NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Perrin***, 2012 NSCA 85

Date: 20120821
Docket: CAC 374749
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Kyle Robert Perrin

Respondent

Judges:	MacDonald, C.J.N.S., Hamilton and Beveridge, JJ.A.
Appeal Heard:	June 1, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal granted and the appeal is dismissed, per reasons for judgment of Beveridge, J.A.; MacDonald, C.J.N.S. and Hamilton, J.A. concurring.
Counsel:	James A. Gumpert, Q.C., for the appellant Roger A. Burrill, for the respondent

Reasons for judgment:

[1] The Crown seeks leave to appeal, and if leave is granted, appeals a sentence of 30 days imposed on the 21-year-old respondent for the offence of break and enter into a seasonal dwelling. The Crown says the trial judge erred in principle by failing to give proper emphasis to denunciation and deterrence and that the sentence is so lenient it is demonstrably unfit. While a longer and more severe sentence might have been imposed, I am not persuaded that we should intervene. My reasons are as follows.

FACTUAL BACKGROUND

[2] There are two main factors that influence the selection of an appropriate sentence, the circumstances of the offender and the circumstances of the offence. Unfortunately, in this case the usual details of these two key factors are scarce. We do know this, the respondent was just 21 years old. He had been sentenced on August 23, 2010 in Provincial Court in Amherst for offences involving cheques. He was granted a conditional discharge and placed on probation for six months. Apart from the statutory conditions in his probation order, he was required to report to and be under the supervision of a probation officer, do community service and make restitution to the bank of $180. The respondent was charged with failing to comply with these conditions. He was sentenced on October 25, 2011, to serve 90 days, but was ordered to serve the sentence in the community pursuant to a conditional sentence order. There were scant conditions attached to the conditional sentence order. There was no house arrest or curfew. He was required to keep the peace and be of good behaviour, perform 25 hours of community service work by December 28, 2011; and fulfill the obligation to make restitution to the bank also by December 28, 2011.

[3] In the early morning hours of December 19, 2011 the RCMP received a report that people were inside a seasonal residence just outside Parrsboro. Flashlights could be seen. A small car was reported as being parked on the side of the road. The police attended. They stopped a small car a short distance away. The respondent was driving. Two others were with him, a young girl, and a 34-year-old man. Speakers were found, along with a quantity of copper piping. These had been removed from the seasonal residence.

[4] The respondent provided a full confession to the police about his involvement in the break and enter and showed the officers what items had been taken. He was charged and appeared in Provincial Court later the same day. He was remanded. The next day, with the assistance of counsel, the respondent elected trial in Provincial Court and pled guilty to the offence of break and enter and commit theft (s. 348(1)(b) of the *Criminal Code*). He also admitted he had breached his conditional sentence order by failing to keep the peace and be of good behaviour.

[5] The parties wanted to proceed directly with sentence. The Crown set out the facts, mentioned the offence is a life imprisonment offence, and the decision of this Court in *R. v. Zong* (1986), 72 N.S.R. (2d) 432 (C.A.) said to have set a benchmark of three years for the offence of break and enter. The Crown recommended collapse of the conditional sentence order, which would leave 34 days to be served in jail, plus a sentence of 18 months consecutive on the break and enter.

[6] Counsel for the respondent noted his youth, completion of the mandated community service, and that the respondent had in his possession the $180 to make the required restitution. Counsel also stressed the fact the respondent had secured employment in Halifax and a place to live there with family. He pointed out that the building the respondent entered appeared to be an abandoned building and suggested a longer conditional sentence or intermittent incarceration for the break and enter, and no action be taken on the conditional sentence breach.

[7] MacKinnon Prov. Ct. J. was the trial judge. He terminated the conditional sentence order and directed the respondent serve the remainder of the 34 days in custody. He concluded it was necessary to impose a further period of custody for the offence of break, enter and theft and imposed one-month consecutive. I will detail later his reasons.

STANDARD OF REVIEW

[8] Sentencing an offender is one of the most difficult tasks facing a judge. The guiding principles are well known, but often conflict. This means a trial judge must decide the appropriate weight to be given to the various principles in the particular circumstances. Appellate court judges are not at liberty to merely

substitute their views as to the appropriate sentence. Great deference is owed to a trial judge's assessment of the appropriate sentence. This has been emphasized repeatedly. Lamer C.J., for the Court in *R. v. Proulx*, 2000 SCC 5 wrote:

> 123 In recent years, this Court has repeatedly stated that the sentence imposed by a trial court is entitled to considerable deference from appellate courts: see *Shropshire*, *supra*, at paras. 46-50; *M. (C.A.)*, *supra*, at paras. 89-94; *McDonnell*, *supra*, at paras. 15-17 (majority); R. v. W. (G.), [1999] 3 S.C.R. 597, at paras. 18-19. In *M. (C.A.)*, at para. 90, I wrote:
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> > Put simply, 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. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. [Emphasis in original.]
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> 124 Several provisions of Part XXIII confirm that Parliament intended to confer a wide discretion upon the sentencing judge. As a general rule, ss. 718.3(1) and 718.3(2) provide that the degree and kind of punishment to be imposed is left to the discretion of the sentencing judge. Moreover, the opening words of s. 718 specify that the sentencing judge must seek to achieve the fundamental purpose of sentencing "by imposing just sanctions that have one or more of the following objectives" (emphasis added). In the context of the conditional sentence, s. 742.1 provides that the judge "may" impose a conditional sentence and enjoys a wide discretion in the drafting of the appropriate conditions, pursuant to s. 742.3(2).
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> 125 Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying interference. Further, minor errors in the sequence of application of s. 742.1 may not warrant intervention by appellate courts. Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit.

