SUPREME COURT OF NOVA SCOTIA

Citation: R. v. McKenna, 2014 NSSC 92

Date: 20140307
Docket: Antigonish No. 422847
Registry: Antigonish

Between:

Randall McKenna

Applicant

v.

Her Majesty the Queen

Defendant

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated January 2, 2015.
Judge:	The Honourable Justice N. Scaravelli
Heard:	March 3, 2014, in Antigonish, Nova Scotia
Final Written Submissions:	March 7, 2014 Written Submissions, February 4, 2014, Crown
Counsel:	Randall McKenna, for the Applicant Catherine Ashley, for the Defendant

By the Court:

[1] The appellant was sentenced for breaches of undertaking and recognizances imposed on October 18, 2013 and October 21, 2013. The breaches relate to the appellant's contacts with Mr. Stewart, an 88 year old gentleman in the Antigonish area. The appellant was requesting the gentleman feel sorry for him and was asking and received money from him.

[2] On August 15, 2013 the appellant was arrested and placed on a police undertaking for calling the elderly gentleman and directing him to meet and accompany him to the bank to get the appellant some money. The conditions of the undertaking were that the appellant was to have no contact with Mr. Stewart and to stay away from his residence.

[3] On October 17, 2013 the appellant was observed getting into Mr. Stewart's vehicle in the town of Antigonish. The appellant was arrested and charged for breach of the police undertaking. On October 21, 2013 he was released on a recognizance with conditions to have no contact with Mr. Stewart and not to enter the town or the County of Antigonish. On October 24 the appellant attended Mr. Stewart's residence in Antigonish County and accompanied Mr. Stewart to the

bank where Mr. Stewart withdrew and gave money to the appellant. The appellant was arrested and charged with breaches of the two conditions as well as a charge of obtaining money under false pretenses pursuant to ***Section 362 (1) of the Criminal Code***. The Crown proceeded summarily on all charges.

[4] Ultimately the appellant entered guilty pleas to the breaches of October 17, 2013 and October 24, 2013. The Crown withdrew the false pretense charge. The Provincial Court Judge sentenced the appellant to a term of 4 months custody for the October 17, 2013 breach. He imposed further sentence of 6 months custody for the first count in the October 24, 2013 breach and 4 months consecutive for the second count. The total sentence was 14 months imprisonment. The trial Judge granted a credit of 1 and ½ to 1 for a total of 50 days resulting in a sentence of 370 days. The trial Judge also placed the appellant on probation for a period of 2 years with conditions.

[5] The appellant was represented by legal counsel throughout. He is self-represented on this appeal.

> POWERS OF COURT ON APPEAL AGAINST SENTENCE / Effect of judgment.
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> 687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the

> fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
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> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
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> (b) dismiss the appeal.
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> (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court. R.S., c. C-34, s. 614.

GROUNDS OF APPEAL

[6] The grounds as set out in the Notice of Appeal are as follows:

1. Requested mental health assessment from Judge regarding pre-existing mental illness - denied without reason.
2. Judge was prosecutor in many previous cases, there was a conflict of interest due to previous interactions.
3. Sentence was too severe for charges as it was not a violent crime.

[7] The mental health assessment request was made in conjunction with pleas of not guilty and setting of trial dates. The appellant, through counsel, subsequently entered guilty pleas to the charges and sentencing was arranged. On appeal, the appellant made it clear that the relief he was seeking was a reduction in sentence. He is not seeking to withdraw his guilty pleas.

[8] During the course of proceedings there was no application for recusal of the Judge based upon conflict of interest or bias. The fact that a Judge was previously a crown prosecutor or previously convicted the offender does not, of itself, raise a reasonable apprehension of bias. Moreover there is no evidence before the court indicating impartiality on behalf of the trial Judge.

[9] As a result this appeal is confined to sentence.

