COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McCue, 2012 ONCA 773
DATE: 20121114
DOCKET: C55198

Doherty, Epstein JJ.A. and Cavarzan J. *(ad hoc)*

BETWEEN

Her Majesty the Queen

Appellant

and

Daniel Lee-David McCue

Respondent

Roger Shallow, for the appellant

Sarah Dover, for the respondent

Heard: October 23, 2012

On appeal from the sentence imposed on February 22, 2012 by Justice Martha B. Zivolak of the Ontario Court of Justice.

By the Court:

[1] After a trial before a judge sitting without a jury, the respondent was convicted of several offences:

- Possession of a loaded prohibited firearm (count 6);
- Possession of a firearm while under an order made pursuant to a robbery conviction prohibiting him from possessing firearms (count 5);
- Possession of a firearm while under an order made pursuant to a mischief conviction prohibiting him from possessing firearms (count 7);
- Possessing a handgun without a licence (count 4);
- Carrying a firearm in a careless manner (count 1); and
- Mischief to property under $5,000 (count 2).

[2] The weapons charges all involved the same handgun and the same event. The mischief charge arose out of a separate event that occurred earlier on the same day as the weapons offences.

[3] The trial judge imposed a sentence of two years less two days on the charge of possessing a loaded prohibited weapon. She gave the respondent credit on a 1:1 basis for 367 days spent in custody prior to sentencing, resulting in an effective sentence of three years on the charge of possessing a loaded handgun.

[4] The trial judge stayed one of the convictions for possession of a firearm while under an order prohibiting the possession of firearms pursuant to *R. v.*

Kienapple, [1975] 1 S.C.R. 729. She imposed one-year concurrent sentences on all of the other weapons charges. She imposed a 90-day concurrent sentence on the mischief charge. In the end result, the respondent received a total sentence of two years less two days, having been given credit for 367 days of pre-sentence custody. This sentence placed the respondent in the reformatory.

[5] The Crown appeals. Counsel makes three arguments. He argues that the trial judge erred in adjourning the sentencing proceedings for over two months to allow the respondent to accumulate sufficient "dead time" so that the sentence the trial judge intended to impose would result in incarceration in a provincial institution rather than a penitentiary. Counsel also submits that the trial judge significantly misapprehended the seriousness of the gun-related offences and failed to give any appreciable weight to the respondent's lengthy and serious criminal record. Finally, counsel submits that the trial judge erred in principle in imposing concurrent sentences on the charge of possession of a weapon while under court order not to possess weapons and on the mischief charge. Counsel contends that these offences required consecutive sentences.

THE ADJOURNMENT

[6] After hearing counsel's submissions on sentencing, the trial judge decided that sentences totalling three years were appropriate. She also concluded that the respondent should receive 1:1 credit for his pre-sentence custody. Had the

trial judge sentenced the respondent at that time, he would have gone to the penitentiary.

[7] The trial judge determined, however, based mainly on a letter given to her by the respondent, that his rehabilitative prospects would be much better if he went to the reformatory and not the penitentiary. The respondent could only go to the reformatory if he accumulated sufficient time in pre-sentencing custody to reduce the sentence to be imposed to less than two years. To achieve this result, the trial judge adjourned the sentencing to allow the respondent to accumulate a further 77 days of pre-sentence custody.

[8] Crown counsel submits that the adjournment directed by the trial judge conflicted with s. 720(1) of the *Criminal Code*:

> A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.

[9] Without commenting on the merits of this submission as a matter of statutory interpretation, we are satisfied that the adjournment was inappropriate in the circumstances of this case for two reasons. First, the adjournment was premised on the trial judge's determination that a sentence totalling three years was appropriate. As we will explain below, the seriousness of the offences and the respondent's criminal background required a sentence well in excess of three years. Consequently, on a proper application of the applicable sentencing

principles, no purpose could be served by adjourning the sentencing for over two months to allow the respondent to accumulate further “dead time”.

[10] Second, even if an adjournment to allow an accused to accumulate sufficient “dead time” so that he or she can be sent to the reformatory rather than the penitentiary might be appropriate in some circumstances, there was no evidence justifying an adjournment for that purpose in this case. If an accused asserts that the nature of the facility in which he or she may be imprisoned is sufficiently important to fixing the appropriate sentence to merit a considerable delay in sentencing, the onus is on the accused to put the necessary information before the trial judge identifying the benefits to the accused flowing from incarceration in a particular institution or in the reformatory system. The material must allow the trial judge to make an informed decision as to the potential placement of an accused within the reformatory or penitentiary systems, the programs available at the various institutions to which the accused may be sent, and the merits of the contention that the principles of sentencing would be better served by placing the accused in one system as opposed to the other.

[11] In this case, the trial judge relied entirely on the respondent’s statements in his letter to the judge. In that letter, the respondent purported to identify the institutions to which he would be sent depending on whether he was placed in the reformatory or the penitentiary system. The respondent also purported to describe the various programs available to him and to explain his strong

preference for the programs he would receive at a particular provincial institution. The trial judge erred in simply taking this information at face value. There was no evidence to support most of what the respondent said in his letter. Clearly, he had a vested interest in avoiding the penitentiary. The trial judge should have required evidence on those issues and not simply relied on the respondent's statements about where he would be sent and the programs that would be available to him in that institution even if he received a sentence of less than two years.

