PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Pye, 2011 NSPC 104

Date: 20111129
Docket: 2350743, 2350749, 2350751, 2350753, 2272798
Registry: Halifax

Between:

Her Majesty the Queen

v.

Kartel Pye

Judge: The Honourable Judge Theodore K. Tax

Heard: November 29, 2011 in Dartmouth, Nova Scotia

Written decision: November 29, 2011

Charges:

On or about the 18th day of August, 2011 at or near Dartmouth, Nova Scotia, did not being authorized under the Firearms Act to carry a concealed weapon, to wit "Hi-Point Firearm, CF, semi-automatic 380 calibre pistol", did carry it concealed, contrary to Section 90(1) of the Criminal Code.

AND FURTHER that he at the same time and place aforesaid, did have in his possession a firearm, to wit. Hi-Point Firearm, CF, semi-automatic 380 calibre pistol, while he was prohibited from doing so, by Order of Recognizance, pursuant to Section 515 of the Criminal Code dated at Dartmouth, Nova Scotia, on the 17th day of January, 2011, contrary to

Section 117.01(1) of the Criminal Code.

AND FURTHER that he at the same time and place aforesaid, being at large on his Recognizance entered into before a Justice on the 17th day of January, 2011, and amended on the 6th day of July, 2011, and being bound to comply with a condition of the Recognizance directed by the said Justice fail without lawful excuse to comply with that condition, to wit., "DO NOT POSSESS, USE OR CONSUME ANY ALCOHOLIC BEVERAGES, AND DO NOT POSSESS, USE OR CONSUME A CONTROLLED SUBSTANCE AS DEFINED BY THE CONTROLLED DRUGS AND SUBSTANCES ACT.", contrary to Section 145(3) of the Criminal Code.

AND FURTHER that he at the same time and place aforesaid, being at large on his Recognizance entered into before a Justice on the 17th day of January 2011, and amended on the 6th day of July, 2011, and being bound to comply with a condition of the Recognizance directed by the said Justice fail without lawful excuse to comply with that condition, to wit., "REMAIN IN YOUR RESIDENCE FROM 8:00 PM UNTIL 6:00 AM THE FOLLOWING DAY, SEVEN DAYS A WEEK EXCEPT:-WHEN DEALING WITH A MEDICAL EMERGENCY OR ATTENDING A MEDICAL APPOINTMENT INVOLVING YOU OR A MEMBER OF YOUR HOUSEHOLD AFTER ADVISING HALIFAX REGIONAL POLICE AT 490-5016
-ADDED EXCEPTION: EXCEPT WHEN AT EMPLOYMENT AT PANADA PIZZA AND TRAVELLING TO AND FROM BY A DIRECT ROUTE.", contrary to Section 145(3) of the Criminal Code

On or about the 15th day of January, 2011 at or near Dartmouth, Nova Scotia, did possess a loaded prohibited firearm together with readily accessible ammunition capable of being discharged in the same firearm and was not the holder of an authorization or license and registration certificate under which he may possess the said firearm, contrary to Section 95(1) of the Criminal Code

Counsel: Perry Borden, for the Crown
Brian Bailey, for the Defence

By the Court:

INTRODUCTION:

[1] Mr. Kartel Pye entered a guilty plea to a charge that, on January 15, 2011, he had possession of a prohibited or restricted firearm with ammunition contrary to section 95(1) of the **Criminal Code**. He has also pled guilty to charges arising on August 18, 2011, in relation to offences contrary to section 90 (1) of the **Criminal Code** for carrying a concealed weapon, possession of a firearm while prohibited from doing so by a court order contrary to section 117.01 (1) of the **Criminal Code** and 2 counts of failing to comply with the terms or conditions of a recognizance contrary to section 145(3) of the **Criminal Code**. The Crown has proceeded by indictment on all of those charges.

The issue is to determine a fit and proper sentence in all of the circumstances of this case.

CIRCUMSTANCES OF THE OFFENCES:

[2] On January 15, 2011, at approximately 2:40 PM, Halifax Regional Police officers conducted a traffic stop on a Cadillac being driven on Mountain Avenue in Dartmouth. Shortly after the police officers activated their emergency lights and siren, they observed a black male person, later identified as Mr. Pye jump out of the moving vehicle, roll on the road, and then get up and run across the road clutching his waist area. Following a short foot pursuit, Mr. Pye was found hiding under a bush on Helene Avenue. After Mr. Pye was arrested, police officers, with the assistance of the K-9 unit, immediately retraced Mr. Pye's footsteps in the snow. The police found a loaded Colt 45 caliber firearm with two rounds in the magazine, a black LG Banter cell phone and a set of keys beside Mr. Pye's footprints in the snow.

