NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Publicover*, 2021 NSCA 78

Date: 20211112
Docket: CAC 491489
Registry: Halifax

Between:

Wendell Corey Charles Publicover

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	September 9, 2021, in Halifax, Nova Scotia
Subject:	Criminal law: allegation of ineffective assistance of counsel in relation to both conviction and sentence; impact on quantum and ancillary orders of trial judge mistakenly sentencing the appellant for the full offence when he had pled guilty to a lesser and included offence.
Summary:	The appellant declined a plea arrangement for a joint recommendation of 2-3 years' incarceration. He wanted to avoid jail time altogether despite the seriousness of at least some of the offences and his previous record. Trial counsel arranged access to a treatment facility. With the assistance of trial counsel, the appellant pled guilty to numerous offences. The trial judge rejected the appellant's request for time served and a suspended sentence. Instead, the judge accepted the Crown's position of five years' incarceration less credit for pre-sentence custody and ancillary orders for DNA and a lifetime firearms ban. The appellant seeks to withdraw his guilty pleas or a lesser sentence due to what he alleges was ineffective assistance of counsel.

Issues:

(1) Is there any basis to permit withdrawal of the appellant's guilty pleas?

(2) Has the appellant made out a claim for ineffective assistance of counsel?

Result:

The appeal from conviction is dismissed. There is no basis to permit withdrawal of appellant's guilty pleas, nor has he made out a claim for ineffective assistance of counsel. However, Crown counsel mistakenly referred to one of the convictions as assault causing bodily harm (s. 267) despite the fact the appellant had pled guilty to the lesser and included offence of common assault (s. 266). The trial judge treated the offence as assault causing bodily harm, imposed six months' consecutive incarceration and made ancillary orders that would not be available if the offence were common assault. The judge erred in law. The ancillary orders were quashed and the sentence reduced to four months' incarceration less three months' pre-sentence custody credit.

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Her Majesty the Queen

Respondent

Judges:	Beveridge, Bourgeois and Beaton, JJ.A.
Appeal Heard:	September 9, 2021, in Halifax, Nova Scotia
Held:	Appeal from conviction dismissed; leave to appeal sentence granted; sentence appeal allowed in part per reasons for judgment of Beveridge, J.A.; Bourgeois and Beaton, JJ.A. concurring
Counsel:	Wendell Publicover, appellant in person Glenn Hubbard, for the respondent

Reasons for judgment:

[1] Mr. Publicover is almost 45 years old. He has spent a lot of his adult life in prison. When not incarcerated, he struggled with alcohol and substance abuse.

[2] In 2018, he faced numerous criminal charges. Mr. Publicover wanted to avoid jail.

[3] In 2019, defence counsel unsuccessfully tried to have Mr. Publicover's matters referred to "Mental Health Court" and then to "Drug Court"[1]. Proceedings were put off numerous times to allow counsel to secure a bed in a treatment facility. Armed with that option, guilty pleas were then entered. The Crown sought federal incarceration. Defence counsel argued for time served along with a suspended sentence under strict conditions, including attendance and compliance with the requirements of the treatment facility.

[4] Despite the availability of a non-carceral setting to treat Mr. Publicover's known drug addiction, on July 19, 2019, the sentencing judge imposed a custodial sentence of five years for 11 offences, less pre-sentence credit for time he had spent on remand and made various ancillary orders.

[5] Mr. Publicover, now self-represented, appeals from conviction and seeks leave to appeal sentence. The main basis for his appeal is his suggestion his trial counsel was ineffective—this caused a miscarriage of justice, and he should be permitted to withdraw his guilty pleas or at least get a reduced sentence.

[6] In support of these suggestions, he filed a lengthy affidavit which he wants admitted as fresh evidence. In response, the Crown filed trial counsel's affidavit.

[7] The fresh evidence is provisionally admitted to assess the appellant's claim of ineffective assistance of counsel. For the reasons that follow, I would not admit the fresh evidence. Although I would dismiss the conviction appeal, I would grant leave to appeal sentence, quash two of the ancillary orders and substitute a sentence of four months' consecutive incarceration less three months' pre-sentence custody credit for the s. 266 offence.

[1] Technically, these are programs overseen by the Dartmouth Wellness Court.

[8] To provide context to the appellant's complaints, I will set out a brief chronology of the proceedings in the court of first instance, the sentence hearing, and the trial judge's decision.

CHRONOLOGY OF THE PROVINCIAL COURT PROCEEDINGS

[9] The appellant received intermittent sentences on February 1, 2018 for the offences of assault, fraud, theft, and numerous breaches of probation. He started serving that intermittent sentence on February 9, 2018 by weekend attendance at the Central Nova Scotia Correctional Facility.

