Date: 1997 08 18
Docket: CR 03372 / CR 03434

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ANTHONY VIRGIL ANTOINE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Summary conviction sentence appeals. Allowed in part.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife , Northwest Territories
on August 13, 1997.

Reasons filed: August 18, 1997

Counsel for the Appellant: Thomas G. McCauley

Counsel for the Respondent: Jolaine A. Antonio

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REASONS FOR JUDGMENT

[1] In these two appeals, the appellant seeks to set aside four different dispositions by two different Territorial Court Judges. The arguments addressed all issues at the same time since the essence of these appeals is that, in the end result, the combined effect of the dispositions resulted in a total sentence that is excessive. Those issues include the factors affecting the decision to impose a conditional sentence, the effect of the termination of a conditional sentence, and considerations going to whether to extend time to appeal.

[2] On November 26, 1996, the appellant appeared in Territorial Court and entered pleas of guilty to two charges of breach of probation. The presiding Judge imposed two consecutive terms of 6 months imprisonment but ordered that the appellant serve the sentences in the community subject to certain conditions. In other words, the appellant received a 12 month conditional sentence. This is the subject matter of the appeal in file CR 03434.

[3] On January 21, 1997, the appellant again appeared in Territorial Court and entered a plea of guilty to a charge of common assault. He was sentenced to a term of imprisonment of 5 ½ months. In addition, submissions were made with respect to his breach of the conditional sentence (specifically the statutory condition that he was to keep the peace and be of good behaviour). The presiding Judge, not the same Judge as in

November, terminated the conditional sentence so that the remainder of that sentence, approximately 10 months, would be actually served in prison consecutive to the sentence on the assault charge. These dispositions are the subject matter of the appeal in file CR 03372.

[4] The end result is that, as of January 21st, the appellant had to serve a total of 15 ½ months in prison. This, he says, is excessive and unreasonable.

[5] On February 7, 1997, the appellant filed a Notice of Appeal personally with respect to the January dispositions. It was not, however, until June 20, 1997, that a Notice of Appeal was filed, by counsel, with respect to the earlier November dispositions. This, of course, was well beyond the 30 day time limit for filing a summary conviction appeal. The appellant therefore seeks an order extending the time to appeal.

[6] The decision to extend time to appeal is a discretionary one: see s.815(2) of the Code. The factors to take into consideration are (a) whether the applicant had shown, within the appeal period, a bona fide intention to appeal; (b) whether the applicant had accounted for the delay; and (c) whether the appeal has a reasonable chance of success: see, for example, *R v Mohammed* (1989), 52 C.C.C.(3d) 470 (Man. C.A.), and *R v Beaverho,* [1995] N.W.T.J. No. 77 (S.C.).

[7] The appellant was unrepresented at the November appearance. He swears, in an affidavit, that he did not know he could appeal the 12 month sentence until well after his January appearance (where he was represented by counsel) when he finally received approval from Legal Aid to consult with new counsel about an appeal. That may go to explain the delay but there are the other factors to consider.

[8] There is no doubt that the appellant had no intention whatsoever of appealing the 12 month conditional sentence until it was terminated in January. So, in essence, the appeal is really about whether that sentence should have been revoked completely or perhaps simply suspended for a period of time (as suggested by counsel for both the appellant and the Crown at the time). Yet before me the appellant's counsel urged that the 12 month sentence should be set aside as unfit, not because it was conditional but because it was excessive. He argued further that the sentencing Judge in November made a fundamental error in the manner by which he imposed the conditional sentence. Therefore, in counsel's submission, there is a reasonable chance of success and so an extension of time to appeal should be granted.

[9] I heard full argument both on the substantive issues on appeal and the motion to extend time. So it is convenient to set out details of the November sentencing in order to consider the appellant's request for extension of time.

[10] The appellant has a lengthy criminal record. As of November, 1996, he had accumulated 38 criminal convictions of all types, including four prior convictions for breaching probation orders. In June, 1995, he was convicted in Alberta of an assault and sentenced to 60 days in jail and 15 months probation. Terms of the probation order were that he report to a probation officer and report for counselling. He failed to do so. He was charged for breach of each term; hence the two breach charges before the court in November. He waived the charges from Alberta so he could plead guilty in this jurisdiction.

