NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ryan*, 2017 NSCA 32

Date: 20170426
Docket: CAC 453748
Registry: Halifax

Between:

Philip Gordon Ryan

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice J.E. (Ted) Scanlan
Appeal Heard:	February 2, 2017, in Halifax, Nova Scotia
Subject:	**Sentence Appeal**
Summary:	The Appellant was a serial thief who stole from retailers across the province to support his drug addictions. He had a lengthy record dating back to the 1980's. A provincial court judge sentenced the appellant to a total of 678 days after giving credit at a rate of 1:1 for time served and reducing the sentence for one offence by 25 days to take into account the principle of totality.
Issues:	Did the sentencing judge err in the application of any principles of sentencing?
Result:	Appeal dismissed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 10 pages.

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Judges:	Fichaud, Hamilton and Scanlan, JJ.A.
Appeal Heard:	February 2, 2017, in Halifax, Nova Scotia
Held:	Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Scanlan, J.A.; Fichaud and Hamilton, JJ.A. concurring.
Counsel:	Roger A. Burrill, for the appellant Mark Scott, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] This is an appeal from sentence. Mr. Ryan, the appellant, argues that the sentencing judge erred in not giving sufficient credit for pre-sentence custody. He also argues that the judge failed to properly address and apply the principle of totality when sentencing him.

[2] I would grant leave and, for the reasons that follow, I would dismiss the appeal.

Background

[3] The appellant, born February 23, 1962, is a mature serial offender who, for many years, has engaged in repeated unsophisticated thefts to feed his crack cocaine addiction. Although the appellant had strong community support and employment, prior rehabilitative efforts have failed to help him control his drug addiction. The appellant's prior convictions date back to the 1980's and involve a series of frauds, thefts, and break and enters. He also has many convictions for breach of conditions of release and breach of conditional sentences.

[4] Between January 18, 2016 and April 8, 2016, while on probation for similar offences, the appellant was engaged in a series of thefts of property each of a value under $5,000. The thefts occurred at a number of stores across the province. Some of these thefts occurred while the appellant was out on bail awaiting sentencing for similar offences.

[5] The appellant's factum includes a chart which particularizes the charges for which the appellant was sentenced on June 30, 2016. It also sets out the respective sentences. I have reproduced that chart as an appendix to this decision but I added to that chart the amounts involved in each offence, if known, and whether the amounts were recovered.

[6] As noted by the sentencing judge: "They're not your usual shopliftings for $100 or so." He noted that some of the victims were out-of-pocket thousands of dollars. In the past, courts have tried many different things in an effort to rehabilitate and/or deter the appellant. Past sentences have included treatment,

fines, probation and conditional sentences. All have failed to prevent the appellant from re-offending. To date he has been unable to control his drug addiction.

[7] At the time of the sentencing, the appellant had outstanding fines in excess of $48,000.

[8] The sentencing judge concluded:

> I think it's time that Mr. Ryan be separated from society because other means of him dealing with his addictions have unfortunately failed.

I agree, non-custodial sentences have failed to protect the public.

[9] The custodial sentence imposed by Provincial Court Judge William Digby totalled 678 days. In calculating the period of imprisonment the sentencing judge gave the offender remand credit of 47 days, using a 1:1 ratio for the time the appellant spent incarcerated pending sentence. The judge also referred to the principle of totality, reducing the period of imprisonment on one offence by 25 days.

Issues

Issue #1 Did the sentencing judge err by not crediting the appellant at a rate of 1:1.5 days for the time spent in pre-sentence custody?

Issue #2 Did the sentencing judge fail to properly apply the totality principle and have one final look at the global sentence to determine if it exceeded a just and appropriate sentence?

Standard of review

[10] The standard of review on a sentencing appeal is one of deference. Absent an error in principle, failure to consider a relevant factor or an over-emphasis of appropriate factors, a sentence should only be varied if this Court is convinced it is demonstrably unfit (*R. v. Knockwood*, 2009 NSCA 98, ¶22; *R. v. Murphy*, 2015 NSCA 14, ¶15).

Issue #1 Did the sentencing judge err by not crediting the appellant at a rate of 1:1.5 days for the time spent in pre-sentence custody?

[11] The appellant submitted that had the ratio of 1:1.5 been applied for remand credit, he would be entitled to an additional 23 day reduction in his sentence. I am satisfied that, in keeping with *R. v. Lacasse*, 2015 SCC 64, ¶44, such an error, if it had occurred, would have "…had an impact on the sentence". Such an impact would warrant appeal court intervention if it was the result of an error.

