*R. v. Lennie*, 2007 NWTSC 69 Date: 2007 09 05
Docket: S-1-CR2007000058

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RAYMOND LENNIE

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

---

Summary conviction sentence appeal.

Heard at Yellowknife, NT on August 13, 2007.

Reasons filed: September 05 2007

---

**REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A.SCHULER**

Counsel for the Appellant: Daniel Rideout
Counsel for the Respondent: Maureen McGuire

*R. v. Lennie*, 2007 NWTSC 69 Date: 2007 09 05
Docket: S-1-CR2007000058

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RAYMOND LENNIE

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

[1] This is an appeal from a total sentence of ten months incarceration and two years probation imposed on the Appellant by a judge of the Territorial Court. The Appellant submits that the sentence is unfit and that the sentencing judge made a number of errors, as follows:

a. the sentencing judge refused to follow the joint submission of counsel;

b. the sentencing judge failed to give appropriate credit for the time spent in pre-sentence custody;

c. the sentence imposed is excessive or unduly harsh;

d. the sentencing judge made the erroneous inference or conclusion that the Appellant had not taken steps to address underlying issues in relation to alcohol or anger management;

e. the sentencing judge ordered that the Appellant serve a term of probation, following the custodial term, for an improper purpose.

[2] The Appellant also submits that the sentencing judge erred in imposing a DNA order. In submissions, the Appellant argued that in the circumstances of this case, the sentencing judge had no jurisdiction to make that order.

*Background*

[3] The Appellant pleaded guilty to four counts of mischief, one count of assault, two counts of uttering threats to cause death, three counts of breach of probation, one count of breach of recognizance and one count of breach of undertaking. The offences occurred in Paulatuk on four separate dates between August 19 and November 28, 2006. Throughout, the Appellant was subject to a probation order which had been imposed in February 2006 and included a term that he keep the peace and be of good behaviour.

[4] A very brief summary of the offences and sentences is as follows. On August 18, 2006, the Appellant made a scene and kicked in the door of a house where his common law spouse was visiting, thus committing mischief (one month in jail) and breach of probation (one month concurrent).

[5] On October 5, the Appellant sought alcohol at a home and after being told to leave, went through the cupboards and grabbed and punched the female resident. After being escorted out, he threw rocks at the house, breaking a window, and threatened to kill the resident. A conviction for assault (three months consecutive), two convictions for mischief (one month concurrent on each), one of uttering death threats (five months consecutive) and one of breach of probation (one month concurrent) resulted from this.

[6] On November 23, 2006, the Appellant, intoxicated, broke a window in a home after he was told to leave. A conviction for mischief (two months concurrent) and one for breach of undertaking (one month concurrent) resulted.

[7] On November 28, 2006, the Appellant was upset that his mother, who was his surety on the recognizance he was released on following the last incident, would not provide him with alcohol. He went to her home and on encountering his sister there, threw a telephone at her and threatened to kill her. This resulted in convictions for uttering threats to cause death (five months concurrent), breach of probation (one month concurrent) and breach of recognizance (one month consecutive).

[8] In addition to the total of ten months in jail, the sentencing judge imposed a two year probation order.

[9] The Appellant was arrested and released after each of the first three incidents. After the final incident on November 28 he was detained in custody.

[10] The Appellant was 24 years old at the time of the offences and had a criminal record for violence, mischief and offences against the administration of justice. He had been sentenced to periods of incarceration. His last convictions before those described above were in February 2006.

[11] Crown and defence counsel presented the sentencing judge with a joint submission of time served and two years probation. Crown counsel does not repudiate the sentence proposed in the joint submission but does not concede that the appeal has merit. She takes the position that the sentence imposed has not been shown to be unfit and that the sentencing judge committed no error in principle.

*Analysis*

[12] The standard of review on sentence appeals is well-settled. In the absence of an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, an appeal court should intervene only if the sentence imposed is unfit: *R. v. C.A.M.*, [1996] 1 S.C.R. 500.

[13] The errors in principle alleged by the Appellant, and my findings, are as follows.

*The sentencing judge refused to follow the joint submission of counsel*

[14] The law is clear that a joint submission cannot bind the discretion of a sentencing judge. The important thing is that the judge must give due consideration to the joint submission, give counsel the opportunity to justify the proposed sentence and not reject the joint submission unless there are clear and cogent reasons for doing so: *R. v. P.J.N.*, [2004] N.W.T.J. No. 21 (S.C.) and cases cited therein; *R. v. Varga*, [2000] A.J. No. 220 (C.A.); *R. v. Cerasuolo* (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); *R. v. McCart*, [2004] A.J. No. 304 (C.A.).

[15] In this case, the sentencing judge told counsel what her concerns were about the proposed sentence and invited further submissions and evidence. After hearing further submissions, she reserved her decision. She gave clear, thorough and cogent reasons for rejecting the joint submission. She found, based on his record and the 12 offences before her, that the Appellant is a danger to people and property in his community. She carefully reviewed the circumstances of the offences and of the Appellant and concluded that denunciation and deterrence were the most important objectives in his case. She noted that the Appellant had been on probation, a rehabilitative sentence, almost continually since 2003 but had continued to commit offences. She also disagreed with the Crown's characterization of the offences as "a spree", noting that there had been a break each time the Appellant was arrested and released, after which he had continued to commit offences. Ultimately she found that the sentence proposed in the joint submission would be contrary to the public interest. I find no error in either the procedure the sentencing judge followed or her conclusion.

