SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Avard,* 2019 NSSC 161

Date: 20190515
Docket: CRH 485847
Registry: Bridgewater

Between:

Michael Peter Avard

Appellant

v.

Her Majesty the Queen

Respondent

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Judge: The Honourable Justice Peter P. Rosinski

Heard: May 9, 2019 in Bridgewater, Nova Scotia

Subject: Summary Conviction criminal sentence appeal – ss. 813 and 822 of the *Criminal Code* – Collapse of Conditional Sentence Order

Summary: For a second breach on a 12 month CSO (with 6 months house arrest), the trial court ordered the entire remaining 247 days to be served as custody. The offender appealed to this court.

Issues: Did the trial judge committed reversible errors in relation to:

1. giving proper credit for time post-arrest the offender spent in custody pending the hearing of the breach of CSO allegation?

2. not considering alternatives to collapsing the entire remainder of the CSO per s. 742.6(9)(d) CC?

3. imposing an unfit sentence?

Result: The appeal was allowed - the decision of the trial court is quashed, and considering that the offender has served 78 days in custody, and three weeks on house-arrest since the breach disposition hearing by the trial court, it is ordered that the CSO in its original form will recommence immediately. No costs awarded.

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Summary Conviction Appeal – Collapse of Conditional Sentence Order

Judge:	The Honourable Justice Peter Rosinski
Heard:	May 9, 2019 in Bridgewater, Nova Scotia
Counsel:	Nicholas Fitch for the Appellant Emma Baasch for the Respondent

By the Court:

Introduction

[1] Mr. Avard was born March 14, 1985. He completed his business degree at St. Mary's University in 2009. He also has certifications in carpentry and heavy equipment operation. Unfortunately, alcohol abuse (sometimes interspersed with cocaine) has overshadowed his attempts to lead a pro-social life. [1]

[2] As a result of a breach of a Conditional Sentence Order ("CSO"), Mr. Avard was ordered to serve the entire remaining non-custodial sentence as a custodial sentence – namely 247 days.

[3] His Honour Judge Paul Scovil concluded without elaboration that on February 5, 2019 there were "remaining 247 days" to be served on the CSO. Counsel did not disagree with this enumeration except in relation to the "credit" for the period January 29 – February 5, 2019.

[4] My own review reveals that as of February 5, 2019, Judge Scovil must have calculated this 247 days amount from the September 19, 2018 12 month CSO Order as follows: 365 days CSO less [time served: September – 11 days;

[1] His criminal record from his time in New Brunswick is set out at page 21 of the Appeal Book; his criminal record in Nova Scotia is set out at page 23 of the Appeal Book.

October, November and December, 31, 30 and 31 days; January and February 2019, 31 days +5 days (139 days in total)] equals 226 days remaining +14 days and 7 days (January 7 – 21 detained in custody; January 29 – February 5 detained in custody) = 247 days.

[5] Thus, it is clear to me that he concluded the CSO was suspended during each day Mr. Avard served in custody as a result of the January breach disposition order *and* pending the February breach disposition hearing. According to section 742.6 (10) and (12) of the *Criminal Code* ("*CC*"), upon arrest and until the breach disposition hearing the CSO is suspended; *but* it continues to run for any time interval the offender is detained in custody pending the disposition hearing -See the court's reasons in *R v Atkinson*, (2003) 170 OAC 117.

[6] Mr. Avard was arrested and *detained* on January 6 and ordered to serve 14 days custody on January 7. Arguably, the CSO was suspended for January 6. More importantly the CSO was suspended during the 14 days actual custody per s. 742.6(9)(c).

[7] Mr. Avard was arrested on January 28 and *detained* from January 29 until February 5, causing the CSO to continue to run for those 7 days (s.742.6(12))- however in his calculation of the unexpired CSO duration Judge Scovil did *not*

give him credit for those as he should have. Thus, the unexpired portion of the CSO was 240 days on February 5, 2019.

[8] He appeals Judge Scovil's decision to this court. I allow his appeal by quashing the February 5, 2019 disposition order and immediately reinstating the CSO to run for its remaining duration.

