SUPREME COURT OF NOVA SCOTIA

Citation: ***R. v. Turner, 2015 NSSC 333***

Date: 2015-11-19

Docket: CRP No. 433399

Registry: Pictou

Between:

Her Majesty the Queen

v.

Tyler Turner

SENTENCING DECISION

Judge: The Honourable Justice N. M. (Nick) Scaravelli

Sentencing Date: November 19th, 2015

Counsel: Jody McNeill for the Crown

Wayne Bacchus for Mr. Turner

Orally By the Court:

[1] Tyler James Turner appears for sentencing for the offence of being unlawfully in a dwelling house contrary to section 349(1) of the *Code* and the offence of possession of stolen property contrary to section 354(1) of the code.

Circumstances of the Offences

[2] On September 26, 2014 the owner of a residence in rural Pictou County was awakened at approximately 7:30 am by a noise in his residence. He encountered the offender in the kitchen uninvited. The owner recognized the offender and told him to leave the house. The offender left the house on foot without altercation or threats.

[3] Upon investigation, the RCMP observed a basement window had been damaged and appeared to be forced open. The police also observed a Cadillac Deville had been left parked near the bottom of the victim's driveway. The owner of the vehicle reported it stolen earlier that morning. Upon inspection of the vehicle the police discovered a prescription pill bottle containing medication

affixed with a label in the name of the owner of the residence where the offender was discovered.

[4] Mr. Turner had initially been charged with break and enter in relation to the residence and theft in relation to the vehicle. He entered guilty pleas to the lesser offences of being unlawfully in a dwelling and possession of stolen property.

Circumstances of the Offender

[5] A pre-sentence report was prepared for sentencing. The offender is 21 years of age, unemployed and was residing with his mother at the time of the offence. He has completed grade 10 education.

[6] Mr. Turner has an extensive criminal record, both as a youth and as an adult. He self-reports having spent "most of his teenage years" incarcerated, having been "in and out" of Waterville since he was 13 years of age. He further reports that he has been incarcerated in both Provincial and Federal Institutions as an adult.

[7] The pre-sentence report indicates that while on remand at the Central Nova Correctional Facility Mr. Turner was described as engaging in "detrimental behavior" and possessing contraband.

Sentencing Principles

[8] In determining the appropriate sentence, I must consider the purpose and principles of sentencing as set out in section 718 to 718.2 of the *Criminal Code.* The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Aggravating and mitigating circumstances are to be considered. I am also required to consider the rehabilitation prospects of the offender. A sentence should be in a range imposed for similar offences in similar circumstances.

[9] The offender's guilty plea is a mitigating factor. Aggravating factors are that he was on parole at the time of these offences and has a lengthy criminal record.

Position of the Crown

[10] The crown contends the principles of denunciation and deterrence are paramount considerations in this case. The crown seeks a sentence in the range of 2 to 2 ½ years of federal custody in relation to the 349(1) offence. The crown submits an appropriate sentence in relation to the 354(1) offence is 6 months custody.

Position of the Defence

[11] The defence submits that despite the offender's record, he has a non-violent history and his age makes him a candidate for rehabilitation. The defence submits a total sentence of six to twelve months incarceration would be appropriate. Both crown and defence reference a number of sentencing authorities in support of their recommendations.

Authorities

[12] Cases reviewed by the crown: **R. v. Larkham** (April 23, 2015) (unreported) (N.S.S.C.); **R. v. Cooper** [2015] N.S.J. No. 37 (N.S.P.C.); **R. v. McInnis/R. v. Caverley**, 2014 NSPC 93 (N.S.P.C.); **R. v. Weins**, 2013 Carswell Alta 100 (Alta.

P.C.); **R. v. Fraser**, 2012 (NSCA 118 (N.S.C.A.); **R. v. Sutherland,** 2010 CarwwellOnt 1715 (Ont.C.J.); **R. v. Cain**, 2009 CarswellNS 656, 2009 NSCA 121 (N.S.C.A.); **R. v. Cornell** 2006 CarswellYukon 129, 2006 YKTC 108; **R. v. Bearboy**, 2005 SKCA 16 (Sask. C.A.); **R. v. Barnes**, 2004 CarswellNS 560 (N.S.S.C.); **R. v. Edwards**, 1983 CarswellNS 235 (N.S.S.C. – Appeal Division).

[13] Cases reviewed to by defence: **R. v. Perrin** [2012] N.S.C.A. 85, June; **R. v. Palmer** [1976] 17 N.S.R. (2d) 236; **R. v. Guye, et al** [1981] 50 N.S.R. (2d) 205; **R. v. Rogers** [1985} 70 N.S.R. (2d) 390; **R. v. Bursey** [1991] 104 N.S.R. (2d) 94 (C. A.).

