R. v. Valerie Desjarlais, 2012 NWTTC 02

Date: 2012 01 05
File: T1-CR- 2011-001585

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

VALERIE DESJARLAIS

REASONS FOR DECISION

of the

HONOURABLE CHIEF JUDGE ROBERT D. GORIN

Heard at:	Yellowknife, Northwest Territories November 17, 2011
Reasons Filed:	January 5, 2012
Counsel for the Crown:	Jean-Benoit Deschamps
Counsel for the Accused:	Louis Sebert & Baljinder Rattan

[Charged under ss. 266, 430(4), 145(3) of the *Criminal Code*]

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Introduction

[1] On November 17, 2011, I sentenced the Accused for three offences she committed on July 31st, 2011. The sentences imposed were 2 months in jail for an assault contrary to s. 266 of the *Criminal Code*, 1 month in jail concurrent for a mischief offence contrary to s. 430(4); and 1 month consecutive for a breaching an undertaking entered into before a justice contrary to s. 145(3).

[2] At issue was the credit to be allotted for the time the Accused spent in custody prior to sentencing.

[3[Sections 719(3) and (3.1) of the *Criminal Code* state:

> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

> (3.1) Despite subsection (3), ***if the circumstances justify it***, the maximum is one and one-half days for each day spent in custody, unless the reason for detaining the person was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).
>
> (Emphasis mine.)

[4] The Accused pointed out that during the period she was remanded in custody she could not earn the one-third statutory remission, for which sentenced inmates are eligible. She argued that she should therefore receive credit for one and one-half days for each day she was detained prior to being sentenced since such credit would mirror the credit she could have earned had she been serving a jail sentence.

[5] The Crown argued that, since s. 719(3) sets out a norm of one day of credit for each day of custody, the Accused's position is contrary to Parliament's clear intention.

[6] Although I agreed with the Crown on this point, I held that because the Accused had established that her behavior was positive throughout the course of her pre-trial detention, she should receive one and one-half times credit. I advised that written reasons would be provided. My reasons are set out in the following paragraphs.

Analysis

Section 719(3.1)

[7] At issue is the meaning of the words "where the circumstances justify it" contained in s. 719(3.1). I find that these words clearly contemplate the individual circumstances of each person detained pending their sentencing.

[8] The fact that individuals who are sentenced to jail-terms are eligible to earn remission does not mean they will earn and receive it. Even if one accepts that a typical sentenced inmate will have one-third of her jail-term remitted, this fact is of no consequence in the absence of evidence specific to the Accused herself. The possibility or probability of an average sentenced inmate having his jail-term reduced is, without any connection to the Accused, merely speculative and of no value.

[9] Furthermore, Parliament, when enacting the *Truth in Sentencing Act* (S.C. 2009, c.29) which created the provisions set out s. 719(3) and (3.1), would certainly have been aware of the provisions it had previously enacted in the *Prisons and Reformatories Act* (R.S.C. 1985, c.P-20).

[10] Section 6(1) of the federal *Prison and Reformatories Act*, states:

> **6.** (1) Every prisoner serving a sentence, other than a sentence on conviction for criminal or civil contempt of court where the sentence includes a requirement that the prisoner return to that court, shall be credited with fifteen days of remission of the sentence in respect of each month and with a number of days calculated on a *pro rata* basis in respect of each incomplete month during which the prisoner has earned that remission by obeying prison rules and conditions governing temporary absence and by actively participating in programs, other than full parole, designed to promote prisoners' rehabilitation and reintegration as determined in accordance with any regulations made by the lieutenant governor of the province in which the prisoner is imprisoned.

[11] When creating s. 719(3) and (3.1) of the *Criminal Code*, it is highly unlikely that Parliament intended the operation of pre-existing legislations to transform the exception set out in (3.1) into a normative exercise of the court's discretion.

Adopting the Accused's argument would in effect, reverse the provisions of s. 719(3) and (3.1). One and one-half times credit would be the effective starting point and one for one credit would be the exception.

