PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Eisener*, 2023 NSPC 42

Date: 20230719
Docket: 8661397, 8661400
Registry: Dartmouth

Between:

His Majesty the King

v.

Krishna Michael Eisener

SENTENCING DECISION

Judge:	The Honourable Judge Bronwyn Duffy
Heard:	July 19, 2023, in Dartmouth, Nova Scotia
Decision	August 16, 2023
Charges:	§129(a), 279(2) *Criminal Code of Canada*
Counsel:	Hartwell Millett, for the Public Prosecution Service Mark Holden, for the Defence

By the Court:

[1] Mr. Eisener is before the Court to be sentenced for one count of resisting or obstructing a peace officer, contrary to section 129(a) *Criminal Code* (CC), and one count of unlawful confinement contrary to section 279(2) CC. Both are dual procedure, and the Crown elected to proceed by Indictment. Accordingly, §129(a) carries a maximum penalty of two years' imprisonment pursuant to subsection (d) of that provision, and the unlawful confinement carries a maximum of ten years, per §279(2)(a). Findings of fact were made after the entry of a guilty plea on the resisting arrest, and Mr. Eisener was tried and convicted of the unlawful confinement. Mr. Eisener was on statutory release when charged with these allegations, and is bail denied in accordance with the provisions of Part XVI.

Recommendations

[2] This was a contested sentencing hearing. The Crown asks the Court to impose a 1080-day sentence, with enhanced remand credit at a ratio of 1.5:1 pursuant to *R. v. Carvery*, 2012 NSCA 107 of 181 days, for 121 days spent in pre-trial custody, which, less remand credit, is 899 days. The prosecution submits that subsection 109(1)(a) is applicable and seeks a prohibition order under section 109(3) for life/life.

[3] The Defence recommends a sentence of incarceration of 182 days, which would result in a disposition of time served based on enhanced remand credit for the time that Mr. Eisener has spent in custody while his matters were awaiting to be dealt with according to law.

Analysis

[4] There are no mandatory minimum penalties applicable, and both are legislatively available sentences. There are no victim impact statements per §722 before the Court. There is a Pre-Sentence Report, which I have considered; however, this report was not prepared to assist the Court in sentencing Mr. Eisener for these offences. It was prepared some five years ago.

[5] The goal in every case is to formulate a "fair, fit and principled sanction", as the Supreme Court of Canada has directed in *R. v. Parranto*, 2021 SCC 46. Proportionality is the organizing principle, with parity and individualization as secondary to the end of achieving a fit sentence (¶ 10). Nevertheless, individualization does remain a key consideration in the proportionality

assessment; as stated by the Supreme Court in *R. v. Lacasse*, 2015 SCC 64, at ¶ 58, each offence is committed in unique circumstances by an offender with a unique profile. The Court says the question must always be "whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case."

Circumstances of the Offences

[6] The circumstances of these offences involve an unusual car-jacking scenario. Mr. Eisener was nine days into a statutory release period at the Jamieson Community Correctional Centre, when a parole warrant was issued for his arrest on 15 February 2023. Police arrived at the Jamieson Centre to see the parole officer, who inquired if police were on site for Mr. Eisener, and at that point police saw him running. The foot pursuit was to no success, and the canine unit was called to assist. In the meanwhile, a cab driver in the area stopped police and said the male that was running jumped into a red vehicle. A security video captured Mr. Eisener approaching the vehicle occupied by Christine Taylor and entering it, and then the vehicle almost immediately driving away and leaving the frame. Findings of fact were made that Mr. Eisener entered the passenger side of Ms. Taylor's vehicle, the two being complete strangers to each other, and said "drive, drive, drive, I won't hurt you" several times, to which Ms. Taylor responded by driving through the parking lot. Some 30 seconds to a minute after Mr. Eisener entered the vehicle, police located the vehicle stopped in traffic, ran over, opened the passenger door and arrested Mr. Eisener. In effect, Krishna Eisener demanded that Christine Taylor operate her vehicle as a getaway car.

