than an organised commercial enterprise, which often involves multiple participants and significantly greater quantities of drugs. It is also relevant to the assessment that Mr Doyle was dealing a Class B drug rather than Class A.

²³ *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [11].

²⁴ At [11].

²⁵ Misuse of Drugs Act, sch 5.

[19] There are some mitigating factors of Mr Doyle's offending relating to his personal circumstances. Mr Doyle provided an affidavit in which he set out how those circumstances catalysed his offending. His uncontradicted account is that in early 2020, his partner of two years had an affair with his platoon commander. He had invested significantly in their relationship, particularly by providing financial support. Her infidelity left him distraught.

[20] Mr Doyle's evidence was that this was common knowledge within his army cohort. He said that it was incredibly difficult enduring their gossip and laughter. He said that his platoon commander had a reputation for behaving in this manner.

[21] Mr Doyle explained that inferior ranks are powerless against and vulnerable to their superior officers; they can exert total control over their subordinates. He commented that it was devastating to be forced daily to obey orders from his partner's lover and call him "sir".

[22] Additionally, Mr Doyle claimed his emotional distress was significantly exacerbated by the NZDF's callous and inappropriate management of the issue. He requested an internal transfer. This was met by a direction to "harden up".

[23] The NZDF transferred Mr Doyle only when pressed by the camp counsellor. Indeed the counsellor was Mr Doyle's sole source of support.

[24] During the 2020 COVID-19 lockdown, Mr Doyle began drinking more heavily to cope with this trauma. He also began using MDMA more frequently. He said that drugs gave him some respite from his distress. To fund his own use he then began selling MDMA to his friends, some of whom were military staff.

[25] While it is impossible not to feel some sympathy for Mr Doyle and the unenviable predicament he found himself in, we do not accept that these circumstances may be pressed into service as mitigating factors to the extent Mr Mulgan advances. As noted by the Judge, Mr Doyle is "not the first person" to use drugs to escape emotional issues and descend into drug dealing.²⁶ While we accept there may be some

²⁶ *R v Doyle*, above n 5, at [14].

nexus between his emotional trauma and his drug and alcohol abuse, the additional step into dealing MDMA in the quantities and manner he did is, in our view, a good deal more remote.

[26] On the other hand, we accept that before these events Mr Doyle demonstrated good character. His NZDF Retention Review described him as an “intelligent soldier” who would likely have had a “bright career ahead of him”. It recorded no significant lapses of service discipline. Nor does he have any history of offending. The index offending is properly characterised as out of character.

[27] It is common ground that Mr Doyle’s youth is also a mitigating factor.²⁷ Mr Doyle was 23 at the time of the offending. The neurological differences associated with youth of that age are recognised contributors towards offending. However, there are two factors which limit the extent of that contribution. The first is that drug dealing necessarily involves some degree of premeditation which may be inconsistent with notions of impulsive youthful behaviour.²⁸ Secondly, at 23, Mr Doyle sits close to or at the outer range of an age-related discount. Notwithstanding, we accept youth remains a relevant factor in this analysis.

[28] Mr Doyle entered an early guilty plea. He is genuinely remorseful. He has taken meaningful rehabilitative steps. These included attending drug and alcohol counselling (on referral from his doctor) and engaging openly and honestly with his counsellor. It is said he now no longer drinks alcohol or uses illicit substances. His counsellor’s view is that Mr Doyle presents a low risk of reoffending.

[29] Mr Mulgan submitted the Judge overstated the gravity of Mr Doyle’s offending. We cannot agree. *Rodrigo v Police* is of assistance.²⁹ There Mr Rodrigo pleaded guilty to supplying Ritalin, a Class B drug, to fellow University of Otago students.³⁰ He appealed his sentence upon learning that his co-offender was

²⁷ See for example *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77(a)]; *Grant v R* [2017] NZCA 614 at [31]; and *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [69] for this Court’s comments that age-related neurological differences between young people and adults mean that youth can mitigate an offender’s culpability.

²⁸ *Kolofale v R* [2022] NZCA 74 at [14].

²⁹ *Rodrigo v Police* [2014] NZCA 68.

³⁰ At [1]–[3].

discharged without conviction.³¹ This Court considered that Mr Rodrigo too should have been discharged without conviction.³²

Here the offending was low-level drug dealing for minimal profit by a young offender who was otherwise of good character, whose ADHD was undiagnosed and untreated, who has now taken steps to treat his condition, and who is unlikely to reoffend. *These matters place the gravity of the offending at the low end.* We consider that the consequences of conviction are out of all proportion to that offending. We consider the proper outcome in these circumstances is to discharge Mr Rodrigo without conviction.

(Emphasis added.)

