In the Court of Appeal of the Northwest Territories

Citation: R. v. Sabourin, 2009 NWTCA 6

Date: 2009 07 03
Docket: A-1-AP-2009000004
Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Respondent

- and -

Eugene Gordon Sabourin

Appellant

The Court:

The Honourable Mr. Justice Earl Johnson
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Sentence of
The Honourable Madam Justice V.A. Schuler
Dated the 22nd day of April, 2009

Memorandum of Judgment

The Court:

Introduction

[1] The appellant challenges his global sentence of imprisonment for 12 months followed by two years probation as imposed following guilty pleas to four counts arising from events on October 11, 2007: two of uttering threats to cause bodily harm to Maria Michel and Kelly Lafferty, one of assaulting Ms. Michel with a hair brush as a weapon, and one of using a shotgun while committing the offence of uttering threats. Ms. Lafferty had been the appellant's common law wife. Ms. Michel was the 76 year old grandmother of Ms. Lafferty.

[2] At the date of sentencing on April 22, 2009, the appellant had been in custody since his arrest on those offences on October 11, 2007, which was a period of 18 months and 11 days. During that time the appellant also was sentenced to and served a term of imprisonment of five months imposed in April, 2008 in relation to one count each of assault and breach of probation relating to Ms. Lafferty. The appellant had been on probation and on release relating to those two counts when the events of October 11, 2007 occurred.

[3] The principal issue on appeal concerns the credit given by the trial judge for pre-sentence custody. Counsel jointly proposed to the trial judge that for the offences under appeal, a global sentence of imprisonment for 30 months was fit. Counsel also jointly invited the trial judge to assume that the appellant would have served three of the five months imprisonment imposed for those other charges had he been serving that term independently. As a consequence, counsel submitted that three months of the 18 months, 11 days, could not be said to be "time spent in custody by the person as a result of the offence" under s. 719(3) of the *Criminal Code*.

[4] Counsel did not, however, agree on the credit to be given for the rest of the pre-sentence custody of 18 months, 11 days, less the three months to be deducted as ineligible under s. 719(3) of the *Code*. Crown counsel argued for a credit of roughly 1 for 1 for pre-sentence custody as against the 30 month figure with a result that the trial judge would impose a further 15 months imprisonment. The appellant's counsel contended for a credit of roughly 2 for 1 for pre-sentence custody, meaning that the appellant's custodial time would end as of the date of sentencing.

[5] The trial judge, correctly in our view, took this fundamental disagreement as to the effective sentence to mean that she was not receiving a joint submission. In the end, as noted above, she imposed a sentence of a further 12 months, followed by a period of probation for two years. In other words, even assuming the notionally remitted two months of the separate five month sentence imposed in April, 2008 was eligible for consideration under s. 719(3) of the *Code*, the trial judge gave 18 months credit for approximately 15.5 months of pre-sentence custody, which involves a ratio

of approximately 1.2 for 1. The trial judge's stated reason for giving less than 2 for 1 credit was that the appellant had committed the offences while on judicial interim release and probation, which in turn led to his denial of judicial interim release pending trial.

[6] The appellant submits that, having regard to ***R. v. Wust***, [2000] 1 S.C.R. 455, [2000] S.C.J. No. 19 (QL), 2000 SCC 18 and other authorities, a credit of 2 for 1 should have been given, and that the reasons given by the trial judge for deviating from that credit were wrong in principle. The appellant submits that the resulting sentence was unfit for the offences and the offender within the meaning of s. 687 and s. 718.1 of the *Criminal Code*. We agree in part with the appellant that the trial judge's rationale for a lower credit was incorrect, but we are not persuaded that in the end result the sentence was unfit and we dismiss the appeal.

Submissions

[7] The appellant argues the trial judge erred in interpreting ***Wust***, and that the reasoning there did not give her "*carte blanche*" to adjust the pre-sentence custody credit to serve purposes other than the fairness concept reflected in s. 719(3) of the *Code*. In particular, the appellant submits that it was not proper to discount the pre-sentencing custody period arising from the fact that the offences before the trial judge were committed while the appellant was at large on judicial interim release facing a similar charge along with the prior breach count.