[3] On January 17, 2011, Mr. Pye was released on a Recognizance with a surety under the terms of a curfew which required him to be in his house from 8 PM to 6 AM, seven days a week, subject to certain exceptions. That court order was varied on July 6, 2011 to add an exception to the curfew for employment purposes.

[4] On August 18, 2011, at about 11:30 PM, Halifax Regional Police officers were dispatched to investigate a complaint of a possible impaired driver operating a silver Pontiac Sunfire car. When the officers stopped that car, Mr. Pye was recognized as the passenger in that vehicle, and they were aware that he was under the terms of a Recognizance which required him to be in his house at that time. In addition, after speaking with Mr. Pye, the police officers noted that Mr. Pye had consumed alcohol , which was contrary to the provisions of the Recognizance.

[5] In conducting a search incidental to Mr. Pye's arrest on August 18, 2011, police officers found a loaded high point ACP-380 handgun with six hollow point rounds in the gun. The gun was concealed under the waistband of his pants and under his shirt. Mr. Pye did not have any valid licence to possess that firearm. The Recognizance of January 17, 2011 had prohibited Mr. Pye from possessing any firearms, prohibited weapons or restricted weapons, ammunition or explosives substances, and therefore, Mr. Pye's possession of the loaded handgun resulted in the charge contrary to section 117.01(1) of the **Criminal Code**.

[6] Following Mr. Pye's arrest on the evening of August 18, 2011, he was also charged with two charges contrary to section 145(3) of the **Code** for being in

breach of the Recognizance relating to the curfew condition and the condition not to possess or consume any alcohol or other intoxicating substances.

SUBMISSIONS OF COUNSEL:

[7] Both counsel note that the section 95(1) **Criminal Code** charge, which the Crown elected to prosecute as an indictable offence, has a maximum term of imprisonment of 10 years and that it is subject to a minimum punishment of imprisonment for a term of three years, for a first offence, as in the case of Mr. Pye. The Crown Attorney relies on the decision of **R. v. Morrissey**, [2000] 2 SCR 90, to submit that the mandatory minimum sentence for this firearms offence should be reserved for the so-called “best offender” and that Mr. Pye, despite his youth, is not that “best offender” because of his youth court record involving crimes of violence and his blatant disregard for court orders. The Crown Attorney submits that Mr. Pye should be sentenced to a period of 3.5 years in custody for the section 95(1) offence. Defence Counsel submits that because Mr. Pye has no prior adult record and he is a youthful first time adult offender, the statutory minimum of three years imprisonment would be a fit and proper disposition on this charge.

[8] With respect to the second firearms offence on August 18, 2011 of carrying a concealed weapon contrary to section 90(1) of the **Criminal Code**, counsel have noted that this firearms charge has a maximum term of imprisonment of 5 years, but that it is not subject to a minimum term of imprisonment. Both counsel have recommended a sentence of imprisonment of one year consecutive to the sentence ordered for the charge contrary to section 95(1) of the **Code**.

[9] In relation to the charge under section 117.01(1) of the **Code**, the Crown recommends a further period of six months imprisonment consecutive to the sentence being served, while Defence counsel recommends a sentence of 30 days concurrent. In relation to the two charges under section 145(3) of the **Code**, the Crown and the Defence both recommend a concurrent sentence of imprisonment for 60 days or 30 days, respectively.

[10] Finally, the Crown submits that Mr. Pye should not receive any credit for pre-sentence custody and, on a go forward basis, considering principles of totality and proportionality, he should be ordered to serve a global sentence of 5 years in a federal penitentiary. Defence Counsel submits that Mr. Pye has been held in

custody for 94 days as of November 15, 2011, and that his client should receive credit for that pre-sentence custody on a 1:1 basis towards the sentence that he will have to serve. It is the position of the Defence, that when the principles of proportionality and totality are considered, and pre-sentence custody is credited to Mr. Pye, then a global sentence of 3 years and 8 months in penitentiary, is a fit and proper sentence in all the circumstances of this case.

