CITATION: R. v. May, 2011 ONCA 74
DATE: 20110127
DOCKET: C52198-C52199

COURT OF APPEAL FOR ONTARIO

Doherty, Laskin and Gillese JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Jesse Brendan May

Respondent

and

Jonathan Whalen

Respondent

Susan Magotiaux, for the appellant

John Lefurgey, for the respondent, May

Mark Halfyard, for the respondent, Whalen

Heard and released orally: January 24, 2011

On appeal from the sentences imposed by Justice D. Taliano of the Superior Court of Justice on May 10, 2010.

ENDORSEMENT

[1] This is a Crown application for leave to appeal the sentences imposed on the respondents, May and Whalen. Both pled guilty to robbery. The robbery involved a home invasion. Mr. May received a sentence of two years less a day to be followed by three years probation. Mr. Whalen received a sentence of 21 months to be followed by three years probation. Both served very brief periods of incarceration prior to sentencing and both were on strict bail terms for approximately a year and a half.

[2] This was a planned robbery. Three individuals, including May, entered the home armed with a variety of weapons. They threatened to kill the occupants. At one point during the robbery, a gun, apparently belonging to one of the victims, discharged and killed one of the robbers. The details surrounding that discharge are unknown. It would appear that May was upstairs at the time the shooting occurred in the basement. Mr. Whalen did not enter the home. He drove the getaway vehicle, but was well aware of the plan to rob the home.

[3] Mr. May was 19 years old at the time of the offence. He has a terrible background and has had very little by way of guidance or parental control. He has accumulated a significant youth record, including two convictions for robbery. The details of those offences were not before the court.

[4] Mr. May was placed on strict bail conditions. Fortunately, the persons responsible for him while he was under release took a real interest in Mr. May. He has turned his life

around during the one and a half years he has been on bail. Everyone agrees he has made very significant strides to becoming a law abiding and responsible citizen.

[5] Mr. Whalen was 21 years of age at the time of the offence. He too has a record, although it does not involve any crimes of violence. He has a conviction for possession of a restricted weapon. As indicated above, Mr. Whalen was the driver. He also made substantial strides towards his rehabilitation while on bail awaiting trial.

[6] This was obviously a very serious offence. The trial judge was well aware of the seriousness of the offence. His reasons show that he was aware of the applicable principles of sentencing and the range of sentence for home invasions set by this court. The trial judge was also aware that a sentence range is not "fixed in stone", but is ultimately provided for the guidance of trial judge who must exercise their sentencing discretion on a case-by-case basis. Sometimes the proper exercise of that discretion takes the sentence out of the range.

[7] The Crown agrees that deference was owed to the sentence imposed by the trial judge. Clearly, he had a difficult task in this case. The trial judge ultimately saw substantial potential for rehabilitation for both of these young men. He saw that there was a real opportunity for them to become productive law abiding citizens. The material before him provided a basis for that finding. Both respondents have also continued their progress while in custody as indicated in the material that has been placed before us. They do seem to have turned their lives around.

[8] The trial judge had to shape a sentence that maximized the potential to achieve rehabilitation, which as indicated was a very real prospect in this case. However, at the same time, he had to impose a sufficient penalty to adequately reflect the needs of general deterrence and denunciation. Balancing these competing, if not somewhat antagonistic, principles, was not an easy task. I think it is fair to say that other trial judges might have come down with a different sentence. However, deference means yielding to the sentence imposed by the trial judge where the balancing engaged in by the trial judge does not reflect error in principle or result in a manifestly unreasonable sentence. In our view, the trial judge's balancing in this case does not suffer from either of those deficiencies. We would not interfere.

[9] In closing, we add one point. The reasons of the trial judge are thoughtful and detailed but could be read as devaluing the impact of this very serious crime on the victims. There is some suggestion that at least one of the victims was involved in the drug trade. The trial judge seems to have thought that the absence of a victim impact statement entitled him to infer that the victims had not suffered any "unusual" harm. This was a terrible experience for anyone to go through and to the extent that the trial judge minimized the seriousness of the impact on the victims because of their backgrounds, he was wrong in doing so. However, his observations concerning the victims did not ultimately affect the balancing engaged in by the trial judge and we would not interfere with the sentence on that basis.

[10] Leave to appeal the sentences is granted. The appeals are dismissed.

"Doherty J.A."
"J.I. Laskin J.A."
"E.E. Gillese J.A."