[10] While in the community, the police arrested the appellant on March 7, 2018 for theft, possession of a prohibited weapon and numerous breaches of various probation orders that had required him to keep the peace and abstain from the consumption of non-prescription drugs and alcohol. The charges were spread out over two Informations sworn March 8, 2018. A little over a week later, the appellant was released from custody on his own recognizance. Not guilty pleas were entered. Trial was set for August 9, 2018.

[11] The police again arrested the appellant on April 16, 2018. This time for break, enter and theft from a dwelling house. Associated charges were property damage (mischief) caused when he broke into the dwelling house, breach of his recognizance and multiple breaches of his various probation orders. Once again, the appellant was released, but on a recognizance with a surety and on conditions that amounted to house arrest at Apartment 31, 16 Mandaville Court, Halifax.

[12] Those conditions allowed him to be outside that residence for attendance at drug or alcohol counselling, employment, or if in a residential treatment program. It appears that the appellant nonetheless remained in custody on other undisclosed matters. Election and pleas on the April 16 charges were to take place on July 23, 2018. Eventually, he was released, but his surety rendered on July 19, 2018. A render of surety warrant issued. A bench warrant for the appellant's arrest followed when he failed to appear on July 23.

[13] Further arrest warrants ensued when the appellant failed to attend for his August 9, 2018 trial.

[14] These warrants remained outstanding until the appellant was arrested on September 19, 2018 for assault causing bodily harm and breach of his earlier probation orders. These offences were alleged to have been committed on

September 13, 2018 at the home of the victim, John O'Toole, in Lower Sackville, Nova Scotia.

[15] This time, remand followed. The Court set an early trial date for November 21, 2018 for the assault causing bodily harm and related breach of probation charges. On that date, with the assistance of defence counsel, the appellant pled guilty to one of the breach of probation charges and the lesser and included offence of common assault.

[16] The appellant then sought his release. A contested bail hearing followed. The Crown presented details on all of the outstanding charges from the incidents in March, April and September. The appellant proposed a new surety, his girlfriend who had been present during the September incident in Lower Sackville. The judge denied bail. Remand resulted.

[17] Defence counsel requested trial dates for the March 7, 2018 theft and related charges. He requested the other matters be referred to Dartmouth Provincial Court #5 "Dartmouth Wellness Court" for his possible acceptance into the Mental Health Program. The judge set March 18, 2019 as the trial date for the March 8, 2018 Informations.

[18] The Mental Health Program concluded the appellant did not qualify. Shortly afterwards, appellant's counsel felt he needed to withdraw due to a breakdown in the solicitor/client relationship. After some delays, Patrick Atherton assumed carriage of the appellant's matters.

[19] Mr. Atherton advocated for the appellant to be referred back to the Dartmouth Wellness Court. Although the appellant had been turned down for acceptance into the Mental Health Program, the report from the Program indicated the appellant would be a candidate for the Drug Treatment Program.

[20] In the meantime, the Crown requested an adjournment of the trial dates for the March 8, 2018 Informations due to the unavailability of a witness. Mr. Publicover opposed. The judge declined to release the trial date of March 18, 2019. Instead, the issue would be revisited when Mr. Atherton could be in court with the appellant.

[21] On Mr. Atherton's appearance, hope was held out for the Drug Treatment Program if he could obtain a bed for the appellant in a local facility. With the assistance of Mr. Atherton, the trial dates were subsequently released on March 8,

2019. Multiple appearances followed as Mr. Atherton endeavoured to secure a bed in a drug treatment facility.

[22] Finally, on July 11, 2019, Mr. Atherton was able to provide to the Court and the Crown a letter from AlCare Place that as of July 31, 2019 it would have an inpatient bed for the appellant. Before Judge Gregory Lenehan, the appellant elected trial in Provincial Court and pled guilty to the break and enter charge and damage to property. He also changed his plea to guilty on the theft charge, possession of a prohibited weapon, and various breaches of probation from the March 7, 2018 Informations.

[23] The parties agreed the sentence hearing would be on July 19, 2019, and they would rely on the appellant's most recent Pre-Sentence Report from 2016. Both counsel filed caselaw. With this chronology in mind, I turn to the July 19 sentence hearing.

JULY 19, 2019 SENTENCE HEARING

[24] The hearing before Lenehan, Prov.Ct. J. proceeded as many do. The Crown: laid out the facts for each of the offences the appellant had pled guilty to; summarized the appellant's 122 prior convictions; discussed the caselaw that dealt with the principles of sentence for serious offences such as break and enter; and, sought to distinguish the caselaw submitted by Mr. Atherton.

[25] The Crown requested five years' incarceration, broken down in a variety of specific terms for each offence, less remand time, plus ancillary orders for DNA and weapons prohibition.