[11] The Crown also seeks orders under section 487.051 of the **Criminal Code** requiring Mr. Pye to provide samples of his DNA, a mandatory firearms prohibition order under section 109(2) of the **Code** and an order of forfeiture of the firearms and ammunition under section 491 of the **Code**. The Defence does not object to these ancillary orders being made.

CIRCUMSTANCES OF MR. PYE:

[12] Information relating to Mr. Pye's personal circumstances was provided to the court by way of submissions from his counsel and a pre-sentence report prepared on November 9, 2011. Prior to submissions, the Corrections Profile in the pre-sentence report was amended to correctly indicate that Mr. Pye had no prior

adult criminal record.

[13] Mr. Pye is presently 20 years old with a date of birth of August 13, 1991. He has completed the requirements for grade 10, but due to frequent absences from school, he did not complete grade 11. The pre-sentence report noted that Mr. Pye had been diagnosed with Attention Deficit Hyperactive Disorder (ADHD) at an early age and was prescribed Ritalin throughout elementary and junior high school.

[14] Prior to January 15, 2011, Mr. Pye was living in a common-law relationship with Ms. Lakisha Clayton. He is the father of a son with another woman with whom he had previously had a relationship. Mr. Pye's parents and many members of his extended family remain supportive of him.

[15] Mr. Pye has been steadily employed with his father, at K. B. Paving since leaving school. He has also worked from time to time as a laborer at Maritime Demolition and has been described as a good worker. In terms of his long-term goals, Mr. Pye states that there is a history of entrepreneurship in his family and he would like to run his own business down the road.

[16] Defence Counsel pointed out that Mr. Pye accepts full responsibility for all of the charges for which he entered guilty pleas and is prepared to accept the consequences as determined by the court. Counsel also says that Mr. Pye is impressionable, easily led by others and that he has made poor choices in terms of the people with whom he associates. Although generally regarded as being a sociable person, Mr. Pye's mother says that her son has become more quiet as a result of the recent deaths of a young nephew, his grandmother and a very good friend who was shot to death.

[17] As mentioned previously, Mr. Pye has no prior convictions as an adult. He does, however, have five prior youth convictions which were referred to by the Crown Attorney under sections 119(1) and 119 (2)(j) of **Youth Criminal Justice Act**. In particular, the Crown noted the previous crimes of violence which involved two assaults with a weapon causing bodily harm and two charges of aggravated assault. Those offences occurred within a four day period in March, 2006, when Mr. Pye was 15 years old, and he was sentenced on October 17, 2006 to six months of deferred custody and two years of probation. The probation officer noted in the pre-sentence report that Mr. Pye completed this period of community supervision without further incident.

[18] Defence counsel noted that Mr. Pye has never served any prior custodial sentences and that the period of pre-sentence custody has had a salutary effect on him.

ANALYSIS:

PRINCIPLES OF SENTENCING:

[19] The fundamental purpose of sentencing as set out in section 718 of the **Criminal Code** is to ensure respect for the law and the maintenance of a just, peaceful and safe society. The imposition of just sanctions, requires me to consider the sentencing objectives which this sentence should attempt to achieve. In this case, the Crown Attorney submits that the primary sentencing purposes should focus on denunciation of the unlawful conduct, specific deterrence of Mr. Pye and general deterrence of other like-minded individuals.

[20] Defence counsel does not take issue with those primary sentencing purposes and he joins the Crown in submitting that the court should also consider a sentence that would best assist in rehabilitating the offender. Both counsel submit that the court should also take into account the principle of proportionality found in section

718.1 of the **Code** and consider any aggravating and mitigating factors as required by section 718.2 of the **Code**. In addition, both counsel have submitted that, given the fact the offences occurred on two different dates, the principle of totality found in section 718.2 (c) of the **Code** should be kept in mind where consecutive sentences are imposed, and that I should ensure that the combined sentence is not unduly long or harsh. Finally, I must also be mindful of the principle of parity as stated in section 718.2 (b) of the **Code** which requires me to consider that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

AGGRAVATING FACTORS:

[21] In terms of the aggravating circumstances, the Crown Attorney points to the fact that Mr. Pye had possession of a loaded firearm that was ready to be fired on two separate occasions. The Crown submits during the incident in January, 2011, after Mr. Pye jumped out of a moving vehicle, he ran through a residential area and threw a loaded firearm into the snow where it could have created a public safety concern if it had been discovered by children, instead of the police. The Crown also says that on August 18, 2011, Mr. Pye was bound by the conditions of a

Recognizance not to have possession of any firearms or alcohol and to be subject to a curfew in his residence. The Crown says that he flagrantly disregarded the court's order by failing to comply with several conditions on that date. Finally, the Crown submits that Mr. Pye's youth court convictions in October, 2006 are also an aggravating factor, as they demonstrate that he has a recent and related record for serious crimes of violence.