STANDARD OF REVIEW

[10] The well accepted standard of review with respect to sentencing is set out in *R. vs. Young*, [2014] NSCA 16:

> [10] As a general proposition, trial judges are entitled to deference with respect to sentence. In *R. v. E.M.W.*, 2011 NSCA 87, Justice Fichaud recapitulated the standard of review in a sentence appeal:
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> [6] In *R. v. Shropshire*, [1995] 4 S.C.R. 227, paras 46-50, Justice Iacobucci for the Court stated or adopted the views that:
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> (a) An appellate court should vary a sentence only when "the court of appeal is convinced it is not fit" or "clearly unreasonable", or the sentencing judge "applied wrong principles or [if] the sentence is clearly or manifestly excessive".
>
> (b) "if a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts".
>
> (c) "[S]entencing is not an exact science", but rather "is the exercise of judgment taking into consideration

> relevant legal principles, the circumstances of the offence and the offender".
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> (d) "The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range".
>
> (e) "Unreasonableness in the sentencing process involves the sentencing order falling outside the `acceptable range` of orders".

[11] At sentencing hearing the appellant was requesting a sentence of 90 days intermittent. He argues on appeal that the total sentence of 14 months from breaches of recognizance is excessive and not within the appropriate range.

[12] The crown submits that the trial judge is entitled to deference in sentencing. That the Judge followed appropriate case law and properly considered the aggravating circumstances as well as the appellant's lengthy criminal record.

SENTENCING DECISION

[13] The Judge reviewed the circumstances of the October 17, 2013 breach, as well as the two October 24, 2013 breaches concerning the no contact order with the same individual and the condition not to enter Antigonish town or county.

[14] The Judge then referred to the principles of sentencing set out in ***Section 718 of the Code***:

[18] The purposes and principles of sentencing are set out in s. 718 of the ***Criminal Code*** and they include denunciation of unlawful conduct. Mr. McKenna, when you breach conditions of release, and in this case you were released on two occasions, when you breach conditions of release, and those breaches, as these breaches are, are pre-planned, deliberate, flagrant, the Courts have to impose sentences that make the point that this type of conduct is to be denounced and cannot be tolerated by the Courts.

[19] Another purpose or principle of sentencing is specific deterrence and general deterrence and I take those into account in determining what is an appropriate sentence. I also have to take into account assistance in rehabilitating offenders, and I do take that into account in terms of imposing a sentence that hopefully will have the effect of rehabilitating Mr. McKenna. Another purpose or principle of sentencing is to provide reparations for harm done to victims or to the community; and lastly, to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[20] S. 718.1 of the ***Criminal Code*** provides:

> The sentence must be proportionate to the gravity of the offence and the degree of responsibility to the offender.

[21] S. 718.2 provides that:

> A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence of the offender and without limiting the generality of the foregoing
>
> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances including their health and financial situation.

[22] And I take into account what the Crown Attorney has said that Mr. McKenna's offences did not cause Mr. Stewart to require hospitalization, and assessment, and/or treatment, but Mr. Stewart was a person who Mr. McKenna was not permitted to have contact with and not only did Mr. McKenna have contact with Mr. Stewart, and as I indicated, that contact was pre-planned, deliberate and flagrant the circumstances of that contact were that Mr. McKenna was requesting this elderly gentleman to give money to him to feel sorry for him and to give money for him.

[23] S. 718.2 (c) of the ***Criminal Code*** provides:

> Where consecutive sentences are imposed the combined sentence should not be unduly long or harsh which is the totality principle.
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> [24] S. 718.2(d) provides:
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> An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> [25] S. 718.2(e) provides:
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> All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[15] At the sentencing hearing the Crown referred the Judge to the 2013 sentencing decision the *Supreme Court in R. vs. Young* where the trial Judge imposed a total of 12 months for breaches of recognizance where the offender had a significant criminal record. The Crown submitted the appellant should be sentenced to a period of incarceration of 14 months. In this regard the Judge stated:

> [32] Section 718.2 (b) provides that:
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> A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
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> [33] And the Crown has referred me to the case of ***R v Young***. Mr. Young's full name is Mark Francis Young, and Mr. Young has a lengthy record of criminal convictions, 99 in total. Mr. McKenna has a total of, I believe, the Crown said 104 convictions and the Crown is suggesting that Mr. McKenna should be sentenced to a similar sentence as was imposed with respect to Mr. Young.