Background

[9] On September 19, 2018 the Honourable Provincial Court Judge Christopher Manning sentenced Mr. Avard on 10 counts contrary to the *CC* by imposing a 12-month CSO with his first 6 months requiring Mr. Avard to be under house-arrest. [2] The Crown had requested 6 months custody in addition to his remand time (effectively a three-months sentence). The Defence had requested a conditional sentence order as the required punitive/deterrent sentence.

[10] Mr. Avard first breached his September 19, 2018 CSO on January 5 – 6, 2019 when he failed to "keep the peace and be of good behaviour" by committing an offence contrary to section 334(b)(ii) *CC* in Cookville, Nova Scotia. When police visited his designated residence he was in breach of the

[2] All the offences proceeded as summary conviction matters. On three further counts, he received 12 months' probation to follow the CSO. The 13 offences were committed between January 13, 2018 and July 14, 2018 at Lower Sackville, Berwick, Kingston, and New Minas, Nova Scotia.

condition that he "remain in your residence or on the property of 54 Publicover Road, Blandford, Lunenburg County, Nova Scotia for the first six months of the conditional sentence" (with exceptions); "prove compliance with the curfew/house arrest condition by presenting yourself at the entrance of your residence should a peace officer attend there to check compliance."

[11] On January 7 he appeared in custody in Bridgewater Provincial Court. The Honourable Provincial Court Judge Paul Scovil ordered him to serve 14 days in custody after he admitted only the "fail to keep the peace and be of good behaviour" breach.

[12] The disposition order regarding the breach (14 days custody) does constitute a "sentence" as defined in sections 673 and 785 *CC*, and it appears remission would apply thereto since the CSO is suspended thereby (s. 742.6 (9)(c))-in contrast to "remand time" (s. 742.6 (12) and s. 742.6(13) *CC*) during which the CSO continues to run.

[13] Approximately 12 days later (January 28) Mr. Avard was arrested at his residence in Blandford Nova Scotia for:

-an assault, and

-breach of the "failure to keep the peace and be of good behavior" condition of his CSO.

[14] Once arrested [3] it became apparent that Mr. Avard had also breached his CSO condition to "not possess take or consume alcohol or other intoxicating substances" as well as "you are not permitted to have any alcohol or alcoholic beverages or non-prescription drugs in your residence or on your property".

[15] He appeared in custody before the Honourable Judge C. Brenton on January 29, 2019. [4]

[16] On February 5, 2019, Mr. Avard agreed that he had breached the alcohol consumption/possession clause of the CSO. He did not agree that he had committed an assault. His Honour Judge Paul Scovil rendered a brief oral decision regarding the disposition for the breach of the alcohol clause. [5] He stated:

> It's his second breach – the last one was for a theft under [s. 334 (b)(ii) *CC*] for which he received a 14- day sentence, and then as well a collapse of the 14 days of the CSO. He has 247 days left to serve.… I have sympathy for anyone who has the addiction issues that Mr. Avard has… However, I can't now say… He shouldn't have been on a condition of alcohol [abstinence].… I'm not going to go behind that. It's clear that the public has to have confidence in a conditional sentence regime… *It appears one where the continued breaches by alcohol would likely take place*, it's a second offence, it would undermine the respect of the

[3] CSO is therefore suspended –s. 742.6(10) *CC.*
[4] I infer that there was a "consent to remand" and order by the court detaining him further pending the hearing of the breach-– CSO running again – s. 742.6(12) *CC.*
[5] CSO ceased running- s. 742.6(10) *CC.*

> public in conditional sentence orders if I did not terminate the order and order him to serve the remaining 247 days. That is what I'm going to do." [6]
>
> [My italicization added]

The Notice of Appeal

[17] Mr. Avard filed a Notice of Appeal on March 7, 2019. As refined by his counsel, the appeal grounds are:

1. that credit for time spent on "remand" [January 29-Feb 5, 2019] ought to have been deducted from the remaining 247 days of the CSO;
2. that the sentencing judge erred in not considering alternatives to collapsing the remainder of the conditional sentence order. [7]

[18] The Crown concedes the first ground of appeal as an error of law based on their reading of s. 742.6 *CC* in conjunction with the Ontario Court of Appeal's reasoning in *R v Atkinson*, 2003 170 OAC 117. They say that Judge Scovil ought to have deducted 7 days (grossed-up by a factor of 1.5 per s. 719 CC) from the 247 days unexpired CSO remaining.