[30] While *Rodrigo* shares some parallels with the present case including street level Class B dealing and previous good character, the gravity of Mr Doyle's offending is not mitigated by an untreated condition such as ADHD. Furthermore, the quantity of drugs involved and indicia of commerciality elevate the seriousness. Approximately 40 grams of MDMA is not an insignificant quantity. In combination with over \$2,000 in cash, tick books, scales and zip-lock bags, the logical inference is that Mr Doyle was profiting from his dealing beyond that necessary to fund his own use.

[31] On the other hand, we accept Mr Doyle's offending is less serious than that in *Police v Graham*.³³ Mr Graham pleaded guilty to three charges of burglary, one charge of offering to supply methamphetamine, one charge of possessing a non-approved psychoactive product with intent to supply, and one charge of possessing a controlled drug.³⁴ He was a serving member of the Royal New Zealand Air Force (RNZAF) who used his security clearance to enter a RNZAF building and steal \$200,000 worth of equipment.³⁵ When police investigated the burglaries, Mr Graham had in his possession 10 BZP pills, 391 grams of NBOME, and two cell phones through which he facilitated the supply of methamphetamine.³⁶

³¹ At [1].

³² At [18].

³³ *Police v Graham* [2017] NZHC 3299.

³⁴ At [5].

³⁵ At [2]–[3].

³⁶ At [4].

[32] Hinton J considered that on its face the offending was serious.³⁷ But this was “materially reduced” by a number of factors.³⁸ Those included Mr Graham’s co-operation with police; his early guilty plea and remorse; his previously unblemished record; his rehabilitative progress in becoming drug free and low risk of reoffending; and the effect of his hostile deployment overseas.³⁹ Hinton J’s view was that the combination of these factors reduced Mr Graham’s culpability such that his offending was properly characterised as moderate.⁴⁰

[33] Mr Doyle’s offending involved a significantly smaller quantity of controlled substances in a less serious class. He did not use his security clearance to facilitate the burglary of high value equipment. Further, many of the mitigating factors which applied to Mr Graham also apply to Mr Doyle. Although Mr Doyle’s emotional trauma may not be as scarring as hostile duty (albeit subjective), his youth is also a factor. For those reasons his offending may be assessed as sitting towards the lower end of the moderate range.

Did the Judge understate the consequences of a conviction?

[34] The second stage requires the court to assess the direct and indirect consequences of a conviction.

[35] Here, the particular consequence advanced was that a conviction impedes Mr Doyle’s employment prospects.

[36] Mr Mulgan submitted that Mr Doyle always aspired to serve his country in the armed forces. He argued that the conviction resulted in him being administratively discharged with no specific transferrable skills. He submitted the Judge incorrectly required Mr Doyle to present clear career plans, when the necessary standard is simply to satisfy the Court that a conviction presents a real and appreciable risk to the individual’s career prospects. Mr Mulgan claimed that a conviction not only inhibits

³⁷ At [25].

³⁸ At [26].

³⁹ At [27]–[30].

⁴⁰ At [31]. In *Graham v Police* [2018] NZCA 172 at [24] this Court agreed with Hinton J’s assessment of the gravity of the offending.

Mr Doyle's prospects of obtaining a job as a civilian, but also cost him his career in the army.

[37] In response, Ms Davies submitted that the Judge considered the possible adverse impact of a conviction on Mr Doyle's employment prospects. She submitted that he took into account the fact that Mr Doyle might have to explain his conviction to prospective employers.

[38] In *R v Taulapapa*, this Court set out several principles relevant to assessing the consequences of a conviction on a young offender's employment prospects:⁴¹

(a) Conviction carries a social stigma which the law sustains by recording and publishing convictions. It may affect a person's career, but that consequence must normally yield to the employer's right to know. This principle extends to independent bodies charged with assessing the character or suitability for a particular career. It applies to all offenders for whom convictions are recorded, including the young.

(b) The consequence may be severe if employers are unwilling to look behind the conviction to consider the person's merits and that reaction is unfair to the offender in the sense that the conviction itself ought not exclude them from the career or job concerned. Such risk may arise where the conviction speaks to character or records a serious offence but does not fairly reflect the offender's character or culpability. Theft may be an example of an offence that may lead employers to reject an applicant without further inquiry.

(c) Some judges have reasoned that where youth, a transitory condition, explains offending, an employer may be willing to make allowances for it, especially where the offender is otherwise a person of good character. Others have reasoned that youth is a disadvantage because the offender has no established skill or history of training or employment that might persuade an employer to take a closer look.

(d) The court may assume that applicants with convictions are likely to be excluded without inquiry where employers must filter many applications before arriving at a shortlist for interview; this may apply particularly to unskilled or semi-skilled work.

(e) The consequences of conviction may be severe where an offender points to a specific career or job to which conviction is likely to present a barrier; and that may be especially so where the offender has already spent some time training for that career.

