IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Dann, 2011 NSPC 22

Date: April 28, 2011

Docket: 2220004, 2220006, 2220007, 2220008

Registry: Halifax

Her Majesty the Queen

v.

Antron Corey Alison Dann

SENTENCING DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Judge Anne S. Derrick
Heard:	April 28, 2011
Decision:	April 28, 2011
Charges:	*Criminal Code* sections 334(b), 145(3) x 2, 733.1(1)(a)
Counsel:	Glen Hubbard – Crown Attorney
	Roger Burrill - Defence Counsel

By the Court:

[1] I am sentencing Mr. Dann on four charges:

1) Theft of a motor vehicle of a value less than $5000, the property of T M.;
2) Breach of a recognizance dated April 28, 2010 requiring him to keep the peace and be of good behaviour;
3) Breach of the house arrest provisions of that same recognizance;
4) Breach of a probation order dated December 17, 2009 with the condition that he keep the peace and be of good behaviour.

[2] These offences were committed on August 15, 2010.

[3] Mr. Dann pleaded guilty to these offences on April 11, 2011. A Pre-Sentence Report dated April 18, 2011 and prepared for a sentencing in the Nova Scotia Supreme Court has been provided. Attached to it is Mr. Dann's criminal record.

[4] At the time Mr. Dann committed the offences I am sentencing him for he had a short criminal record. On December 17, 2009 he was placed on a 12 month probation order for a theft under $5000 that had been committed on October 13, 2009. He was sentenced on July 14, 2010 for breaching an undertaking on July 12, 2010. He received a $200 fine.

[5] The probation order Mr. Dann received on December 17, 2009 was the one he breached when he stole Mr. M.'s car.

[6] The breaches of Mr. Dann's recognizance also emerge from the car theft.

[7] Otherwise, Mr. Dann is facing a sentencing on April 29 for assault with a weapon and assault. The date of those offences is September 14, 2009.

[8] Mr. Dann was also charged with attempted murder, aggravated assault and possession of a weapon in relation to a severe beating that Mr. M. received on August 15, 2010. I acquitted Mr. Dann of these charges on April 20 after a trial.

[9] Mr. Dann has been in pre-trial custody since September 3, 2010. His counsel, Mr. Burrill, advises that this amounts to 237 days in custody. That is the number I arrive at as well.

[10] There are a number of issues I have to address in this sentencing and they have to be dealt with under tight time constraints as my decision on Mr. Dann's sentence this afternoon, and more particularly, the application to that sentence of his remand time, is material to his sentencing tomorrow morning in the Supreme Court. I am therefore obliged to be relatively concise in my reasons.

[11] The first issue is the fundamental question of what constitutes the appropriate sentence for Mr. Dann. The Crown submits that he should receive a global sentence of 9 months in custody followed by 12 months probation. The Crown breaks this sentence down as follows: six months for the car theft and 30 days for each of the breaches to be consecutive to each other and to the six month car theft sentence.

[12] In the submission of the Defence, a nine month sentence for Mr. Dann is disproportionate to the offences and not an appropriate balancing of the denunciatory, deterrent and rehabilitative principles of sentencing. The Defence argues that a sentence of 1 – 3 months for the car theft is the more appropriate range. The Defence does agree that a period of probation should be imposed to assist with Mr. Dann's rehabilitation.

[13] As I prepared these reasons I realized that the Defence did not address the issue of sentencing for the breaches. However, I have the Defence' submissions on

the principle of proportionality and the need to tailor a sentence that is appropriate for the offences and the offender.

[14] The circumstances of the offences are essentially captured in my decision from Mr. Dann's trial, reported as *R. v. Dann, 2011 NSPC 21*. I found at trial that Mr. Dann was a participant in the theft of the car from Mr. M.. The young persons, D and J were also actively involved. All three individuals pleaded guilty to the theft, which was a serious one. They did not drive the car around the block and ditch it. It was driven all the way to Montreal and abandoned. I have not been told what shape it was in when located but I assume it was recovered. As Mr. M.'s keys were used to access and drive the car, there should have been no damage to it of that nature.

[15] Mr. Dann has had a difficult life to this point. His pre-sentence report indicates that his childhood and adolescence were chaotic. He experienced physical abuse from his father. He lived with an aunt between the ages of 9 and 12 while his mother got herself re-established in Texas. He then went to live with her where he was successful in completing high school.