[26] Mr. Atherton stressed the root problem of the appellant's difficulties was drugs. The appellant had not received his methadone when he had been released on the completion of his weekend incarceration at Central Nova. This triggered immediate consumption of alcohol and drugs which caused him to "black out". It was while in this state that he committed the break and enter. A three year suspended sentence would give the appellant an opportunity to break the cycle of incarceration and recidivism.

[27] The Crown made brief comments in reply. The appellant addressed the Court. The trial judge reserved until the afternoon.

[28] On his return, the trial judge, in an unreported oral decision, reviewed the basic facts of the allegations, the positions of the Crown and defence, and the relevant principles of sentence. Those principles included parity, the mitigating and aggravating factors, the step principle, and totality.

[29] The decisive factor for the judge's choice between the Crown and defence positions was he simply did not have faith that if he imposed a suspended sentence the appellant would not commit further offences. The judge found the Crown's recommended sentence at the low end of what could have been requested:

> The difficulty for Mr. Publicover, and he can tell where I'm going with this, is that I simply do not have any faith that Mr. Publicover, if he were to be released into society right now, would not commit further offences. He's been given multiple opportunities in the last six years and each and every time he has been unsuccessful.
>
> When I take a look at how other people would be sentenced with regards to a break and enter into a dwelling house when they have multiple prior convictions for the same type of offence and the Crown's recommendation of four years quite frankly, I think, is at the low end of what could have been requested here.

[30] The trial judge imposed a total sentence of five years' incarceration, less pre-sentence custody credit of 15 months, broken down as follows:

Charge:	Sentence:
s. 348(1)(b) break enter and commit	4 years
s. 430(4) mischief (damage to property)	1 month concurrent
s. 91(2) possession of a prohibited weapon	3 months consecutive
s. 334(b) theft under $5000	3 months consecutive
s. 266 assault	6 months consecutive

[31] The total time to serve of 60 months was reduced by 15 months' pre-sentence custody credit, calculated at the statutory maximum of 1.5 days for each day spent on remand. The total sentence on a "go-forward" basis came to 3 years and 9 months.

[32] For the six counts of breach of probation, all the terms of imprisonment were made concurrent—that is, they added nothing to the total sentence the appellant had to serve. The remaining charges were withdrawn.

ISSUES

[33] It is a challenge to succinctly capture all of the appellant's arguments. The grounds of appeal set out in his Notice of Appeal cover nine single-spaced pages comprised of a litany of complaints. The appellant's written appeal materials are set out in a 78-page document that was accepted by the Court as his factum and proposed fresh evidence.

[34] In essence, the appellant wants this Court to vacate his guilty pleas, either because he did not know the Crown was asking for 5 years' incarceration or as a remedy for ineffective assistance of counsel. By implication, he also asks that his sentence be reduced as a remedy for ineffective assistance of counsel.

[35] I would therefore summarize the issues as follows:

1. Should this Court permit the appellant's request to withdraw his guilty pleas?
2. Has the appellant made out a claim for ineffective assistance of counsel? and,
3. If he has, what would be the appropriate remedy?

ANALYSIS

Withdrawal of guilty pleas

[36] With respect to the appellant's conviction appeal, there was no trial. He pled guilty. The appellant does not suggest the trial judge made any legal error in how his pleas were entered or in the course of any failed application before the trial judge to withdraw his pleas. The appellant made no such application.

[37] The appellant's only recourse is to ask this Court to permit withdrawal of his guilty pleas to prevent a miscarriage of justice (*R. v. Henneberry*, 2017 NSCA 71; *R. v. Wong*, 2018 SCC 25). To constitute a miscarriage of justice the appellant must demonstrate on a balance of probabilities that his pleas were invalid.

[38] To be invalid, a plea must have been involuntary, uninformed or equivocal. The appellant advances no assertion his pleas were equivocal or involuntary, or that trial counsel's putative incompetence had any role to play in his having pled guilty.

[39] The appellant also does not claim there was a plea arrangement in place that was somehow violated by the Crown's position on sentence. The record, and Mr.

Atherton's affidavit makes it clear there was an earlier plea arrangement on the table.

[40] The appellant raised the issue on January 31, 2019 in Court as to availability and start date of a proposal discussed between the Crown and his former counsel. The Crown declined to discuss in open court any aspect of settlement discussions. The appellant advised the Court he did not want to go to trial. This occurred prior to Mr. Atherton's involvement.

