NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. McKenna*, 2015 NSCA 58

Date: 20150616
Docket: CAC 433276
Registry: Halifax

Between:

Randall Bruce McKenna

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Farrar and Van den Eynden, JJ.A.
Appeal Heard:	June 8, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.: Fichaud and Van den Eynden, J.A. concurring.
Counsel:	Appellant in person Marian Fortune-Stone, Q.C., for the respondent

Reasons for judgment:

Overview

[1] On September 15, 2014, the appellant pled guilty to two indictable offences: possession of property obtained by the commission of a crime and breach of probation.

[2] On September 22, 2014, Provincial Court Judge Del Atwood sentenced the appellant to 18 months imprisonment: six months on the possession of property offence and 12 months on the breach of probation.

[3] The sentences were to run consecutively to each other but concurrent to an intermittent sentence of 90 days which was imposed on Mr. McKenna just four days before the offences under appeal. Mr. McKenna seeks leave to appeal, and if granted, will appeal arguing the sentences are unfit because they are manifestly excessive.

[4] For the reasons that follow I would dismiss the appeal.

Background

[5] The circumstances giving rise to the charges against Mr. McKenna took place on August 22, 2014. The facts, for sentencing, were agreed to by counsel and were summarized by the sentencing judge in his decision. The most salient facts are as follows:

- At around 9:40 p.m. officers were dispatched to the Acro Lounge in downtown New Glasgow after the Appellant called their police service requesting transportation to the bus station.
- The Appellant stated that he was required to report to Burnside for weekend service of his intermittent sentence and wanted the drive to catch the bus to Burnside.
- The officers arrived at the lounge and spoke with two female employees who identified the Appellant as "the same guy we had just had an incident with who was threatening staff". The Appellant identified himself to the officers by producing a birth certificate.
- A staff member described the Appellant as belligerent saying: …. he stated to staff … "I could smash you with this…. I'll come back here and end our life."

- The Appellant was wearing a grey hoodie and matched the description given to police dispatch as the person who had also just stolen a woman's purse. A witness saw the Appellant stealing the purse from a vehicle parked in front of a local business and then throw it across the street.
- The purse was recovered and nothing was stolen.
- The Appellant initially denied stealing the purse and said that the purse had been given to him by Mr. Buzzy Graham. When it was pointed out that his pal, Mr. Graham, had died several-months' previously, the Appellant said: "Oh, it must have been someone else."

[6] At the initial sentencing hearing on September 15, 2014 (following the guilty pleas), Patrick Young, representing the Crown, asked the court to sentence Mr. McKenna to three months in custody on the breach of probation charge and three months consecutive on the possession of stolen property charge, to be served in addition to any time already served by the accused.

[7] Douglas Lloy, on behalf of Mr. McKenna, sought a suspended sentence, or in the alternative, a period of 60 days in custody after credit was given to him for the time he had already spent on remand.

[8] It was the view of the sentencing judge that a much more significant sentence would be warranted based on Mr. McKenna's extensive criminal record. He adjourned the sentencing hearing to September 22, 2014, to allow counsel to submit further authorities for their positions.

[9] Both the Crown and Mr. McKenna's counsel submitted sentencing memoranda. The Crown revised its position and sought 12-18 months imprisonment on the breach of probation charge and 6-12 months consecutive on the possession of stolen property charge. Both sentences were to be consecutive to time already being served.

[10] In his memorandum, the defence suggested a sentence in the range of six months imprisonment.

[11] At the resumption of the sentencing hearing on September 22, 2014, the sentencing judge also heard additional submissions from Mr. McKenna, on his own behalf, and Mr. Lloy. Mr. Lloy advised that the appellant had instructed him to consent to a custodial sentence that was up to six months in duration. Following the submissions, Atwood, P.C.J. imposed the sentences as previously noted.

Issue

[12] Are the sentences demonstrably unfit because they are excessive?