[11] At the November hearing, the presiding Judge questioned the appellant directly about whether he, and his family, may benefit if he were to participate in counselling. Upon receiving a positive reply, the following exchange took place between the Judge and the appellant:

THE COURT: Well, I have one further question then of you; do you think it would be more beneficial for me to put you on conditional sentences of an extended period on these two charges or a short period of time just in jail and have it all finalized by a short jail term instead of a longer conditional term? Now, the conditional sentence means that --

THE ACCUSED:If I look at the conditional sentences, you said the condition and I have to comply with them. And if it's for an extended period of time and I screw up on it then for that extended period of time, that's how long I'll be incarcerated for.

THE COURT:That's what it is. And the reason I'm saying it is this. You know that you're presently supposed to be reporting or have been reporting to the probation officer and you haven't done that since February. Now in this instance, if you're placed on conditional sentences that would total one year, because they're two offences six months each, you're about the worst offender you can find, six months each and you fail to attend on one counselling session that's arranged, then you know you're hooked in for the six months on each offence for a total of a year. So you can think that over if you want, take a little time to think it over and even discuss it with Mr. Taylor who is the court worker and has some experience in this matter and then you can come back in a few minutes and let us know what you think might be appropriate. Because when I'm saying a conditional sentence, I mean it in a serious way that you would be required to take counselling and to keep out of trouble and so on and that was the only way that I think I could be assured of protecting other people from your tendency to be violent with them because you have some violent offences on your record and even since Edmonton in 1995 it would appear. Do you want to take a few minutes to talk with Mr. Taylor?

THE ACCUSED: I don't think - -
THE COURT: Don't need to talk to him; what do you think?
THE ACCUSED: I'll go with the extended period.

[12] Appellant's counsel submitted that it is an error in principle for a sentencing judge to abdicate his or her discretion in sentencing by dangling before an accused the option of a short actual jail term or an extended conditional term. He argued that the judge failed to determine a fit and proper sentence and simply left the appellant with these two options. Crown counsel submitted that it is at least arguable that the Judge had a conditional sentence in mind all along but was merely engaging in this dialogue to make sure that the appellant understood the consequences.

[13] While I think Crown counsel makes a plausible argument, the transcript does reveal a fundamental flaw in the sentencing process in this case.

[14] Conditional sentences are now provided for by s.742.1 of the Criminal Code:

> 742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
>
> (a) imposes a sentence of imprisonment of less than two years, and
>
> (b) is satisfied that serving the sentence in the community would not endanger the safety of the community,
>
> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under s.742.3.

[15] Several recent cases, in particular two out of the Ontario Court of Appeal, *R v Pierce* (1997), 32 O.R. (3d) 321, and *R v Wismayer* (1997), 33 O.R. (3d) 225, have analysed the principles and considerations applicable to conditional sentences.

[16] The statute sets out only three prerequisites for a conditional sentence:

(1) the offence is not punishable by a minimum term of imprisonment;
(2) the court must impose a sentence of imprisonment of less than two years; and,
(3) the court must be satisfied that serving the sentence in the community would not endanger the safety of the community.

If all three prerequisites are met, then the court, in its discretion exercised judicially, may order that the sentence be served in the community subject to conditions.

[17] While the cases do not expressly say so, there is in effect a two-stage process that the sentencing court must follow. First, the court must determine a fit sentence according to the principles and objectives of sentencing as enunciated in the Criminal Code and by the courts. That involves a consideration of all options: suspended sentences, probation, fines and imprisonment. Then, once the decision has been made to impose a term of imprisonment of less than two years, those same principles and objectives of sentencing are also brought to bear on the decision whether or not to impose a conditional sentence. At that point, however, the primary consideration is whether serving the sentence in the community would endanger the safety of the community.

[18] A conditional sentence is not to be viewed as less of a sanction than actual imprisonment. The relatively summary nature of proceedings if there is a breach of a conditional sentence implies a readiness to incarcerate the offender should he breach. The sentencing judge must therefore always keep in mind when setting the length that the conditional sentence could end up being real time in prison.

[19] In this case it is obvious that the sentencing Judge gave primary emphasis to the prospect of the appellant's rehabilitation. A conditional sentence can provide the opportunity for rehabilitation through mandatory treatment or other requirements. But, it is equally obvious that the sentencing Judge failed to consider, or at least failed to articulate, the question of danger to the community.

