NOVA SCOTIA COURT OF APPEAL
Citation: *R v. West*, 2021 NSCA 80

Date: 20211214
Docket: CA 506000
Registry: Halifax

Between:

Nirica West

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	December 1, 2021, in Halifax, Nova Scotia
Subject:	Criminal law. Sentencing. Conditional Sentence. Pre-sentence custody. *R. v. Fice*, 2005 SCC 32.
Summary:	The sentencing judge imposed a total sentence of 865 days' imprisonment. He gave the appellant 300 days' credit for pre-sentence custody. He found the 565-day sentence of imprisonment that remained could be served as a conditional sentence. The Crown successfully appealed to the Summary Conviction Appeal Court relying on *R. v. Fice*, 2005 SCC 32, as settled law establishing that pre-sentence custody could not be used to qualify an offender for a conditional sentence where the total sentence of imprisonment was two years or more. The appellant sought leave to appeal the decision of the SCAC judge.
Issues:	(1) Did the Summary Conviction Appeal Court judge err in finding that a conditional sentence was not available to the appellant?

Result: Leave to appeal denied. The Summary Conviction Appeal Court judge did not err in law. He was bound by *Fice*. The appellant's total sentence of imprisonment was 865 days. A conditional sentence is only available as a sentencing option where the total sentence of imprisonment is no more than two years less a day. The appellant was ineligible for a conditional sentence.

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Judges:	Bryson, Van den Eynden, and Derrick, JJ.A.
Appeal Heard:	December 1, 2021, in Halifax, Nova Scotia
Held:	Leave to appeal denied, per reasons for judgment of Derrick, J.A.; Bryson and Van den Eynden, JJ.A. concurring
Counsel:	Jonathan Hughes, for the appellant Mark Scott, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] Nirica West pleaded guilty on January 6th, 2021, to multiple offences committed over multiple dates. Judge Gregory Lenehan of the Provincial Court of Nova Scotia sentenced her to a 565 day Conditional Sentence Order after deducting 300 days of pre-sentence custody credit from a total sentence of imprisonment of 865 days.[1]

[2] Crown and defence agreed the appellant's offences warranted a sentence of imprisonment of 865 days. They disagreed on how the sentence should be served. The Crown argued for straight jail time; the defence sought a conditional sentence to be served in the community on house arrest and under curfew.

[3] Neither counsel referred the sentencing judge to the Supreme Court of Canada's decision in *R. v. Fice*[2] and he did not mention the case. As these reasons explain, *Fice* is dispositive of the issues in this appeal.

[4] Section 742.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 provides that a conditional sentence may be imposed if the sentence of imprisonment is less than two years, and certain other statutory conditions are satisfied. The appellant's global 865 day sentence was more than two years. *Fice* established that credit given for pre-sentence custody cannot be used to reduce a sentence to less than two years allowing for a conditional sentence to be imposed.

[5] The Crown appealed to the Summary Conviction Appeal Court (SCAC) on the basis the judge had erred in law imposing a conditional sentence where the appellant's total sentence of imprisonment was 865 days. Justice Rosinski, sitting as a SCAC judge, allowed the appeal.

[6] The appellant sought leave to appeal to this Court and argued the SCAC judge was wrong in law and should not have set aside her conditional sentence.

An Overview of the Basic Facts

[1] Judge Lenehan gave an oral sentencing decision which is unreported.
[2] 2005 SCC 32

[7] The appellant's offences were committed between October 1st, 2018 and September 10th, 2020. The 19 Informations laid against her were consolidated and dealt with at her January 6th sentencing hearing. The appellant entered guilty pleas to theft, possession of stolen property, break and enter, damage to property, failure to attend court, unlawful use of a credit card, fraud, theft of a motor vehicle, dangerous operation of a motor vehicle, and breaches of probation orders, undertakings, a recognizance, and release orders. The sentencing judge noted that her offending behaviour was fueled primarily by a crack cocaine addiction: "From October of 2018 to September of 2020 there wasn't really a whole lot of time that Ms. West wasn't engaging in some sort of criminal activity to support, in large part, her addiction."

[8] The appellant, who was about to turn 28, had a lengthy, related criminal record. The sentencing judge observed that she had been in conflict with the law for the past eight years. Previous sentences included incarceration in a federal penitentiary, intermittent jail time, probation, and two conditional sentences.