[41] Mr. Atherton's affidavit of July 23, 2021 describes the availability of a joint recommendation of a 2-3 year period of incarceration and his opinion it would be a favourable sentence, if accepted by the Court. He deposes that the appellant instructed Mr. Atherton to reject the joint recommendation and seek a "community based disposition". Mr. Atherton's affidavit explains:

> 8. That I discussed with Mr. Publicover that a community-based sentence would be a difficult sentence to achieve in the circumstances and on the basis of the prevailing case law in Nova Scotia, but that he was adamant that he wished to proceed in this way.
>
> 9. **That Mr. Publicover advised me the Crown had initially been seeking a two-to-three year period of incarceration upon early resolution. It was his desire to seek a community-based disposition that led to his rejection of that offer**.
>
> 10. That I did explain to Mr. Publicover that with his record and the prevailing case law in Nova Scotia, **the joint recommendation would be a favourable sentence if accepted by the Court. Additionally, I explained to Mr. Publicover that in the absence of a joint recommendation, the Crown would not likely be seeking the same length custodial sentence. Mr. Publicover understood the risk and instructed me that he did not wish to accept the joint recommendation offered by the Crown, instead seeking a community-based disposition**.
>
> [Emphasis added]

[42] The appellant did not seek to challenge these details. Instead, he now insists he was caught unawares on July 19, 2019 by the magnitude of the Crown's sentence recommendation.

[43] There is absolutely no evidence the Crown ever committed to a particular position on sentence prior to the entry of the guilty pleas, nor were they entered for any *quid pro quo*.

[44] Nonetheless, the appellant points to a comment made by Mr. Atherton on July 11, 2019, about the Crown "looking for a deuce"—in the vernacular of Provincial Court proceedings—two years' incarceration in a federal institution. This was the exchange:

> **MR. ATHERTON:** Your Honour, I did file ... **I know my friend is looking for a deuce. I filed some case law.**
>
> **THE COURT:** Yeah, I've got the three ...
>
> **MR. ATHERTON:** I'm pretty sure you've read them before.
>
> **THE COURT:** Yeah. All right.
>
> [Emphasis added]

[45] The appellant's position now is that he would not have pled guilty had he known the Crown was going to recommend five years' incarceration, hence he should be allowed to withdraw his guilty pleas.

[46] There are numerous reasons I cannot accept the appellant's position. First, the appellant pled guilty to the assault in November 2018. It had nothing to do with the Crown's eventual position. Second, the appellant does not say he entered guilty pleas in exchange for a particular position by the Crown. Third, it is contradicted by Mr. Atherton's unchallenged affidavit that the Crown's position would be more than the spurned deal for a joint recommendation of 2-3 years' incarceration; and, the appellant had to have known from his experience of 22 prior convictions for break and enter (a number of which resulted in a sentence of three years' incarceration) that he faced more than a minimum period of federal incarceration. Fourth, the Crown's position on sentence is simply a submission made by counsel—absent a joint recommendation, trial judges can and frequently depart from the positions advanced by either or even both Crown and defence counsel.

[47] Dissatisfaction with the sentence imposed is not a valid ground to permit withdrawal of guilty pleas. There is nothing in the materials to substantiate a miscarriage of justice. I would dismiss this ground of appeal.

Ineffective assistance of counsel

[48] The analysis of this ground of appeal overlaps somewhat. That is because for a claim of ineffectiveness of counsel to succeed an appellant must establish prejudice to the extent that a miscarriage of justice resulted from trial counsel's

incompetence (see: *R. v. G.D.B.*, [2000] 1 S.C.R. 520; *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal denied [1996] S.C.C.A. No. 347).

[49] Typically, claims of ineffective assistance of counsel focus on alleged shortcomings of trial counsel that are said to have jeopardized trial fairness or at least the appearance thereof. An appellant must establish counsel's conduct or omissions amounted to incompetence. In a nutshell, a court must be satisfied of prejudice caused by incompetent performance.

[50] However, as the Supreme Court suggested in *R. v. G.D.B.*, *supra*, and repeatedly followed by appellate courts across the country, usually the best practice is to begin with the issue of prejudice. If an appellant cannot demonstrate prejudice that rises to the level of a miscarriage of justice, it is unnecessary to address the performance issue (see for example: *R. v. West*, 2010 NSCA 16; *R. v. Gogan*, 2011 NSCA 105; *R. v. Ross*, 2012 NSCA 56; *R. v. Dugas*, 2012 NSCA 102; *R. v. Ogden*, 2013 NSCA 25; *R. v. Kobylanski*, 2019 NSCA 57; *R. v. Ball*, 2019 BCCA 32).

[51] To assess prejudice, it is necessary to identify what the appellant now suggests trial counsel should have done. By way of overview, the appellant says trial counsel should have done more. The appellant has meticulously gone through the transcript and set out a number of complaints.

[52] These include counsel: did not correct the judge's factual misstatement; did not correct the Crown and the judge's misapprehension his common assault conviction was for assault causing bodily harm; failed to present more argument about the impact of addiction; did not stress the appellant's accomplishments and the programs he had followed up on while incarcerated; did not elaborate on the medication he had missed or the impact of segregation on mental health or the "inhumane conditions" at Central Nova; and, did not ask for 2/1 credit for pre-sentence custody.