THE PROPER CHARACTERIZATION OF THE GUN OFFENCES

[12] It is necessary to briefly outline the facts underlying these charges. The police were looking for the respondent in the late evening of February 20, 2011. They went to the residence where they understood he lived. The police saw the respondent leave the residence and enter a taxi. They followed the taxi for a few blocks, at which point the respondent got out of the vehicle and fled the scene, running through backyards.

[13] The police chased the respondent through several backyards and eventually apprehended him. A police search of the route followed by the respondent after he left the taxi led to the discovery of a loaded nine millimetre semi-automatic handgun in the backyard of one of the homes. The respondent had thrown the gun away as he fled from the police.

[14] In describing the relevant events for the purposes of sentencing, the trial judge said:

> I do see this as a minimal fact situation if there is such a thing, when it comes to possession of a restricted and loaded firearm, on the following basis. There was no attempt to use the firearm, a restricted weapon, and in fact it would appear that the only attempt by you was to get rid of it…. So there's no suggestion that it was in your possession for you to actively use, and you didn't use it, and in fact you disposed of it at the first opportunity you had, no doubt to avoid its detection…. [Emphasis added.]

[15] The facts underlying the gun offences are not properly described as "minimal". The respondent had a loaded gun when he left his residence and travelled in a taxi. He clearly intended to have the gun on his person in public places. His possession of a loaded firearm while attempting to escape the police is a significant aggravating factor. He gets no credit for throwing the gun away while attempting to avoid capture. Furthermore, discarding a loaded handgun in someone's backyard in a highly populated residential area invites tragedy. Had the police not located the loaded gun, who knows what might have happened? Finally, we see no reason to infer anything other than that the respondent intended to "actively use" the loaded gun for some purpose if he saw the need. Why else would he have it in his possession?

[16] The circumstances of the offence called for a significant sentence. For reasons we need not detail, the parties at trial proceeded on the basis that the

three-year minimum was inapplicable. They should not have done so, but in our view that error did not have any effect on the sentence imposed. The circumstances of the offence, particularly having regard to the offender's serious criminal history, including prior convictions for robbery, called for a sentence well in excess of three years. The trial judge's mischaracterization of the circumstances of the offence as "minimal" led her to impose a sentence that was outside of the appropriate range for this offender.

THE IMPOSITION OF CONCURRENT SENTENCES

[17] As described above, the trial judge imposed concurrent sentences on all of the charges. The Crown submits that the sentence on the mischief charge and the sentence on the charge of possession of a firearm while under a court order not to possess firearms should have been consecutive to the other weapons charges and consecutive to each other.

[18] The facts giving rise to the mischief charge occurred earlier on the same day as the events that gave rise to the weapons charges. The respondent went to the home of an individual and insisted that he be allowed to see his ex-girlfriend, who was apparently staying at the home. When that person would not let the respondent into the home, he became very angry and threw a bicycle through the window of the home.

[19] The events underlying the mischief charge were no doubt frightening to the persons affected by them, particularly in light of the respondent's prior relationship with one of the occupants of the home and his serious and well-established propensity for acts of violence. The respondent also had prior convictions for mischief. Incarceration on this charge was fully warranted.

[20] The mischief conviction warranted a consecutive sentence. That offence was entirely distinct from the weapons offences. It should have been treated as a separate and distinct matter for the purposes of sentencing. A concurrent sentence denigrates the significance of the mischief charge and suggests that it is not in and of itself worthy of punishment. Of course, in fixing the appropriate length of a consecutive sentence, a trial judge must have regard to the totality of the sentences to be imposed. Totality concerns can, however, be adequately addressed by adjusting the length of the various consecutive sentences, if necessary.

[21] The Crown also contends that the sentence on the charge of possession of a weapon while prohibited by a court order from possessing weapons should have been consecutive to the other sentences. Counsel submits that unless the sentence is made consecutive, disregard of the court order goes unpunished.

[22] We think the trial judge had two options in considering the impact of the breach of the prohibition order. She could have taken the breach into account as

a significant aggravating factor when fixing the appropriate sentence on the possession of a loaded firearm charge, and then imposed a concurrent sentence on the charge alleging a breach of the prohibition order. Alternatively, the trial judge could have ignored the prohibition order in fixing the appropriate sentence on the possession of the weapon charge and then imposed a consecutive sentence on the charge alleging the breach of the prohibition order. Clearly, the trial judge could not do both. Unfortunately, she did neither.

CONCLUSION

[23] Having regard to the circumstances of the offences and the offender, and taking into account the totality of the sentences to be imposed, we would allow the appeal and vary the sentences as follows:

- Possession of a loaded prohibited firearm (count 6) – 4 years;
- Possession of a firearm while under an order made pursuant to a robbery conviction prohibiting him from possessing firearms (count 5) – 6 months consecutive to the sentence imposed on count 6;
- Possession of a handgun without a licence (count 4) – 1 year concurrent to the sentence imposed on count 6;
- Carrying a firearm in a careless manner (count 1) – 1 year concurrent to the sentence imposed on count 6;

- Mischief to property under $5,000 (count 2) – 90 days consecutive to the sentences imposed on counts 6 and 5.

[24] In total, the respondent's sentence is varied to 4 years and 9 months. He is, of course, entitled to credit for 367 days pre-sentence custody on a 1:1 basis, leaving a sentence to be served as of the date of sentencing by the trial judge of just under 3 years and 9 months.

RELEASED: "DD" "NOV 14 2012"

"Doherty J.A."
"G.J. Epstein J.A."
"Justice Cavarzan J. (per Doherty J.A.)"