NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. L.T.***, 2014 NSCA 25

Date: 20140319
Docket: CAC 419867
Registry: Halifax

Between:

L.T.
A Young Person within the meaning of
the *Youth Criminal Justice Act*

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Pursuant to s. 110(1) and s. 111(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1

Judges:	MacDonald, C.J.N.S.; Bryson and Scanlan, JJ.A.
Appeal Heard:	February 21, 2014, in Halifax, Nova Scotia
Held:	Leave to appeal sentence is granted but the appeal is dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Bryson and Scanlan, JJ.A. concurring.
Counsel:	Rickcola Brinton, for the appellant Marian Fortune-Stone, QC, for the respondent, Public Prosecution Service of Nova Scotia Jonathan Langlois-Sadubin, for the respondent, Public Prosecution Service of Canada

<u>PUBLISHERS OF THIS CASE PLEASE TAKE NOTE</u> THAT s. 110 (1) and s. 111(1) OF THE *YOUTH CRIMINAL JUSTICE ACT*, S.C. 2002, c. 1 APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

111. (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Reasons for judgment:

Overview

[1] The appellant young person plead guilty to a string of serious charges. Nova Scotia Provincial Court Judge John G. MacDougall sentenced him to an 18-month custody and supervision order, to be followed by 12 months' probation and supplemented with several DNA, weapons prohibition, and forfeiture orders. Before us, he now challenges this ruling, asserting several errors in principle.

[2] For the reasons that follow, I would not disturb this outcome. Simply put, despite at least one error along the way, the judge's ultimate disposition was appropriate in the circumstances.

Background

[3] Following discussions among his counsel, the Provincial Crown and the Federal Crown, L.T. plead guilty to 10 of 22 charges. All 10 offences resulted from a crime spree between December 24, 2012 and May 8, 2013.

[4] These were very serious offences. They included an assault causing bodily harm, two robberies, possession of cocaine for the purpose of trafficking, other drug possession charges, possession of a weapon dangerous to the public peace, and several breaches of probation. The more serious offences bear highlighting. For example, the Provincial Crown describes the assault and the two robberies this way in its factum:

> 26. On December 24, 2012, the victim Tika Timsina, was walking with a friend on Titus Street in Fairview when the Appellant 'sucker punched' him and then continued to punch him several times in the face. The assault, completely random and unprovoked, on a victim unknown to L.T., left Mr. Timsina with badly injured lips, stitches to his eyebrow, unable to eat solid food for a week and an eye swollen shut. The psychological harm was described in the Victim Impact Statement as having had a "huge affect" on his daily life causing him to remain indoors. He delayed telling his family because he believed they would be afraid to live in Halifax. He described his security concerns and mental suffering about remaining in Canada to live. The victim also suffered financial loss from the attack.
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> . . .

> 28. On April 13, 2013, the Appellant contacted Christopher Davis about a gold engagement ring that Mr. Davis had advertised for sale on Kijiji and arranged to meet in Dartmouth. Mr. Davis, his brother and friend went to the location where he received a call saying that because of the presence of police cars, he was to go to the end of Gaston Road. The Appellant and another male were standing to the side on Gaston Road. Mr. Davis walked toward them and gave the Appellant the ring to look at when the Appellant produced a can, sprayed him in the face, and then fled with the gold ring.
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> 29. On May 1, 2013, the Appellant contacted Kaillin Hepburn about an 18 inch gold necklace she had advertised on Kijiji and arranged to meet in a parking lot in Sackville where she went accompanied by friends. The Appellant approached the driver's side of the vehicle and was handed the gold necklace by the driver, a friend of Ms. Hepburn. When the Appellant, still with the necklace, walked away with another male, Ms. Hepburn's friend said "Hey", at which time the Appellant "bear-sprayed" all four occupants in the vehicle.

[5] The drug charges (as described in the Federal Crown's factum) reveal a scary sophistication for a teenager:

> 4. On May 8, 2013 at around 7pm, Halifax Regional Police officers observed the appellant seated in the passenger seat of a vehicle on Westridge Drive in Halifax and knew he was arrestable for robbery. Upon approaching the vehicle, the officers observed him holding a red bag which he placed in the rear seat of the vehicle before he was arrested. Upon his arrest, the Appellant was holding a mobile phone. A search incident to his arrest yielded another mobile phone, $100 in cash, 0.36 grams of cannabis resin all located in his right front pants pocket. The red bag contained a small safe. The safe was opened and was found to contain $1215 in Cash, 37 Valium pills, and 0.36 grams of cocaine. Upon arrival at the police station, he became sick and threw up a plastic baggie containing six individually wrapped pieces of crack cocaine. These pieces of cocaine ranged from 0.46 grams to 0.63 grams each, and had a total weight of 3.4 grams. He was strip searched and in the folds of his underwear, seven pieces of Cannabis Resin were found. These pieces ranged from 0.71 grams to 1.04 grams, and had a total weight of 5.77 grams. He was taken to the hospital for medical evaluation which indicated he had not ingested any further items.