[16] In that case Mr. Young entered into a recognizance regarding a matter of domestic abuse. He was to have no contact and keep the peace and be of good

behaviour. His first breach occurred on the same day. In addition to his extensive and serious criminal record, the trial Judge considered Mr. Young's behaviour to be a flagrant violation of a court order and sentenced him to 12 months in custody for his contact breach and 6 months concurrent for failing to keep the peace. The sentence however, was overturned by the ***Nova Scotia Court of Appeal*** on its decision February 18, 2014 [2014 NSCA 16]. The court reduced the sentence to 6 months. The court extensively reviewed the range of sentence for breach offences.

> **[12]** Mr. Young does not challenge the trial judge's reliance upon the foregoing principles. But he submits that the sentence is unfit because it was outside an appropriate range. Mr. Young begins his submission by relying on the Newfoundland Court of Appeal decision in *R. v. Oxford*, 2010 NLCA 45:
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> - 100 It is correct that up to 24 months has been imposed for breach of a court order. An example referred to by the trial judge is *R. v. Murphy* (2009), 289 Nfld. & P.E.I.R. 333 (N.L.T.D.). There Mr. Murphy breached probation by committing a violent sexual assault that left the young victim hospitalized with physical injuries, as well as traumatized. Mr. Murphy had 60 previous convictions. Thus, one must see the 24 month sentence in the context of an extremely serious crime and a hardened criminal. The facts differ markedly from those in this case.
> - 101 As to the lower end of the range, we would adopt what Goodridge, J. wrote in *R. v. Gibson*, 2010 NLTD 17 at para. 20:
> - Sentences for breach of probation of one month or less have been accepted as appropriate and have been routinely imposed in this jurisdiction even when there is an existing record.
>
> **[13]** In *Oxford*, the accused pleaded guilty to unlawful confinement, possession of a weapon for a dangerous purpose, breach of undertaking and two counts of breach of probation. In rejecting the trial judge's sentence, [2009] N.J. No. 356, the Court of Appeal commented:
>
> - 103 Instead, we conclude that sentences of three months total for the two summary conviction offences (one for breach of undertaking and two for breach of probation order) and six months for the indictable offence would be well within the normal range for such an offender as Mr. Oxford in circumstances similar to those in this case, other than that a plea bargained joint submission is involved here. Obviously, in the context of the plea bargained joint submission, sentences of two months and six months respectively would not be contrary to the public interest or threaten the repute of the administration of justice.

- 104 Thus, for the three "breach of court order" type offences, we are of the view that a total of nine months, rather than the 20 months imposed by the trial judge would be a more appropriate standard by which to judge the acceptability or otherwise of the joint submission.

[14] In *Oxford*, the Newfoundland Court of Appeal imposed a sentence of nine months for more serious breaches of conditions than the far less harrowing circumstances of this case…

[20] As to fitness, the Crown argues that 12 months was within the appropriate range for a breach of recognizance by someone with a lengthy record of breaches of court orders, citing *R. v. Zimmerman*, 2011 ABCA 276; *R. v. D.(W.C.)* 2007 BCSC 1912; *R. v. Lewis*, 2012 NLCA 11; *R. v. Muyser*, 2009 ABCA 116; *R. v. Wuckert*, 2000 MBCA 5.

[21] With respect, the examples cited by the Crown are not appropriate in this case. For example, in *Zimmerman*, the accused evaded the conditions of his recognizance by leaving the jurisdiction and attempting to avoid detection by assuming a false identity. He was in possession of stolen money from a bank, a knife and shoelaces with slipknots. He was charged with six breaches of recognizance, fraud and breach of the S*ex Offender Information Registration Act* order. His breaches were pursuant to s. 810.2 of the *Code* -- a more serious recognizance. His sentence of 17 months bears no relation to Mr. Young's circumstances.

[22] Likewise *Muyser* has no application because Mr. Muyser's sentence did not flow from a breach of recognizance. He was on probation for prior offences of a breach of recognizance and obstructing a peace officer when he committed the offences for which he was sentenced to 12 months.

[23] In *Wuckert*, Mr. Wuckert was convicted of 33 counts of fraud, one count of attempted fraud, conspiracy and two counts of failure to comply with recognizance orders. He was sentenced to six years' imprisonment including a restitution order for $1,240,066 and one year consecutive for breach of recognizance. Again the circumstances of *Wuckert* bear no relation to those of Mr. Young here.

[24] Two examples of cases which have some similarity to the circumstances of the offence and the offender in this case are: *R. v. Clayton*, [2001] N.S.J. No. 438 and *R. v. J.W.F.*, 2006 NSSC 273.

