NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Hatt*, 2017 NSCA 36

Date: 20170509
Docket: CAC 457828
Registry: Halifax

Between:

Richard Edward Hatt

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	March 24, 2017, in Halifax, Nova Scotia
Subject:	Criminal law. Sentencing, s. 719 *Criminal Code*. Credit for remand.
Summary:	Mr. Hatt pleaded guilty to nine separate offences. He was on remand for two offences. His remand time exceeded what the Crown would ask by way of sentence on those two charges, so Mr. Hatt sought credit for remand against all nine. The Provincial Court refused. Mr. Hatt appealed.
Issues:	Did the judge err when deciding that she could only credit remand time for the two offences for which Mr. Hatt was remanded?

Result: Appeal dismissed. Section 719(3) of the *Criminal Code* allows the Court to credit an offender for remand time "as a result" of the offence(s) for which he is being sentenced. While there may be circumstances in which a court may take into account remand on otherwise unrelated charges, that was not so in this case. Mr. Hatt was remanded on only two of nine charges. He may have agreed to remand on two of the nine because of the other charges, but the judge did not err in law by finding that he was not incarcerated "as a result" of those other charges.

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Judges:	Fichaud, Hamilton, and Bryson, JJ.A.
Appeal Heard:	March 24, 2017, in Halifax, Nova Scotia
Held:	Leave granted and the appeal dismissed, per reasons for judgment of Bryson, J.A.; Fichaud and Hamilton, JJ.A. concurring
Counsel:	Roger Burrill and Drew Rogers, for the appellant Timothy O'Leary, for the respondent

Reasons for judgment:

[1] Richard Edward Hatt asks this Court to correct an alleged lack of credit for pre-sentence custody where the trial judge was "technically precise" but "unfair".

[2] Mr. Hatt was before Provincial Court Judge Alanna Murphy on nine Informations for a variety of property-related offences and breaches of Recognizance, to which he eventually pleaded guilty. Mr. Hatt received a global sentence of 13 months in custody. He had already spent almost seven months in pre-trial custody. Unfortunately, Mr. Hatt only received four months' credit for his pre-sentence custody because he had only been remanded for two of the nine offences to which he pleaded guilty. So his sentence was nine months on a "go forward" basis.

[3] Section 719(3) of the *Criminal Code* authorizes the Court to take into account pre-sentence custody for sentencing purposes:

> 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.
>
> [Emphasis added]

[4] The emphasised language is what is in issue in this appeal.

[5] The judge explained how the emphasised language should be reflected in her sentence:

> The remand time only attaches to two informations, the one alleging February 24th, 2015, and the one alleging March 25th, 2016. Frankly, the remand time is well in excess of what would be sought by the Crown in terms of those two sets of offences. So Mr. Hatt, at the end of the day, is going to end up having some remand time that will not have been credited as a result of his consent to remand.

[6] In *R. v. Wilson*, 2008 ONCA 510, Justice Rosenberg quoted from the Supreme Court in describing the relationship between 719(3) and pre-trial custody:

> [41] In *R. v. Wust* (2000), 2000 SCC 18 (CanLII), 143 C.C.C. (3d) 129 (S.C.C.) at para. 41, Arbour J. explained the purpose of giving credit for pre-sentence custody:

> Therefore, while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3) [of the *Criminal Code*].
>
> [42] The time the appellant spent serving his sentence for importing was not in any sense part of the "punishment" for the robbery offences; that sentence was punishment for the importing offence. To now give the appellant credit for time spent serving a sentence for another offence would distort the sentencing regime.

[7] In *R. v. Pammett,* 2016 ONCA 979, the Ontario Court of Appeal elaborated on *Wilson*:

> [27] The time spent in custody by an offender on unrelated charges can be considered in a limited way in determining a fit sentence. As Justice Rosenberg stated in *Wilson* at para. 46, "a sentencing judge is entitled to take into account time spent serving another sentence as part of the complete picture for understanding a particular offender." Justice Rosenberg cited as one example a situation where an offender with a drug problem received treatment while serving his sentence.
>
> [28] In this case the sentencing judge referenced the fact that while in custody on the Kingfisher charges Mr. Pammett worked as a cleaner and was in a relationship of some permanence, which was relevant to his rehabilitative potential. The sentencing judge also noted the lack of evidence that Mr. Pammett either refused or agreed to participate in available programs while in custody on the Kingfisher charges.
>
> [29] This type of limited consideration of the impact of Mr. Pammett's time in custody on the Kingfisher charges is consistent with the direction in Wilson. ***It would have been an error in law for the sentencing judge to go beyond this limited analysis and grant credit for the time served on unrelated charges.***
>
> [Emphasis added]