[9] The correct approach was explained recently by LeBel J., again for the full Court, in *R. v. Nasogaluak*, 2010 SCC 6 as follows:

> [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:
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> > 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. 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.

ANALYSIS

[10] The Crown has two complaints. The first is that the sentence imposed inadequately reflects the objectives of denunciation and deterrence. The second is that given the circumstances it is demonstrably unfit.

[11] The Crown relies heavily on the decision of *R. v. Adams,* 2010 NSCA 42, where Bateman J.A., writing for Court commented:

> [29]As I have observed above, the judge provides a generic reference to the principles of sentencing in his reasons. Absent is any meaningful analysis of those principles as they apply to the offences and offender before him. For example, when one considers that a single break and enter offence attracts a benchmark sentence of three years (**R. v. McAllister**, 2008 NSCA 103), it is difficult to determine how he could have concluded that a total sentence of 42 months even with the addition of fines and community service, was fit for this collection of offences.

[12] With respect, I do not find the Crown's reliance on *Adams* persuasive. In *Adams*, the offender eventually pled guilty to multiple counts of break and enter, 75 counts of possession of stolen property, and counselling perjury. The offences

occurred over a three-year period. The value of the goods he was convicted of stealing or possessing amounted to $690,000. He was sentenced to serve 42 months incarceration, probation, community service and fined $82,000. Bateman J.A. found that the trial judge erred by failing to turn his mind to the appropriate sentence for each conviction. Instead the trial judge had decided on a global sentence and then worked backwards. This resulted in a sentence that was manifestly unfit.

[13] In the case at bar, the trial judge recognized the principles that guide the exercise of discretion in arriving at an appropriate sentence. He quoted s. 718, which reads:

> **718.** The fundamental purpose of sentencing is 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:
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> (*a*) to denounce unlawful conduct;
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> (*b*) to deter the offender and other persons from committing offences;
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> (*c*) to separate offenders from society, where necessary;
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> (*d*) to assist in rehabilitating offenders;
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> (*e*) to provide reparations for harm done to victims or to the community; and
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> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[14] The trial judge referred to the respondent's youth, his lack of a record for similar offences and found that there were good prospects for his rehabilitation. The Crown does not say the trial judge erred in making these findings. There was evidence to support them. It was uncontested that the respondent had found employment, fulfilled the required hours of community service and had the money to comply with the restitution order. In addition, the respondent spoke directly to the trial judge:

> **MR. PERRIN:** I just want to say that it was not planned at all. We just went for a drive. I don't know what we were thinking. And I've never done this sort of thing before. I have no youth record at all. ...

[15] This is not a case like *R. v. Best*, 2012 NSCA 34, where the trial judge in sentencing a young adult offender for an offence of break enter and commit an aggravated assault said that the principles of denunciation and deterrence were not particularly pressing, nor did they "need to be emphasized". Here, the trial judge recognized the importance of these principles. He said:

> [7] 718(a) is particularly important "to denounce unlawful conduct" when the offence is a break and entry offence. 718(b) is also important with respect to this type of offence, because courts have to deter offenders and other persons from committing offences.

[16] The trial judge then continued:

> The other factors that I have to take into account are that I have to impose a sentence which assists in rehabilitating offenders, which provides reparations for harm done to victims and to the community, and which promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
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> [8] Based on all of the circumstances of your case, Mr. Perrin, and based on the fact that you entered a guilty plea to this charge at an early opportunity, which is a mitigating factor, hopefully that tells me that not only are you accepting responsibility for what you did, but that you are a person who can be specifically deterred, and you are a person who can be rehabilitated. And so I conclude that those things should be taken into account in determining what is an appropriate sentence.
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> [9] With respect to the breach of the conditional sentence order, I have already indicated that you are going to serve 34 days in custody.
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> [10] With respect to the break and entry charge, I conclude that it's necessary to impose a further period of custody. There will be one month in custody, consecutive to the conditional sentence time that remains to be served.