[20] Crown counsel made the point, with which I agree, that if the sentencing Judge erred in the manner by which he imposed the conditional sentence, then such error accrued to the benefit of the appellant. Considering the appellant's lengthy criminal record, including crimes of violence, it could only have been beneficial to the appellant that the judge did not address the question of the danger he posed to the community. He should not now be heard to say that the sentence should be set aside because of the process by which it was imposed.

[21] So here the sentencing Judge made errors: he equated a short term of actual incarceration with a longer conditional term; he failed to consider the potential impact of such a long term should there be a breach; and, he failed to consider the question of danger to the community. But all of these errors worked in the appellant's favour. He was given a choice. He knew the consequences.

[22] Were the two consecutive 6 month terms unfit (leaving aside the conditional aspect)? They are, after all, the maximum jail terms that can be imposed for these offences. The Supreme Court of Canada recently reminded appellate judges of the deference that must be shown to sentencing decisions of trial judges: *R v McDonnell*, [1997] S.C.J. No. 42. In this particular case, considering the appellant's record, and even accounting for the substantial mitigating effect of the guilty pleas, I cannot conclude that the sentences were so unreasonable, that is to say falling outside of the acceptable range, that they were demonstrably unfit. And, as Crown counsel pointed out, these were not the maximum sentences in reality. The court could have imposed 6 months incarceration plus a fine. Therefore, the argument that the maximum penalty should be reserved for the worst offence by the worst offender is not applicable here: *R v Brown* (1989), 95 A.R. 318 (C.A.).

[23] With respect to the application to extend time to appeal, I am not satisfied either of the appellant's chance of success or that he had a bona fide intention to appeal. The errors made by the sentencing Judge, while errors in approach, were not such as to create a miscarriage of justice. The appellant's real complaint is not over the 12 month conditional sentence imposed in November but with the termination of that sentence in January. The termination proceedings were instituted only because of the appellant's further criminal act. As Crown counsel argued, to extend time in this situation would simply open the door to offenders being able to appeal conditional sentences up to the time they breach the conditions. For these reasons I deny the application to extend the time to appeal the sentences imposed in file CR 03434.

[24] The appeal of the January dispositions raises different considerations.

[25] The appellant does not take issue per se with the sentence of 5 ½ months imposed on the assault charge. It is the combination of that sentence plus the termination of the conditional sentence that the appellant says is excessive. The sentencing judge made the two terms consecutive but s.718.3(5) of the Criminal Code mandates that in any event. The combined effect, in January, of that sentence and the unexpired portion of the conditional sentence was that the appellant had approximately 15 ½ months to serve.

[26] At the January hearing, Crown counsel (not the same as on this appeal) recognized a concern about the totality of the sentences. She also recognized the mitigating effect of the appellant's desire to plead guilty at the earliest opportunity. She recommended a total sentence of 9 to 12 months being made up of (i) a sentence

on the assault charge in the "high end" toward the potential maximum of 6 months imprisonment, and (ii) the balance made up by a suspension of the conditional sentence for the appropriate length of time. Much the same submission was made by the appellant's counsel at the time (also not the same counsel as on this appeal). Both counsel referred to the potential benefit of having a part of the conditional sentence continue after the appellant's release so that some steps could be taken on the counselling set as a condition of that earlier sentence.

[27] The sentencing Judge did not accept these submissions. He said in part:

> Obviously, Judge Davis, when he imposed a conditional sentence, was persuaded or impressed by arguments that perhaps the turning point had been reached in Antoine's life. Here is a man with approximately 30 criminal convictions, and for two more convictions Judge Davis placed the accused on a conditional sentence, which is at a higher degree of supervision and jeopardy as it were than simple probation. Antoine was told that he would get six months for each of those offences unless he did three things: Stay out of trouble, take counselling and take treatment. Obviously, he persuaded the presiding Judge that the time was right, that he was ready to take those steps; now, equally obviously, we see that the time was not right and the hope was a false hope. Antoine is not ready to take responsibility for his own actions and stop drinking.
>
> At this point in the man's career, I think my obligation as a judge is clear and that is to protect the public. Until he takes responsibility for his drinking and does something about it, my obligation is to protect, and as far as I can, to see that there are not another 30 victims over the next ten years, especially with respect to his common-law wife and the children. There may be victims that won't appear in court but victims nonetheless, victims of a family where the father is drinking and fighting and attacking the mother. Mr. Antoine knew what was at stake.