[9] By the time the appellant was sentenced on January 6th, 2021 she had spent 200 days in pre-sentence custody. The judge applied the usual credit of 1.5 days for each day in custody and deducted 300 days from the total 865 day sentence he imposed. The judge found the remaining 565 day "go-forward" sentence should be served as a conditional sentence under s. 742.1 of the *Code*.

[10] The Crown's appeal to the SCAC relied on *Fice*. The SCAC judge found on the basis of *Fice* the judge had erred as a conditional sentence was not available to the appellant.

R. v. Fice

[11] In *Fice*, a majority[3] of the Supreme Court of Canada held: "A conditional sentence cannot become available to an offender who otherwise deserves a penitentiary term solely because of the time the offender spends in pre-sentence custody".[4]

[12] The *Fice* majority was very clear: "…the time spent in pre-sentence custody is part of the total punishment imposed; it is not a mitigating factor that can affect the range of sentence and therefore the availability of a conditional sentence".[5] The

[3] Fish, J.A. strongly dissented in *Fice*.
[4] At para. 4
[5] At para. 18

majority found that "the appropriate range of sentence and therefore the availability of a conditional sentence is dependent on the gravity of the offence and the degree of responsibility of the offender",[6] factors that do not change by virtue of time spent in pre-sentence custody.

[13] *Fice* is settled authority for the principle that a conditional sentence is available if the judge has imposed as the offender's total punishment, a global term of imprisonment that is less than two years. In the appellant's case the judge imposed a total sentence of imprisonment of 865 days, which is more than two years.

The Sentencing Judge's Decision

[14] It is clear that the 865-day sentence the appellant received was a total sentence:

> The amount of time that's being recommended on these charges, I have looked at this. I've looked at each of these based on Ms. West's prior record, and on any one of these charges the recommendation of time could be much greater than what it is. When I've looked at the total number, given the 19 files that we're dealing with, the frequency of breaching court orders, the total length of time that's being recommended here, when looked at by totality, with Ms. West entering a guilty plea, the explanation that this was largely induced by intoxication, I'm satisfied that the total sentence is appropriate.

[15] The judge apportioned the 300 days of pre-sentence custody credit to the various sentences he imposed for each of the appellant's convictions over the 19 Informations. He concluded: "That is a total sentence of 865 days, less 300 days of pretrial custody credit, for 565 days going forward."

The SCAC Judge was Correct in Law

[16] This is an appeal pursuant to s. 839(1) of the *Criminal* Code. Leave to appeal is required. Leave to appeal a SCAC decision is to be granted sparingly and only where there appears to be a clear error of law.[7]

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[6] At para. 24
[7] *R. v. Pottie*, 2013 NSCA 68, at para. 21

[17] Contrary to the appellant's arguments, the SCAC judge did not err in his interpretation of *Fice*. The SCAC judge correctly found that the sentencing judge should have applied *Fice* in sentencing the appellant:

> [18] …the trial judge's reasoning should have followed the binding authority of *Fice*: namely, he should have considered the first stage, which involves a consideration of whether a CSO is available…[8]

[18] As the judge found, *Fice* is clear. It explicitly prohibits the use of pre-sentence custody to reduce a total sentence of over two years' imprisonment to a sentence that meets the threshold requirement for a conditional sentence. Pre-sentence custody cannot transform an 865 day sentence of imprisonment into a sentence of imprisonment that can be served under conditions in the community. It is only if an offender's total sentence is less than two years' imprisonment that a conditional sentence may be considered.[9]

[19] The judge's total sentence of 865 days, a sentence of more than two years' imprisonment, made the appellant ineligible for a conditional sentence. This was not a case like *R. v. Perry*[10] where the sentencing judge, dealing with five offences, applied pre-sentence custody credit to the sentences for each of three offences with the result that those sentences had been served.[11] The judge then sentenced Mr. Perry for one remaining offence. He was satisfied a sentence of imprisonment of less than two years was appropriate and imposed a conditional sentence.[12]

[20] The SCAC judge addressed an argument that was repeated before us, that each of the 19 Informations should be viewed as constituting a separate proceeding, with each individual sentence falling below the conditional sentence upper limit of two years less a day. As the judge noted, this submission was aimed at "notionally permitting 19 separate CSOs (plus probation) – effectively rendering legal the global sentence that the trial judge imposed".[13]