Standard of Review

[13] The standard of review for sentence appeals is well-established. The approach to be taken is a deferential one. In **R. v. L.M.**, 2008 SCC 31, LeBel, J., writing for the majority, 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:
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> > . . . 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.
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> (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; and F. Dadour, *De la détermination de la peine: principes et applications* (2007), at p. 298.)

Analysis

[14] Mr. McKenna did not file a factum. However, he was present in court on the appeal hearing to set forth his position. Simply put, he considers that the one year prison term for the breach of probation is excessive. He does not take issue with the six month prison term imposed for the possession of stolen property charge.

[15] He suggested that a six month sentence on the breach of probation charge to run consecutively with the six month sentence on the possession of stolen property charge would be fair.

[16] Unfortunately for Mr. McKenna, his argument that the one year sentence for the breach of probation was excessive is not supported on this record. I will explain why.

[17] The sentencing judge was obviously concerned with Mr. McKenna's extensive criminal record. As he described it, Mr. McKenna held a "championship-level criminal record". His record consists of 29 prior convictions for failing to comply with conditions of undertakings or recognizances; 25 prior convictions for breach of probation-related offences; 20 prior convictions for property-related offences; 13 convictions for offences against a person including one conviction for intimidating a justice system participant and 5 convictions for assaulting police officers.

[18] The sentencing judge's reasons are comprehensive. Before arriving at the 18 month sentence for the two offences, he instructed himself on the principles of sentencing as set out in s. 718.1 and s. 718.2 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

[19] He outlined in detail Mr. McKenna's prior record for violent offences as follows:

> [13] In fact, Mr. McKenna's record informs me that his prior record for violence offences includes: one prior conviction for intimidating a justice system participant; five prior convictions for assaulting peace officer; three prior convictions for assault, and four prior convictions for uttering threats. Furthermore, Mr. McKenna has received significant prison sentences in the past. A nine-month sentence imposed 13 December 2012; six months imposed 8 February 2011; eleven months imposed 3 February 2011; eleven months imposed the 10 December, 2009; two years, four months imposed 20 July 2006 and six months imposed 30 March 2005. And that merely encompasses the lengthier sentences imposed upon Mr. McKenna.

[20] Also of significance to the trial judge and on this appeal is the fact that Mr. McKenna was subject to two probation orders at the time of these offences. One that had been imposed in Provincial Court on November 22, 2013, and the other imposed by the same sentencing judge on August 18, 2014.

[21] He further recognized the need for restraint in sentencing but made particular note of Mr. McKenna's failure to take advantage of judicial restraint in the past where he was given opportunities to obtain counselling for substance abuse and refused.

[22] Finally, he referred to **R. v. Dean**, 2011 NSPC 40 to address the parity principle:

> [22] In *R. v. Dean* 2011 NSPC 40, this court imposed a sentence of 755 days upon a flagrant probation violator whose record, while significant, did not approach the profligacy of Mr. McKenna's. In *R. v. Smith* 2013 NSPC 106, the court went along with the joint-submission of a two-year sentence for a serial probation and undertaking violator. In *R. v. Pilgrim* 2013 NSPC 60, the court imposed a 24-month sentence for a breach-of-probation repeat offender.

[23] He went on to conclude that the appropriate sentence in this case was 12 months imprisonment for breach of probation and 6 months for the property offence to be served.

[24] I am not convinced that the sentence in this case is unreasonable. If anything, Judge Atwood exercised considerable restraint in light of the significant criminal record of Mr. McKenna which called out for specific deterrence. Prior prison terms, prohibition and opportunities given to Mr. McKenna to obtain treatment for his alcoholism have done nothing to deter him or to lead to his rehabilitation. The sentencing judge's decision is certainly within the range of sentences for these offences.

[25] The law requires us to pay great deference to the judge's sentencing decision. I am satisfied that the sentencing judge applied the proper principles of sentencing in concluding that the sentence should be a total of 18 months for these offences. The sentencing judge committed no error nor is the sentence demonstrably unfit. I would grant leave but dismiss the appeal.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Van den Eynden, J.A.