Circumstances of Mr. Eisener

[7] As to his personal circumstances, defence counsel described Mr. Eisener's close relationship with his mother, with whom he is in daily contact. He had no relationship with his father, now deceased. The Pre-Sentence Report, though not altogether helpful due to its vintage, discloses problems with opioid use, which the Defence says continue to be managed by Mr. Eisener, and which his mother views as the root of his criminality. Mr. Eisener is open to counselling to attempt to curb his habitual drug use, and counsel noted his history of employment which included varied roofing, drywalling and scalloping jobs. He describes having no money, no savings, and no medications to stabilize his mental health, which he thinks are needed, but he is on medication to manage his drug addiction. With respect to the circumstances to which he has been subject at the correctional facility, Mr. Eisener did not testify at the sentencing hearing, but Mr. Holden in his submissions

described that his client has been on lockdown range since the end of May, given only two hours of access from his cell and relayed the conditions as being debilitating.

Application of Purpose, Principles and Objectives of Sentencing

[8] I must consider and apply the objectives, purpose and principles of sentencing set out in ss. 718 through 718.2 of the *Criminal Code*. The fundamental principle is proportionality, both to the gravity of the offence and degree of responsibility of the offender. Individualized sentencing is central to that process of achieving proportionality. (*R. v. Parranto, supra*, ¶ 12, *R. v. LaCasse, supra*, ¶ 58).

[9] The purpose of sentencing legislated in section 718 is to protect the public and contribute to respect for the law and the maintenance of a safe society. The purpose is to be effected by the imposition of just sanctions that have one or more of the following objectives: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; reparations; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community. *R. v. Nasogaluak*, 2010 SCC 6, ¶ 39.

[10] Denunciation and deterrence, both specific to the offender and general to the community, are at the fore of the inquiry for serious offences.

[11] The prosecution submits a three-year jail sentence is supported by the parole violation, the recency of his offending and the criminal history of Mr. Eisener. He submits that the public safety, and separating the offender from society is a paramount consideration because Mr. Eisener committed these offences while on early release. Rehabilitation, while it must be considered, is not one of the key inquiries in these circumstances, argues the prosecution.

[12] Defence counsel advocates that Mr. Eisener, out of desperation, made a poor decision as a means of avoiding detection by the police. He says it is worthy of consideration that Ms. Taylor said during her *viva voce* evidence at trial that she knew she could have exited the vehicle. He argues that this offence should be positioned at the low end of unlawful confinement cases. In advocating for a 182-day sentence, defence counsel asks the Court to consider that the absence of physical violence in this case should operate in favour of Mr. Eisener and supports that this conviction is at the lower end for these types of offences.

[13] The Crown Attorney acknowledges the mitigation to which Mr. Eisener is entitled, namely that he entered a guilty plea to one of the charges, and admitted some evidence without contest on the trial matters, which reduced the number of witnesses required for the prosecution's case. The Crown submits it is aggravating that there is an active warrant for Mr. Eisener in relation to a breach of probation from Alberta, and that it is particularly aggravating that he was nine days into a statutory release period for a robbery conviction when these offences were committed. He concludes that the aggravating factors outweigh the mitigation in this case.

[14] The Defence urges the Court to focus on the mitigation to which Mr. Eisener is entitled; he has pled guilty to the section 129(a) and accepted responsibility for that offence; he is relatively youthful at 27 years of age. He argues that there are indeed prospects for rehabilitation and the Court should guard against dispensing with a rehabilitative sentence, particularly for a youthful offender.