MITIGATING FACTORS:

[22] In terms of mitigating factors, Defence counsel submits that I should consider that Mr. Pye has entered guilty pleas which saved the Crown and the Court several days of trial and did not require the Crown to present evidence on several contentious issues relating to the search and seizure of the firearms. In addition, Defence counsel submits that Mr. Pye is a youthful, first time adult offender, who has strong family support in the community. He also points to the fact that, although Mr. Pye has only completed grade 10, he has worked steadily since leaving school and is considered to be a good worker. In terms of his prior criminal record, Defence counsel submits that the youth criminal justice charges occurred at a time when he was 15 years old, immature, highly impressionable and

easily led by others. Counsel adds that Mr. Pye completed the period of deferred custody and probation without any further incidents.

THE APPROPRIATE SENTENCE:

[23] In order to determine what is an appropriate sentence in all the facts and circumstances of this case, I am satisfied that denunciation of the unlawful conduct, specific deterrence of Mr. Pye and general deterrence of like-minded individuals are the important sentencing objectives to keep in mind. However, in view of the fact that Mr. Pye is a youthful first-time adult offender, I find that it would also be appropriate to consider the impact of this sentence on his rehabilitation. This principle of restraint in imposing a first sentence of imprisonment was succinctly stated by Rosenberg J.A. in **R. v. Priest,** 1996 CanLii 1381 (Ont. C.A.) at page 5:

> "Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this Court that the first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused, rather than

solely for the purpose of general deterrence."

[24] The Crown Attorney indicated that, during the year to date, there has been a significant number of firearms related incidents in our community and it is fair to say that the presence of firearms and firearms related incidents is a serious concern in this city as it is in many other cities in Canada. While I find that this is certainly a cause for concern and a rational reason for stressing general deterrence, Defence counsel points out in his submissions that, in this case, the firearms that Mr. Pye possessed and concealed were not used in the commission of any other offence. Defence counsel added that, although the firearms were loaded, they were not pointed at any police officers who arrested Mr. Pye, nor were they threatened to be used or pointed at any third parties. As for the potential danger that a loaded firearm could have been found by children, Defence counsel states that the actual danger was minimized by the police officers locating the firearm that was thrown in the snow, immediately after Mr. Pye was arrested.

[25] Both counsel referred the court to the Nova Scotia Court of Appeal's decision in **R. v. Adams,** 2010 NSCA 42 at paragraph 23 where the court outlined the appropriate relationship between the selection of concurrent or consecutive

sentences and the principle of totality. The Court of Appeal noted that a judge should first fix a fit and proper sentence for each offence and determine which sentence should be served consecutively and which, if any, should be served concurrently. Then, the judge should take a final look at the aggregate sentence and if he or she concludes that the total exceeds what would be a just and appropriate sentence, then the overall sentence should be reduced.

[26] In this case, the principle of totality must be considered in light of the fact that there is a statutory minimum penalty for the possession of a prohibited or restricted firearm with ammunition [section 95(1) **Code**]. The minimum penalty for that offence was increased by Parliament on May 1st, 2008, to three years in prison, where the Crown proceeds by indictment in relation to a first offence. Prior to that amendment, the minimum term of imprisonment for that offence was a term of one year in prison. There can be no doubt that Parliament's decision to increase the minimum punishment for this and other firearms offences was in answer to the growing prevalence of firearms and firearms related violence in our communities. Furthermore, I find that the increase in the minimum penalty for this offence sends a clear message to those who carry loaded restricted or prohibited firearms without authorization, that if convicted, they will face certain and significant penal

consequences.

