

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Derby, 2015 ONCA 222

DATE: 20150402

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Watt, Lauwers and Hourigan JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jerome Derby

Appellant

Paula Rochman, for the appellant

Michael Fawcett, for the respondent

Heard and released orally: March 13, 2015

On appeal from the sentence imposed on October 11, 2013 by Justice Joseph M. Fragomeni of the Superior Court of Justice, sitting with a jury.

ENDORSEMENT

[1] The appellant, Jerome Derby, was tried by judge and jury on a charge of second degree murder. He was convicted of manslaughter and sentenced to eight years in custody, less credit for time served on a 1:1 basis.

[2] The facts underlying the conviction are as follows. The appellant attended at the hotel room of a prostitute. The woman he was meeting identified him as

the person possibly responsible for robbing other prostitutes at gunpoint. She called her pimp, Donald Grant, and he attended at the scene. A fight ensued between the appellant and Mr. Grant, which ended with the appellant fatally shooting Mr. Grant in the chest.

[3] On this sentence appeal, the appellant raises two grounds of appeal: (i) he should have received enhanced pre-trial custody credit on a 1.5 to 1 basis; and (ii) the sentence was unfit given the sentencing judge's findings of fact.

[4] The pre-trial custody ground of appeal is conceded by the Crown. I note that the sentencing judge did not have the benefit of the Supreme Court of Canada's decision in *R. v. Summers* [2014] S.C.J. No 26 at the time of sentencing. Calculating pre-trial custody on a 1.5 to 1 basis increases pre-trial custody by 13 months to a total of 39 months.

[5] On the issue of the fitness of sentence, the appellant submits that the sentencing judge failed to give sufficient weight to the fact that, although he fired the gun, he did not bring the gun to the hotel and only momentarily wrestled the weapon from Mr. Grant. He argues that this fact attenuates the aggravating features of the offence. In these circumstances, the appellant submits, a fit sentence should have been five years' incarceration less pre-trial custody.

[6] We would not give effect to this ground of appeal.

[7] The Crown sought a sentence in the range of 12 years' incarceration, less pre-trial custody credit. The defence sought a sentence of 4 years' incarceration, less pre-trial custody credit.

[8] The issue of who brought the gun to the hotel was an important factual determination on sentencing. The Crown sought to rely on the appellant's bringing the gun to the hotel as an aggravating factor.

[9] In very thorough and careful reasons for sentence, the sentencing judge found that the appellant did not bring the gun to the hotel. Rather, he concluded that Mr. Grant brought the gun to the hotel as part of a plan to ambush the appellant. He explicitly rejected the Crown's much higher position on sentence because he found that: "the aggravating features that the Crown urged the Court to find, namely that Mr. Derby attended at the hotel with a loaded gun to commit a robbery, are absent."

[10] In our view, therefore, in fashioning an appropriate sentence, the sentencing judge took into account the fact that the appellant did not bring the gun to the hotel room.

[11] With respect to the fitness of the sentence generally, we note that the custodial sentence imposed was mid-way between the positions of the parties. The sentence also accords with sentences imposed in comparable manslaughter cases. In the circumstances of this case, including aggravating factors such as

the appellant's criminal record, the fact that he was on probation at the time of the shooting, and the fact that the shooting took place in a public place, we are of the view that the sentence imposed is fit subject to an adjustment in the credit for time spent in pre-sentence custody.

[12] Accordingly, leave to appeal sentence is granted and the sentence is varied to increase the amount of credit for pre-trial custody to a total of 39 months. The appeal is otherwise dismissed.

"David Watt J.A."

"P. Lauwers J.A."

"C.W. Hourigan J.A."