[17] The trial judge also imposed probation for 18 months. In addition to the statutory conditions, he ordered the respondent not to associate with or be in the company of any person known to him to have a criminal, *Controlled Drugs and*

Substances Act, or *Youth Justice Act* record, without written permission of his probation office, or unless association was incidental to his employment or counselling program or a member of his immediate family; and to make reasonable efforts to locate and maintain employment or an education program as directed. The trial judge summed up his reasons as follows:

> [15] ...Hopefully the sentence that I am imposing will have the desired effect under section 718 of the *Criminal Code*, and that is that the sentence will deter you and others from committing these types of offences, and also that the sentence will effect rehabilitation, so that you are not before the courts again. You now have a record for a break and entry offence, and that will be taken into account if you do appear before courts in the future. Good luck, Mr. Perrin.

[18] Here the trial judge exercised his discretion in electing to impose a short additional period of incarceration. I agree with the respondent that the imposition of what is sometimes referred to as a short, sharp sentence is appropriate, particularly where the offence was one of property as opposed to a crime of violence. Martin J.A. in *R. v. Vandale* (1974), 21 C.C.C. (2d) 250, quoted with approval the reasons of McKenna J. of the English Court of Appeal in *R. v. Curran* (1973), 57 Crim. App. R. 945, where he said:

> As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence and imposed as this sentence was for reasons of general deterrence, that is, as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence and that sentence is needed to teach this particular offender a lesson which he has not learned in the lighter sentences which he has previously received.

[19] The trial judge was well aware of the circumstances of the offender. He had an opportunity to observe him, hear him express his remorse, and was satisfied that a sentence of 30 days consecutive was all that was required to denounce his conduct and deter him from further like behaviour. I recognize that ordinarily where an offender commits an offence while serving a conditional sentence a significant denunciatory and deterrent sentence would be the norm. However, here the conditional sentence "being served" by the respondent was more like a suspended sentence than a true conditional sentence. There were no conditions attached to that order beyond what was in his original probation order. I would not accede to this ground of appeal.

[20] With regard to the complaint that the sentence arrived at is so lenient as to be demonstrably unfit, the Crown's submissions parallel those made in relation to the argument that the trial judge erred in principle: the circumstances of a break into a seasonal dwelling removing copper piping make the sentence inadequate, particularly in light of the two prior lenient and rehabilitative sentences.

[21] Reliance is again placed on *R. v. Adams*, *supra* in support of the imposition of a sentence in the range of two years. With all due respect, the circumstances in *Adams* are far different. Although a first time offender, Adams had been involved for three years in a series of breaks, with obvious planning and premeditation with the total value of goods involved of $690,000. Here the respondent is a youthful offender. The offence was not planned and he was remorseful. An order for restitution for the damage done to the dwelling would have been appropriate, but the Crown did not ask for such an order.

[22] This Court, on a number of occasions, has imposed or upheld non-custodial or short jail sentences for break and enters over a wide range of circumstances. In *R. v. Palmer* (1976), 17 N.S.R. (2d) 236, the respondent had no prior record. He was convicted at trial of four counts of break, enter and theft in relation to summer cottages. The trial judge granted him conditional discharges. This sentence is not available for a life imprisonment offence. MacKeigan C.J.N.S. allowed the appeal and substituted a 12-month suspended sentence.

[23] In *R. v. Guye et al.* (1981), 50 N.S.R. (2d) 205 four accused pled guilty to a break and enter into a furniture store where they stole appliances. All were youthful offenders, aged 19 to 23 years. Two were on parole at the time and two had no prior record. The trial judge imposed one month for the offenders on parole and a suspended sentence and two years probation of the others. On Crown appeal, the Court found the sentences inadequate to reflect general deterrence and imposed four months on the respondents who were on parole and two months imprisonment on the others and deleted the probation order.

[24] In *R. v. Rogers* (1985) 70 N.S.R. (2d) 390, the Crown appealed a one-year suspended sentence for a 31-year-old offender who pled guilty to break, enter and theft just one month after being released on parole. He had nine prior convictions including two break and enters. The respondent had secured employment and

formed a relationship. The Court agreed that there was still a chance of rehabilitation but increased the sentence to 90 days intermittent plus probation.

[25] In *R. v. Bursey* (1991), 104 N.S.R. (2d) 94 (C.A.), a 20-year-old offender with multiple prior convictions, including theft, failure to comply with probation, and break and enter. The trial judge was impressed with the rehabilitation efforts by the respondent and suspended sentence for two years and placed him on probation. Chipman J.A. concluded the sentence was not clearly inadequate and dismissed the appeal.

[26] In *R. v. Schrader* (1991), 104 N.S.R. (2d) 91 (C.A.), the Crown appealed a three-year suspended sentence for a 20-year-old offender who had a long record as a young offender and an adult, including prior convictions for break and enter. The appeal was dismissed due to hopes of rehabilitation. No error in principle was found, nor the sentence found to be manifestly inadequate.

[27] I likewise see no error in principle, and while the one-month consecutive sentence was lenient, do not find it to be manifestly inadequate. I would grant leave to appeal, but dismiss the appeal.

Beveridge, J.A.

Concurred in:

MacDonald, C.J.N.S.

Hamilton, J.A.