[8] Mr. Hatt argues that his charges are related:

> [38] The appellant says that the seven (7) months spent in custody are necessarily intertwined with the Informations where remand was formalized and the Informations where it was not. Certainly, to the appellant -- as his sentencing plan was being considered and presented to both the Mental Health Court and Provincial Court Judge Murphy – the pre-sentence custody time he experienced could easily have been seen as "spent in custody… as a result of the offence" or "offences". Justice Rosenberg in *Wilson* confirmed that the Court could take into account time spent in custody on another matter "as part of the complete picture for understanding a particular offender": *R. v. Wilson,* 2008 ONCA 510, para. 46. See also *R. v. K.G.*, 2012 ONSC 3523, para. 41.

[9] This final submission implies that time spent on remand on unrelated charges can be brought into the larger picture on sentencing. But as Justice Rosenberg made clear in *Wilson*, that would only be true if the remand time somehow was relevant to that sentencing. He gave the example of someone using remand time to deal with a drug addiction in a positive manner that may affect an appropriate sentence related to that charge. This is not such a case.

[10] Mr. Hatt cites a number of cases that accord a much broader interpretation to remand time "as a result of the offence" than the judge did here: *R. v. Reid*, [2005] O.J. No. 1790 (Ont CA); *R. v. Tsai*, [2005] O.J. No. 2574 (Ont CA); *R. v. Noor*, 2015 ONCA 550.

[11] Respectfully, these laconic examples are unhelpful to Mr. Hatt. *Reid* and *Tsai* received a lukewarm endorsement in *Wilson* where Justice Rosenberg explained them as defensible because bail refusal on the second set of charges was consequential on the accused's release on the first set of charges:

> [50] While both *Reid* and *Tsai* appear to be examples of this court permitting the banking of pre-sentence custody, it seems to me that there is another explanation. In both cases the accused was refused bail on the second set of charges (the charges that were later withdrawn) because he was already on bail for the first set of charges. Thus, in part, the time spent in custody for the withdrawn set of charges could be attributed to the first set of offences. In any event, neither *Reid* nor *Tsai* represent the stark picture presented in this case where an appellant seeks to have this court retroactively take into account time spent serving sentence on another offence.

[12] *R. v. Haughian*, 2016 BCPC 112, cited by Mr. Hatt may be viewed in a similar way.

[13] As for *Noor*, the Court of Appeal did not question the sentencing judge's treatment of remand on stayed charges in one case as connected to another, but merely increased credit from .5:1 to 1:1, after remarking that the stayed charges were "outside the sweep of s. 719(3)".

[14] For its part, the Crown brings to our attention a number of cases where courts approached s. 719(3) in different ways, sometimes broadly to permit consideration of pre-sentence incarceration on other matters, sometimes not: *R. v. Gobin*, 2012 ONSC 3523, ¶ 41 and *R. v. Filli*, 2015 ONSC 3652, ¶ 21.

[15] In *Gobin*, the Ontario Superior Court gave credit to an offender who was on remand on subsequent charges that were later stayed, because detention on the earlier charges "would have been inevitable after a bail hearing on the merits given the seriousness of the allegations in both…". But the Court seemed ambivalent about the basis for the "credit" accorded Mr. Gobin:

> [44] Given Mr. Gobin's questionable level of motivation for change and his risk to re-offend, consideration of the Newmarket incarceration is properly limited to a 1:1 basis. The offender will be credited with 2 ½ months of pre-sentence custody credit on the Peel custody (40 days x 2) and, ***whether described as on account of a mitigating circumstance, or as s. 719(3) pre-sentence custody***, with 13 months on the Newmarket charges.
>
> [Emphasis added]

[16] *Gobin* was not followed in *Filli* where a second set of charges had not been resolved and so remand time in relation to them was not applied to sentencing for the first set of charges. The Court found that Mr. Filli was not in custody "as a result" of the first set of charges.

[17] Mr. Hatt's situation is more complex. As the Crown points out, he committed nine separate, unrelated offences over a 17 month period. The number and variety of prior outstanding offences may have influenced Mr. Hatt to agree to remand on two of them – a March 25, 2016 charge for breach of a March 23, 2016 recognizance and failing to attend court on March 7, 2016. But he was not on remand "as a result" of those other charges, but because of his new offences in March of 2016.