[12] It is true that in the present case, the Accused has received a jail-term of a duration less than two years and is therefore subject to the *Corrections Act* of the Northwest Territories (R.S.N.W.T. 1988, c.C-22). However, since the relevant provisions of the *Corrections Act* (NWT) having to do with statutory remission incorporate those of the *Prisons and Reformatories Act* (Canada), the same rational would also seem to apply to jail-terms in the territorial range.

[13] Section 23(1) of the C*orrections Act* provides:

> **23.** (1) The provisions of the *Prisons and Reformatories Act* (Canada) respecting temporary absence, the remission of sentence and the forfeiture of the remission apply to every sentenced inmate.

[14] Section 1 of the *Corrections Service Regulations*, made under the territorial *Corrections Act* reads in part, as follows:

> "remission" shall be construed as having the same meaning as "statutory remission" or "earned remission" or both or "remission", as those terms are used in section 6 of the *Prisons and Reformatories Act* (Canada); (*réduction de peine*)

[15] Section 11 of these same regulations state:

> **11.** The Warden may grant remission to every sentenced inmate in accordance with the *Prisons and Reformatories Act* (Canada) and the rules and procedures established by the Director. R-081-2008,s.2.

[16] I conclude that the intention of Parliament in ss. 719(3) and (3.1), is clear and that recourse to the excerpts from the Hansard provided by counsel is

unnecessary. As stated, if the Accused's position were accepted, the exception set out in subsection (3.1) would become the norm, and the norm set out in subsection (3) would become the exception.

[17] On the other hand, the words "if the circumstances justify it" are broad in scope. Parliament has elected to not require circumstances that are "exceptional". I have held that the fact that an average sentenced inmate will receive statutory remission is not in and of itself enough to bring an individual Accused within the scope of s. 719(3.1). However, I think that if an Accused is able to establish that her behaviour during her detention was such that, were she a sentenced inmate, she would in all likelihood have received a reduction of the jail-term imposed on her, she should receive credit that mirrors this reduction. Allowing for increased credit under such circumstances does not amount to the speculative exercise previously referred to. Rather, doing so takes into account the circumstances of the Accused on an individual basis.

[18] In cases in which an Accused receives the full statutory remission allowed for under s. 6 of the *Prisons and Reformatories Act*, she would serve 60 days of a 90-day jail-term. It follows that someone who has been in pre-trial detention for a period of 60 days and establishes that her behaviour was such that, had she been a sentenced inmate, she would have received full remission, should receive credit of 90 days for the 60 days served. In other words, she should receive one and one-half times credit for each day in pre-trial detention.

Evidence of the Accused's Good Behaviour while in Pre-Trial Detention

[19] Counsel for the Accused presented an affidavit from the Accused's case manager at the Fort Smith Correctional Centre (FSCC), the institution where Ms. Desjarlais was detained. The affidavit establishes that:

- After they are sentenced, serving inmates at FSCC are not credited remission for the time they have spent in pre-trial detention.
- Had the Accused been a sentenced inmate, she would have earned full remission at a rate of 15 days for each calendar month in custody. She would also have earned remission each partial calendar month served at the same rate on a prorated basis, so long as she maintained positive behaviour.
- Remanded inmates who arrive at FSCC may sign a remand waiver in order to be brought into general population.
- Two days after the Accused arrived at the (FSCC) as a remanded inmate, she was placed in general population due to her good behaviour.
- If a remanded inmate's behaviour is not positive, then her remand waiver into general population can be terminated for a length of time determined by the seriousness of her misbehavior and her ability to change her behaviour.
- With the exception of the first two days following her arrival at FSCC, the Accused appears to have spent her entire pre-trial detention in general population.

[20] Because she was placed in general population as a result of her good behaviour and was at no time removed, it appears that the Accused maintained good behaviour throughout the period of her detention. Based on this, I conclude that her behaviour throughout her pre-trial detention was sufficiently positive that,

had she been a sentenced inmate, she would have received remission at the rate outlined in her case manager's affidavit – an effective rate of one and one-half days credit for each day served. Accordingly, I find that the Accused has established that the circumstances justify her receiving credit for pre-trial detention at the same one and one-half to one rate.