[15] Mr. Eisener has an unenviable criminal record. He has over 100 adult and retainable youth convictions (§119 *Youth Criminal Justice Act*) in Nova Scotia with little reprieve. His most recent convictions included a face-masked robbery, assaulting a peace officer and possession of controlled substances, for which he received a sentence of three years, 178 days; he was on statutory release for those offences when charged with the allegations for which he was convicted and bring him before the Court today. Mr. Eisener's history includes convictions for being unlawfully at large in 2018, break and enter in 2014, and his offending is not confined to Nova Scotia. He was convicted of weapons-related, possession of controlled substance and administration of justice offences in Alberta in 2017. The prosecution aptly describes Mr. Eisener's history as involving continuous and escalating offending. He is not a stranger to custodial sentences.

[16] Mr. Eisener has served continuous custody at both federal and provincial facilities, intermittent custody, and community-based dispositions over the course of his young life. There has been no meaningful decrease in the seriousness of offences, nor has there been any significant gap in his record. It is statutorily aggravating that he committed these offences while on statutory release (s. 718.2(a)(vi)). However, the Court must also be restrained in its accounting on the sentencing outcome; parole was revoked as a result of these charges, and Mr. Eisener will not receive remand credit from February 15 to March 20 that he spent in custody serving the remainder of that sentence, so the morally blameworthy conduct has already been counted and penalized once (*R v. Stewart*, 2016 NSCA 12, ¶ 27).

[17] In *R. v. Lacasse*, *supra*, as well as *R. v. Hamilton* (2004) 186 CCC (3d) 129 (ONCA) the Court emphasized proportionality as the fundamental principle of sentencing, accounting for the gravity of the offence and the degree of responsibility of the offender. The Court explained that sanction severity should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction. Aggravating and mitigating factors, and the principles of parity, totality and restraint are also important principles that must be engaged in the determination of a fit and proper sentence. (*Hamilton, supra*, ¶ 95).

[18] Notably, the *Criminal Code* views imprisonment as a sentence of last resort. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered. This is a codification of the principle of restraint, of which the Court reminded us in *R. v. Antic*, 2017 SCC 27, in the context of bail. The issue here is not whether jail is warranted, it is how much.

[19] Rehabilitation and denunciation and deterrence are not mutually exclusive principles of sentencing. Rehabilitation can be an applicable principle even where deterrence has a more central application (See *R. v. Chase*, 2019 NSCA 36; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7). I must also be aware that a criminal record, on its own, is not an aggravating factor (*R. v. Mauger*, 2018 NSCA 41). As Justice Beveridge said at para 64:

> [64] That is not to say an offender's prior record is not relevant, nor that its existence and extent may lead a court to impose a harsher type or longer sentence than it might otherwise. A prior record can speak to the need for greater emphasis on specific deterrence or diminish the importance of rehabilitation, but, on its own, it is not an aggravating factor leading to a sentence that is untethered to the purposes and principles of sentence.

[20] I consider the nature of Mr. Eisener's criminal history, his extensive history of re-offending without much gap, the recency and seriousness of some of his offences, and his consistent failure to abide by court process to speak to the need for specific deterrence. With respect to the outstanding warrant from Alberta, I consider that as well in the context of his criminal record, as Mr. Eisener did not respond to the call of the Court, which resulted in the release of the unendorsed warrant. Regarding the underlying conduct, however, it remains unproven and as such the breach of probation is not an aggravating circumstance (*R. v. Pike*, 2010 BCCA 401, ¶ 57-60). Mr. Eisener's record of offending does not suggest he is a

particularly good candidate for rehabilitation. He has been offered rehabilitative programming in the past, to insufficient benefit.