[27] With respect to the parity principle, the court was referred to several cases where similar offenders were sentenced for similar offences committed in similar circumstances. In **R. v. James**, 2011 ONSC 241 (CanLii), the accused was subject to an outstanding warrant in Toronto, Ontario, and when police officers attempted to arrest him, Mr. James fled. He ran between slow-moving traffic and crossed Highway 401. The officers followed him and saw Mr. James remove a handgun from his waist area and toss it into the back of a dump truck. After Mr. James was arrested, police officers located the dump truck and when it was searched, they found a loaded semi-automatic handgun with six cartridges - one round was in the chamber and five rounds were in the magazine. Mr. James was 26 years old with a grade 11 education. He had several prior adult convictions and was subject to a firearms prohibition order. Mr. James had pled guilty and was ordered to serve a sentence of 42 months for the possession of a loaded prohibited firearm contrary to section 95(1) of the **Code** and a further 8 months consecutive for the possession of a firearm while being prohibited from doing so by court order. The sentence of 50 months was reduced by a credit for time served in pre-sentence custody.

[28] In **R. v. Phinn**, 2010 NSSC 99 (CanLii), a 20-year-old offender pled guilty to possession of a loaded prohibited firearm without authorization contrary to section 95(1) of the **Code** and related charge for breach of a condition in his recognizance. Mr. Phinn was approached by police officers acting on source information and he immediately fled on foot. Police officers chased him and eventually tackled him. During the struggle to arrest him, a 32 caliber Smith & Wesson revolver fell to the sidewalk from a holster worn by Mr. Phinn. The firearm had six live rounds in the chamber. Mr. Phinn had a grade 11 education, family support, plans to complete his high school education and to secure a job in the family brick laying business upon completion of his sentence. At the time of his arrest, Mr. Phinn was bound by the terms of a recognizance which prohibited him from possessing any firearms as well as being under section 109 firearms prohibition order which was a result of a prior conviction under section 95(1) of the **Code** under the **Youth Criminal Justice Act**. The court ordered Mr. Phinn to serve a sentence of 3 1/2 years, less credit for pre-sentence custody served on remand on a two-for-one basis. The breach of recognizance resulted in a term of 30 days imprisonment to be served concurrently with the section 95(1) **Code** sentence.

[29] In **R. v. Velez-Lau**, 2011 ONSC 4805 (CanLii), the accused was found

guilty of eight charges relating to the possession of firearms, a magazine and ammunition. The offender was 24 years old with no prior criminal record. He had completed most of his high school credits and held various jobs in construction and roofing, although at the time of his arrest, he was unemployed. He had a close relationship with and the support of his close family members. He was the father of two young children who he supported financially and participated in their upbringing. His prospects for rehabilitation were deemed to be good. The accused was sentenced to four years for possession of a prohibited firearm, four years for possession of his restricted firearm and one year for each of the two charges of careless storage of a firearm. All sentences were to be served concurrently with one another. The court ordered some additional credits for pre-trial custody on a 1.5 to1 basis under section 719(3.1) **Code** after concluding that some of that time had been served under “difficult” conditions.

[30] In terms of the fit and proper sentence for the charge contrary to section 95(1) of the **Code,** I note that there is a 3 year minimum sentence for a first offence as in the case of Mr. Pye. I accept the principles expressed in **Morrissey,** *supra,* by Justice Arbour at paragraph 75 that the mandatory minimum sentences for firearms related offences act as an “inflationary floor” setting a new minimum punishment

for the so-called “best offender” whose conduct was caught by these provisions. I find that Mr. Pye is not that so-called “best offender” because he has a prior youth criminal Justice record which includes crimes of serious violence against other people.

[31] Looking at the sentences imposed upon similar offenders who committed similar offences in similar circumstances, the range for the section 95(1) **Code** offence would appear to be between 3.5 to 4 years in prison. However, in order to determine a fit and proper sentence for the section 95(1) **Code** charge, I must also be mindful of the fact that Mr. Pye is a youthful, first time adult offender who has not been previously sentenced to be incarcerated as a result of the commission of an offence. After considering all of circumstances of the charge under section 95(1) of the **Code**, as well as the aggravating and mitigating factors, I find that Mr. Pye is very close to that “best offender” and that it would be appropriate to order a period of 40 months incarceration for the offence of being in possession of a prohibited or restricted firearm with ammunition.

[32] With respect to the remaining charges contrary to section 90(1) of the **Code** for carrying a concealed weapon, the section 117.01(1) **Code** charge for possessing

a firearm while prohibited from doing so by a court order and the two breaches of the terms and conditions of his recognizance contrary to section 145(3) of the **Code**, there is no doubt that those offences are related to and arise out of one transaction. In such a case and where the court is dealing with two or more sentences to be imposed, the question of whether a sentence should be served consecutively or concurrently will depend on a number of factors including whether there is "reasonably close nexus" between the offences in time and place, whether the offences violated different legally protected societal interests or are completely unrelated.