[8] In effect, the appellant is saying that the principle behind giving credit for pre-sentence custody under s. 719(3) of the *Code* is consistency of sentence calculation. Fairness is said to be served if the effective sentence for an offender who is subjected to pre-sentence detention is not unfairly disparate from the effective sentence for a similar offender with a similar degree of culpability for a similar offence, but who was not subjected to pre-sentence detention to the same degree. It is for that reason that the deduction even applies as against minimum sentences provided by Parliament: see also ***R. v. Morrisey***, [2000] 2 S.C.R. 90, [2000] S.C.J. No. 39 (QL), 2000 SCC 39) at paras. 1 and 2. The appellant submits that the extent of credit is not a means for addressing, for a second time, factors in aggravation or mitigation which are relevant to the calculation of the index sentence to begin with.

[9] The Crown's essential submission is that s. 719(3) of the *Code* provides for a discretion, and that ***Wust*** did not impose a mandatory rule that excluded relevant considerations about the offence and offender from consideration in calculating the effect of pre-sentence custody.

Analysis

[10] The reasoning used in calculating the effect of pre-sentence custody in most of the case law appears to be that a trial judge would determine what would have been the fit sentence had the offender been sentenced on the date his custody commenced, and would then deduct the functional

effect of the pre-sentence custody from that sentence. The ratio of 2 for 1 which was adopted in ***Wust*** reflected several considerations: (a) the fact that serving prisoners get remission or other credit either under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, or the *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20, for time served on the sentence, (b) the fact that remand custody circumstances are frequently 'dead time' in the sense that there may be few or no helpful programs or treatment made available to the prisoner during the remand time, and (c) the circumstances in remand centres may well be more crowded or difficult than in correctional institutions or penitentiaries: see *e.g.* ***R. v. Tallman*** (1989), 48 C.C.C. (3d) 52, [1989] A.J. No. 119 (QL). The trial judge would have discretion as to credit in light of the fact-sensitive assessment of the functional effect of pre-sentence custody. In light of s. 719(3) of the *Code*, intervening offences and detention are a complicating factor that must also be considered, as ineligible time should not be credited: see *e.g.* ***R. v. A. (R.K.)***, 384 A.R. 222, [2006] A.J. No. 307 (QL), 2006 ABCA 82.

[11] Plainly, it would be appropriate and usually necessary for trial judges to have evidence and submissions helpful to forming a realistic conclusion as to the effect of pre-sentence custody in the particular case unless the facts are agreed: s. 724(3) of the *Code*. In the absence of such agreement or of such evidence and submissions, ***Wust*** would allow trial judges to resort to the 2 for 1 credit as a generalized assumption or default position. It may be that Parliament may choose to enact a different default position.

[12] The appellant proposes, based on ***R. v. Orr***, (2008) 228 C.C.C. (3d) 432, [2008] B.C.J. No. 282 (QL), 2008 BCCA 76, that the consensus in appellate courts is in favour of a 2 for 1 credit being presumptive unless a factor arises that justifies a different credit.

[13] For example, as a general rule a lesser credit may be considered appropriate if the time spent on remand had appropriate post-sentence programming, or was in hospital treatment: see e.g. ***R. v. Neudorf*** (2004) 187 C.C.C. (3d) 190, [2004] B.C.J. No. 1341 (QL), 2004 BCCA 374 at para. 44; ***Orr*** at paras. 17 to 18; ***R. v. Roulette***, (2005) 201 Man.R. (2d) 148, [2005] M.J. No. 459 (QL), 2005 MBCA 149 at paras. 1 to 2, 6 to 19. Similarly, if a trial judge determines that the offender would not have realistically been eligible for early release and thus would have served much of the fit sentence in custody, then a ratio less generous than 2 for 1 would seem to make sense. Besides the facial logic of this, the law should not invite offenders to 'bank' pre-sentence custody credit at a 2 for 1 rate so as to acquire a better ratio of release eligibility than they would have received if they had started the sentence from day one: see ***R. v. Coxworthy,*** (2007) 417 A.R. 242, [2007] A.J. No. 1146 (QL), 2007 ABCA 323 at paras. 8 to 11; ***R. v. Sooch***, (2008) 433 A.R. 270, [2008] A.J. No. 517 (QL), 2008 ABCA 186 at paras. 11 to 13; ***R. v. Sparham***, (2007) 220 Man.R. (2d) 3, [2007] M.J. No. 200 (QL), 2007 MBCA 84; ***R. v. Traverse***, (2008) 238 C.C.C. (3d) 330, [2008] M.J. No. 338 (QL), 2008 MBCA 110 at para. 82; ***R. v. Mills*** (1999) 133 C.C.C. (3d) 451, [1999] B.C.J. No. 566 (QL), 1999 BCCA 159 at para. 48; ***R. v. Pangman***, (2001) 154 C.C.C. (3d) 193, [2001] M.J. No. 217 (QL), 2001 MBCA 64, but see also ***Orr*** at para. 9 and para. 17. Some pre-***Wust*** authority has it that if an offender is clearly a dangerous person, that factor may influence the overall outcome including the