[21] Our Court of Appeal reminds courts that to craft a fit sentence, it must be proportionate to the gravity of the offence and the degree of moral responsibility of the offender (*R. v. Wournell*, 2023 NSCA 53, ¶ 68). I accept the submission that Mr. Eisener, out of desperation, made a poor decision as a means of avoiding detection by the police. There was no physical violence against the victim, which Ms. Taylor was very clear in stating during her *viva voce* evidence. This was not a planned hijacking. There was no sophisticated undertaking by Mr. Eisener to effect his escape. This speaks to his moral blameworthiness, which I would characterize at the mid to lower end. With respect to seriousness, considering the circumstances of the offences as detailed earlier, I agree with the defence that the §279(2) should be positioned at the low end of unlawful confinement cases; that said, unlawful confinement is a serious offence, particularly when prosecuted by Indictment, attendant to it is a maximum penalty of ten years' incarceration. It involves a victim, and I consider it exacerbated by the fact that it was committed nine days into his parole.

[22] Counsel have provided jurisprudence to specifically comment on the appropriate range of sentence for Mr. Eisener. The Crown offers the case of *R. v. Cassanova-Alman*, 2023 ONSC 1470, and while acknowledging that the facts in that case are dissimilar to those at bar – that case involved a face-masked pharmacy robbery, a carjacking robbery, dangerous driving and other offences – the prosecution offers it as a yardstick for carjacking sentences. In *Cassanova-Alman*, the total sentence was four years' incarceration before applying pre-sentence custody credit, with three years ordered in relation to the carjacking robbery. There was a high-speed police chase, an eight-year-old child was in the car, the offender's face was masked while committing the robbery and it involved a stolen motor vehicle.

[23] The prosecution submitted *R. v. Enotie*, [2013] OJ No. 6246 as a valuable case regarding sentences for these types of offences. The *Enotie* Court sentenced the offender to eight years in a federal penitentiary; the facts involved five car-jackings for which Mr. Enotie was found guilty by a jury. A high-speed chase was also involved here, and all perpetrators had a gun, four of the carjackings were at gunpoint, and one involved a threat to kill. In paragraphs 30-40 of that case, the Court discusses similar sentences for similar offences and offenders, and the sentences ranged from two to 16 years. The Crown Attorney argues the typical sentences were in the 3.5 to five-year range.

[24] Finally, the prosecution offers *R. v. Handule*, 2023 BCSC 1031, most particularly for the declaration of the Court at paragraph 60 that the range of sentencing for unlawful confinement is 5-10 years, relying on *R. v. Tse*, 2010 BCSC 1273, but that "before reaching that determination on the facts before him, Davies J. also made clear that the range of sentencing for cases of unlawful confinement "is infinite", given the range of circumstances in which the offence can arise." In *Handule*, which involved a forcible confinement for a duration of two days, during which degrading videos were taken, some at gunpoint, the Court sentenced Mr. Handule to six years' imprisonment, less remand credit, to be served concurrently to a life sentence he was already serving. Mr. Abdullahi, an offender who engaged in the enterprise with Mr. Handule, was found to be less culpable and had personal circumstances including a physical condition that factored into the Court's sentencing outcome; he was sentenced to two years less a day, to be served in the community under a Conditional Sentence Order.

[25] Defence counsel brings the case of *R. v. Drodge* from the Newfoundland and Labrador Provincial Court, [2015] NJ No. 33. Mr. Drodge was sentenced on a collection of offences including uttering threats, unlawful confinement, assault, assault of a peace officer, causing a disturbance and various breaches of court process. The offender was sentenced to a total of 630 days' incarceration, lengthy probation and ancillary orders, with 150 days for the unlawful confinement. The victim of the unlawful confinement was the offender's domestic partner.

[26] The Defence cites the case of *R. v. Ezekiel*, 2018 NUCJ 26, also involving a series of offences that included a resisting arrest and unlawful confinement, together with various administration of justice offences and common assaults. The disposition was two years' incarceration, with 60 days ordered on the unlawful confinement and 30 days on the resisting arrest. The victim was assaulted, repeatedly and for hours, in the context of an alcohol-fueled rampage, and the offender would not let her leave.