[14] It is often a difficult and futile exercise to attempt to draw distinctions and comparisons when considering similar cases. In **R. v. Doyle** (1991) N.S.J. 447 (N.S.C.A.) Chipman J. observed:

> . . . Comparisons with other cases is a difficult exercise. Attempts to seek similarities with or differences from other murders committed by other people can be very frustrating and counter productive. We are not dealing with an exercise of reviewing "comparables" such as is done in a property appraisal. In exercising the discretion under s. 744 of the *Code, other cases are no more than a rough guide for the sentencing judge in identifying the types of aggravating or mitigating circumstances that other courts have relied on as relevant in applying the guidelines.*

[15] Most of the cases submitted by the crown at the high end involved weapons and/or threats of violence. In **R. v. Fraser** the offender was found inside the home of his ex-girlfriend following which he chased her and threatened her. The offender had a lengthy criminal record and was subject to a conditional sentence order imposed 10 days before the offence, requiring him to have no contact with the same victim. While acknowledging the sentence of 3 years was substantial in the circumstances, the appeal court saw no reversible error and upheld the sentence.

[16] In **R. v. Cain** the Court of Appeal upheld a sentence of 18 months jail time where the offender knocked on the door and entered the elderly victim's home when a knock was unanswered. The offender was confronted by neighbors who called police. There was no evidence of threats or violence.

[17] The older cases submitted by the defence supported a range from suspended sentences to four months custody even where prior convictions and existing parole violations were involved. In **R. v. Perrin** a 21 year old with a prior criminal record was convicted of break and enter into a summer residence while serving a conditional sentence order. The crown sought to have the conditional

order collapsed leaving 34 days to be served in jail, plus 18 months imprisonment for the break and enter. The Court of Appeal upheld the trial judge's sentence of collapsing the conditional sentence order leaving 34 days to be served in jail plus 30 days imprisonment together with 18 months' probation. The Appeal Court noted the sentence was a lenient one but not reversible. Moreover, the conditional sentence being served was more like a suspended sentence which mitigated the denunciation and deterrence consideration of a regular breach of conditional sentence order.

[18] Being unlawfully in a dwelling house is not a mere property offence. Under section 349(1) the maximum penalty is 10 years imprisonment. The crime represents the violation of the sanctity of the home especially when residents are present.

[19] I am mindful that the offence of break and enter under section 348 carries a maximum sentence of life imprisonment. Our Court of Appeal has stated that a single break and enter offence attracts a bench mark sentence of three years. **R. v. Zong** [1986] N.S.J. 207 (N.S.C.A.); **R. v. McAllister** (2008) N.S.C.A. 103. This

bench mark may be off sent either way according to mitigating and aggravating circumstances. **R. v. Adams** (2010) N.S.C.A. 42.

Sentence

[20] In terms of prospects for rehabilitation Mr. Turner appears not to be a good candidate at this time. Despite his relatively young age he has an extensive criminal record consisting of 39 prior convictions over a six year period. He expressed a criminal attitude to the RCMP at the time of his statement. Previous counselling efforts have been unhelpful by his own admission. His letter expressing remorse is eerily similar to the expressions made to his parole officer following his statutory release from Federal Penitentiary in July of 2014. He has since breached his parole and committed these offences. He has caused problems within the correctional facility while on remand. Nevertheless, at his age Mr. Turner has the option to turn his life around. Under the circumstances I sentence Mr. Turner to a term of 20 months incarceration for offence under section 349(1).

[21] Mr. Turner entered a plea of guilty to the included offence of possession of stolen property under a separate indictment. Under section 355(a) the maximum

sentence is 10 years imprisonment where the value of the subject matter exceeds $5,000 or under 355(b) a maximum of 2 years. Where there is no evidence that the value exceeds $5,000 the court can sentence under section 355(b). **R. v. Gillis** [1977] N.S.J. No. 481. There was no evidence adduced by the crown as to the value of the vehicle.

[22] In determining whether the sentence should be consecutive or concurrent, the court determines whether there was a reasonably close nexus between the offences. Generally a concurrent sentence is appropriate where the offences were part of a continuing criminal operation in a relatively short period. **R. v. Hatch** [1979] N.S.J. No. 520.

[23] In the present case the offender was observed in the residence in west Pictou at approximately 7:30 am. The vehicle was reported stolen from a residence in the west Pictou area earlier that morning. Under the circumstances I sentence Mr. Turner to a period of 6 months imprisonment to be served concurrently with the sentence of 20 months for being unlawfully in a dwelling.

