PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. McKenna*, 2014 NSPC 99

Date: 2014-09-22
Docket: 2768991, 2766982
Registry: Pictou

Between:

Her Majesty the Queen

v.

Randall Bruce McKenna

SENTENCING DECISION

Judge:	The Honourable Judge Del Atwood
Heard:	September 22, 2014, in Pictou, Nova Scotia
Decision:	September 22, 2014
Charges:	Section 733.1 Criminal Code of Canada Section 354(1)(a) Criminal Code of Canada
Counsel:	Patrick Young, for the Nova Scotia Public Prosecution Service Douglas Lloy Q.C., for Randall Bruce McKenna

By the Court:

[1] Randall Bruce McKenna is a compulsive and serial probation and undertaking violator who showed up in Pictou County a few days ago, caused a commotion at a local lounge, and then committed an opportunistic theft. I heard the facts at Mr. McKenna's bail hearing; those facts, as agreed upon by counsel, constitute the facts for sentencing in accordance with the provisions of Sections 723 and 724 of the *Criminal Code* , and are as follows:

- On Friday, August 22nd, 2014, at around 21:40 hours, Constables Lloyd and MacNeil were dispatched to the Acro Lounge in downtown New Glasgow after their police service had received a call from Mr. McKenna requesting transportation to the bus station. Mr. McKenna stated that he was required to report to Burnside for weekend service of his intermittent sentence, and he was looking for a drive so he could catch the bus to Burnside.

- Police arrived at the Acro Lounge shortly thereafter. They spoke with two female employees who identified Mr. McKenna as "the same guy we had just had an incident with who was threatening staff". The officers approached Mr. McKenna who produced a birth certificate. Mr. McKenna

was wearing a grey hoodie and it was then reported to police that a male with a grey hoodie had just stolen a purse. The description provided by the dispatcher matched Mr. McKenna's description.

- The dispatcher advised the officers that the purse had been recovered and that there was nothing stolen.

- Police spoke with a Mr. Delorey, who identified Mr. McKenna as an individual whom Mr. Delorey had seen taking a purse from a motor vehicle parked in front of Rahey's Furniture. Police proceeded again to interview staff at the Acro Lounge. Acro Lounge staff described Mr. McKenna as belligerent stating "he stated to staff … "I could smash you with this. I'll come back here and end our life."

- Mr. Delorey provided a statement to police in which he described an individual, later identified as Mr. McKenna stealing a woman's purse from a car and then throwing the purse across the street. A Ms. Breen, who owned the purse, went through it and determined that there was nothing missing. Mr. McKenna was arrested and taken to booking.

- Mr. McKenna denied initially stealing the purse. He stated that the purse had been given to him by Mr. Buzzy Graham. When it was pointed out to Mr. McKenna that his pal Mr. Graham had died several-months'

previously, Mr. McKenna's response was: "Oh, it must have been someone else."

[2] Mr. McKenna holds a championship-level criminal record that consists of 29 prior findings of guilt for section145-related offences; 25 prior findings of guilt for breach of probation-related offences; 20 prior findings of guilt for property-related offences; 13 offences against the person, including one conviction for intimidating a justice system participant; and five convictions for assaulting peace officers.

[3] I have reviewed, in great detail, the decision of Scaravelli , J. in *R v. McKenna*, 2014 NSSC 92, a decision involving this very offender. In his decision, Scaravelli, J. varied a 14-month prison sentence imposed in Provincial Court by reducing it to a sentence of six-months' imprisonment. Scaravelli J. based his decision on the application of the principles of totality and concurrency for offences arising out of the same transaction.

[4] Defence counsel urges today the same sentence here, based on what has been referred to by defence counsel as "judicial comity". Judicial comity is not an applicable principle here. Rather, the principle is of *stare decisis*. This court is bound by decisions rendered by courts to which decisions of this court might be appealed, and that would include the Supreme Court of Nova Scotia.

[5] The high importance of the application of *stare decisis* was outlined by Green, C.J.N.L., in *R. v. Oxford*, 2010 NLCA 45 at para. 122.

[6] I am bound by the pronouncements of law in *R. v. McKenna*, and, indeed, the pronouncements of law in that case are entirely correct. Judicial restraint must be exercised in the sentencing process as required statutorily in paras. 718.2 (c), (d) and (e) of the *Criminal Code*. Further, as was noted completely correctly by Scaravelli J. at para. 18 of *R. v. McKenna*,

> Generally sentences imposed for offences arising out of the same transaction are concurrent.

[7] That principle was eminently applicable in the sentence appeal heard by Scaravelli J., where Mr. McKenna had been sentenced for two violations of bail arising from the same unlawful act involving the identical bail document. However, what the court is dealing with today is a criminal charge of theft and a breach of probation arising from that theft.

[8] Theft and breach of probation involve distinctive criminal elements, and will attract, typically, consecutive sentencing. The principle behind this approach was outlined by Haliburton, C.C.J., as he was then, in *R. v. Morrison*, [1988] N.S.J. No.429. In that case, Haliburton, CCJ, stated as follows:

> Those considerations, however, do not apply on this charge under Section 666(1)…

and that is the 1970 R.S.C. analog of Section 733.1.

