

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Coleman 2000 NSCA 20]

Chipman, Pugsley and Flinn, JJ.A.

BETWEEN:

HARTLEY ALLEN COLEMAN)	Appellant in person
)	
Appellant)	
)	
- and -)	
)	
HER MAJESTY THE QUEEN)	William D. Delaney
)	for the respondent
Respondent)	
)	
)	
)	Appeal heard:
)	January 25, 2000
)	
)	Judgment delivered:
)	January 28, 2000
)	
)	

THE COURT: Leave to appeal denied per reasons for judgment of Flinn, J.A.;
Chipman and Pugsley, JJ. A. concurring.

FLINN, J.A.:

[1] The appellant applies for leave and, if granted, appeals a sentence imposed upon him by Judge Claudine MacDonald of the Provincial Court.

[2] On June 24th, 1999, the appellant, represented by counsel, pled guilty to various offences. In the first Information, on which the Crown was proceeding by way of summary conviction, the appellant pled guilty to the offences of breach of probation, assault with a weapon, and carrying a concealed weapon. In the second Information, on which the Crown was proceeding by way of Indictment, the appellant pled guilty to the offences of theft under \$5,000.00 (two counts), attempted theft under \$5,000.00, and break, enter and theft.

[3] The appellant was on probation at the time these offences were committed. The appellant's criminal record includes six previous convictions for either break, enter and theft or break and enter with intent to commit an indictable offence. He had three previous convictions for assault, two previous convictions for breach of probation, and an assortment of other convictions, most of them for property related offences.

[4] At the sentencing hearing, a joint submission was made by the Crown and counsel for the appellant that the appellant be incarcerated for a period of two and one-half (2½) years. In addition, the Crown submitted that an order should be made under s. 110 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, prohibiting the appellant from possessing firearms and other devices. Counsel for the appellant submitted that

the firearms prohibition order was unnecessary.

[5] The sentencing judge accepted the joint recommendation of counsel, and indicated, “considering the totality principle” that the “total sentence” would be two and one-half (2½) years incarceration. She then indicated that the breakdown, among the various offences, would be as follows: assault with a weapon - 2 years; break, enter and theft - 1 year concurrent; theft - six months concurrent; theft - six months concurrent; attempted theft - six months concurrent; breach of probation - six months concurrent; and carrying a concealed weapon - six months consecutive.

[6] Prior to the sentencing judge dealing fully with the prohibition order, counsel for the Crown advised the judge that the Crown was proceeding, by way of summary conviction, on the assault charge (for which the maximum penalty is eighteen (18) months imprisonment) and by way of indictment on the break, enter and theft matter. As a result, the sentencing judge changed the breakdown “to reach the same result”. She sentenced the appellant to two years on the break, enter and theft offence, and six months concurrent on the assault offence. The remainder of the sentence was not changed.

[7] With respect to the prohibition order sought by the Crown, the assault charge was a summary conviction matter, and, as a result, the prohibition order was not mandatory. The sentencing judge exercised her discretion and issued a prohibition order pursuant to s. 110 of the **Criminal Code** to be in effect for five years.

[8] The appellant, who is unrepresented by counsel, raises, essentially, two grounds of appeal:

1. after the sentencing judge gave her first breakdown as to the two and one-half (2½) year sentence, she was *functus officio*, and she could not change her sentence. Further, the initial sentence of two years for the assault charge was “illegal”; and
2. the appellant appeals the firearms prohibition order. He claims that the Crown had alleged that a rifle had been involved in the commission of one of the offences, and that no such rifle was involved.

[9] This appeal has no merit.

[10] It is clear from a review of the record that the sentencing judge had not completed her sentence of the appellant when it was pointed out to her that the appellant could not be sentenced to two years incarceration for the assault offence, it being a summary conviction offence. Therefore, the sentencing judge was not *functus officio*, and retained jurisdiction to vary the periods of incarceration for certain offences, while leaving the total sentence unchanged.

[11] As to the appellant’s second ground of appeal, it is clear from the record, as the appellant alleges, that the Crown did at one point indicate that a rifle was used in the commission of one of the offences. However, it is equally clear that, before sentencing, the Crown withdrew that point, and apologized for making the erroneous representation.

Quite apart from this, the use of a firearm in the commission of an offence is not a prerequisite for a discretionary prohibition order under s. 110 of the **Criminal Code**.

Section 110(1) of the **Code** provides as follows:

110. (1) Where a person is convicted, or discharged under section 730, of
- (a) an offence, other than an offence referred to in any of paragraphs 109(1)(a), (b) and (c), in the commission of which violence against a person was used, threatened or attempted, or
 - (b) an offence that involves, or the subject-matter of which is, a firearm, a crossbow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance and, at the time of the offence, the person was not prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing,
- the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, consider whether it is desirable, in the interests of the safety of the person or of any other person, to make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, and where the court decides that it is so desirable, the court shall so order.
(emphasis added)

[12] Given the circumstances of these offences for which the appellant pled guilty, and considering his prior record, the sentencing judge made no error in principle in the exercise of her discretion to impose the fire year firearms prohibition on the appellant.

[13] The total sentence which the sentencing judge imposed on the appellant was, clearly, a fit sentence under the circumstances.

[14] Leave to appeal is denied.

Flinn, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.