*The sentencing judge failed to give appropriate credit for the time spent in pre-sentence custody*

[16] The Appellant had spent approximately 5 and a half months in pre-sentence custody ("remand") by the time he was sentenced. The joint submission was for time served and probation for two years. The Appellant submitted that a credit of two for one should be given to the remand time. He submitted that the remand time was particularly difficult for him because he was away from his young son and his community and his grandfather had died while he was awaiting sentence.

[17] The sentencing judge noted that the Appellant had been arrested and released three times and committed further offences each time before being remanded in custody. She noted that many offenders in the north are in remand far from their home communities. She also noted that programs and counseling were available to the Appellant while in remand had he chosen to take them. She acknowledged the lack of remission on remand time. Because of the latter, she decided that something more than a straight one for one credit was appropriate and credited 8 months for the remand time, which amounts to something less than a factor of 1.5.

[18] There is no merit in the submission that the sentencing judge erred in not giving the remand time a two for one credit. There is no obligation on a sentencing judge to use that calculation. In *R. v. Wust*, [2000] S.C.J. No. 19, Arbour J., speaking for the Court, called a two for one credit "entirely appropriate" and said that it reflects not only the harshness of pre-sentencing detention due to the absence of programs but also the fact that the remission mechanisms in the *Corrections and Conditional Release Act* do not apply to that period of detention. She also stated, "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" (at paragraph 45).

[19] The sentencing judge in this case did exactly what Arbour J. said is left to a sentencing judge to do: she weighed the factual circumstances of the Appellant's detention, the reason why he was detained and decided on the appropriate credit. There is nothing unreasonable about her decision in that regard.

[20] The Appellant argues that taking into account that he breached his release conditions as a reason not to give a credit of two for one, while at the same time sentencing him for the breaches of undertaking and recognizance amounts to double jeopardy. I do not agree. *Wust* makes it clear that there is no presumption of a certain credit for remand time. Remand time is simply one factor to be taken into account along with other factors in determining the appropriate sentence for the offences before the Court.

[21] In determining the amount of credit to be given to remand time, it is open to a sentencing judge to consider any violations by the offender of the terms of his release. If the offender has been given the opportunity to remain at large but by his own actions has caused the termination of his release, the sentencing judge has the discretion to take that into account: *R. v. Warren*, [1999] O.J. No. 4591 (C.A.). Although *Warren* predates *Wust*, it is in keeping with the latter in holding that there is no rigid formula for determining the credit to be given to remand time.

[22] I find, therefore, that the sentencing judge did not err in the way she credited the remand time.

*The sentence imposed is excessive or unduly harsh*

[23] The Appellant submits that an effective sentence of 18 months in jail (10 months imposed and 8 months credit for remand time) and two years probation is excessive and unduly harsh to the point of being crushing. The concern that a sentence should not crush an offender usually arises when the Court is considering a lengthy sentence, often in a penitentiary, in circumstances where the offender might be left with no hope and therefore no incentive to rehabilitate: for example, *R. v. T.K.A.*, [2004] N.W.T.J. No. 50 (S.C.); *R. v. Malicia*, [2006] O.J. No. 3676 (C.A.). No circumstances particular to the Appellant were identified that would lead to a concern that the sentence imposed in this case would be crushing for him. The sentence itself is not harsh, particularly when one considers that it is for a total of 12 offences, committed on four separate occasions, including violence and threats of violence. The sentencing judge took into account totality in coming to the sentence. No error in principle has been demonstrated on this ground.

*The sentencing judge made the erroneous inference or conclusion that the Appellant had not taken steps to address underlying issues in relation to alcohol or anger management*

[24] It is for the sentencing judge to draw inferences from the facts presented. Absent palpable error, an appeal Court will not interfere. Here, the sentencing judge found that the Appellant had not taken the necessary steps to address his problems and that until he does he is at risk to re-offend. She found that his “will may be strong, but the effort is weak”, an inference available to her on all the evidence as to what the Appellant had and had not done and wished to do.

[25] The main thrust of the Appellant's argument on this ground is that the sentencing judge did not view his telephone conversations with a mental health worker while on remand as a step toward change. However, the evidence about the telephone conversations was simply that the Appellant felt they kept him aware of his problems. There was no evidence of any counseling or other steps taken by the Appellant as a result of the conversations.

[26] I see no error in the inferences drawn by the sentencing judge in relation to this issue.

*The sentencing judge ordered that the Appellant serve a term of probation for an improper purpose*

[27] Although the Appellant says that the sentence proposed in the joint submission of time served and two years probation is appropriate, he argues that the probation imposed by the sentencing judge to follow the ten month jail sentence was improper. He interprets part of what the sentencing judge said in her reasons as meaning that probation would serve no purpose; he says, therefore, she must have ordered probation for an improper, punitive purpose.