effect of pre-sentence custody: ***R. v. Lapointe***, (1999) 244 A.R. 358, 209 W.A.C. 358, [1999] A.J. No. 1276 (QL). The jurisprudence as to pre-sentence custody under the *Youth Criminal Justice Act* need not be discussed here. The question here is whether the trial judge erred in principle in taking into consideration – as a factor justifying a reduction of the pre-sentence custody credit – the *reason* for the pre-sentence custody as compared to the *circumstances* of the pre-sentence custody.

[14] In other words, does the fact that the accused was denied release because of his misconduct justify a reduction from the usual pre-sentence custody credit? Counsel before us did not make submissions (since they agreed on the point) on the sub-issue as to giving the appellant credit on a 2 for 1 basis for what counsel estimated to be two months of remission time from the intervening sentence served during the remand period. It seems to us that there is conjecture in such a credit and that there is also an anomaly in doing so. It is not facially obvious why time which would otherwise be remitted or would otherwise be governed by parole or temporary absence for an unrelated sentence should be deductible from time spent in remand, much less why effective double credit should be given for it. It is not necessary for us to solve this riddle in the circumstances of this appeal because the trial judge seems to have accepted the joint position of counsel on this sub-point.

[15] The main question as to reduction of credit arising from the reason for pre-sentence custody was answered by the trial judge directly, and she explained her position in the following terms:

> I quote from the Supreme Court of Canada decision in ***Wust***, which is often mistakenly, in my view, relied on as pronouncing a rule that the court must give credit of two-for-one for remand time. That is not what ***Wust***, says. In speaking of remand time, Justice Arbour said for the court:
>
> > The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.
>
> That ruling has been reflected in several cases in this court, for example recently in the ***R. v. Rayworth***, 2008 NWTSC 43, where Justice Richard said "there is no automatic two-for-one formula. Each case is to be assessed on its own circumstances". And in that case, like this one, the accused had a history of failing to comply with court orders. In that case, like this one, the accused was on release on another charge when he committed the offence that Justice Richard was sentencing him for. And as Justice Richard observed in that case, it should be no surprise to him that he did not get bail while awaiting trial. Similarly it should come as no surprise to Mr. Sabourin that he did not get bail on these charges when he committed the offences after being released when charged with another assault on K.L. He is not in

> the same position as someone who has no other pending charges, has not breached release conditions but is still not granted bail. At the same time, it is true that his remand time does not attract remission and I am told he was not permitted to take all the programs a sentenced prisoner would have access to. Those circumstances are said in the *Wust* case to underlie the two-for-one ratio but they are not said to require a two-for-one ratio.
>
> I accept that in all the circumstances, having considered them very carefully, a sentence of 30 months in jail as proposed by both counsel is not unreasonable. In my view, balancing the factors I have just referred to in connection with the remand time, something less than two-for-one credit is appropriate for that remand time.

[16] There is some jurisprudential support for the trial judge's position that the credit for pre-sentence custody can be developed having regard to the reason for pre-sentence custody. In ***Coxworthy***, the Alberta Court of Appeal affirmed a decision to depart from 2 for 1 credit, holding that his pre-charge conduct was a relevant consideration. To a similar effect is the decision in ***R. v. Millward***, (2000) 271 A.R. 372, [2000] A.J. No. 1371 (QL), 2000 ABCA 308, where reduced credit for time spent by the offender on remand awaiting extradition to Canada was found to be justified. Also in ***Sooch*** at para. 13, Martin J.A. disagreed with the doubt expressed in ***Orr*** about the relevance of the reasons for pre-sentence custody. In those cases, in ***A. (R.K)*** and in ***R. v. Lau***, (2004) 357 A.R. 312, [2004] A.J. No. 1348 (QL), 2004 ABCA 408, the Alberta Court of Appeal also affirmed the point in ***Wust*** that a trial judge's decision to give no or reduced credit for pre-sentencing custody should be explained on a principled basis. See also ***R. v. Roulette***, [2008] M.J. No. 336 (QL), 2008 MBCA 113 at paras. 3 to 4; ***R. v. Butler***, (2008) 239 C.C.C. (3d) 97, [2008] N.S.J. No. 478 (QL), 2008 NSCA 102 at paras. 27 to 28.