[12] The appellant and respondent differ on their views as to the application of the law relating to credit for remand time. The appellant argues that the sentencing judge erred by considering the repeated breaches of release orders as an aggravating factor in determining the proper sentence and then considering it again when calculating pre-sentence credit. This, the appellant argues, constituted "double-dipping" which he says is contrary to the principles identified in *R. v. Summers*, 2014 SCC 26, ¶79. To put a finer point on the appellant's submission, he argued that *Summers* stands for the proposition that an offender's conduct, prior to being placed in custody was not to be a factor in determining remand credit. I, like the respondent, disagree with the appellant's position.

[13] I refer to s. 719 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 which deals with remand credit. It provides:

> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).
>
> (3.2) The court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.

[14] Sections 515(9.1) and 524(4) and (8) deal with judicial interim release and arrest of accused on interim release. In this case, the appellant did not apply for bail after his most recent arrest because, as the respondent suggests in its factum:

> …the outcome was apparent to everybody. …

[15] The appellant would have been denied bail because of his previous convictions and breaches of bail and release provisions.

[16] In this case the sentencing transcript sets out the judge's reasons in giving the credit of 1:1:

> With respect to Information 731940, Mr. Ryan has been in custody for 47 days. That's resulted, and he's in custody, of course, because he continually breached his release provisions. Credit will only be on a one-to-one basis. He gets credit for five days on that one. With respect to the sentence of 50 days from Rona, he's also been in custody for 47 days so the balance of that figure (47-5) of 42 (recording says 40 days but that is an error) days is credited towards the 50-day sentence.

[17] At no point in the decision did the sentencing judge refer to the offender breaching the release provisions other than in his reference to the remand credit. This was stated after all of the sentences had been set out in detail. The judge was then considering how much credit to give the appellant for time served on remand. Nothing in the judge's comments would suggest that he had "double dipped". What the sentencing judge did was state, on the record, his reason for limiting remand credit. This he was required to do in accordance with the provisions of s. 719 of the *Code*.

[18] There was no reversible error in the calculation of credit for remand time.

Issue #2 Did the sentencing judge fail to properly apply the totality principle and have one final look at the global sentence to determine if it exceeded a just and appropriate sentence?

[19] The appellant has had a long-standing history of drug addiction. He had completed a 5-week in-house treatment program in June, 2013. The pre-sentence report suggested that, since being diagnosed as a diabetic in February, 2015, the appellant abstained from the use of illicit drugs. This is inconsistent with his assertion that the reason he committed the offences now before this Court was to support his drug addiction. He was on probation for similar offences, and was awaiting sentence for similar offences until March 3, 2016. After that date he was on probation when not serving an intermittent sentence. He was on bail until remanded.

[20] In the Provincial Court, defence counsel sought a conditional sentence order of 12 months. The Crown asked for a sentence of 28 months incarceration. The sentencing judge concluded that it was time to separate the appellant from society. He was given 1:1 remand credit and ordered to serve 22 months in jail.

[21] In his appeal, the appellant refers to the principle of totality and also the jump principle.

[22] There are a number of things that guide courts at the sentencing stage of the criminal trial process. This includes the provisions of the *Criminal Code*. Section 718 which speaks to the fundamental purpose of sentencing:

Purpose and Principles of Sentencing

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[23] In sentencing, Courts have a number of tools which they use in an attempt to protect society from would-be offenders. The best way to protect society is to deter and/or rehabilitate offenders. A rehabilitated offender will, of course, have no additional victims. Except for the most serious crimes, jail sentences are rarely imposed on young or first time offenders. Courts use other tools whenever possible to rehabilitate or deter offenders. For example, the appellant had at one time been enrolled in rehab programs as part of a sentence imposed.

[24] A review of the appellant's corrections history shows a progression in terms of more severe penalties. There must, however, come a point at which a court is satisfied that rehabilitation and deterrence is not working. Once the courts are satisfied an offender cannot be rehabilitated or deterred, courts then are forced to look for other ways to protect the public. Specific deterrence and rehabilitation always remain a part of the toolbox. In this case, the appellant's record and the

evidence suggests that the prospects of rehabilitation and deterrence without incarceration are minimal. Previous attempts to protect victims have failed.

[25] I have already referred to the fact that these are not the run-of-the-mill shoplifting cases. The appellant has not been stealing chocolate bars. I agree completely with the trial judge that the time has come to remove the appellant from society. There is little or no prospect of society being protected from the appellant any other way.

[26] The issue, therefore, is how long should he be incarcerated. As I have noted above, the sentencing judge imposed a 22-month sentence. He referred to the principle of totality and said in relation to one of the offences that, the sentence would have been 30 days (for being unlawfully at large) but imposed a sentence of 5 days' incarceration. The 25 days credit on that offence is as a result of the application of the principle of totality. The respondent suggests the principle of totality does not mean offences are "cheaper by the dozen". The principle of totality allows a sentencing judge to take into account the rehabilitation prospects of an offender and also allows a sentencing judge to focus on deterrence and rehabilitation as a means to protect society. In the appellant's case he committed a 'spree' of offences, not even interrupted by probation or the prospect of imminent sentencing on prior offences.