[18] The judge did not ascribe all Mr. Hatt's remand time to the nine offences for which he was sentenced. She was satisfied that remand was not "as a result" of all nine. Certainly, they are unrelated offences, as Mr. Hatt's own chart in his factum discloses:

Informations	**Offence**	**Offence Date**	**Sentence**	**Remand Credit**	**Summary/ Indictable**
1 (Tab 6 of A.B.)	s. 145(2)(b)	Mar. 7, 2016	1 month Consecutive 2 years' Probation		Summary

2 (Tab 7 of A.B.)	s. 368(1)(a)	Mar. 22, 2016	2 months' Consecutive 2 years' Probation		Indictable
3 (Supplementary Appeal Book, Tab 1)	s. 368(1)(a) s. 355(b)	Nov. 10, 2014 Nov. 10, 2014	2 months' Consecutive 2 months' Concurrent 2 years' Probation		Indictable
4 (Supplementary Appeal Book, Tab 2)	s. 334(b)	Dec. 20, 2014	1 month Consecutive 2 years' Probation		Summary
5 (Tab 2 of A.B.)	s. 355(b)	Feb. 24, 2015	1 month Consecutive 2 years' Probation		Indictable
6 (Tab 3 of A.B.)	s. 403(a)	Apr. 14, 2015	1 month Consecutive		Indictable
7 (Tab 4 of A.B.)	s. 380(1)(b) s. 368(1)(a)	Feb. 24, 2015 Feb. 24, 2015	1 day deemed served on each count Concurrent 2 years' Probation	45 days' remand credit	Indictable
8 (Tab 8 of A.B.)	s. 145(3)	Mar. 25, 2016	1 day deemed served 2 years' Probation	45 days' credit	Summary
9 (Tab 5 of A.B.)	s. 334(b)	Feb. 6, 2016	1 month Consecutive 2 years' Probation		Summary

[19] This constellation of charges is given context in the Crown's factum:

> 11. To elaborate, the December 20, 2014, s. 334(b) information … was scheduled for trial in November of 2015. As well, the February 24, 2015, s. 355(b) information … was also scheduled for trial in November of 2015. The Appellant was not able to attend court in November of 2015 for health reasons. The trials were adjourned. After a number of appearances, these informations were scheduled for March 7, 2016 to set trial dates.
>
> 12. The Appellant also had a trial scheduled for March 7, 2016 on another information. The trial was for the November 10, 2014, s. 368(1)(a) and s. 355(b) information. …
>
> 13. The Appellant did not attend court on March 7, 2016. As a result, a warrant was issued for his arrest. The Appellant was also charged with failing to attend court on March 7, 2016. …
>
> 14. Before the warrant was executed, the Appellant was charged with new offences on March 22, 2016. ...
>
> 15. With respect to the December 20, 2014, February 24, 2015, November 10, 2014, March 7, 2016 and March 22, 2016 informations, the Appellant was released on his own recognizance in the amount of $1,500.00. ...
>
> 16. The date of the recognizance was March 23, 2016. Two days later the Appellant was charged with breaching the recognizance. ...
>
> 17. The Appellant had a trial scheduled for April 1, 2016. The trial was in relation to the February 24, 2015, s. 380(1)(b) and s. 368(1)(a) information at Tab 4 of the Appeal Book. The Appellant did not attend his trial. A warrant was issued for his arrest.
>
> 18. The Appellant was in custody on April 4, 2016. He was remanded on the March 25, 2016 breach information and the February 24, 2015 s. 380(1)(b) and s. 368(1)(a) information.

[20] Mr. Hatt's counsel points to two notes on the Information for the February 24, 2015 fraud charges to suggest that his charges were to be for "possible consolidation". Those notes are dated February 10 and 23, 2016. But Mr. Hatt had not finished offending. He was charged again on March 7, 22 and 25. Mr. Hatt then unsuccessfully applied to Mental Health Court. That extended his time on remand. Mr. Hatt was no longer offending, because he was now in custody.

[21] It is clear from other Informations that Mr. Hatt was not in custody on those. The Information relating to his April 14, 2015 fraud, possession and personation charges notes in July 2016 "in custody other matters". Likewise, the February 16,

2016 charge for theft and possession (March 25, 2016 "in custody other matter") and the March 22, 2016 fraud and possession Information which makes the same note for August 25. Mr. Hatt's counsel argues that this means these charges are "dragged along" with those on which he was in custody. The notes suggest the opposite.