[28] The sentencing judge found that the proposed sentence was unfit and would not address the goals of sentencing. She stated:

> And even if rehabilitation were the main consideration in this sentencing, which I do not find that it is, the sentence proposed is rehabilitative only in the most superficial or speculative level. Probation has not worked for Raymond Lennie in the past, and there is nothing concrete to suggest that it will work now.

[29] I read the sentencing judge's remarks to mean that she rejected the proposed sentence as focusing solely on rehabilitation even though similar sentences imposed on the Appellant in the past had not had that effect. The sentencing judge did, however, find that rehabilitation is still a consideration, albeit a secondary one. She also noted that the Appellant needs to take steps to address his addictions. She obviously felt that this was important because she directed that the warrant of committal be endorsed with her recommendation that the Appellant be given access to counseling and other programs to address various issues. The probation order

also included conditions that he take counseling or programs recommended by his probation officer and that he make restitution for the damage he caused. Although, as the Appellant points out, the restitution could have been the subject of a separate order, the counseling could not.

[30] Clearly the sentencing judge was of the view that the Appellant is a risk to the public unless and until he addresses his problems. The probation order was aimed at helping him do that. That is a legitimate purpose and not punitive.

[31] I find no errors in principle as alleged by the Appellant. Nor is the sentence imposed unfit. The appeal from the sentence of ten months imprisonment and two years probation is therefore dismissed.

*The DNA Order*

[32] Among the offences of which the Appellant was convicted is assault, which is a secondary designated offence for purposes of s. 487.051 of the *Criminal Code*, which provides for orders for the taking of DNA samples. Section 487.051(1)(b) provides that where a person is convicted of a secondary designated offence, the Court may make an order authorizing the taking of such samples if the Court is satisfied that it is in the best interests of the administration of justice to do so. The Court has a discretion as to whether to make the order, unlike in the case of primary designated offences, for which s. 487.051(1)(a) makes such orders mandatory except where subsection (2) applies. Under s. 487.051(3), in deciding whether to make the discretionary order, the Court is to consider a number of circumstances, including the impact such an order would have on the person's privacy and security of the person.

[33] At the sentencing hearing, the Crown did not request a s. 487.051(1)(b) order, nor was any reference made to the issue. The sentencing judge reserved her decision on sentence and when sentence was later pronounced she made the order and gave reasons for doing so.

[34] The Appellant appeals the DNA order on the ground that the sentencing judge lacked jurisdiction to make the order because the subject was not addressed at the sentencing hearing or, alternatively, because there was no evidence that it would be in the best interests of the administration of justice to make the order and no

evidence about the impact the order would have on the Appellant's privacy and security of the person.

[35] In my view the circumstances do not give rise to a question of jurisdiction. The Appellant relies on *R. v. Bevin* (2002), 164 C.C.C. (3d) 376 (N.S.C.A.). In that case, however, the sentencing judge did not have jurisdiction to grant the s. 487.051(1)(b) order because the application for it was not made until months after the offender had been sentenced; the judge was functus. The sentencing judge in this case had jurisdiction to make the order and was obliged to consider making it even though the Crown had not made application for it: *R. v. T.N.T.*, [2004] A.J. No. 780 (Alta. C.A.).

[36] The problem in this case is not one of jurisdiction, but of procedural unfairness. The sentencing judge should have invited submissions from counsel before making an order that was not mandatory, that the Crown had not sought and that neither counsel had addressed: *R. v. Ku* (2002), 169 C.C.C. (3d) 535 (B.C.C.A.); similarly, on orders deferring parole eligibility under what is now s. 743.6: *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.); *R. v. Post*, [1996] B.C.J. No. 383 (C.A.).

[37] Although one alternative would be to quash the order and remit the issue to the sentencing judge to hear submissions on whether the order should be made, that procedure is complicated by the fact that the DNA sample has been taken from the Appellant. It is not clear what would follow if, after hearing from counsel as to whether the DNA order should be made, the Court declines to make it. Although it may be that this Court could order the sample removed from the DNA databank, a point that I do not decide, I doubt that the Territorial Court judge would have that jurisdiction.

[38] In *R. v. Ku* (at paragraph 43), having found that the Appellant was not given the opportunity to make submissions before the sentencing judge made the DNA order, the Court of Appeal heard full submissions and reviewed the order made for correctness. I will follow the same procedure in this case. The order will remain in effect for the time being, however I adjourn this aspect of the matter to the Criminal Chambers docket for Monday, October 1, 2007 at 2:00 p.m. for submissions on the merits of the DNA order. The Appellant's counsel is to apply for a removal order to bring the Appellant before the Court at that time. Counsel should also be

prepared to address what, if anything this Court can do about the sample already taken in the event of a decision that the DNA order should not have been made.

[39] Counsel are free to seek an earlier date to appear before me if one can be arranged.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 5th day of September, 2007.

Counsel for the Appellant: Daniel Rideout
Counsel for the Respondent: Maureen McGuire