[6] After careful consideration, the judge arrived at his 18-month sentence by ordering consecutively four months for each of the assault and two robbery offences and six months for the cocaine offence. For the weapons offence, he ordered two months concurrent to the assault. For the two other drug possession offences – cannabis and clonazepam (valium), he ordered three months each concurrent to the cocaine offence. He ordered probation for the breach offences.

Analysis

[7] All the parties acknowledge that one problem escaped the lawyers and the judge during this sentencing hearing. L.T. was originally charged with an offence under s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 in relation to possession of clonazepam (valium). That is a drug that is included in Schedule IV of the *Act*. At the time of sentencing, counsel and the court agreed to substitute the charge so that L.T. was permitted to enter a plea of guilty to a charge of possession under s. 4(1) of the *Act*. Schedule IV drugs are not included in s. 4(1). Therefore, the conviction and 3-month sentence on that count must be set aside.

[8] As well, L.T. challenges the 3-month custodial sentence he received for the possession of cannabis offence and the 2-month sentence he received for the weapons charge. Specifically, he questions whether he was even eligible for custody. In advancing this submission, he relies on s. 39 (1) of the *Youth Criminal Justice Act,* S.C. 2002, c. 1 ["*YCJA*"], which sets out the prerequisites for a custodial sentence:

> 39. (1) **Committal to custody** – A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless
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> (a) the young person has committed a violent offence;
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> (b) the young person has failed to comply with non-custodial sentences;
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> (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or
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> (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

[9] Specifically, L.T. highlights the fact that these are hybrid offences whereby the Crown could have elected to proceed either summarily or by way of indictment. With the Crown making no such election, he asserts that the Crown is deemed to have proceeded summarily. Here he relies on s. 37(7) of the *YCJA*:

> 37. (7) **Deemed election** – For the purpose of appeals under this Act, if no election is made in respect of an offence that may be prosecuted by indictment or

> proceeded with by way of summary conviction, the Attorney General is deemed to have elected to proceed with the offence as an offence punishable on summary conviction.

[10] Although both respondent Crowns conceded this point in oral argument, I am hesitant to do so. I say this because in **R. v. R.V.F.**, 2011 NSCA 71, this Court limited the reach of s. 37(7) to the jurisdictional question of which court would hear appeals from Youth Court. For example, appeals from summary conviction matters go to the Supreme Court of Nova Scotia sitting as a Summary Conviction Appeal Court, while appeals from indictable matters go to this Court. Thus, s. 37(7) directs that, without an election, hybrid matters are deemed to be summary proceedings thereby granting appellate jurisdiction to the Supreme Court as opposed to this Court.

[11] So, in my view, **R.V.F.** is of questionable assistance to this appellant. In fact, in **R.V.F.**, the trial judge relied on s. 34(1)(a) of the *Interpretation Act*, R.S.C. 1985, c. I-21 to presume, in the absence of an election, that the matter would proceed by indictment:

> 34. (1) Where an enactment creates an offence,
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> (*a*) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;

Furthermore, in **R.V.F.**, we specifically made no comment on the merits of that analysis:

> [39] What led the trial judge to his conclusion the proceedings were by indictment was that there was nothing in the circumstances to displace the presumption created by s. 34(1)(a) of the *Interpretation Act* that the offence was indictable. *I make no comment on the correctness of the analysis or conclusion of the trial judge*.
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> [40] It is sufficient to say, that the trial judge's conclusion, based as it was, on s. 34(1)(a) of the *Interpretation Act*, cannot confer jurisdiction on this Court in light of the clear specific statutory direction set out in s. 37(7) of the YCJA that for purposes of an appeal under the *Act*, absent an election to proceed by indictment on a hybrid offence, the Crown is deemed to have elected to proceed summarily. The Crown in fact made no such election. It was silent. By s. 37(7) and (5), an appeal from sentence is to the Summary Conviction Appeal Court. As a consequence, I would dismiss the application for leave to appeal.
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> [Emphasis added.]