[16] Mr. Dann returned to Canada when he was 18 believing the move would afford him better opportunities. He also re-established contact with his father whom he hoped could help him. His living situation has been precarious and he has not been able to establish a permanent, stable residence. He has lived temporarily in many locations, including with the mothers of his father's many additional children.

[17] Mr. Dann's living circumstances were very marginal when these offences were committed. This is referred to in my trial decision. Homelessness has been a persistent problem with Mr. Dann staying at the Phoenix Shelter and Metro

Turning Point. His Phoenix Youth Programs case manager has described him as having been taken advantage of by others. She noted that Mr. Dann is: "goal oriented and driven by school but things always fell apart."

[18] Both Mr. Dann's former case worker and his aunt have identified a variety of related needs that Mr. Dann would benefit from having addressed: anger management, mental health, depression and anxiety, self-esteem, confidence, overwhelming emotions and supportive housing. He is described in positive terms in the pre-sentence report by his former case worker as "positive, bubbly, respectful…always [following] instructions" and by his aunt as "a nice kid."

[19] The author of the pre-sentence report noted that Mr. Dann would benefit from a mental health assessment and treatment program, attending an employment or educational program as well as substance and alcohol abuse treatment.

[20] Mr. Dann made a good impression at the pre-sentence interview. It is reported that he took the process seriously and made "his best effort to provide as much information as possible." He was described as "pleasant and respectful." Although the pre-sentence report was prepared for the sentencing he is facing on April 29 and therefore dealt with different charges, I will note that Mr. Dann took full responsibility for his actions and expressed remorse in respect of them.

[21] Mr. Dann is a young man, aged 20. He has the capacity to make something of himself and a positive contribution to the community. He comes before me with a limited criminal record. In all the circumstances, and having regard for a proper balancing of the principles of denunciation, deterrence and rehabilitation, I view the appropriate sentence to be 3 months for the car theft and 30 days on each of the breaches, to be served concurrently to the 3 months and concurrently to each other.

These breaches all arose out of the same circumstances and I see no justification for the sentences relating to them to be served on a consecutive basis.

[22] The next issue I must tackle is that of Mr. Dann's remand time. Mr. Burrill has made a submission that Mr. Dann should be entitled to receive a credit of 1.5 days to 1day of his pre-trial custody. If I agree this would mean I would calculate that Mr. Dann has spent the equivalent of 355.5 days in custody on remand, in effect, almost a year.

[23] The calculation of pre-trial custody credit is governed by sections 719(3) and 719(3.1) of the *Criminal Code* which reflect amendments made to the *Code* on February 22, 2010.

Sections 719(3) and 719(3.1) read as follows:

> 719(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
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> 719(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

[24] The Crown has argued that Mr. Dann cannot qualify for an enhanced remand credit ratio because he is captured by the exclusionary provisions of section 719(3.1). These are the references to sections 515(9.1) and 524(4) and (8). I understand the Crown to be acknowledging that section 515(9.1) does not apply

here: Mr. Dann was not detained in custody on these charges because of a previous conviction. In fact, Mr. Dann consented to his remand: after a couple of initial court appearances where show cause hearings were set down, Mr. Dann consented on October 5, 2010 to be remanded and that consent was affirmed on subsequent dates.

[25] The Crown submits that Mr. Dann's consent to remand obviated the need for the Crown to apply for a bail revocation. In the Crown's submission, Mr. Dann essentially admitted to the applicability in his case of section 524(8), the provision relevant to an accused before the Provincial Court, and that this brings him within the scope of the provisions of section 719(3.1) that exclude him from consideration for an enhanced remand credit on sentencing. The Crown argues that Mr. Dann was in a reverse onus situation, recognized this and chose not to seek bail, and cannot now benefit from section 719(3.1).

[26] I do not agree. There is nothing in the record before me to explain why Mr. Dann did not seek bail. I do know that he has been homeless and that he has had little or no supports in the community since his return to Nova Scotia in 2008. He may have had nothing to put forward as a bail plan whether or not faced with a reverse onus. Furthermore, there was no finding, as is required by section 524(8) by a judge leading to a cancelation of a recognizance and an order for detention in custody unless the accused shows cause why detention is not justified within the provisions of section 515(10).