> While it is true that the charge arises from the same incident which has already lead to the conviction for theft, the character of the charge is entirely different. As noted in *Ruby on Sentencing*, it raises the issue of willful disobedience of a probation order, and, as argued by Crown counsel in this case, it involves the protection of different interests than did the theft charge. To find otherwise, would be to permit a probationer to flaunt the authority of the court with impunity. A probation order which has been imposed upon the accused in lieu of punishment in order to promote his own rehabilitation would, in that case, simply serve as a vehicle to bring the authority of the court into disrepute and derision.

[9] Furthermore, the Court of Appeal of this province has long affirmed consecutive sentencing for breach-related offences. I refer specifically to *R. v. Harvey* [1993] N.S.J. No. 211 and *R. v. B.L.L.*; *R. v. J.T.F.* [1989] N.S.J. No. 12.

[10] A similar approach has been followed elsewhere in Canada, and I would refer to *R. v. O'Connor*, 2008 ONCA 206 at para. 19; *R. v. Jeyanandakumar*, [2006] O.J. 1620 (C.A.). Also, *R. v. Janes, [*1999] N.J. No. 18 (C.A.) at para. 12; *R. v. Houdaji,* 2013 ONCA 25; *R. v. Botelho,* 2010 ONCA 497 at para. 4.

[11] I am reinforced in this view by the decision out of our Court of Appeal in *R. v. Adams* 2010 NSCA 42 at para. 24. Bateman JA summed it up:

> This court has addressed and rejected any approach that when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences.

[12] Furthermore, it is clear to me that Scaravelli, J. did not have before him a complete criminal history for Mr. McKenna. I say that based on the contents of para. 17 of his decision where he stated as follows:

> Mr. McKenna also has an extensive record including breaches of probation or recognizances. The maximum sentence he received for breaches was three months concurrent to sentences for other offences. Other than offences for resisting arrest and assaulting a peace officer, the appellant does not have a record of violence.

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

[14] Mr. McKenna was subject to two probation orders at the time of these offences, one that had been imposed in Provincial Court on 22 November 2013,

and later upheld by Scaravelli J; the other imposed by me on 18 October 2014, as part of an intermittent sentence.

[15] I have reviewed, in detail, the decision of *R. v. Young*, 2014 NSCA 16. That case underscores properly the need for restraint in sentencing, particularly in the unique circumstances that prevailed in that case. As Bryson JA noted at para. 27 of *Young*:

> The imposition of twelve months' imprisonment for breach of a recognizance in a non-violent domestic abuse context, absent violation of a current probation order and compulsive re-offending behaviour in this case is excessive. Certainly, Mr. Young's behaviour was serious and a flagrant disregard of the court's authority. But it was spontaneous, not pre-meditated and appears to be a reaction to frustrating circumstances in the controlled environment of a courtroom where Mr. Young lacked counsel. Mr. Young was in court by compulsion. Ms. Kirk was there voluntarily. Mr. Young could not avoid the proximity of her presence.

[16] However, in Mr. McKenna's case, the court is dealing with compulsive reoffending behaviour, and which includes the violation of a probation order. Mr. McKenna's record is substantial, and while the prior record does not work as an aggravating factor, in that Mr. McKenna is not to be re-sentenced for past offences, it does satisfy me that his prospect for rehabilitation is bleak and the need for specific deterrence is great.

[17] Mr. McKenna stated in court today that he has sought many times the opportunity to obtain counselling for his substance abuse but has continuously

been denied it. When I review Mr. McKenna's record, I find over and over and over again the imposition of probation orders that provide for counselling and assessment in relation to alcohol abuse. So it is that I cannot accept the proposition that Mr. McKenna has been denied the opportunity . . .

[18] **Mr. McKenna**: *… inaudible …*

[19] **The Court**: Excuse me, Mr. McKenna. This is my turn to speak.

[20] Mr. McKenna has not been denied the opportunity. He has refused to avail of the opportunity.

[21] The principle of proportionality satisfies me that Mr. McKenna is solely responsible for his crimes and a significant prison sentence ought to be imposed here.

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

[23] In this case, I believe that the appropriate sentence is six months' imprisonment in relation to the theft, and twelve months' imprisonment consecutive for the breach of probation. Both of these matters proceeded indictably.

[24] To account for the remand time, I order and direct that this sentence, be served concurrently to the sentence that was imposed by the court on the 18th of August, 2014. There will be a s. 719(3.3) endorsement.

[25] There will be a $200-victim surcharge amount in relation to each of the charges before the court, which is the mandatory amount under Section 737 of the *Criminal Code*, and Mr. McKenna will have 36 months to pay.

[26] The court declines to impose any additional period of probation as the prospects of a probation order accomplishing any rehabilitative purpose are slim to none; therefore, the sentence of the court is 18 months and as noted, Mrs. Cunningham, that is ordered to be served concurrently to the sentence that was imposed on the 18th of August, 2014.

[27] Anything further for Mr. McKenna, counsel?

[28] **Mr. Young**: No, Your Honour, thank you.

[29] **Mr. Lloy**: I'm not sure, Your Honour. I know that my client's been trying to get my attention.

[30] **The Court**: Mr. McKenna, I'll have you go with the sheriffs.

[31] **Mr. McKenna**: This isn't over.

Atwood, JPC