[19] While counsel did not expressly bring this "credit" to the attention of Judge Scovil, and such details may be overlooked as a result of the often frenetic pace

[6] It must be remembered that Mr. Avard was not found to have breached the alcohol prohibition clause at the January 7, 2019 breach hearing.

[7] The underlying premise is also argued: that the 247 days custody ordered is a disproportionate disposition given the circumstances and in particular the principles of restraint and parity.

of proceedings in Provincial Court, it is nevertheless incumbent upon him to correctly cite, interpret and apply the applicable law which dictated credit must be given in such circumstances.

[20] In my opinion, since during those 7 days, per s. 742.6 (12) *CC*, the CSO continued to run, therefore a claim for a grossed-up (by s. 719 *CC* or earlier jurisprudential underpinnings therefor) "remand" credit makes no sense. It is not consistent with the continued running of the related extant CSO. I agree Mr. Avard should have received credit such that the un-expired portion of the CSO on February 5, was 240 rather than 247 days. This amounts to an error in principle committed by Judge Scovil-however is it a reversible error-that is, one which had an impact on his disposition order regarding the breach?

[21] I am obliged to ask myself: what effect did this have on the judge's decision to collapse the entire CSO? In my opinion it had none, however significantly it did affect his calculation of the unexpired portion of the CSO.

[22] I must also go on to consider whether Judge Scovil failed to consider alternative options under section 742.6(9) *CC* and the sentence imposed is manifestly unfit. I conclude he committed no error in relation to the former but did in relation to the latter.

The Law Applicable to Summary Conviction Appeals

[23] Appeals are creatures of legislation. They all must find their roots in soil deliberately deposited by legislators.

[24] Rule 63.02 of Nova Scotia Civil Procedure Rules (Summary Conviction Appeal), reads:

> This Rule applies to a summary conviction appeal under part 27 of the *Criminal Code*, which includes an appeal of a decision in both federal summary conviction proceedings and, by operation of the *Summary Proceedings Act* (Nova Scotia) a provincial summary conviction proceeding.

[25] Sections 813 of the *Criminal Code* reads:

> 813(1) Except where otherwise provided by law,
>
> the defendant in proceedings under this Part may appeal to the appeal court…
>
> (ii) against a sentence passed on him,

[26] The "appeal court" is defined in section 812, in the case of Nova Scotia, as "the Supreme Court".

[27] Section 822 reads:

> 822(1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5) apply, with such modifications as the circumstances require.

[28] Part 21 of the *Criminal Code* (Appeals - Indictable Offences) includes ss. 673 - 696.

[29] Section 687 reads: [8]

> (1) Where an appeal is taken again sentence, the Court of Appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > (b) dismiss the appeal.
>
> (2) A judgment of a Court of Appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

The Standard of Review to be Used by this Court in Assessing the Trial Judge's Sentencing Decision

[30] When reviewing the jurisprudence, it is important to keep in mind the distinction between *Criminal Code* appeals to a Summary Conviction Appeal Court ("SCAC"), such as this Court, and those to the Nova Scotia Court of Appeal.

[31] This distinction was helpfully summarized by Justice Bryson, sitting as a chambers judge in *R. v. Alkhatib* 2013 NSCA 91:

> 13 Justice Farrar in *R. v Pottie*, 2013 NSCA 68 explained the standard of review for summary conviction appeals:
>
> > [15] In the recent decision of *R. v. Francis*, 2011 NSCA 113, Fichaud, J.A. considered the standard of review to be applied in an appeal pursuant to s. 839(1)(a) of the Criminal Code. In summary, there are two standards of review at play in summary conviction matters; the first is the standard of review to be applied by the SCAC judge when reviewing the trial decision; and the second being the standard we apply to the decision of the SCAC judge.

[8] Recall that s. 742.6(9) *CC* orders are included in the definition of "sentence" under sections 673 and 785 *CC*.

> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.
>
> [17] Our jurisdiction is grounded in the error alleged to have been committed by the SCAC judge. It is not a *de novo* appeal from the trial judge. This Court must determine whether the SCAC judge erred in law in the statement or application of the principles governing its review (see Francis, para. 7; see also *R. v. R.H.L.*, 2008 NSCA 100; *R. v. Travers*, 2001 NSCA 71; *R. v. Nickerson*, 1999 NSCA 168, para. 6). This distinction is important when considering whether to grant leave; the error we must identify is in the SCAC judge's decision.

[32] As this is a sentence appeal, more particularly the relevant jurisprudence is captured by the following cases:

1. *R v Nasogaluak*, 2010 SCC 6 regarding the fitness of a sentence

> 46 Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that *a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor* (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:
>
> To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. [page235] *To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.* [My italicization added]

2. In *R. v. L.M.*, 2008 SCC 31, LeBel, J. for the Court stated:

[14] In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that ... the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, at para. 90:

> *... absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.*

(See also *R. v. W.(G.)*, [1999] 3 S.C.R. 597, at para. 19; A. Manson, *The Law of Sentencing* (2001), at p. 359;

[15] Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. *The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (M.(C.A.), at para. 91). ...*

[My italicization added]

3. In *R. v. Muise* (1995), 135 N.S.R. (2d) 81 (N.S.C.A.) Hallett, J.A. described what constitutes a fit sentence:

[81] The law on sentence appeals is not complex. *If a sentence is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts* ... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. *The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which courts of appeal review sentences when the only issue is whether the sentence is inadequate or excessive.*

[My italicization added]

[33] This passage was quoted with approval in *R. v. Shropshire*, [1995] 4 S.C.R. 227. See also *R. v. Henry*, 2002 NSCA 33 at para. 11.

4. In the context of a conditional sentence, the Nunuvat Court of Appeal stated in *R v McDonald*, 2016 NUCA 04:

> IV. STANDARD OF REVIEW
>
> 15 Appellate intervention in a sentence decision is warranted where there has been a clear error of principle, a failure to properly consider, or an over-emphasis of, a relevant factor, or where the sentence imposed is demonstrably unfit (*R v M(CA)*, [1996] 1 SCR 500 at paras 89-90, 105 CCC (3d) 327; *R v LM*, 2008 SCC 31 at para 14, [2008] 2 SCR 163).
>
> …
>
> 25 In my view, if termination of the CSO complies with relevant sentencing principles it should be made; if not, then other options under *Criminal Code* s 742.6(9) must be considered.
>
> 26 *R v Langley* (TE), 2005 BCCA 478 at para 13, 216 BCAC 311, sets out *various factors a court ought to consider in determining whether the presumption of termination should be applied in an individual case. These include*:
>
> > *. . . the nature of the offence; the nature, circumstances, and timing of the breach; any subsequent criminal conduct and sentences for that conduct; changes in the plan for community supervision; the effect of termination on the appropriateness of the sentence for the original offence; and the offender's previous criminal record . . . the list of factors [is not] closed* (See also *R v Beaulieu*, 2015 MBCA 90 at para 20, 125 WCB (2d) 667 [Beaulieu]).
>
> 27 *Another important consideration is the length and nature of the conditional sentence, in comparison to that which would have been appropriate had the sentence for the original offence been custodial* (*R v Talman*, 2005 BCCA 279 at para 10, 213 BCAC 43; Weir, at para 18). Where a conditional sentence may be lengthier than a conventional jail sentence for a particular offence, an accused on a breach becomes vulnerable to serving more time in jail than would have been served for the original offence had custody been imposed in the first instance. Here, the Crown originally sought 105 days in custody for the original offences for which the CSO was imposed. In my view, this is a relevant consideration, together with time served, in assessing the options for breaching the CSO.
>
> 28 Nothing on the record suggests that the hearing judge considered any option but to terminate the CSO and commit the appellant to custody to serve out the

> remainder of the CSO. This is an error, compounded by failing to permit Defence Counsel to make sentencing submissions on the appellant's background and circumstances.
>
> [My italicization added]