[33] As Beveridge J.A. stated in **R. v. Naugle**, [2011] N.S.J. No. 165 (NSCA) at paras. 24-25, the court must also ensure that the selection of consecutive sentences does not give rise to a sentence that is out of proportion to the overall gravity of the conduct, or otherwise creates a sentence that is unduly long or harsh. As a result, a sentencing judge should review the cumulative sentence to determine if it is "just and appropriate" so as not to offend the totality principle. The Court of Appeal also agreed with the comments of Clayton Ruby in *Sentencing* that the totality principle may be offended if the aggregate sentence is substantially above the normal level of the sentence for the most serious of the individual offences

involved, or if its effect is to impose on the offender “a crushing sentence” not in keeping with his record and prospects.

[34] Given the seriousness of firearms charges and the prevalence of firearms related violence in this community, I find that Mr. Pye’s carrying of a concealed weapon which was loaded with live ammunition on August 18, 2011, is a serious offence. Furthermore, I find that his degree of responsibility for that offence is high, especially when I consider that the court had ordered, only a few months before that incident, that he was not to have in his possession any firearms or ammunition. On this charge contrary to section 90(1) of the **Code**, I agree with the submissions of both counsel that a fit and proper sentence is a period of one year of imprisonment to be served consecutively to the other sentences being imposed.

[35] In terms of the section 117.01 (1) **Code** charge, I find that while it arises out of the same transaction, in this case a sentence for this charge seeks to protect different legal and societal interests. I find that Mr. Pye’s possession of that firearm on August 18, 2011, was a flagrant disregard of the Recognizance put in place in relation to the firearms charges of January 15, 2011, which prohibited him from possessing any firearms. I find that the underlying public interest here is the

protection of the public from the danger posed by the unlawful possession of firearms and the possibility that they may be used, as well as maintaining respect for the law and orders of the court. On this charge, I find that a fit and proper sentence is that Mr. Pye serve a period of 6 months of imprisonment consecutively to the other sentences ordered today.

[36] With respect to the two remaining charges contrary to section 145(3) of the **Criminal Code**, I find that they arise out of the same transaction and they seek to protect the same legal and societal interests as the section 117.01(1) **Code** charge. In these circumstances, I find that a fit and proper sentence for these two charges is to order a period of 60 days incarceration on each of those two charges, to be served concurrently with the other sentences.

CREDIT FOR PRE-SENTENCE CUSTODY:

[37] The Crown Attorney had submitted that the court ought not to give Mr. Pye the customary credit for pre-sentence custody. The Crown position is that the court has a discretion under section 719(3) of the **Code** and that Mr. Pye had secured his release on January 17, 2011 and as a result of his actions on August 18, 2011, he

was re-arrested. The Crown then opposed to his release, and since that time, he has consented to his remand in custody. Defence counsel seeks court's customary practice of giving credit for pre-sentence custody on a one-to-one basis for his client.

[38] Since February 22nd, 2010, when Bill C-25 came into force and amended subsection 719(3) and added subsection 719(3.1) of the **Code**, the customary credit for any time spent in pre-sentence custody was limited to a maximum of one day for each day spent in custody, but Parliament provided some discretion to the trial judge "if the circumstances justify it" to credit a person with a maximum of 1 ½ days credit for each day spent in custody.

[39] In support of their submission, the Crown cited **R. v. Hickey**, [2011] N.S.J. No. 144 (NSSC) at paragraph 63, where Justice Cacchione did not credit the offender with the five months spent in pretrial detention because the "pretrial custody was as a direct result of the accused violating the terms of his release and not because the accused was denied bail." In that case, on two occasions, the accused who had been released on a recognizance with the surety, was placed in custody because the surety had rendered as a result of the accused's failure to abide

by the terms of his release.

[40] While there is no doubt that the facts of this case presented an opportunity for the Crown to advance this position, in my view, the Supreme Court of Canada has recognized that while pre-trial detention is not intended as punishment when it is imposed, in effect, it may be deemed to be part of the sentence following the offender's conviction, by operation of section 719(3) of the **Criminal Code**. In **R. v. Fice**, [2005] 1 SCR 742 at paragraph 21, the Supreme Court of Canada stated that:

> ".... the time credited to an offender for time served before sentence ought to be considered part of his or her total punishment, rather than a mitigating factor that can affect the range of sentence."