[17] By comparison, the appellant refers to ***Orr***, and cases cited therein, for the proposition that there must be a valid reason not to give the 2 for 1 credit, and that such valid reasons do not generally include the fact of unrelated misconduct: ***Neudorf*** at para. 45; ***R. v. Calderberg***, (2007) 221 C.C.C. (3d) 449, [2007] B.C.J. No. 1335 (QL), 2007 BCCA 343 at para. 23; ***Orr*** at para. 14. Under s. 515 of the *Criminal Code*, there are various rationales for the pre-sentence detention of an accused person which may include either pre-offence conduct or post-offence conduct.

[18] If the case-specific reason for pre-sentence detention relates to pre-offence conduct by the accused, the facts supporting that reason will generally be aggravating factors relevant to determining the index sentence for the offence, or they will be essentially irrelevant. There is a risk, therefore, that reducing the pre-sentence custody credit will amount to double or inappropriate punishment. For example, the offender should not be re-punished for his prior criminal record. The prior conduct should not be an aggravating factor in sentencing and then be used again to reduce pre-sentence custody credit. The accused should not be convicted (or be at risk of conviction) for a pre-offence breach of recognizance, and also have that breach used to reduce pre-sentence custody credit. The

risk of double punishment, however, may not always exist, since the line of reasoning from such circumstances might not always result in double punishment. The offender's character and attitude, his prospects of rehabilitation or benefit from programs, his eligibility for sentencing options, are all matters that remain relevant. Consequently, a mandatory rule of exclusion of such factors would not seem justified.

[19] If the reason for pre-sentence detention relates to post-offence conduct by the offender that does not form part of the index offence, then such conduct would either be evidence of the character and attitude of the offender (and thus again be relevant to the index sentence), or it would be subject to independent charge and prosecution. If a separate charge (such as under s. 145 of the *Code)* could be laid, Alberta jurisprudence would have it that (except now by agreement under s. 725 of the *Code*) the post-offence conduct would not be considered directly as an aggravating factor in sentencing: see ***R. v. Sawchyn***, (1981) 60 C.C.C. (2d) 200, [1981] A.J. No. 26 (QL) leave denied (1981) [1981] 2 S.C.R. xi, at paras. 28 to 34, 39 N.R. 616 (S.C.C.); ***R. v. Ambrose***, (2000) 271 A.R. 164, [2000] A.J. No. 1148 (QL), 2000 ABCA 264 at para. 20, paras. 71 to 86. It is open to the Crown to prosecute separately or to invoke s. 725 of the *Code*: see ***R. v. Larche***, [2006] 2 S.C.R. 762, [2006] S.C.J. No. 56 (QL), 2006 SCC 56. Absent the Crown doing so, the offender should not be punished for uncharged offences: ***R. v. Angelillo***, [2006] 2 S.C.R. 728, [2006] S.C.J. No. 55 (QL), 2006 SCC 55 at para. 24. *A fortiori*, the existence of such post-offence conduct should also not negatively influence the pre-sentence custody credit as it would either be a factor on the index sentence or subject to separate prosecution.

[20] Based on this, if the trial judge meant to say that the discretion available for trial judges as recognized in ***Wust*** could include reducing the pre-sentence custody credit by reason of conduct which was already counted in determining the index sentence, or which was capable of being prosecuted separately, this was error. The principles in ***Wust*** and later cases do not absolutely prohibit, when determining the functional effect of pre-sentence custody, consideration of facts which may also happen to have influenced the occurrence of pre-sentence custody. But care and circumspection are necessary to ensure that duplication of punishment does not occur. The reasons should also be clear. Here they suggest that she double counted to some extent.

[21] In deciding whether to accept the common submission of counsel as to the quantum of 30 months, the trial judge was entitled to consider the appellant's lengthy criminal record commencing as a youth in 1990 and continuing to early 2008. That record includes many crimes of violence including assault with a weapon, robbery and sexual assault. Moreover, the factual underpinnings of the charges were serious. He entered the home of his spouse's 76 year-old grandmother and assaulted his spouse. He responded to requests to leave by picking up a loaded shotgun. As the grandmother was trying to call the police he pointed the gun at her head and said he was going to shoot her. A struggle ensued between the appellant and his spouse over control of the shotgun and it discharged into the ceiling of the room. The appellant then twisted his spouse's arm and threatened to break it. The grandmother tried to stop the appellant by hitting him with a brush but was knocked to the floor.