[25] In *Clayton*, the accused was sentenced to four months' imprisonment for breaches of recognizance, concurrent to his current sentence. Conditions of recognizance included keeping the peace. Clayton had a 20-year criminal record for breach of recognizance, sexual assault and failure to appear.

[26] In *J.W.F.*, the context was sexual assault and communicating with a minor for sexual purpose, the court decided:

- [3] ... Count 3 -- that he did between the 1st day of January A.D., 2004 and the 30th day of June A.D., 2004 at or near (...) Dartmouth, in the Province of Nova

> Scotia, being at large on his Undertaking Given to a Justice, and being bound to comply with a condition of that Undertaking directed by the said Justice, fail without lawful excuse to comply with that condition, to wit: you shall **keep the peace and be of good behaviour,** contrary to Section 145(3)(a) of the *Criminal Code*.
>
> - ...
> - [17] ... On the 3rd Count it is the sentence of the court that you be sentenced to a term of **4 months concurrent** ...
> - ...
> - [3] Count 8 -- did between the 1st of January A.D. 2004 and the 30th day of June A.D., 2004 at or near (...) Dartmouth in the Province of Nova Scotia being at large on his Undertaking Given to a Justice fail and being bound to comply with a condition of that Undertaking directed by the said Justice fail, without lawful excuse to comply with that condition, to wit: you shall **keep the peace and be of good behaviour**, contrary to Section 145(3)(b) of the *Criminal Code*.
> - ...
> - [19] On Count No. 8 the sentence will be **4 months concurrent**.
>
> [Emphasis added]
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> **[27]** Both counsel submitted that breaches of recognizance usually attract a sentence of one to three months' incarceration. The imposition of 12 months' imprisonment for breach of a recognizance in a non-violent domestic abuse context, absent violation of a current probation order and compulsive re-offending behaviour in this case, is excessive…
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> **[28]** Although Mr. Young has an extensive criminal record, with one exception, he had never received more than a two month sentence for breaches of recognizance, undertaking or probation. In many instances his custodial sentence was a matter of days. His most serious -- and recent -- period of incarceration for a breach of probation occurred in 2009. He received a sentence of six months, consecutive to sentences for theft under $5,000 (s. 334(b)) and possession of stolen property (s. 334(1)(a)).

[17] Mr. McKenna also has an extensive record including breaches of probation or recognizances. The maximum sentence he received for breaches was 3 months concurrent to sentences for other offences. Other than offences for resisting arrest and assaulting a police officer, the appellant does not have a record of violence. The circumstances relevant to the presence charges were nonviolent.

[18] Where consecutive sentences are imposed for multiple offences, the "totality principle" applies and the cumulative sentence should not exceed the overall culpability of the offender. ***R vs. Bernard [2011 NSCA 53]***. Moreover, the October 24, 2013 breaches arose out of the same fact situation. Generally sentences imposed for offences arising out of the same transaction are concurrent. ***R vs. Osachie [1973 NSJ 112 NSCA]***.

[19] Given the appellant's prior record including breaches of probation and recognizance, a period of imprisonment was clearly required. However, in the circumstances of this case the total sentence of 14 months incarceration is clearly excessive and unreasonable. Unfortunately the Judge was influenced to an extent by the ***Young*** decision which was under appeal at the time.

[20] As a result I allow the Appeal and sentence the appellant to a total of 6 months incarceration. The sentence is 180 days less a 50 day credit for a net sentence of 130 days. Otherwise the sentence imposed by the Judge is not altered.

Scaravelli, J.

Date: 20140307
Docket: Antigonish No. 423519
Registry: Antigonish

Between:

Randall McKenna

Applicant

v.

Her Majesty the Queen

Defendant

Judge:	The Honourable Justice N. Scaravelli
Heard:	March 3, 2014, in Antigonish, Nova Scotia
Final Written:	March 7, 2014
Submissions:	Written Submissions, February 4, 2014, Crown
Counsel:	Randall McKenna, for the Applicant Catherine Ashley, for the Defendant

<u>Erratum</u> to decision & library sheet dated January 2, 2015
Page 1 reads: **Docket:** Antigonish No. 423519
Page 1 should read: **Docket:** Antigonish No. 422847