**SUPREME COURT OF NOVA SCOTIA**
Citation: R. v. Melvin, 2009 NSSC 152

Date: 20090520
Docket: Hfx. No. 302257
Registry: Halifax

Between:

**Corey Patrick Melvin**

Appellant

-and-

**Her Majesty the Queen**

Respondent

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**Decision**

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**Judge:** The Honourable Justice Robert W. Wright

**Heard:** March 11, 2009 in Halifax, Nova Scotia

**Last Written Submission:** March 24, 2009

**Written Decision:** May 20, 2009

**Counsel:** Counsel for the Appellant - Joshua Arnold, Q.C.
Counsel for the Respondent - Christine Driscoll

Wright, J.

**PROCEDURAL FACTS**

[1] This is a summary conviction appeal by the appellant Corey Melvin from the sentence imposed by Judge Marc Chisholm on October 6, 2008 following a plea of guilty to two counts of breaching a condition of a judicial interim release order, contrary to s. 145(3) of the Criminal Code.

[2] Briefly by way of background, the appellant was charged on February 28, 2007 with the offence of possession of a weapon for a dangerous purpose contrary to s. 88 of the Criminal Code, as well as the offence of unauthorized possession of a weapon in a motor vehicle contrary to s. 94 of the Criminal Code.

[3] On March 2, 2007 the appellant entered into an Undertaking in attaining his interim release and consented to the various conditions attached, which included a curfew requirement that he remain in his residence from 12:00 o'clock midnight until 6:00 a.m., seven days a week, except when dealing with a medical emergency or medical appointment. A corollary condition obligated the appellant to prove compliance with the curfew by presenting himself at the entrance of his residence, should a peace officer or his supervisor attend there to check compliance. The appellant's trial date was thereupon scheduled for July 3, 2007.

[4] As it turned out, the Crown did not proceed with either of these charges against the appellant on July 3rd for reasons unknown to the court. However, that was not the end of the matter. On August 9, 2007 an Information was sworn charging the appellant with six breaches of his curfew condition, contrary to

s.145(3) of the Criminal Code. Three of these charges were alleged to have been committed on June 21, 2007 and the other three on June 28, 2007.

[5] The appellant entered not guilty pleas to these six charges on March 20, 2008 and a trial date was scheduled for July 16, 2008.

[6] The Crown and defence subsequently engaged in plea negotiations which culminated in an agreement whereby the appellant would plead guilty to two of the s. 145(3) charges and the Crown would offer no evidence on the remaining four charges. As part of the negotiated plea, the Crown also agreed to recommend to the court a total sentence in the range of 30 to 60 days incarceration, leaving it open to the appellant to argue for a more lenient sentence.

[7] In the result, on the July 16th trial date, the appellant entered guilty pleas to two s.145(3) charges for breach of curfew, one pertaining to each of the aforesaid dates of June 21 and 28, 2007. A pre-sentence report was then ordered for purposes of the sentencing hearing, which ultimately took place on October 6, 2008.

[8] In keeping with the plea agreement, Crown counsel recommended at the sentencing hearing that Mr. Melvin be sentenced to a period of incarceration in the range of 30 to 60 days, to be served on a straight time basis. Defence counsel, on the other hand, urged the court to impose a conditional sentence or, in the alternative, a period of incarceration in the range of 15 to 20 days, to be served intermittently to facilitate Mr. Melvin's employment. Neither counsel

contemplated or said anything in their sentencing submissions about an added term of probation.

[9] After hearing submissions, Judge Chisholm sentenced the appellant to a total period of 60 days custody, to be served intermittently. This was comprised of a sentence of 30 days intermittent custody on each of the two remaining counts to be served consecutively. The judge went on to add, however, that this period of custody was to be followed by two years' probation which included a number of conditions, including an initial six month curfew between 12:00 a.m. and 6:00 a.m. (with the usual exception for medical emergencies). From this sentence Mr. Melvin now appeals, having obtained an order granting a stay of the sentence in the interim.

**POSITIONS OF THE PARTIES**

[10] The stated grounds of appeal are as follows:

(a) the sentence imposed is demonstrably unfit and/or manifestly excessive, given the circumstances of the offence and of the offender;

(b) the trial judge erred in applying the proper principles of sentencing.

[11] More specifically, defence counsel argues that the sentencing judge erred by: (a) denying the conditional sentence sought by the appellant and by instead imposing an excessive period of custody, as a result of failing to apply the proper principles of sentencing, and (b) adding a term of probation, including a curfew condition, thereby "jumping" the joint submission of counsel on range of sentence arising from the negotiated plea agreement.

[12] Crown counsel argues in response that the period of intermittent custody imposed here by the sentencing judge is a fit and proper sentence and well within the range of sentencing options that were available. Crown counsel further takes the position that this was not a true joint submission situation because counsel had not agreed on a specific sentence to be jointly recommended to the court but rather the Crown had simply agreed to recommend a period of incarceration within the range of 30 to 60 days and nothing higher than that. Crown counsel therefore argues that the appellant is not entitled to the protections embodied in the case law that are normally afforded to a joint recommendation based on a negotiated plea agreement.