[28] In revoking the conditional sentence, the sentencing Judge acted under the authority of s.742.6(9) of the Code. This section sets out various options:

> (9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may
>
> (a) take no action;
>
> (b) change the optional conditions;
>
> (c) suspend the conditional sentence order and direct

> (i) that the offender serve in custody a portion of the unexpired sentence, and
> (ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
> (d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

[29] Crown counsel on appeal does not gainsay the position taken at the sentencing hearing. She merely points out that, while it would have been appropriate for the sentencing Judge to accept what was in effect a joint submission, the result is also not inappropriate and certainly not unfit so as to warrant appellate interference.

[30] Appellant's counsel submitted that the sentencing Judge erred by not acceding to the submissions of counsel at the hearing. He noted that the sentencing Judge did not address the options available to him nor did he give reasons for rejecting counsels' recommendation. The resulting sentence, it was argued, was excessive and the sentencing Judge erred by not considering the totality principle.

[31] I must admit that I have some sympathy with the general proposition that a person who has been allowed to serve his sentence in the community, on the basis that his doing so would not endanger the community, and then commits a further crime of violence (irrespective of whether the victim is in the home, i.e., the "domestic community", or in the "community at large"), then that person should be sanctioned and controlled severely. Such a person, like the appellant here, who was given a chance, and fails to live up to that chance, evidently endangers the community. The fact that the Criminal Code provides for a relatively quick and summary procedure for dealing with breaches of conditional sentences implies to me that Parliament wants the courts to move quickly and effectively so as to protect the community. But, all that still does not mean that the known and accepted principles of sentencing are not to be considered. That is why there are options set out instead of merely the one alternative of terminating the conditional sentence completely.

[32] One of the long-standing principles of sentencing is that of totality. In his text, *Principles of Sentencing* (2nd ed.), at page 56, Prof. D.A. Thomas notes that:

> the effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing

> consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’.

If, on such review, it appears that the sentences, though otherwise fit in themselves, are excessive in the aggregate they are to be adjusted in one way or another ‖ usually, though not invariably, by making them concurrent in the case of prison terms ‖ so as to result in a total term that is consistent with the aims of sentencing.

[33] It seems to me that the totality principle must be kept in sight where a court is considering the option of terminating a conditional sentence completely or merely suspending it for a portion of the time when that decision is coupled with the imposition of a sentence for a new crime. This is because of the mandatory consecutive nature of the sentences. It may not be applicable if the decision to terminate stands alone. In this case it does not appear as if the sentencing Judge gave consideration to this concern.

[34] Another accepted principle in sentencing is that a joint submission made in the context of a guilty plea should not be overridden unless it is unreasonable in the sense that the resulting sentence is not fit: *R v Thomas* (1992), 131 A.R. 161 (C.A.). In January counsel did not refer to a joint submission but their recommendations were tantamount to it. I cannot say that those recommendations were unreasonable. In my view those recommendations had much to commend them.

[35] I also do not think that it behooves the Crown to now seek to uphold a sentence that it did not seek at the original hearing. I understand the guiding principle to be that the Crown ought not to repudiate on appeal the position it took at trial except for the gravest possible reasons: *R v Desroches* (1994), 93 C.C.C. (3d) 118 (P.E.I.C.A.). The Crown does not expressly repudiate its original position here and indeed I think Crown counsel on appeal took a very professional approach in saying that either outcome ‖ either what counsel recommended or what the sentencing Judge decided ‖ would not be unfit. But it seems to me that in such a case the Crown should be content with the position originally taken.

[36] For these reasons I allow the appeal in file CR 03372 to this limited respect. The decision of the sentencing Judge to terminate the conditional sentence is set aside. In its place will be an order suspending the conditional sentence for a period of 5 months, which will be served in custody, and with the unexpired portion of 5 months (more or less) to continue as a conditional sentence after the appellant’s release from custody. Since the 5 month portion that is to be served in custody is consecutive to

the 5 ½ month sentence on the assault charge (for a total of 10 ½ months from January 21, 1997), I will leave it to the correctional authorities to calculate the appellant's new release date.

[37] Counsel should take out separate orders reflecting the result on each file.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 18th day of August, 1997.

Counsel for the Appellant: Thomas G. McCauley

Counsel for the Respondent: Jolaine A. Antonio

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