5. I similarly recall the court's words in *R v Proulx*, [2000] 1 SCR 61:

> 38 *The punitive nature of the conditional sentence should also inform the treatment of breaches of conditions.* As I have already discussed, the maximum penalty for breach of probation is potentially more severe than that for breach of a conditional sentence. In practice, however, breaches of conditional sentences may be punished more severely than breaches of probation. Without commenting on the constitutionality of these provisions, I note that breaches of conditional sentence need only be proved on a balance of probabilities, pursuant to s. 742.6(9), whereas breaches of probation must be proved beyond a reasonable doubt.
>
> 39 *More importantly, where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. This constant threat of incarceration will help to ensure that the offender complies with the conditions imposed*: see *R. v. Brady* (1998), 121 C.C.C. (3d) 504 (Alta. C.A.); J. V. Roberts, "Conditional Sentencing: Sword of Damocles or Pandora's Box?" (1997), 2 Can. Crim. L. Rev. 183. *It also assists in distinguishing the conditional sentence from probation [page90] by making the consequences of a breach of condition more severe.*
>
> [My italicization added]

An Analysis of the Trial Judge's Decision

[34] I agree with the reasoning in *Atkinson*. The trial judge ought to have considered the 7 days credit when he collapsed the conditional sentence and assessed the un-expired days remaining. That the trial judge made no reference to such a credit, and miscalculated by 7 days, fuels my conclusion that he did not turn his mind to the issue. That constitutes an error of law.

[35] Nevertheless, what is the effect of that error?

[36] Arguably, such an error could allow this court to intervene and reconsider the sentence entirely, if I conclude that the sentencing decision is therefore not entitled to any deference. Our Court of Appeal has addressed this general issue in two decisions: *R v Bernard*, 2011 NSCA 53 per Saunders JA (leave refused: [2011] SCCA No. 381) *and R v Stewart*, 2016 NSCA 12 per Beveridge JA.

[37] In *Bernard* Justice Saunders stated:

> 21 *Having found that the judge erred by not taking the proper approach when imposing sentences for consecutive offences, it falls to this Court to fix an appropriate sentence.*
>
> 22 Before doing so I wish to dispose of a preliminary point raised by the Crown at the hearing. *Mr. Fiske suggested that before we could decide what we felt to be an appropriate sentence we would first have to address the fitness of the sentence imposed in the court below. In other words, we could not substitute our own sentence for the sentence imposed by the trial judge unless we had first determined that the trial judge's sentence was "manifestly unfit". To support his argument, Crown counsel emphasized a phrase in Justice Bateman's reasons from Adams.* For ease of reference I will repeat it here:
>
> [28] Here, with respect, I would conclude that the judge did not turn his mind to the appropriate sentence for each individual conviction but worked backwards from a global disposition. Although that methodology does not necessarily produce an unfit sentence, here it was an error in principle <u>which, in fact, resulted</u> in a sentence that is manifestly unfit (excessively lenient) for these crimes and this offender. [My underlining]
>
> 23 In the Crown's submission these four words, "which, in fact, resulted" oblige us to first conclude that the trial judge's legally flawed sentence was *also* "manifestly unfit" before we are entitled to intervene.
>
> 24 *I respectfully disagree. The Crown's assertion is tantamount to saying, despite the error, the sentence is entitled to deference any way. I would not accept such a proposition.* I do not regard the four impugned words from Justice Bateman's lengthy reasons as establishing some kind of ancillary threshold which must be crossed before we are entitled to decide what we think is a fit sentence in the circumstances. On the contrary, I take the impugned phrase "which, in fact, resulted" as simply emphasizing Justice Bateman's conclusion in Adams that the

flawed approach taken by the judge in that case when sentencing for consecutive offences had produced an excessively lenient and demonstrably unfit sentence.

25 *In my opinion, once we find that a trial judge has erred in principle when imposing a sentence, any deference which might otherwise have been paid is ignored, and we are presented with a "clean slate" to decide for ourselves what constitutes a fit sentence.*

26 Our powers on appeal against sentence are set out in s. 687(1) of the Criminal Code:

> 687(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> > (a)vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > (b)dismiss the appeal.