**STANDARD OF REVIEW**

[13] The applicable standard of review in a sentencing appeal is well-known. A leading example is found in **R. v. Longaphy** [2000] N.S.J. No. 376 where the Nova Scotia Court of Appeal stated (at para. 20):

> A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": R. v. Shropshire (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": R. v. M.(C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in R. v. Proulx (2000), 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61 at [paragraph] 123-126.

[14] Bearing this standard of review in mind, I now then turn to the two main issues raised in this appeal.

**FIRST ISSUE - Fitness of Sentence**

[15] The first issue to be dealt with in this appeal is whether the sentencing judge erred in denying the offender a conditional sentence by failing to properly apply the conditional sentence principles enunciated in the seminal case of **R. v. Proulx** (2000) S.C.C. 5. Also to be determined is whether the sentencing judge erred by over emphasizing the need for general deterrence when ordering the appellant to serve 60 days in intermittent custody, as opposed to the 15 to 20 days intermittent custody as recommended by defence counsel in the alternative.

[16] Counsel for the appellant canvassed a number of factors in his submissions, both here and in the court below, that reflect positively on the appellant as an appropriate candidate for a conditional sentence. The factors highlighted are that the appellant had only one prior adult conviction in 2004 (similarly, a s.145(3) violation for which he was sentenced to 14 days intermittent custody with probation); that the appellant had a fairly positive pre-sentence report (citing his education upgrading, his current employment, his family support and his acceptance of responsibility); that he had pleaded guilty to the two remaining charges; and that relatively speaking, the subject s.145(3) breaches were not at the high end of the continuum for such charges.

[17] It is clear from reading the transcript of the sentencing judge's oral decision that he did consider the various points argued in favour of Mr. Melvin, along with those points that were not in his favour. The sentencing judge also reflected on the primary purpose of sentencing set out in s.718 of the Criminal Code and the consciousness of the court of the significant need for deterrence, both specific and general, to individuals who choose to violate conditions of their interim release.

The judge noted that the appellant knew that the police were regularly checking on him for compliance and nonetheless breached his curfew condition on two occasions a week apart, thereby showing a lack of respect for the criminal justice system and the rules of interim release. He also noted the appellant's prior s.145(3) conviction for a similar breach which resulted in jail time.

[18] The judge then considered the range of sentencing options available in the situation before him (including a non-custodial sentence), recognizing that each case must be looked at in its own circumstances.

[19] In the final analysis, the judge concluded that this was not an appropriate case for a conditional sentence. The principle reasoning quoted from his oral decision is as follows:

> As I have indicated, I find it problematic to consider a conditional sentence for an individual where the matters before the court for which they're being sentenced are failure to comply with the compliance condition of a house arrest, where the court would be considering house arrest, or at least a curfew, as part of the conditional sentence order. Because of that fact, I do not view a conditional sentence order as being appropriate. When I consider the purpose and principles of sentencing, I do not view it as something that would properly communicate to individuals, including Mr. Melvin, the need for compliance with those conditions.

[20] The judge then concluded that he was left with two options, namely, an intermittent sentence or a straight time sentence. He ultimately decided on an intermittent sentence, taking into account the various factors favouring the appellant's position and to facilitate his part-time employment.

[21] In going on to consider the appropriate length of the intermittent sentence, the judge agreed with the position of the Crown that the sentence should be sufficiently long to provide the appellant and others the clear message that when someone is placed on a release order, the failure to comply with it is likely to result in a sentence that emphasizes deterrence, not rehabilitation. He thereupon imposed a sentence of 60 days intermittent custody to be served on weekends (consisting of 30 days custody on each of the two counts to be served consecutively). Additionally, the judge imposed a term of two years' probation which specified a number of conditions, including an initial six month curfew between 12:00 a.m. and 6:00 a.m.

[22] As noted by the Nova Scotia Court of Appeal in **R. v. Parker** [1997] N.S.J. No. 194, the satisfaction of the requisite conditions set out in s.742.1 of the Criminal Code does not automatically entitle an offender to a conditional sentence, nor oblige the judge to impose one. A discretion always remains with the sentencing judge which is to be accorded considerable deference from an appellate court.

[23] I have no hesitation in reaching the conclusion that the sentencing judge did not err in deciding upon a sentence of intermittent custody instead of a conditional sentence. The sentence imposed was well within the range of sentencing options for such an offence and should not be interfered with under any facet of the standard of review recited earlier from **R. v. Longaphy**.

[24] Neither can it be successfully argued that the length of the intermittent sentence was excessive or unfit, considering the various factors that were weighed and keeping in mind as well that the maximum term of punishment for this offence is six months plus a maximum term of probation of three years. I accordingly dismiss the grounds of appeal which challenge the fitness of the sentence of intermittent custody imposed.

