

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Courtney, 2012 ONCA 478

DATE: 20120706

DOCKET: C55129

Laskin, Cronk and Hoy JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Thomas Courtney

Appellant

Richard Litkowski, for the appellant

Michael Medeiros, for the respondent

Heard: July 3, 2012

On appeal from the sentence imposed by Justice Edward J. McGrath of the Ontario Court of Justice, on August 11, 2011.

By the Court:

I. Introduction

[1] The appellant was convicted of robbery, dangerous driving, failing to stop for police, assaulting a peace officer and perjury. He was sentenced, on a joint submission by counsel, to five years' imprisonment on the robbery charge, less three months' credit for pre-trial custody, and six months' imprisonment,

concurrent, on each of the other offences. A restitution order in the amount of \$567.67 – the total amount stolen during the robbery – was also imposed.

[2] The appellant appeals against sentence. He submits that: (1) his sentence on the robbery charge offends the parity principle since his related accused, who was also convicted of robbery, received an effective sentence of nine months' imprisonment; and (2) the five-year sentence on the robbery count also violates the 'jump' principle, as the appellant had never been sentenced previously to more than 90 days in custody. The appellant also contends that the restitution order was illegal because the circumstances of the offence support the reasonable inference that all the stolen cash was recovered by the police.

II. Parity Principle Not Violated

[3] The appellant acknowledges that several aggravating factors were relevant to his sentencing that did not apply to the sentencing of his companion in the robbery, Brandon White. Based on these factors, he concedes that he should have received a longer custodial sentence than that imposed on White. However, relying on the parity principle, he argues that the disparity in sentences here is extreme and unwarranted. He submits that on application of the parity principle, an appropriate sentence for his robbery conviction is three years' imprisonment, less credit for pre-trial custody, resulting in a sentence of 33 months' imprisonment.

[4] We disagree. The parity principle does not require that all co-accused be subject to the same sentence, or even that they be treated similarly for sentencing purposes. On the contrary, disparate sentences for different offenders, for the same offence, do not violate the parity principle so long as they are warranted by all the circumstances. See *R. v. Ipeelee*, [2012] S.C.J. No. 13, at paras. 78 to 79, *per* LeBel J.

[5] In this case, we see little, if any, parallel between the circumstances of the appellant and those of White. Indeed, on this record, there were fundamental differences in the antecedents of the two men and in the offences for which they were convicted.

[6] The appellant was 31 years of age at the time of the robbery. He had a lengthy criminal record with 43 convictions (albeit mostly for property offences and repeated breaches of court orders). Further, in addition to the robbery count, he was charged with a series of serious offences arising out of or associated with the robbery. These additional offences themselves warranted significant sanctions.

[7] In contrast, to the limited extent evident on this record, White's circumstances were materially different from those of the appellant. White was a youthful offender (18 or 19 years of age at the time of the robbery) and had no prior criminal record. He was charged and convicted of one count of robbery,

while the appellant pleaded guilty to different and multiple crimes. As the Crown points out, the principles of sentencing that apply to a youthful first offender, like White, differ greatly from those applicable to the appellant. Different sentences for these offenders, given their disparate circumstances, would be expected especially if, as is likely, rehabilitation figured in White's sentencing.

[8] Little else is known on the record before us concerning White's conviction and sentence. In particular, the record contains no information regarding the facts to which he admitted at trial, his background and any relevant mitigating circumstances. As a result, we agree with the Crown that only a limited comparison can be made between the appellant's circumstances and those of White.

[9] We therefore conclude, on the available information, that a violation of the parity principle is not made out.

III. Jump Principle Not Violated

[10] We reach a similar conclusion concerning the appellant's claim that his sentence on the robbery charge offends the jump principle. The appellant's crimes are fundamentally different in kind and seriousness than the crimes for which he was previously sentenced. Accordingly, the rationale for the jump principle – that successive sentences should be increased gradually – is simply

not engaged. As this court observed in *R. v. Borde* (2003), 63 O.R. (3d) 417, at para. 39:

[The jump] principle cautions a court against imposing a dramatically more severe sentence than the sentences imposed upon the offender for similar offences in the recent past. It has little application where the severity of the offender's crimes shows a dramatic increase in violence and seriousness.

[11] It also bears emphasis that the appellant's sentence was the product of a joint submission. This court has repeatedly held that it will not lightly interfere with a sentence imposed in accordance with a joint submission. The appellant does not contend that the sentence imposed was manifestly unfit given the nature of his crimes.

IV. Restitution

[12] It remains to consider the restitution order imposed on the appellant. The Crown has now determined that, in fact, the full amount of the cash stolen in the robbery was recovered by the police, as the appellant asserts. As a result, the Crown acknowledges, quite properly, that the restitution order cannot stand since no loss was sustained by the victim of the robbery. We agree.

V. Disposition

[13] Accordingly, for the reasons given, leave to appeal sentence is granted and the sentence appeal is allowed, in part, by quashing the restitution order. In all other respects, the appeal is dismissed.

Released: "JUL -6 2012"
"JL"

"John Laskin J.A."
"E.A. Cronk J.A."
"Alexandra Hoy J.A."