[12] Of course, here we have an appeal involving a mix of purely indictable offences and hybrid offences. As such, by virtue of s. 37(6) of the *YCJA*, we clearly have jurisdiction:

> 37. (6) An appeal in respect of one or more indictable offences and one or more summary conviction offences that are tried jointly or in respect of which youth sentences are jointly imposed lies under this Act in accordance with Part XXI (appeals — indictable offences) of the *Criminal Code*, which Part applies with any modifications that the circumstances require.

[13] Thus, despite the Crowns' concession, s. 37(7) does not appear to be at play in this appeal and it remains an open question whether these two offences would be deemed to be summary or indictable. It therefore also remains an open question whether these two offences would be custody eligible. Furthermore, there has been no discussion (either before the sentencing court or before us) about s. 39(1)(b) of the *YCJA* (failing to comply with non custodial sentences) and whether it would apply to make these two offences custody eligible. After all, these were not L.T.'s first offences. See **R. v. S.T.**, 2009 BCCA 274, and **R. v. R.J.D.**, 2012 NSSC 286.

[14] Fortunately, as I will explain, these issues will ultimately have no bearing on the outcome of this appeal. Therefore, it is unnecessary for me to resolve them. In fact, since they have not been thoroughly argued, it would be unwise to do so. I raise them simply to highlight that these two offences may indeed have been custody eligible.

[15] In any event, it is clear that the decision under review was the product of one error involving the valium charge. Therefore, it falls to us to consider the merits of the overall sentence. See **R. v. Scott**, 2013 NSCA 28, at ¶80. In doing, I find it to be an entirely appropriate disposition. After all, the three impugned sentences were all concurrent to the more serious assault and cocaine charges. They added nothing to the ultimate disposition. In other words, L.T. received a total of 18 months for four very serious offences. In my view, that is a very reasonable outcome. In fact, L.T. can consider himself lucky, given the grave circumstances surrounding these four offences.

[16] In reaching this conclusion, I acknowledge L.T.'s submission that he spent 61 days in pre hearing custody for which the judge did not calculate a mathematical credit. However, the record reveals that the judge was well aware of this and alluded to it on several occasions. It is equally clear that he intended this to

be an 18-month sentence going forward. It would have been preferable had he made this clearer. However, this would not be enough for me to interfere with what is otherwise a totally appropriate disposition.

[17] In short, this judge carefully and appropriately applied all applicable sentencing principles. In fact, I would endorse these passages from the respondent Provincial Crown's brief:

> 46. This very experienced, front line Judge crafted a sentence that was reflective of the **YCJA** principles, and alive to the realities of the Appellant and his need for a structured environment as a means to rehabilitation and reintegration.
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> 47. The comments of McLaughlin J. (as she was) in **R. v. B. (R.H.) (1994)**, 89 C.C.C. (3d) 193 (S.C.C.) at paragraph 19, in the context of verdicts, are apposite.
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> > To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out.
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> 48. A functional reading of the decision reveals a proper application of the **YCJA**. The reasons make it clear that the Sentencing Judge agreed with the Crown and Defence Counsel that in all of the relevant circumstances, a Custody and Supervision Order was the only appropriate disposition.
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> 49. The Appellant identifies the following specific principles as encompassing the Learned Judge's errors in application.
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> 72. This Honourable Court has considered the issue of youth court judges rejecting alternatives to custody. In **R. v. C. (S.A.)**, 2007 NSCA 55, paras. 31 – 32, and **R. v. G. (S.N.)**, 2007 NSCA 83, paras. 19 – 21, the Court is clear in its view that alternatives to custody raised in circumstances of serious offences requires proposed alternatives to be well founded or appropriate in the circumstances. The conclusion reached in **G.(S.N.)** applies equally to Judge MacDougall's reasons.
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> > In summary, the judge was aware of her obligation to consider alternatives to custody. She carefully reviewed the material presented to her and, after consideration of the available options, determined that the appellant's rehabilitation called for a custodial sentence. As a front line judge, knowledgeable of her community and the services available to those who appear before her, her sentencing decision is entitled to deference from this court. I see no reviewable error on this ground of appeal.

Disposition

[18] I would vitiate the three-month concurrent sentence for possession of clonazepam (valium). Otherwise, while I would grant leave, I would dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Bryson, J.A.

Scanlan, J.A.