[21] The judge dispensed with this argument in a footnote:

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[8] *R. v. West*, 2021 NSSC 113
[9] *Criminal Code*, s. 742.1; *R. v. Proulx*, 2000 SCC 5, at para. 49
[10] 2018 NSSC 16
[11] One of Mr. Perry's offences was simple possession of marijuana for which he received a fine.
[12] As Mr. Perry was on a four-month conditional sentence already, the judge imposed a sentence of twenty months less a day to be served consecutively. At para. 119 he said this was to avoid "the prohibition against consecutive conditional sentences totalling more than twenty months (see for example, *R. v. Frechette*, 2001 MBCA 66, and *Middleton v. R.*, 2009 SCC 21, at para. 44)."
[13] 2021 NSSC 113, at para. 10

> When pronounced at a single sitting by the judge presiding over the summary conviction offences before them, a "sentence" as defined and referenced in ss. 785, and 822/687 CC [*Criminal Code*] respectively, while individually ordered in relation to each count to which a guilty finding is made or guilty plea is entered, is accurately considered to be as the result of one sentencing process – as a matter of procedure. In the circumstances of this case specifically, it is artificial and inaccurate to characterize the process as if there are 19 CSOs in existence – one for each Information. There was but one sentencing process, and there was one global outcome – collectively the offences were all contained in one CSO and a consecutive 30-month probation order…[14]

[22] The appellant submits the consolidation she undertook of her 19 Informations into one sentencing should be incentivized. She says such consolidations use scarce judicial resources more efficiently by allowing multiple Informations to be dealt with at one time. In her submission, applying the SCAC judge's interpretation of *Fice* will discourage consolidations. In short, the appellant is saying that where the sentencing occurs in the context of a consolidation,[15] *Fice* should not, and does not, eliminate the option of a conditional sentence.

[23] With respect, there is no merit to this submission. *Fice* applies where a total sentence has been imposed and pre-sentence custody credit applied. If the total sentence is two years or more, a conditional sentence is unavailable. It does not matter whether the total sentence is in relation to one conviction or multiple convictions as part of a consolidation. *Fice* firmly established that a conditional sentence cannot be imposed even if the pre-sentence custody credit applied against the total sentence reduces the time remaining to be served to less than two years' imprisonment.

[24] The appellant, who is African Nova Scotian, also submits the sentence she received is in keeping with the imperative to reduce incarceration rates for racialized offenders. That objective, most recently addressed by this Court in *R. v. Anderson*,[16] must be served through the application of lawful sentences. In the appellant's case, the 865 day sentence recommended to the judge by the Crown and the defence was less onerous than it might have been. As the judge himself noted, "…on any one of these charges the recommendation of time could be much greater than what it is". The SCAC judge also viewed the sentence as at the "low

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[14] At para. 10, fn 3

[15] Ms. Fice was sentenced for offences committed on three separate dates: aggravated assault, fraud over $5000, personation and forgery committed in June and August, 2000 and breach of a release order in March 2002 (*R. v. Fice* (2003), 65 O.R. (3d) 751, at paras. 1-3 (C.A.)).

[16] 2021 NSCA 62

end of the range".[17] This was not a case where the principle of restraint was ignored.

Conclusion

[25] The sentencing judge's imposition of a total sentence of 865 days' imprisonment disqualified the appellant from receiving a conditional sentence. The 300 days of pre-sentence custody could not be used to create eligibility. The sentencing judge was well-intentioned in his recognition of the appellant's struggles with crack cocaine and her difficult circumstances, but the sentence he imposed was not legal. The appellant's conditional sentence is prohibited by *Fice*. The SCAC judge had no option but to set it aside. He made no error in doing so. He was bound by *Fice*, as are we.

[26] The sentence that should have been imposed on January 6th, 2021was straight jail time: 865 days of imprisonment less 300 days of pre-sentence credit for a net "go-forward" sentence of 565 days' imprisonment, followed by 30 months' probation. Having determined the conditional sentence could not stand, in sentencing the appellant afresh, the SCAC judge was required to show deference to the sentencing judge's determination that 865 days' imprisonment was a fit and proportionate sentence.

Disposition

[27] I would deny leave to appeal.

Derrick, J.A.

Concurred in:

Bryson, J.A.

Van den Eynden, J.A.

[17] At para. 27