[53] None of these alleged shortcomings have any connection to the voluntary, informed and unequivocal guilty pleas. Hence, there is no basis to question the fairness of the convictions and no miscarriage of justice is made out (see also: *R. v. Riley*, 2011 NSCA 52; *R. v. Messervey*, 2010 NSCA 55).

[54] I do not know of any case in Canada where counsel's alleged lapses constituted ineffective assistance of counsel in relation to sentence proceedings.

The only case of which I am aware where the issue was even addressed is *R. v. Gogan*, *supra*.

[55] In *Gogan*, the appellant faced lengthy provincial incarceration. Counsel advised the trial judge that the appellant preferred a minimum federal sentence (two years). The judge imposed two years' incarceration. The appellant complained that trial counsel did not consult him, and he actually would have preferred a lengthy period of incarceration in a provincial institution.

[56] Trial counsel's affidavit flatly denied the complaint—in fact, her evidence was that she had express instructions to prefer federal incarceration. This Court was satisfied counsel's position was in accordance with her client's instructions, and there was no miscarriage of justice.

[57] As noted earlier, ineffective assistance claims usually allege trial counsel's incompetence jeopardized trial fairness. In those types of cases, a miscarriage of justice is made out when there is a reasonable probability that the verdict would have been different but for counsel's incompetent errors (see: *Joanisse, supra*, at para. 81; *R. v. Ball*, *supra* at paras. 110-1).

[58] I am not entirely sure the "reasonable probability" test should govern an examination of alleged shortcomings in the context of a sentence hearing. A more stringent test may be more appropriate. I say this for two reasons. First, it is well established that a trial judge must balance conflicting principles of sentencing and exercise their discretion to craft an appropriate and just sentence in light of the circumstances of the offence and of the offender. Unlike a trial, it is not a binary choice.

[59] Second, an appeal court, pursuant to s. 687(1) of the *Criminal Code*, must consider the fitness of the sentence, which by statute includes evidence it may require or receive—engaging a less onerous regime for an appeal court to consider information that may not have been available or submitted at trial. In other words, we have the duty to consider the fitness of the sentence, whatever the reason for important, accurate information not being before the trial judge. I recognize the power and duty is of course subject to the requirement that appeal courts defer to a lawful sentence imposed at trial absent an impactful legal error or the imposition of a manifestly inadequate or excessive sentence.

[60] In any event, I need not decide if a more onerous or stringent test than "reasonable probability" of a different outcome ought to govern a determination of

a miscarriage of justice in a sentencing context. I am far from satisfied there is even a reasonable probability the alleged omissions would have led to a different type or length of sentence imposed by the trial judge.

[61] I will comment briefly on the matters identified by the appellant.

[62] During the judge's oral decision, he referred to the police looking for somebody that matched the appellant's description as the possible thief from Steak and Stein. They found the appellant, detained and searched him, which led to the discovery of the folding knife that opened by centrifugal force. The trial judge said:

> Later that day when police were looking for somebody matching Mr. Publicover's description as the possible thief from the Steak & Stein, they located Mr. Publicover, detained him, and while detained did a pat-down search and at that time located on Mr. Publicover a folding knife that opened by centrifugal force.

[63] This was inaccurate. The Crown had set out the facts accurately.

[64] The police had detained the appellant because he matched the description of a male who had made off with a VLT ticket from Dooly's. A search turned up the prohibited weapon. No theft charge was laid because the owner of the ticket just wanted it back.

[65] While in police custody due to violation of his probation orders and possession of a prohibited weapon, Steak and Stein reported a theft of a cell-phone and $1,496.20 made up of a quantity of bank notes and rolls of coins from their safe. The investigating officers learned the appellant was in custody. They went to Booking and saw the amount and kind of money the appellant had had in his possession. This led to the charge of theft from Steak and Stein.

[66] The appellant says trial counsel did not correct this error. With respect, the error by the trial judge was inconsequential. It had nothing to do with the appellant's moral culpability for the theft from Steak and Stein.

[67] As for counsel not saying more about the impact of the appellant's addictions, the medication (methadone) he had missed and his accomplishments, I am not sure what more could have been said. It was not disputed the root cause of the appellant's troubles was his substance abuse. Counsel referred to this issue and to the impact on the appellant's mental state when he missed his methadone medication. Further, the appellant himself addressed the judge at some length

about his mental state and the efforts he had made to start a business, the hard time he had spent while on remand, and his diminished mental capacity due to his missed medication.

[68] The appellant faults counsel for not asking for 2/1 credit for his pre-sentence custody. With respect, this complaint has no merit.