27 In *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.), Laskin, J.A. considered appellate variation of sentence when a trial judge has erred in principle. He said at p. 103:

> ... an appellate court may interfere if the sentencing judge commits an "error in principle". Error in principle is a familiar basis for reviewing the exercise of judicial discretion. It connotes, at least, failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and, more generally, it includes an error of law. See *Re Fox and Ontario Legal Aid Plan* (1977), 14 O.R. (2d) 668 (Ont. H.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.); *Reza v. Canada* (1994), 116 D.L.R. (4th) 61 (S.C.C.). If the sentencing judge commits an error in principle, the sentence imposed is no longer entitled to deference and an appellate court may impose the sentence it thinks fit. [Underlining mine]

28 This passage from Rezaie has been frequently quoted with approval. See, for example, *R. v. Brunet*, 2010 ONCA 781 at para. 18; *R. v. Liwyj*, 2010 CMAC 6 at para. 46; *R. v. MacDonald*, 2009 MBCA 36 at para. 25; *R. v. Kozun*, 2007 MBCA 101 at para. 22; and *R. v. Provost*, 2006 NLCA 30 at para. 12.

29 *As my colleague Justice Beveridge recently observed in R. v. Hawkins, 2011 NSCA 7 at para. 94*:

> [94] *Having found an error in principle that impacted on the sentence order, this Court is at liberty to determine what would be an appropriate sentence in light of the factors set out in s. 745.4 of the Criminal Code, and keeping in mind the principles mandated by ss. 718, 718.1 and 718.2*.

> 30 For all of these reasons I would conclude that the judge's error in this instance obviates the deference which would otherwise be paid to the sentence he imposed. *We are free to decide the sentence we think appropriate, having regard to the principles of sentencing legislated by Parliament, and the circumstances of this case and this offender.*
>
> [My italicization added]

[38] In *Stewart*, the court stated:

> 40 As explained in *R. v. Aubin*, the proper approach for appellate courts is to correct the error while deferring to the sentence arrived at by the sentence judge: [quotations omitted]
>
> 41 This approach is consistent with the recent direction from the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64 that deference is owed to a trial judge's determination of a fit sentence. Wagner J., for the majority wrote:
>
> [42] *My colleague states that a sentence may be unfit if there is a reviewable error in the thought process or reasoning on which it is based (para. 140).* For this reason, in his view, where there is a reviewable error in the trial judge's reasoning, for example where the judge has characterized an element of the offence as an aggravating factor (para. 146), it is always open to an appellate court to intervene to assess the fitness of the sentence imposed by the trial judge. Having done so, the court can then affirm that sentence if it considers the sentence to be fit or impose the sentence it considers appropriate without having to show deference (paras. 139 and 142). *In other words, any error of law or error in principle in a trial judge's analysis will open the door to intervention by an appellate court, which can then substitute its own opinion for that of the trial judge.*
>
> [43] *With all due respect for my colleague, I am of the view that his comments on this point need to be qualified.* I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. *However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning.* If the rule were that strict, its application could undermine the discretion conferred on sentencing judges. It is therefore necessary to avoid a situation in which [TRANSLATION] "the term 'error in principle' is trivialized": *R. v. Lévesque-Chaput*, 2010 QCCA 640, at para. 31 (CanLII).
>
> [44] *In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify*

> *appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.*
>
> [My italicization added]

[39] I conclude that Judge Scovil's credit error in this case did not have an impact on his decision to collapse the CSO entirely, however it did impact how many days in custody Mr. Avard would have left to serve. Therefore, I need not defer to his sentencing decision.

[40] Furthermore, in relation to the other suggested reversible errors, such as not considering alternative dispositions, and that the disposition he imposed (ie.to collapse the CSO in order the remaining 247 days to be served as custody) is unfit, I find he did not err in relation to the former, but did err in relation to the latter.

Why I Conclude that Judge Scovil Did Not Fail to Consider Alternatives to Collapsing the CSO

[41] His decision is terse, but it must also be read in context of the submissions made to him by counsel that day, the extensive information he had available through the PSR, and by him having previously sentenced Mr. Avard for breach of a term of the CSO on January 7, 2019.