[27] Defence counsel Mr. Holden also argues *R. v. RDC*, 2016 BCPC 388 to support his position on sentence. The offender had pled guilty and was an Indigenous offender, with a lengthy criminal record and drug addiction. The sentencing was for offences including criminal harassment, assault, two counts of unlawfully in a dwelling house with intent, three counts of breaches of court process, unlawful confinement and resisting or obstructing a peace officer. The victim was a former domestic partner. The offender was sentenced to 164 days' imprisonment and two years' probation. The Court applied three months to the confinement conviction.

[28] Mr. Holden also submitted for the Court's consideration *R. v. Tulk*, 2014 CanLII 5593 (NLSC). The events giving rise to these convictions involved former domestic partners. The offender grabbed his victim, threw her to the floor, blocked her from leaving, all in front of two children who were distraught and frightened. The offender had no prior criminal history. Mr. Tulk was sentenced to 90 days for assault on his spouse, 90 days for the unlawful confinement, 60 days for a secondary assault, all to be served concurrently to each other and intermittently.

[29] The Supreme Court in *Parranto* declined to proscribe the use of starting point sentences but did limit their use. I am satisfied that the recommendations of counsel are within the range of appropriate sentences for offences of this nature in these circumstances. The Crown's recommendation on sentence would see Mr. Eisener serve just over 2.5 years after credit for time spent in pre-trial custody. The Defence asks the Court to arrive at a sentence that would permit Mr. Eisener to be released from custody upon the passing of sentence. I have also reviewed the case of *R. v. Chad*, 2009 ABCA 48. At the end of September 2007, the respondent fled from an officer who was investigating an earlier robbery. The respondent jumped into a vehicle at a nearby gas station and instructed the driver to take off. When the driver refused, the respondent pushed him out and drove away in the vehicle, which was found damaged a few days later. In increasing the sentence of the court of first instance from 18 months to three years, the Alberta Court of Appeal said as follows at paragraph 28:

> [28] We have considered the sentences imposed on similar facts, particularly in *Bell* and *McCrea*, along with the respondent's maturity and lengthy criminal record, the seriousness of these offences, the lack of a weapon and the guilty plea. In our view, the sentence imposed (18 months) is not proportionate to sentences for similar offences. A sentence of three years should be substituted, to be served consecutively. The discussion of the appropriate starting point for a sentence for car-jacking should be left to another occasion.

[30] This, however, was in the context of a 48-month sentence for ten offences arising from four incidents each involving a stolen vehicle. Of those four, three involved the respondent fleeing from the police. In the result, the sentence was increased to 66 months less credit.

[31] I also found helpful the case of *R. v. Garland*, 2013 NSPC 27. While the findings of fact in *Garland* were altogether different, its review of the sentencing ranges for robbery and unlawful confinement aid this Court in the task before me. That case involved Mr. Garland showing the victim a dagger, saying he had a gun and that he would blow up her family members throughout the ordeal. They drove for almost 2.5 hours, stopping at several bank machines, where he instructed the

victim to withdraw money. He demanded she drive down a dirt road, and instructed her to get in the trunk. At that point she ran for her life. As Judge Derrick, as she then was, described it at paragraph 19: "the facts I have just recited are a dry narrative of the terror Ms. Pronk experienced while confined by Mr. Garland. When she escaped, she ran for her life, fearing that if she ended up in the trunk of her car, she would have no hope of emerging alive."

[32] The Crown and Defence in that case jointly recommended eight years. Cases in support of the sentencing range included *R. v. West*, [2006] N.S.J. No. 146 (S.C.), in which the offender confined employees for 45 minutes in a two-seat vehicle, then took them into a washroom where he ordered them on their knees and bound them. The total sentence included six years' incarceration for robbery, two years for unlawful confinement, and three years for use of imitation firearm. In *R. v. Johnson*, [2007] N.S.J. No. 430 (C.A.) there was a successful appeal by the Crown from an order imposing a conditional sentence of two years' less a day. The case involved a masked robbery, unlawful confinement and breach of probation, though the unlawful confinement was subsequently withdrawn. In *R. v. Downey*, [2012] N.S.J. No. 577 (S.C.) the offender conspired to, and did commit an armed robbery, in which two people were abducted at gunpoint by masked men. The robbers forced one of those persons to provide access to her place of employment at a bowling alley, where the robbers stole approximately $10,000. The victims were released without physical harm. The offender had convictions for robbery as both a youth and an adult. The sentence was eight years' incarceration for robbery, with five years' concurrent for unlawful confinement, and three years' concurrent for possession of a weapon.