[69] Credit for pre-sentence custody is limited by statute to a maximum of 1.5/1 (see: s. 719(3.1) of the *Criminal Code*; *R. v. Carvery*, 2014 SCC 27; *R. v. Summers*, 2014 SCC 26). The appellant refers to a decision by Moir J. in *R. v. Casey*, 2015 NSSC 187 where a credit of 2/1 was upheld. In fact, the appellant referred to this case during his remarks to the trial judge.

[70] The circumstances in *Casey* were different. The offender had a recognized major psychiatric illness—bipolar disorder. She had medication. It was in the institution's dispensary. While on remand, the institution did not provide it to her, despite her requests, her lawyer's pleas, the recommendation of two judges, and one judge's order to do so. The sentence judge found her constitutional right to security of the person to have been egregiously violated (s. 7 of the *Charter*). As a remedy pursuant to s. 24(1) of the *Charter*, 2/1 credit for pre-sentence custody was granted. Moir J., sitting as the Summary Conviction Appeal Court, found no error.

[71] The appellant's complaint has no merit because: 1) obtaining 2/1 credit would have required a *Charter* motion, which would have entailed a lengthy adjournment courting the possible loss of the bed at the treatment facility; 2) pre-sentence custody credit was irrelevant to the appellant's focus on obtaining a suspended sentence; and, 3) of the paucity of evidence to establish the appellant's s. 7 rights were violated.

[72] The last thing to touch on is the common assault issue. Originally, the appellant faced trial on a charge of assault causing bodily harm (s. 267). On the day of trial, he pled guilty before Lenehan, Prov. Ct. J. to the lesser and included offence of assault *simpliciter* or common assault (s. 266).

[73] Nonetheless, on July 19, 2019, the Crown referred to the September 13, 2018 incident as the "assault bodily harm matter". The Crown described the circumstances. The appellant had an argument with one John O'Toole. Mr. O'Toole said to the appellant, "Can you shut the fuck up? I'm trying to watch my program". At which point the appellant punched O'Toole three times. When the police showed up they saw a "massive amount of blood" in the bathroom and

Mr. O'Toole bleeding from his eye area and nose. They advised pressure to try to stop the blood flow.

[74] The Crown tendered a booklet of photographs that depicted Mr. O'Toole's injury and the bloody scene. Trial counsel simply said, " No dispute, Your Honour."

[75] That is not the end of the confusion. The Crown sought orders to obtain DNA samples for both the break, enter and commit and what was referred to as the "assault causing bodily harm" as being primary designated offences. The Crown also sought a mandatory lifetime prohibition on firearms possession under s. 109. This was the exchange with the trial judge:

> **MR. LACEY:** […] In addition, the Crown will be seeking a DNA order. For the break and enter, it's a DNA primary. For the ... but ...
>
> **THE COURT:** This is the assault causing bodily harm?
>
> **MR. LACEY:** Correct. The only difference, Your Honour, is the break and enter is, I believe, presumptive as opposed to the latter offence you just mentioned, which is actually mandatory, but they are both primary, correct.
>
> **THE COURT:** Yeah.
>
> **MR. ATHERTON:** There's no issue with the DNA order ...
>
> **MR. LACEY:** And the Crown ...
>
> **MR. ATHERTON:** ... (inaudible).
>
> **MR. LACEY:** Sorry. And the 145(3) is a DNA secondary, I believe. Crown would also seek in relation to the break and enter and the 267(b) [assault causing bodily harm], lifetime 109 order.

[76] To these submissions, trial counsel simply said, " No issue."

[77] In his oral decision, the trial judge summed up the circumstances of the assault offence as follows:

> And then following his release on those matters, on September 13th, 2018, while he was visiting with Mr. O'Toole in Mr. O'Toole's residence, there was some disagreement. When Mr. O'Toole suggested that Mr. Publicover quiet down, Mr. Publicover walked over without Mr. O'Toole being aware that he was going to do so, and Mr. Publicover struck Mr. O'Toole approximately three times in the face, causing a cut and causing a lot of blood. He was on probation at the time to keep the peace, be of good behaviour.

[78] At various points in the remainder of his decision, the trial judge referred to the offence as one of "assault". However, when he addressed the issues of the Crown's requested ancillary orders for a DNA sample and firearm prohibition he said:

> Before I go any further, I will speak about the ancillary orders. There will be a DNA sampling order, primary designated offences under s. 348(1)(b) and the s. 267 [assault causing bodily harm] are both primary designated offences, so there will be a DNA sampling order with regards to those matters.
>
> When I take a look at Mr. Publicover's record, it does show that he has been subject to previous firearms prohibitions. The matter under 267 [assault causing bodily harm] is one that calls for a firearms prohibition in the circumstances. Under s. 109(3) of the *Criminal Code*, that prohibition will be for life.