She was hit on the side of the head and suffered a two inch lump and swelling to her head. There were also before the learned trial judge two victim impact statements which speak eloquently to the serious effects of the crimes upon both complainants. On these facts, the joint proposal as to the index sentence was not severe.

[22] The trial judge was informed that the appellant was, at the time of these serious offences, under an undertaking that contained a condition prohibiting contact with his spouse and that he was also on probation requiring him to keep the peace and be of good behaviour. Accordingly, the trial judge was rightly concerned that the appellant committed the offences while on probation and release and was rightly concerned about the protection of the public. Her reasoning, however, suggests that she considered these matters directly on the pre-sentence custody credit and in taking up the common submission as to the index sentence in the same light.

[23] The next question is whether in all the circumstances, the trial judge's sentence was unfit. As noted above, the trial judge could consider the evidence before her in light of the reasoning factors mentioned in paragraphs [10] to [13] above in determining the functional effect of the pre-sentence custody, including his likelihood of early release or of advantageous access to programming beyond that which was in fact available to him on remand. Perhaps that was to some degree what the trial judge meant in what she said. She had discretion as to whether to give the ***Wust*** level of credit, or some reduced amount in light of those factors, but not on a double counting basis. We are persuaded that, in light of those factors, the appellant did not show that the ***Wust*** level of credit was imperative. Indeed, before us, counsel for the appellant quite frankly conceded that had the trial judge chosen to give the appellant credit at a rate of 1.5 for 1 there likely would not have been an appeal by the appellant.

[24] The trial judge did not refuse to give any credit for pre-sentence custody above 1 for 1. In fact, she gave 1.2 for 1 if one counted the two months estimated remission on the 2008 sentence as eligible under s. 719(3) of the *Code*. If one disregarded those two months, the 18 month credit for 13.5 months of pre-sentence custody would be closer to 1.4 to 1 credit. Against the fair and appropriate concession of counsel for the appellant, the discrepancy is not such as to justify interference under the deference principle in ***R. v. M (C.A.)***, [1996] 1 S.C.R. 500, [1996] S.C.J. No. 28 (QL); ***R. v. M. (L.)***, [2008] 2 S.C.R. 163, [2008] S.C.J. No. 31 (QL), 2008 SCC 31. Particularly having regard to the seriousness of the offences, their consequences, and the offender's circumstances, the resulting sentence upon the appellant is not unduly harsh.

[25] In our view, assuming the trial judge erred on how to evaluate the significance of pre-sentence custody and thus to some extent double counted, the comments of Laskin J.A. in ***R. v. Rezaie*** (1996) 112 C.C.C. (3d) 97, [1996] O.J. No. 4468 (QL), as described in ***Orr*** are relevant:

> [6] Laskin J.A. found the judge had erred in failing to give any credit for part of the period the appellant had spent in pre-sentence custody. However, he went on to

> hold that notwithstanding this error in principle by the judge, the sentence imposed was fit and ought not to be altered. Thus, in the result, the appeal did not succeed.
>
> [7] The conclusion of Laskin J.A. points to what one might consider a conundrum on occasion raised where an appellate court is considering this type of issue in sentence appeals. Although the appellate court may discern in the record an error in approach by the sentencing judge, if the appellate court considers a sentence fit, it may decide, in appropriate cases, not to alter the sentence despite the existence of perceived error. That result, with respect, seems correct in those cases where the sentence is found fit and stands unaltered by an appeal court. The core consideration guiding an appellate court in sentence appeals is delineated in s. 687(1) as an assessment of "the fitness of the sentence appealed against". If the sentence is fit, it ought to stand.

That is the situation here. We are not persuaded that the effective sentence imposed on the appellant for the offences he committed, in light of their circumstances and the circumstances of the appellant as an offender is unfit.

Conclusion

[26] Leave to appeal sentence is granted, but the appeal is dismissed.

Appeal heard on June 16, 2009

Memorandum filed at Yellowknife, N.W.T.
this 3rd day of July, 2009

Authorized to sign for: Johnson J.A.

Watson J.A.

Slatter J.A.

Appearances:

G. Boyd
for the Respondent

H.R. Latimer
for the Appellant

A-1-AP-2009000004

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

Her Majesty the Queen

Respondent

- and -

Eugene Gordon Sabourin

Appellant

MEMORANDUM OF JUDGMENT