[42] Mr. Fitch suggests that the judge's words reflect a refusal or failure to consider alternatives to collapsing the entire remainder of the days to be served under the CSO. Specifically, he references the following:

> "I can't go behind the – I have sympathy for anyone who has the addiction issues that Mr. Avard has. It is difficult. However, I can't go now and say – which is what is essentially I've been asked to say – 'that sentence [September 2018] wasn't right. He shouldn't have been on a condition of alcohol'. He was. And it was a joint recommendation. I'm not going to go behind that."

[43] I reject this argument.

[44] Firstly, although he was mistaken in that he believed there had been a joint recommendation in September 2018, this mistaken belief was based on his conversation with Mr. Avard in court. I am satisfied that this had no effect on the sentencing for the breach of the CSO.

[45] Secondly, Mr. Fitch urged Judge Scovil to consider that by inclusion of a "no alcohol" clause in the CSO, Mr. Avard was essentially set up to fail, and since the January 28 breach was of the "no alcohol" clause, he should order "time served" (January 29 – February 5, 2019) as the s. 742.6 (9) *CC* disposition for that breach. Mr. Fitch's comments might also be taken to communicate to the judge that as a disposition he should consider changing/removing that optional condition henceforth in the CSO.

[46] Thirdly, judges are presumed to know the law. Judge Scovil has had a lengthy career as a criminal lawyer, and served as a judge for many years as well. His attention was drawn to section 742.6 (9) *CC*, and he would have been very conversant with it by virtue of his position. There is no doubt in my mind that he was aware of the alternatives contained in that subsection.

[47] Fourthly, Judge Scovil's decision was responsive to the positions taken by counsel: the Crown argued for termination of the CSO; Mr. Fitch argued for "time served" or "take no action". The only other options were for him to "change the optional conditions" (which I have addressed above) or "suspend the conditional sentence order and direct that the offender serve in custody a portion of the unexpired sentence".

[48] The onus is on Mr. Avard to establish that Judge Scovil did not keep an open mind to alternative dispositions available in s. 742.6(9) *CC*. I am not satisfied that he did not keep an open mind to such alternatives. Therefore, I find no such error by Judge Scovil.

[49] Mr. Avard is also arguing that Judge Scovil's disposition order was an unfit "sentence" option.

Was the Trial Judge's Decision to Convert the Remaining 240 Days to be Served in the Community into a Custodial Sentence Demonstrably or Clearly Unreasonable Rendering it an Unfit Sentence?

[50] The Crown argues that Judge Scovil's decision is reasonable, primarily because: [9]

1. as the Supreme Court of Canada stated in *R v Proulx*, [2000] 1 SCR 61:

> 36 *Accordingly, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest or strict curfews should be the norm, not the exception.* As the Minister of Justice said during the second reading of Bill C-41 (House of Commons Debates, supra, at p. 5873), "[t]his sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community under tight controls" (emphasis added).
>
> 37 There must be a reason for failing to impose punitive conditions when a conditional sentence order is made. *Sentencing judges should always be mindful of the fact that conditional sentences are only to be imposed on offenders who would otherwise have been sent to jail*. If the judge is of the opinion that punitive conditions are unnecessary, then probation, rather than a conditional sentence, is most likely the appropriate disposition.
>
> 38 *The punitive nature of the conditional sentence should also inform the treatment of breaches of conditions*. As I have already discussed, the maximum penalty for breach of probation is potentially more severe than that for breach of a conditional sentence. In practice, however, breaches of conditional sentences may be punished more severely than breaches of probation. Without commenting on the constitutionality of these provisions, I note that breaches of conditional sentence need only be proved on a balance of probabilities, pursuant to s. 742.6(9), whereas breaches of probation must be proved beyond a reasonable doubt.
>
> 39 *More importantly, where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. This constant threat of incarceration will help to ensure that the offender complies with the conditions imposed*: see *R. v. Brady* (1998),

[9] While the conditional sentence legislation has been amended over time, the following comments are still valid in my opinion.