[79] When the judge pronounced sentence he referred to the offence simply as one of assault:

> **THE COURT:** ... breach of probation two months concurrent, and with regards to the assault on Mr. O'Toole, six months would be the sentence but reduced that by three months of pre-trial custody credit, so three months consecutive ...
>
> **MR. PUBLICOVER:** I even pled guilty to that ...
>
> **THE COURT:** ... to the other times being served. That's a total of 45 months going forward.
>
> **MR. PUBLICOVER:** Oh ...
>
> **THE COURT:** That is the sentence of the Court.
>
> **MR. PUBLICOVER:** I even pled guilty to the assault, dropped down to normal assault and you still called it causing bodily harm and everything. Oh my God! I can't believe it.

[80] The following exchange then ensued:

> **THE COURT:** It's an assault ...
>
> **MR. PUBLICOVER:** Yeah, but ...
>
> **THE COURT:** ... and the assault ...
>
> **MR. PUBLICOVER:** ... there was a fight ensued (inaudible) weren't there.
>
> **THE COURT:** The assault ... the assault was a ...
>
> **MR. PUBLICOVER:** It did not happen that way. You know why I pled guilty because you said two years down there in that courtroom, concurrent. The Crown ... he said my friend is looking for two years, right in front of you last week. I

> said, Guilty. That's why I ... I mean I sit here and you say five years. I'm like, I get downstairs I said I never heard of railroading, you know, I don't believe in that. Now I know. And then I didn't get my medication or mental health meds for a whole weekend, and I go and I drink to a point where I don't remember, and I'm ... got a key to (this?) apartment, my own floor. .

[81] The Crown should not have described the offence as assault causing bodily harm. Further, the trial judge should not have relied on a conviction under s. 267(b) to order a DNA sample and a lifetime firearms ban under s. 109(3) of the *Criminal Code*. Common assault is neither a primary designated offence under s. 487.051 (see: s.487.04) nor does it trigger a mandatory firearms prohibition under s. 109, let alone one for life as a consequence of the appellant having been previously convicted of a qualifying offence[2].

[82] It cannot be gainsaid that trial counsel should have corrected the Crown's mistake. Having missed it, he should have spoken up when the judge, part-way through his oral decision, mistakenly relied on a s. 267(b) conviction for the ancillary orders.

[83] But what is the significance of this lapse? The additional DNA sample order is of no consequence. A DNA sample was mandatory on the s. 348(1) offence as that offence is a primary designated offence. The record reveals previous DNA orders were made. The record also demonstrates previous orders prohibiting his possession of firearms or prohibited weapons, the latest being issued on October 25, 2016 for 25 years.

[84] Although the appellant makes no complaint about the issuance of the ancillary orders, the rule of law must be respected. I would quash those orders.

[85] The appellant does complain the judge erred by sentencing him for the offence of assault causing bodily harm. In response, the Crown suggests the judge simply misspoke or was momentarily confused — what is important is that the six-month sentence is not unfit.

[86] With respect, the inference is irresistible that the trial judge did not simply misspeak or exhibit momentary confusion. I say this because the judge accepted the Crown's representations the offence was one of assault causing bodily harm. He had to have done so since he ordered a DNA sample on the basis that the

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[2] This is apart from the problem of the apparent lack of prior Crown notice it would seek a longer prohibition as a subsequent conviction as discussed in *R. v. Ellis* (2001), 143 O.A.C. 43.

offence at hand was a primary designated offence and he ordered a lifetime firearms ban, which could only be within his reach if the offence was assault causing bodily harm. The Information was endorsed to reflect the imposition of a lifetime firearms ban. It cannot be viewed as a momentary lapse or inarticulate expression, despite the later endorsement on the Warrant of Committal of six months' incarceration for a s. 266 offence.

[87] My conclusion is reinforced by the fact a sentence of six months' incarceration was the maximum allowable term of imprisonment. At the time of the offence, s. 787 of the *Criminal Code* stipulated a maximum sentence for a summary conviction offence to be a fine up to $5,000.00 or a term of imprisonment not exceeding six months or both. The Information reveals the Crown had proceeded summarily.

[88] A sentence of six months' imprisonment, while it may well have been entirely appropriate for an offence of assault causing bodily harm, was the maximum possible sentence for common assault.