[33] Paragraph 30 of *Garland* is a focal point:

> [30] In the Crown's very helpful written submissions it is noted, with reference to a number of cases, that the sentencing range for offences such as Mr. Garland's goes from a low of three years to a high of twelve years. The Crown points out that sentences at the low end of the range have been imposed on offenders "with little or no criminal record, a fairly fleeting period of confinement of the victim, and an expression of remorse." Cases near the high end "often involve the use of firearms, lengthy confinement of victims who are traumatized by the ordeal, and extensive related records." *(Crown Brief, pages 23 and 24)* Although rehabilitation cannot be lost sight of, the sentencing principles emphasized in such cases are denunciation and deterrence.

[34] The factual circumstances in *Garland* bear little similarity to those involved here, beyond the victim and her vehicle being used as a getaway car. The confinement was less than a minute rather than close to 2.5 hours, there was no threat of harm, no weapons were involved, there was no stealing of money, and no

instruction to get in the trunk of her car. Mr. Eisener, does, however, have an ample criminal history. There is no expression of remorse or like mitigation deriving from a guilty plea or acceptance of responsibility as it relates to the unlawful confinement.

[35] In arriving at a fit and proper sentence for Mr. Eisener for these offences, I must consider totality. In short, the cumulative sentence cannot exceed the overall culpability of the offender (*R. v. M(CA)*, [1996] 1 SCR 500. It would be an error in principle to work backwards from a global disposition rather than first determine the appropriate sentence for each offence *(R. v. Adams*, 2010 NSCA 42). The first step is to make a preliminary determination of a fit sentence for each offence. Considering all of the circumstances of the offences and the offender detailed above and the application of the principles of sentencing to these facts, I conclude that 12 months' incarceration is an appropriate sentence on the unlawful confinement, and 60 days on the resisting or obstructing a peace officer.

[36] The resisting arrest arose out of the same set of circumstances as the unlawful confinement – Mr. Eisener was evading police to escape arrest on his parole warrant. This arises from one transaction; given the closeness of the nexus between these offences, I am of the view that 60 days' concurrent is appropriate.

[37] I must next review the total sentence to address totality, with a mind to whether the disposition would constitute a disproportionate sentence. I am satisfied that the total sentence is a suitably restrained sanction, responsive to the objectives, purpose and principles of sentencing.

[38] The final step is remand credit. Mr. Eisener is entitled to 224 days, based on the calculation of 182 enhanced credit days (121 x 1.5) and taking into account the elapse of time since then, which is 28 days for the Court to formulate these reasons – 42 days of enhanced credit. This credit is reckoned based on the 1.5:1 ratio set out in *Carvery*, as authorized in ¶ 719(3.1) of the *Code*. The total sentence is 141 days in custody. This will be served on a straight time basis.

[39] In accordance with s. 719(3.3), the warrant of committal will be endorsed to record that the amount of time spent in custody is 149 days to date, the term of imprisonment that would have been imposed but for the remand credit is 365 days, the amount of time credited is 224 days, and the total sentence of the court is 141 days in custody.

[40] A lifetime weapons prohibition and a lifetime restricted or prohibited weapons prohibition issues per section 109(3).

[41] Given the current personal and financial circumstances of Mr. Eisener, he has little ability to pay a victim surcharge, and I find that the imposition of surcharge amounts would work an undue hardship and I decline to impose them.

Bronwyn Duffy, JPC