[27] Often we see sentencing courts incrementally increasing the severity of sentences with repeat offenders, not making large jumps in the severity of the dispositions. That does not mean an offender has a licence to re-offend with impunity, expecting only incremental increases in sentences.

[28] The appellant forfeited any reasonable expectation of incremental increase through the sheer number of serious offences. As noted by the respondent, the nine Informations with twenty offences was nothing like any prior combination of sentences on the appellant's record. The jump principle is more applicable to cases where rehabilitation is still in play. I agree with the sentencing judge that there is little prospect for the appellant to beat his addiction, hence little prospect of rehabilitation.

[29] Sentencing judges are entitled to a great deal of deference on the issue of sentencing. In the case of this offender, I agree with the sentencing judge; the time has come to remove the appellant from society to protect victims. It is apparent that deterrence, denunciation, and attempts at rehabilitation all failed. There is no realistic probability of the offender providing restitution. Obviously fines,

conditional sentences, conditional releases or even interim releases on bail have had little or no impact on the offender.

[30] I would not interfere with the sentences imposed. They were not demonstrably unfit.

Conclusion

[31] Leave is granted but I would dismiss the appeal.

Scanlan, J.A.

Concurring:

Fichaud, J.A

Hamilton, J.A.

Appendix

Section and Description of Offences	Date and Place	Sentence or Custodial period	Amount Involved
CC. 334(b) Theft Under $5,000 CC. 733.1(1)(a) Breach of Probation	January 18, 2016 Rona, Bedford, NS January 18, 2016 Bedford, NS	90 days Sentence 90 days Concurrent Sentence	$913
CC. 334(b) Theft Under $5,000 CC. 733.1(1)(a) Breach of Probation	February 16, 2016 Lee Valley Tools, Bedford, NS February 16, 2016 Bedford, NS	60 days Consecutive Sentence 60 days Concurrent Sentence	Undetermined Amount
CC. 334(b) Theft Under $5,000 CC. 733.1(1)(a) Breach of Probation	February 26, 2016 Lee Valley Tools, Bedford, NS February 26, 2016 Bedford, NS	60 days Consecutive Sentence 60 days Concurrent Sentence	$1,000 recovered
CC. 334(b) Theft Under $5,000 CC. 733.1(1)(a) Breach of Probation	February 26, 2016 Homesense, Bedford, NS February 26, 2016 Bedford, NS	20 days Consecutive Sentence 20 days Concurrent Sentence	Unknown value most recovered
CC. 334(b) Theft Under $5,000	February 8, 2016 Shur Gains Feeds, Truro, NS	90 days Consecutive Sentence	$2,917.57
CC. 334(b) Theft Under $5,000	January 25, 2016 Shur Gains Feeds, Truro, NS	90 days Consecutive Sentence	Included in Feb. 8/16 amount
CC. 334(b) Theft Under $5,000 CC. 733.1(1)(a) x2 Breach of Probation	March 16, 2016 Dewalt Factory, Dartmouth, NS	90 days Consecutive Sentence 90 days Concurrent Sentence	$1,000

		90 days Concurrent Sentence	
CC. 334(b) Theft Under $5, 000	February 22, 2016 Happy Harry's, Dartmouth, NS	20 days Consecutive Sentence	$2,599
CC. 145(1)(b) Unlawfully at Large	April 22, 2016 Dartmouth, NS	5 days Remand time Consecutive 5 days Term if no credit Deemed Time Served 5 days Credit given 5 days sentence (Deemed time Served)	
CC. 334(b) Theft Under $5,000 CC. 733.1(1)(a) x2 Breach of Probation	April 8, 2016 Rona, Halifax, NS	42 days Remand time Consecutive 50 days Term if no credit 42 days Credit given 8 days Sentence 42 days Remand time Concurrent 50 days Term if no credit 42 days Credit given 8 days Sentence 42 days Remand time Concurrent 50 days Term if no credit 42 days Credit given 8 days Sentence	$768 (recovered as they were dropped by offender while he was being pursued)
CC. 334(b) Theft Under $5,000	February 4, 2016 Pleasures n' Treasures, Truro, NS	60 days Consecutive Sentence	$656.81
CC. 334(b) Theft Under $5,000	February 4, 2016 Shur Gains Feeds, Truro, NS	90 days Consecutive Sentence	Included in Feb. 8/16 amount