[89] That is not to say the trial judge could not have imposed the maximum for the common assault offence. The Supreme Court of Canada has made clear that a maximum sentence, whatever the mode of procedure, is not just available for the "worst offender" coincidental with the "worst offence" (see: *R. v. Cheddesingh*, 2004 SCC 16; *R. v. Solowan*, 2008 SCC 62). In *Solowan*, Fish J., for the Court wrote:

> [15] A fit sentence for a hybrid offence is neither a function nor a fraction of the sentence that might have been imposed had the Crown elected to proceed otherwise than it did. More particularly, the sentence for a hybrid offence prosecuted summarily should not be "scaled down" from the maximum on summary conviction simply because the defendant would likely have received less than the maximum had he or she been prosecuted by indictment. Likewise, upon indictment, the sentence should not be "scaled up" from the sentence that the accused might well have received if prosecuted by summary conviction.
>
> [16] In short, the sentencing principles set out in Part XXIII of the *Criminal Code* apply to both indictable and summary conviction offences. Parliament has made that clear in the definition of "court" at s. 716 of the *Code*. And when the Crown elects to prosecute a "hybrid" offence by way of summary conviction, the sentencing court is bound by the Crown's election to determine the appropriate punishment within the limits established by Parliament *for that mode of procedure*. Absent an error of principle, failure to consider a relevant factor, or overemphasis of the appropriate factors, any sentence within that range --

> including the maximum -- should not be varied on appeal unless it is demonstrably inadequate or excessive.
>
> [Original emphasis]

[90] The problem is the trial judge did not impose the maximum for common assault but imposed six months' consecutive imprisonment for the offence of assault causing bodily harm. As a matter of law, the appellant stood acquitted of that offence.

[91] I have considerable sympathy for the trial judge. The Crown said the offence was assault causing bodily harm. The Crown's description of the circumstances of the offence included the fact bodily harm was caused—amply illustrated graphically by the tendered photographs.

[92] Defence counsel, on behalf of the appellant, admitted the circumstances as described by the Crown, but did not correct the misstatement of the offence. In these circumstances, I need not wrestle with the difficult question of the exact role for admitted aggravating facts that make out the full offence can or cannot play in sentence (see for example: *R. v. MacLeod*, 2018 SKCA 1 at paras. 27-35; and *R. v. Fehr*, 2018 MBCA 131).

[93] I have concluded the trial judge erred in principle by sentencing the appellant as if the offence were one of assault causing bodily harm. I am satisfied that error impacted the sentence imposed. We must now impose what we consider a fit sentence in light of the circumstances of the offender, the offence and the applicable principles of sentence (see: *R. v. Lacasse*, 2015 SCC 64 at paras. 43-44). More recently, in *R. v. Friesen*, 2020 SCC 9, the Court affirmed a long line of cases[3] that if an impactful error is found, an appeal court no longer owes deference to the existing sentence—it must apply the principles of sentence afresh to the facts to determine a fit sentence. Wagner C.J. and Rowe J., for the unanimous full Court, explained:

> [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor.

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[3] See, for example: *R. v. Landry*, 2016 NSCA 53; *R. v. Bernard*, 2011 NSCA 53; *R. v. Brunet*, 2010 ONCA 781*; R. v. MacDonald*, 2009 MBCA 36; *R. v. Provost*, 2006 NLCA 30; *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.); and *R. v. Willis*, 2013 NSCA 78).

> The weighing or balancing of factors can form an error in principle "[o] nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.
>
> [27] If a sentence is demonstrably unfit or **if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence (*Lacasse*, at para. 43). It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range**. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.
>
> [Emphasis added]

[94] The essential facts are these. The victim was not a particularly vulnerable member of society. He was the appellant's friend. Having said that, the assault was an unprovoked attack that took place in the victim's home. The appellant was not only on numerous probation orders to keep the peace and be of good behaviour, he was on judicial interim release that required him to be on house arrest in Halifax. Instead, he was in Lower Sackville at another residence.

[95] As noted by the Crown at the sentence hearing, the appellant had no less than twelve prior convictions for assaults, two with weapons, one assault causing bodily harm, three assault peace officers, and six common assaults. The longest sentences previously imposed were six months' concurrent for assault with a weapon (2003) and 90 days' concurrent for assault causing bodily harm (2016). The sole mitigating factor was he pled guilty.

[96] The principles of sentence require the imposition of a consecutive period of incarceration. Despite the seriousness of the offence and the circumstances of the offender, I would not impose six months' incarceration. I would impose four months' incarceration, less the same pre-sentence custody credit of three months directed by the trial judge. Section 110 of the *Code* requires this Court to consider

the imposition of a discretionary firearms prohibition. I would decline to do so in light of the existing 25-year firearms prohibition order imposed in 2016.

[97] I would not admit the fresh evidence and would dismiss the appeal from conviction. However, I would grant leave to appeal from sentence and allow the sentence appeal to the extent that I would quash the ancillary DNA and s. 109 orders and substitute a sentence of four months' consecutive incarceration for the s. 266 offence, less three months' pre-sentence custody.

Beveridge, J.A.

Concurred in:

Bourgeois, J.A.
Beaton, J.A.