[27] Section 719(3.1) does not disqualify the person who has, for whatever reasons, consented to his or her remand. It disqualifies from consideration for the enhanced remand credit the person who is caught by section 524(8). What is described by section 524(8) is not what happened in Mr. Dann's case. Section

524(8) does not say that persons who consent to remand are also to be disqualified from consideration for the enhanced remand credit. The Crown seeks to read that into the provision but, as I will note shortly, penal provisions, when ambiguous (if it can even be said that this is a case of ambiguity which I do not concede it is) should be interpreted in a manner favourable to the accused.

[28] I will proceed now to deal with sections 719(3) and 719(3.1).

[29] Mr. Burrill has referred me to the case of *R. v. Johnson, [2011] O.J. No. 822* from the Ontario Court of Justice, decided by Green, J. on February 23, 2011. The Johnson case has only been mentioned in one Canadian decision that I could find – *R. v. Jackson* from the Yukon Territorial Court (*2011 YKTC 14*). As the Jackson case ultimately proceeded on the basis of a joint recommendation on sentence, Johnson was not discussed or considered.

[30] *Johnson* was a constitutional challenge to the amended provisions of the *Criminal Code* recited above, a bill extravagantly entitled the "*Truth in Sentencing Act*." Justice Green did not find the provisions to be in violation of the *Charter* if the legislation is properly interpreted. While such a finding is not binding on the Nova Scotia courts, the constitutionality of these amendments is not an issue before me.

[31] Justice Green brings a sharp and learned focus to the language in section 719(3.1) which provides that "if the circumstances justify it", a ratio of 1.5 days for each day in custody can be credited to a prisoner on remand. He says the following at paragraph 162 of his meticulously reasoned decision:

> As I see it, the central issue comes down to the meaning of those five words that span the 1:1 and 1.5:1 regimes: "if the circumstances justify it." Applying the appropriate cannons of

> statutory interpretation, and read in the sentencing framework in which it is embedded, the word "circumstances" in this phrase includes the loss of remission and delayed parole eligibility which, in turn, "justify" a credit enhancement beyond a maximum ratio of 1:1.

[32] Justice Green goes on to say at paragraph 164:

> Loss of remission readily lends itself to quantitative assessment and remuneration on sentencing. The effort to offset this relative disadvantage inspires the application of a compensatory arithmetic formula.

[33] Loss of remission is a significant issue for the remanded offender. Justice Green heard uncontradicted evidence that "…almost all offenders sentenced to imprisonment in Canada serve no more than two-thirds of their sentence in custody." (*paragraph 56*) This is due to remission of sentence which the great majority of offenders receive. Justice Green referred to the uncontradicted testimony of the eminent criminologist, Professor Anthony Doob: "Although prisoners can lose remission for disciplinary infractions while in custody…this is a 'very, very rare' occurrence." (*paragraph 56*)

[34] Prisoners in pre-trial custody do not however earn remission. Furthermore, Justice Green made note of the disadvantaged circumstances of African-Canadians in the criminal justice system. (Mr. Johnson is an African-Canadian, as is Mr. Dann.) Professor Doob gave evidence that he thought it likely the same racial inequality that affects the granting of bail exists today as it did when the Commission on Systemic Racism in the Ontario Criminal Justice System reported on the issue in 1994. There is no reason to think that Nova Scotia is any different. Racism in the criminal justice system was identified in Nova Scotia by the Royal Commission on the Donald Marshall, Jr. Prosecution which made

recommendations "for specific rules and policy changes" intended to "…put Blacks on a more equal footing in dealing with the criminal justice system and at least guarantee them equal opportunity within, and equal access to, the criminal justice system." (*Royal Commission Report, Findings and Recommendations 1989, page 182*)

[35] In the *Johnson* case, Justice Green viewed Professor Doobs' reasoning as strongly suggesting "…that any custodial sentencing disadvantage visited on those detained in custody pending their trials as a consequence of [the *Criminal Code* amendments] would only be compounded in the case of black persons as they are more likely than members of other races to be denied bail." (*paragraph 18*)

[36] As noted by Justice Green in *Johnson*, "…the award of credit for pre-sentence custody remains discretionary…" He acknowledged that offenders who "deliberately protracted their remand detention or otherwise endeavoured to manipulate the system…" may well have their credit ratio discounted as may offenders who "are likely to remain incarcerated until their warrant expiry date" or are doing remand time that is "of negligible value in light of the sentence imposed…" In such cases, Justice Green observes, "…judges may well entirely disregard credit for pre-sentence custody as the logic of compensation no longer holds." (*paragraph 165*)