[21] In this matter the affidavit material has been very helpful. However, it may be that under similar circumstances it will be unnecessary for an Accused to file affidavit material in order for his position to be accepted. For example, the submissions of defence counsel on what he has been advised by the Accused's case manager may be sufficient. The rules of evidence are relaxed during the sentencing process. The unsworn statements of counsel, as officers of the court, are a frequent and necessary evidentiary source in many aspects of the administration of criminal justice, such as bail matters, adjournments and remands, sentencing and publication bans: *R. v. Smith,* [1993] A.J. No. 401, 141 A.R. 241, 19 W.C.B. (2d) 569 (Alta. C.A.).

The Accused's Consent to Pre-trial Detention

[22] Crown counsel argued in the alternative that I should not allow the Accused enhanced credit since she elected to waive her bail hearing and consented to her pre-trial detention. He stated that had she proceeded with her bail hearing, she would, in all likelihood, have been detained and the provisions of s. 515(9.1) (*accused detained primarily because of a previous conviction(s))* and/or ss. 524(4) & (8) *(cancellation of prior process)* would have applied. It was argued that because, under those circumstances, s. 719(3.1) would have prohibited anything

greater than one for one credit, the Accused should not be able to better her position by waiving her bail hearing.

[23] The Crown also states that earlier jurisprudence predating the *Truth in Sentencing Act*, such as *R. v. Sooch* [2008], 234 C.C.C. (3d) 99 [A.C.A.], is applicable to the present case. In *Sooch* the Alberta Court of Appeal held that the respondent should not have been granted the "three to one" credit then typically provided to those who were detained in the Calgary Remand Centre pending trial. The Court stated that the failure to apply for bail, where bail was a viable possibility, militated against awarding enhanced credit on a three to one basis. The Court stated further that because the respondent had not been ordered detained and had no explanation for his being housed in protective custody, he should have not have received such credit and should have only received two for one credit.

[24] I disagree with the Crown on both points. Firstly, attempting to ascertain the outcome of a bail hearing that never occurred is speculative. It may have been that had the Accused elected to proceed with her bail hearing, she could have put forth a plan that would have adequately allayed concerns under the primary, secondary and tertiary grounds set out in s. 515(10) of the *Criminal Code*. Without having had the benefit of hearing the evidence and submissions that counsel would have provided during a bail hearing, it is very difficult for me to determine whether or not I would have released the Accused.

[25] Secondly, cases such as *Sooch* have to do with the granting of what was then referred to as "enhanced credit" for pre-trial detention. Enhanced credit meant credit beyond the usual two for one credit often applied following the Supreme Court of Canada's decision in *R. v. Wust* [2000] S.C.R. 455. Prior to the *Truth in Sentencing* Act, inmates awaiting sentencing may well have attempted to receive a

reduction in their jail sentences by manipulating matters. Inmates who otherwise would likely have been released could waive their bail hearing, serve one third of their anticipated jail-term at the Calgary Remand Centre, and then plead guilty and receive a sentence of "time served".

[26] However, I see no such danger under the present statutory scheme. The maximum credit for pre-trial detention now mirrors the maximum remission of a jail-term. The potential for inmates who have not yet been sentenced to manipulate matters in order to receive a reduction in the total time they spend in jail has been greatly diminished if not completely eliminated.

Conclusion

[27] I conclude that where an Accused is able to establish on a balance of probabilities that her behaviour during pre-trial detention was such that, had she been a sentenced inmate, she would have received a reduction of one third of her jail-term, she should receive credit for one and one-half days for each day of incarceration prior to sentencing.

[28] I thank Mr. Deschamps, Mr. Sebert, and Ms. Rattan for their first-rate assistance.

R.D. Gorin, C.J.T.C.

Dated at Yellowknife, Northwest Territories
this 5th day of January, 2012

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