(f) Contrary to Mr Carruthers' submission, the consequences may also be severe where the offender points only to general consequences for a young person looking for any employment suited to his or her talents. That may be

⁴¹ *R v Taulapapa* [2018] NZCA 414 at [42].

so where, as noted above, employers are unwilling to consider the young person on their merits.

(Footnotes omitted.)

[39] When determining the effects of conviction on employment, the court must identify the consequence, assess the evidence offered for it, evaluate the risk that the consequence will happen to the particular applicant, and form an overall assessment of seriousness.⁴² The question is whether there exists a real and appreciable risk that the relevant consequence will happen.⁴³ The stated consequence of a conviction may be a question of fact that is capable of proof in the ordinary way.⁴⁴ Evidence of employers' attitudes may not be available however, in which case the court must use what evidence is available and take judicial notice of facts where appropriate.⁴⁵

[40] An inability to join or continue serving in the NZDF has been cited as a consequence of a conviction in many cases.⁴⁶ However, this ground is of limited assistance to Mr Doyle. He has already been discharged from the NZDF. Counsel advised us that the discharge is final. It followed a parallel investigation by the NZDF. It will not be reversed. His NZDF Retention Review, which recommended administrative discharge, records that:

PTE Doyle has eroded the trust of the service and is likely not able to be deployed as a soldier in the NZDF. If retained, PTE Doyle would face a career of working in garrison or training settings in limited roles due to his conviction and inability to hold a security clearance.

[41] The review concluded that Mr Doyle had committed offences which were “not conducive to good order and discipline” and in doing so he had “irreparably damaged the ability of the organisation to trust him”.

[42] Mr Doyle's discharge from the NZDF did not flow from the fact of his conviction but, rather, the offending which underlies it. This position is quite different

⁴² At [46].

⁴³ At [45].

⁴⁴ At [46(a)].

⁴⁵ At [46(c)].

⁴⁶ See for example *R v Taulapapa*, above n 41; *Amstad v Police* HC Auckland CRI-2011-404-161, 6 September 2011; *Police v Graham*, above n 33; *Weng v Police* [2014] NZHC 2586; *Strickland v Police* [2013] NZHC 2704; and *Police v Payne* [2020] NZDC 17815.

from someone intending to pursue a career path in the NZDF where a conviction would operate as a bar, as was the case in *Amstad v Police*.⁴⁷

[43] The real focus in this appeal must be on Mr Doyle's ability to find employment outside the NZDF. His evidence is that he has obtained employment at a local transport company.

[44] Experiencing some difficulties in obtaining employment and advancing a career while a conviction is fresh is not an extraordinary consequence of the conviction. In *Graham v Police*, this Court commented that:⁴⁸

[28] While we accept that Mr Graham will face difficulties in furthering his current apprenticeship, we consider his overall skill level and aptitude is such that he will be able to find employment in the future. Difficulties experienced in the meantime would not be out of all proportion to the gravity of the offending. On the contrary, they will be the kinds of difficulties that naturally flow from convictions for the offences in question.

[45] We accept that Mr Doyle's training in the NZDF is somewhat specific to that career path, but nevertheless consider that Mr Doyle has developed transferrable skills which will assist him in obtaining and maintaining employment. He has already overcome a significant obstacle in obtaining employment in a different field. Any remaining consequences are those which naturally flow from convictions for offending of this nature.

[46] For these reasons, we do not accept that the Judge can be criticised for finding that the consequence of a conviction for Mr Doyle was a generic risk to employment prospects. Taking that and the other matters discussed above, our view is that the consequences of a conviction on Mr Doyle are properly characterised as relatively minor.

Did the Judge err by finding that the consequences of Mr Doyle's conviction were not out of all proportion to the gravity of the offending?

[47] Ordinarily, offending involving dealing in drugs is considered too serious to permit granting a discharge without conviction. That is not to say that the legal test

⁴⁷ *Amstad v Police*, above n 46, at [24].

⁴⁸ *Graham v Police*, above n 40.

can never be met.⁴⁹ This is not one of those cases. The indicia of commerciality, particularly the quantity of MDMA possessed, and the finality of Mr Doyle's discharge from the NZDF, operate against a discharge without conviction.

[48] While we accept Mr Doyle's seven years of commendable service to the NZDF, his offending breached his employer's trust and revealed a lack of discipline. Given the moderate gravity of his offending and the relatively minor consequences to his career prospects, we are not satisfied that the consequences of a conviction are out of all proportion to the gravity of his offending. It follows we conclude the Judge did not err by refusing to discharge Mr Doyle without conviction.

Result

[49] The appeal is dismissed.

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⁴⁹ *Rodrigo v Police*, above n 29, at [18].