Credit for Pre-sentencing Custody

[24] Section 719(3) of the *Criminal Code* provides that a court may take into account any time spent in custody by the person as a result of the

offence, limiting the credit to a maximum of one day for each day spent in pre-sentence custody. Under section 719(3.1) the court may, "if the circumstances justify it", increase the credit to one and one-half days for each day spent in presentence custody unless, pursuant to 515(9.1) the court stated in writing the primary reason for detention was a previous conviction or where the accused was ordered detained under section 524(4) for having breached a release order.

[25] As of September 26th, 2014, the date of the offence, Mr. Turner was subject to an outstanding warrant dated September 5th, 2014 for an unrelated parole violation. He was recommitted to continue serving his federal sentence and was not remanded in relation to the present charges.

[26] Mr. Turner became eligible for parole on January 26th, 2015. At that time he consented to remand for the present charges until July 9th, 2015 when he was released on a recognizance. However, on July 11th, 2015 Mr. Turner was arrested and remanded on new charges stemming from Halifax. As a result of this arrest, Mr. Turner was again parole violated. He became eligible for parole on August 19th, 2015 but remains in custody on remand, both on the Halifax charges and the present charges. He returns to court on the Halifax charges following today's sentencing.

[27] Mr. Turner submits that the period from January 16th, 2015 to July 9th, 2015 totaling 165 days is an appropriate period for consideration of pre-sentence credit. He submits a further credit period should be granted from August 19th, 2015, the date upon which he became eligible for parole, to this sentencing date of November 19th, 2015, which is 92 days, for a total of 257 days. Mr. Turner seeks credit pursuant to section 719(3.1) at a rate of one point five to one, for a credit of 386 days.

[28] The crown submits the appropriate period for which credit may be applied should be from January 26th, 2015 to July 9th, 2015, a total of 165 days. The crown recommends that section 719(3) be applied with a credit at a rate of one to one for a credit of 165 days based on Mr. Turner's poor prospects for parole. Moreover the crown submits no further day's credit beyond July 9, 2015 should be granted based upon Mr. Turner's conduct while on bail.

[29] Our Court of Appeal emphasized that any allowance for presentence credit is at the discretion of the trial judge, and that credit can be abridged or even denied. *R. v. LeBlanc* 2011 NSCA 60:

> **22** Various factors may justify the principled exercise of the sentencing judge's discretion to abridge or even deny credit for remand time, including evidence that earlier release would not promote rehabilitation, failure to seek bail, remand because the accused failed to appear as required, the offender's conduct while on bail such as breach of conditions of release, a significant or

> violence based criminal record, or that the offender would pose a danger to society.

[30] Generally, the adverse aspect of pre-sentence custody in terms of loss of parole eligibility is recognized as a circumstance that would justify enhanced credit under section 719(3.1). However, if it appears that an offender will be denied early release, enhanced credit can be denied. *R. v. Summers* 2014 SCC 26. In terms of assessing the offender's prospects for early release, Justice Karakatsanis:

> **78** However, judges are often called upon to make assessments about an offender's future, for example by considering prospects for rehabilitation. I see no reason why judges cannot draw similar inferences with respect to the offender's future conduct in prison and the likelihood of parole or early release.
>
> **79** The process need not be elaborate. The onus is on the offender to demonstrate that he should be awarded enhanced credit as a result of his pre-sentence detention. Generally speaking, the fact that pre-sentence detention has occurred will usually be sufficient to give rise to an inference that the offender has lost eligibility for parole or early release, justifying enhanced credit. Of course, the crown may respond by challenging such an inference. There will be particularly dangerous offenders who have committed certain serious offences for whom early release and parole are simply not available.[7] Similarly, if the accused's conduct in jail suggests that he is unlikely to be granted early release or parole, the judge may be justified in withholding enhanced credit. Extensive evidence will rarely be necessary. A practical approach is required that does not complicate or prolong the sentencing process.

[31] In my view, Mr. Turner has not established entitlement to enhanced credit. Moreover, the crown adduced evidence at sentencing establishing that Mr. Turner is considered a poor candidate for early release.

[32] I have decided to give Mr. Turner a presentence credit for only a period of 165 days on a one to one to one basis. In doing so I have considered the following factors:

> (a) It is likely that Mr. Turner will be denied early release;
>
> (b) Mr. Turner breached his conditions of release while on parole;
>
> (c) Mr. Turner has a significant criminal record, mainly relating to property offences and breaches of court orders;
>
> (d) Mr. Turner is not a good candidate for rehabilitation;
>
> (d) Had Mr. Turner not been remanded on the present charges he would still be in custody on the resulting parole violation which rendered him ineligible for further parole release until August 19th, 2015. On that date Mr. Turner would still have remained in custody on remand in connection with the Halifax charges which remand continues until this day.

As a result the sentence for Mr. Turner is imprisonment for a term of 20 months (608 days) less presentence credit of 165 days for a total of 443 days.

[33] I will grant the ancillary DNA order.