> 121 C.C.C. (3d) 504 (Alta. C.A.); J. V. Roberts, "Conditional Sentencing: Sword of Damocles or Pandora's Box?" (1997), 2 Can. Crim. L. Rev. 183. It also assists in distinguishing the conditional sentence from probation by making the consequences of a breach of condition more severe.
>
> [My italicization added]

2. Mr. Avard has had a significant criminal record build up since 2015, and many opportunities for rehabilitation as demonstrated in the PSR;

3. Mr. Avard committed his first breach of the (September 19, 2018) CSO conditions on January 5 – 6, 2019, and the 14 days custody was ineffective in preventing the second breach on January 28, 2019 a mere two weeks later. Moreover, Judge Scovil concluded that: "*it appears one where the continued breaches of alcohol would likely take place…* It would undermine the respect of the public in conditional sentence orders if I did not… order him to serve the remaining 247 days."

[51] Mr. Avard argues that: the first breach did not involve alcohol, and the second one did – but not involve any incidental criminal offence; through no fault of his own, he has not been able to consistently access mental health and substance abuse counselling since being subject to the conditions of the CSO; he has excellent employment opportunities and the continued support of his

partner Ms. Martin. He suggests that collapsing the entire remaining 247/240 days into a custodial sentence (even if only two thirds thereof will likely be served in light of remission) [10] is disproportionate to his breach of the alcohol condition.

[52] I agree with the following approach suggested by Justice Ryan in *R v Langley*, 2005 BCCA 478:

> 13 This brief review of the appellate authorities following *Proulx*, suggests the task of the court at a disposition hearing is to consider the nature of the offence; the nature, circumstances, and timing of the breach; any subsequent criminal conduct and sentences for that conduct; changes in the plan for community supervision; the effect of termination on the appropriateness of the sentence for the original offence; and the offender's previous criminal record, in determining whether the presumption of termination for breach is to be applied. If the presumption is rebutted, the court then is to ask itself which of the other three options is appropriate, having regard to those same factors. I do not understand the list of factors to be closed.

[53] Through that lens, was Judge Scovil's disposition order demonstrably or clearly unreasonable?

[54] I am hesitant to interfere with the sentencing decision of the local judge who is much closer to the community in question and has a much finer appreciation for the sentencing approaches that might suit a particular community, in light of

[10] The impact of earned and statutory remission arises from three federal statutes: the *Criminal Code*, RSC 1985, c.C-46, the *Corrections and Conditional Release Act* SC 1992, c.20,and the *Prisons and Reformatories Act* ,RSC,1985, c.P-20, and the *Remission of Sentence Regulations* made under section 6 of the Act regarding Nova Scotia (OIC 88-1364;NS Reg. 249/88).

the Purpose and Principles of sentencing as generally set out in sections 718, 718.1 and 718.2 *CC*.

[55] However, with the greatest of respect, I conclude that the disposition order in this case is demonstrably unreasonable. I conclude that the presumption that the entire CSO be collapsed (*Proulx)* has been rebutted.

[56] The outcome is disproportionate to Mr. Avard's moral blameworthiness, associated as it is with no independent criminal offence, and as the "maximum" punishment available in the circumstances was imposed, it stretches the required consideration of the "restraint" principle to the point of breaking, while also keeping the parity principle in mind. Moreover, the original CSO only contained 6 months of house arrest, which would have ended on approximately March 20, 2019.

[57] I also consider that: there are quite limited opportunities and choices regarding rehabilitative programs in provincial correctional facilities; Mr. Avard's rehabilitation would likely be better served accessing such services in the community; in jail he will be necessarily associating with a negative peer group.

[58] Having concluded that the trial judge erred, it falls to me to make a determination of an appropriate disposition for the January 28, 2019 breach of the CSO.

Conclusion

[59] The appeal is allowed.

[60] I keep in mind that, as a result of his breach of the CSO, Mr. Avard has served 78 days in custody (between February 5 and April 23, 2019) and that since then he has been on bail pending appeal according to the strict conditions imposed by Justice Lynch which mirror his CSO conditions, including house arrest (for approximately another three weeks which have passed without incident).

[61] I quash Judge Scovil's disposition, and order that the CSO recommence immediately in the same form until its duration has run its course.

[62] No costs are awarded.

Rosinski, J.