[37] Justice Green's reasoning on the application of section 719(3.1) for the vast majority of offenders makes for a persuasive and compelling case that the loss of remission experienced by remanded offenders constitutes the "circumstances" that "justify" compensation by way of an enhanced remand credit ratio. (*paragraph 166*) Justice Green's conclusion that loss of remission is "an almost 'universal' consequence of any pre-trial custody" is indisputable. (*paragraph 167*) I also find

persuasive Justice Green's determination that "The loss of remission calculation most closely (if not perfectly) translates…into a pre-sentence custody credit ratio of 1.5:1." (*paragraph 172*)

[38] Justice Green also comments on the settled law that "provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused." (*R. v. Wust, 2000 SCJ No. 19, paragraph 34*) He makes the following finding, with which I agree:

> The "liberty of the subject" is impacted by the amendments to s. 719. There are "real ambiguities, or doubts of substance" in the construction of the critical phrase in sub-s.(3.1). In my view, the "favourable interpretation" that follows application of this principle is one that contemplates the loss of remission by remand offenders as part of the "circumstances" that "justify" enhanced pre-sentence custody credit at a ration of up to 1.5:1. Any other reading results in systematic and fundamental unfairness. (*paragraph 175*)

[39] I adopt Justice Green's conclusion in *Johnson* that the functions of sections 719 and 719(3.1) are "primarily compensatory" and that the "circumstances" in section 719(3.1) "comprehends the loss of remission and delay in parole eligibility." And I share Justice Green's assessment that,

> …sentencing judges have discretion to grant credit for remission and parole loss of up to one and a half days for each day spent in pre-trial custody. The maximum ratio available under this regime affords quantitative compensation for the very vast majority of offenders who receive sentences of incarceration…any quantitative credit authorized by s. 719 is, at the end of the sentencing exercise, deducted from an otherwise fit sentence. (*paragraphs 198 and 199*)

[40] In light of my acceptance of the persuasive value of the reasoning in *Johnson* and my adoption of Justice Green's analysis with respect to the wording of section 719(3.1), I find that Mr. Dann is entitled to receive a 1.5 to 1 ratio for his time in pre-trial custody. I note that no representations were made by Mr. Dann with respect to "qualitative" factors that may influence the calculation of remand credit so there has been no consideration of this aspect of the issue by me. (Referring to *R. v. Nasogaluak, 2010 SCC 6*, Justice Green indicates his view that "…a claim of arduous or oppressive remand conditions, if judicially acknowledged, forms part of the mix of mitigating and aggravating factors that contribute to the crafting of a fit sentence rather than a component of any extra-mural compensatory credit regime." (*paragraph 189)*)

[41] I have now done what was requested of me by Crown and Defence: I have considered the applicability of sections 719(3) and 719(3.1) to this case. I have to admit to being somewhat uncertain about the true import to this sentencing of my finding that Mr. Dann is entitled to a 1.5 to 1 ratio for his time in pre-trial custody. I am sentencing Mr. Dann to a sentence, as I described at the start of these reasons, of three months, broken down as I indicated. He has served that custodial sentence already whether a 1:1 ratio or a 1.5 to 1 ratio is used. In light of that fact, while I consider Mr. Dann to be entitled to a 1.5 to 1 remand credit ratio, I see no utility in applying it. In the circumstances, he therefore has a remaining remand credit of 5 months on a 1:1 basis or 7.5 on a 1.5 to 1 basis. As there is no point in my applying the enhanced credit that I can see, on this sentencing Mr. Dann has "used up" three months of his remand time.

[42] I will note that I specifically asked Defence counsel in light of his submissions on the quantum of sentence whether he was still asking me to consider the applicability of section 719(3.1) which he indicated he was, so I have done so.

[43] I will conclude this sentencing by placing Mr. Dann on twelve months probation with the usual statutory conditions, including to keep the peace and be of good behaviour and conditions of reporting, no contact or communication, direct or indirect with T M., assessment, counseling, treatment and programs as directed by his probation officer, and a condition that he not be in any motor vehicle without the registered owner being present unless it is a taxi cab or public transport.