[22] In his "fairness" argument, Mr. Hatt relies on the Ontario Court of Appeal decision in *Wilson* and particularly the remarks of Justices Doherty and Rosenberg. No one was more aware of the apparent injustice of not crediting an offender for pre-trial custody than Justice Rosenberg – see for example his comments in *R. v. MacDonald*, 111 O.A.C. 25 (Ont CA), ¶ 31-38. But Justice Rosenberg also recognized that not all pre-sentence incarceration receives credit. As he observed in *Wilson*:

> [44] No doubt there are flaws in our justice system. Innocent people are held in custody, and innocent people are found guilty and sentenced to terms of imprisonment. To avoid this severe unfairness, bail is granted as liberally as possible consistent with public safety, cases of in-custody accused come on for trial as soon as possible and safeguards are in place to avoid wrongful convictions. As well, in some cases, people who have been wrongfully convicted and spent time in jail receive monetary compensation from the government.
>
> [45] ***But, at the end of the day when it comes time to sentence an offender the court can only take into account factors that relate to the particular offence under consideration.*** The fact that an offender, like the appellant, still happens to be in the appeal system when a flaw in relation to a totally unrelated conviction comes to light is not, in my view, a principled reason for giving that offender credit for the time he or she spent serving the sentence for that unrelated conviction.
>
> [Emphasis added]

[23] Justice Rosenberg explained the judicial aversion to "banking" pre-sentence incarceration, expanding on the quotation in ¶ 6, above:

> [42] The time the appellant spent serving his sentence for importing was not in any sense part of the "punishment" for the robbery offences; that sentence was punishment for the importing offence. To now give the appellant credit for time spent serving a sentence for another offence would distort the sentencing regime.
>
> [43] To give effect to this submission would permit accused to "bank" time spent in custody. If this appellant can use the time he spent serving his drug offence sentence as credit for his robbery sentences, then an accused who years earlier spent time in custody for a prior offence of which he was acquitted should

> also be able to ask a trial judge to take that prior time into account. I can see no basis in principle for allowing credit in this case, and not giving an accused credit for time spent in custody on a prior offence that was not used up because the accused was acquitted of that prior offence at trial. Or consider the case of an accused who successfully appeals his sentence and the appeal court reduces the sentence, as it sometimes does, to "time served". In the future, the appeal court would be asked to indicate what the appropriate sentence was so that the difference between the "appropriate sentence" and the time served could be banked for any future offence that the accused may be found guilty of. ***In all of these cases, the offender has spent time in jail in excess of what should have been the case if the system had worked expeditiously and flawlessly.***
>
> [Emphasis added]

[24] In this case, the sentencing judge found that Mr. Hatt was incarcerated prior to trial as a result of two charges: a February 24, 2015 fraud and a March 25, 2016 breach of Recognizance. She was well aware that Mr. Hatt's remand exceeded what the Crown might be looking for by way of sentence. She could have adapted his sentencing to his remand time, by inflating sentences for those offences, but was rightly concerned about adversely affecting Mr. Hatt in the future because other courts might be misled by excessive sentences in this case.

[25] Credit for pre-sentence custody is discretionary, and it is for the sentencing judge to decide whether the accused is incarcerated "as a result of" the offences for which he is being sentenced. Sometimes, but not invariably, remand on other charges may be taken into account.

[26] Mr. Hatt came before Judge Murphy with the formidable record of 189 prior convictions. Despite the limited credit being granted for pre-sentence custody, the judge was satisfied with the go forward sentence of nine months:

> ***As I've said, the remand credit that I've looked at can only attach to the February 2015 and March 2016 offences. I do take it into consideration but, given Mr. Hatt's significant record, I think that, even given that he has unused remand credit, or he will have unused remand credit, I don't think what the Crown is seeking is an inappropriate length of time given the principles of general and specific deterrence*** – and specific deterrence is a real live issue for Mr. Hatt – even given his age, given the virtually unbroken chain of convictions, but also denunciation and general deterrence and the principle of totality, which I think has a role and is recognized by what was recommended by the Crown.
>
> [Emphasis added]

[27] The judge made no error of law in concluding that Mr. Hatt had been remanded on only two of the nine charges. Consolidating them for sentencing purposes did not create a relation among charges that had none. It did not invariably connect remand on two, to remand on all nine. I would grant leave, but dismiss the appeal.

Bryson, J.A.

Concurred in:

Fichaud, J.A.

Hamilton, J.A.