**SECOND ISSUE - Joint Recommendation of Counsel**

[25] The second issue to be dealt with in this appeal is whether the sentencing judge erred by adding a term of probation to the appellant's sentence, including a curfew condition, where probation was neither sought nor even mentioned by either Crown or defence counsel in keeping with their negotiated plea agreement.

[26] The obligations of a sentencing judge, when presented with a joint recommendation of counsel arising from a genuine plea bargain, were recently considered by the Nova Scotia Court of Appeal in **R. v. MacIvor** [2003] N.S.J. No. 188 and in **R. v. G.P.** [2004] N.S.J. No. 496. In essence, the Court of Appeal has set out those obligations in two respects:

(1) The sentencing judge is required to assess whether the joint recommendation on sentence is within an acceptable range (i.e., whether it is a fit sentence) and if it is, there must be sound reasons for departing from it (see, **MacIvor** at paras. 31-35 where the sentencing judge was found to have erred in "jumping" the joint submission in a case where the jointly recommended sentence was manifestly fit and there were no compelling reasons for departing from it; and

(2) The sentencing judge, before rejecting the joint recommendation, is required to advise counsel that judicial consideration was being given to departing from it and to afford counsel an opportunity to make submissions justifying their proposal (see, **G.P.** at paras. 17-19 where the appeal was allowed by reason of the sentencing judge's failure to do so).

[27] Counsel for the appellant submits that this twofold obligation comes into play not only where both counsel have jointly recommended a specific sentence but also in the situation where, as a result of plea negotiations, counsel have agreed only on the range of sentence to be jointly submitted. It is further argued that this twofold obligation extends to the range of sentence situation where, as here, the Crown has committed itself to recommend one end of the range, with the defence at liberty to argue a more lenient position.

[28] In principle, I agree with that submission whether the negotiated plea agreement in the present case is properly labelled a joint recommendation or something short of that. It is nonetheless based on a genuine plea bargain and committed the Crown to a certain position. I do not see any sound rationale for distinguishing this agreement from more close knit plea agreements which involve a joint recommendation for a specific sentence or a defined range of sentence. Each of these situations, in my view, trigger the above recited obligations of the sentencing judge provided they arise from a genuine plea bargain. From an interests of justice perspective, I consider the following passage written by Justice Fish in **R. v. Verdi-Douglas** (2002) 162 C.C.C. (3rd) 37 (Que. C.A.) to have equal application here:

> Their shared conceptual foundation is that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty - provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.

[29] Counsel have not otherwise been able to refer me to any case authority which is directly on point. I have read the decision of the British Columbia Court of Appeal in **R. v. Koenders** [2007] B.C.J. No. 1543 which describes a "joint submission" only in terms of an agreement between Crown and defence counsel where, in return for a guilty plea, counsel will together urge the sentencing judge to impose a particular sentence. That decision was based on a different set of facts, however, with a different focus (the accused was found guilty after a trial and there was no agreement of counsel on sentence), and does nothing to dissuade me from the view I have earlier expressed.

[30] Unfortunately for the appellant, this whole line of argument collapses because of the fact that the sentencing judge was never actually informed that the respective sentencing recommendations by counsel arose from a plea negotiated agreement. I have carefully scrutinized the transcript of the sentencing hearing, along with the adjournment proceeding which preceded it, and notwithstanding certain passages pointed out by defence counsel in his factum, nowhere do I see any instance where the judge was expressly made aware that the sentencing recommendations were based on a negotiated plea agreement.

[31] Indeed, Crown counsel told the judge at the outset of her submissions that she wasn't sure what defence counsel's position was going to be before they started and she later informed the court, near the end of the sentencing hearing, that counsel didn't have a joint submission (following a question from the court as to whether counsel wished to speak to the terms of probation and the exceptions thereto). Crown counsel acknowledged to the court that she had not asked for probation but that she didn't have an issue with it. The court's response was to afford defence counsel an opportunity to go outside with the appellant in case he wished to speak to the terms of probation before the sentencing was completed.

[32] The crux of the matter is that nowhere does the transcript demonstrate that the sentencing judge was expressly made aware that he was dealing with any kind of a joint submission situation arising out of a negotiated plea agreement. No such indication is to found either in the respective submissions of counsel or within the judge's oral decision itself; nor can it be inferred from the surrounding circumstances of the case that the judge must have known that he was dealing with such a situation. If he had, one would expect to have seen at least some mention of it in delivering his oral decision.

[33] In the absence of such knowledge, it follows that the obligations on a sentencing judge articulated in the **MacIvor** and **G.P.** cases never materialized in the present case. Although it is somewhat curious that he attached a curfew condition, the sentencing judge therefore did not err by adding a term of probation above and beyond the sentencing recommendations of the Crown and defence

counsel respectively.

[34] This sentencing appeal is accordingly dismissed.

J.