[41] Based upon my review of sub-sections 719(3) and 719(3.1) of the **Code** and cases which have applied or interpreted that section, I conclude that the court has a discretion whether to take into account the credit for pre-sentence custody in determining the sentence to be imposed. However, it is fair to say that, in this court, it is a daily practice, usually with the consent of both the Crown and

Defence, that an offender who has spent time in custody on remand awaiting trial or sentencing, is granted credit on a one-to-one basis for that time in custody as result of the offence. In my view, a judge should not deny credit for pre-sentence custody without good reason for departing from the well-established practice. If I was to do so, I expect that the party seeking to depart from the established practice, would have the responsibility to establish facts which would support a credit for something other than a one to one basis. In this case, I am not satisfied that the Crown has introduced evidence or established facts upon which I would be prepared to reject the well-established practice of granting credit for pre-sentence custody on a one-to-one basis.

[42] As a result, in terms of the sentence to be imposed today, I am prepared to credit Mr. Pye on a one to one basis for his for pre-sentence custody. I understand that, as of today's date, the total amount of pre-sentence custody is 109 days or 3 ½ months.

THE GLOBAL SENTENCE

[43] In accordance with the methodology outlined by our Court of Appeal in the

Adams case, I am required to take a final look at the aggregate sentence which presently stands at 58 months less the credit of 3 ½ months of pretrial custody which leaves a total of 54 ½ months of custody in a federal institution. At this point, if I conclude that the total sentence exceeds what would be a just and appropriate sentence, then I may reduce the overall sentence. In this regard, I have reviewed the comments of Bateman J. A. in the case of **R. v. Butler**, 2008 NSCA 102 at paragraph 32 where she cited with approval a statement from *Ruby on Sentencing* (4th edition at p.204):

> "The proper sentencing of first offenders requires that the sentencing judge exhaust all other possibilities before concluding that imprisonment is required.... One may be treated as if one were a first offender, in appropriate circumstances, if a custodial sentence has never been imposed, or even if one has served only a very minor term of imprisonment. The notion that a first offender should be treated leniently in the hope that lesser punishment would be effective has been characterized as "doubly so" in the case of youthful first offenders. There is a presumption of fact that one who has not offended previously is capable of reform and not to be dealt with

accordingly ” (Emphasis added by Bateman J.A.)

[44] As a result, the court must consider not only the appropriate sentence for each individual offence, but whether, in light of the principles of totality and proportionality, the global sentence is a fit and just disposition which is responsive to the circumstances of this offender and the circumstances surrounding the commission of these offences. I must also bear in mind that the global sentence must not be unduly long or harsh so as to impose upon Mr. Pye, a youthful first time adult offender, a so-called “crushing sentence” which might not be in keeping with his record or prospects. In this case, I find that there were several positive aspects in the pre-sentence report which militate in favour of concluding that there are positive prospects for Mr. Pye’s rehabilitation in the future.

[45] In **Butler**, *supra,* Justice Bateman added at paragraph 33 that sentences for youthful offenders should, where appropriate to the circumstances, lean toward rehabilitation rather than general deterrence. I find that this is especially so when sentencing youthful first time, adult offender such as Mr. Pye who has never previously served any sentence of imprisonment, to a significant penitentiary term. With that statement of principle in mind and after considering the overall totality of

all of the sentences that I am ordering today, I find that a fit and proper sentence warrants a reduction in the global sentence imposed. I hereby order Mr. Pye to serve global sentence of four (4) years or 48 months of imprisonment in a federal institution. I find that this is a fit and proper sentence taking into account all of the principles of totality and proportionality as well as considering the sentences of imprisonment that have been ordered for similar offenders in similar circumstances.

[46] I also grant the Crown's request for the ancillary orders which they sought in this case, namely, the DNA order under section 487.051of the **Code**, the section 109(2) mandatory prohibition on the possession of firearms, other weapons and ammunition as well as the section 491 order forfeiting the firearms and the ammunition to Her Majesty in Right of the Province of Nova Scotia to be disposed of as the Attorney General directs.

[47] Finally, in light of the present circumstances of Mr. Pye and the period of incarceration that I have just ordered, I find that it would be an "undue hardship" to impose the victim fine surcharge under section 737(5) of the **Criminal Code**. As a result, I hereby waive the imposition of that fine surcharge and will not order that it be imposed in this case.