COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McKenzie, 2015 ONCA 917
DATE: 20151224
DOCKET: C57266

Juriansz, Watt and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

George McKenzie

Appellant

James Carlisle, for the appellant

Matthew Asma, for the respondent

Heard: December 16, 2015

On appeal from the conviction entered on January 25, 2010 and the sentence imposed on April 17, 2012 by Justice Elizabeth M. Stewart of the Superior Court of Justice, sitting with a jury.

ENDORSEMENT

[1] On January 25, 2010, the appellant was found guilty of attempted murder, robbery and possession of a weapon dangerous to the public peace. In her sentencing decision dated April 17, 2012, Stewart J. found the appellant to be a dangerous offender and imposed an indeterminate sentence of imprisonment.

[2] The appellant has abandoned his appeal of the convictions. He appeals only the dangerous offender designation. His counsel asks that the matter be remitted to the sentencing judge to reconsider, on a different weighing of the evidence, whether he should be designated a long term offender with a determinate sentence of 12 years less credit for the time already served and supervision for 10 years in the community.

[3] The appellant concedes that the statutory requirements to declare him a dangerous offender have been met. The only issue he raises is whether the trial judge's finding that there was no reasonable possibility of eventual control of the risk posed by the appellant was unreasonable.

[4] The appellant is 66 years old. His lengthy serious criminal record started in 1966 when he was 18 years old. His 27 prior convictions include 13 for robbery and 5 for weapons offences. He has spent some 35 of the previous 40 years in the penitentiary and has demonstrated a pattern of violation of conditional releases.

[5] In committing the index offence on October 27, 2007, the appellant showed a total disregard for the life of his victim. While attempting to rob the victim, the appellant stabbed him several times while taunting him, punctured his heart, and left him bleeding on the floor of a washroom of a bar. But for quick

medical intervention and good fortune, the appellant would have faced a murder charge. He had been released from prison in August 2007.

[6] The appellant is addicted to alcohol, cocaine and heroin, and his criminality is strongly associated with his drug use. Both Crown and defence experts agreed that when not affected by drugs, he is a low risk to reoffend, but when using drugs he is a serious danger to the public.

[7] The trial judge, proceeding under the version of s. 753 of the *Criminal Code* in force prior to the amendment in 2008, concluded that the prospects of the appellant being able to overcome his lifelong addiction to drugs and alcohol and the life of violent crime associated with his drug use were so slim that they could not be said to amount to a reasonable possibility of control in the community. The sentencing judge accepted the evidence of the Crown's expert that the appellant had had the benefit of every conceivable treatment program, and had completed many successfully, but that every time he was released into the community he committed further violent offences, usually very quickly.

[8] Both Crown and defence experts were clear that the appellant, even after successful completion of a treatment program, required close supervision to manage the risk he posed to the public. The sentencing judge found that the level of supervision he would be subject to as a long term offender was inadequate to manage the risk.

[9] On appeal, the appellant's principal submission is that in reaching this conclusion, the sentencing judge did not attach sufficient weight to the availability of a treatment program aimed specifically at aboriginals. The appellant discovered he has some aboriginal ancestry after he was arrested for the predicate offences. Counsel submits that the appellant has not had the benefit of such a program, and his participation in such a program could reasonably reduce any danger he posed to acceptable levels within the community during the ten years he would be under supervision as a long term offender. Close supervision during the term of the long term offender order is an indispensable element of the scenario counsel puts forward.

[10] The difficulty is that at the end of a long term supervision order, the appellant would no longer be subject to any supervision. Counsel suggests that by the end of the order the appellant would be "burned out". However, the only evidence in the record was that the appellant has demonstrated no signs of burnout.

[11] To succeed on the appeal, the appellant must persuade us that the trial judge was required to conclude that there was reasonable possibility of eventual control of the risk posed in the community. However, on the record, the trial judge could reasonably conclude the appellant had failed to establish he would not pose a risk to the community when he would no longer be subject to any supervision at the end of the long term offender order.

[12] We note that the appellant is able to participate in a treatment program specifically aimed at aboriginals while in prison, and that successful completion of such a program might be considered to support a future parole application.

[13] The appeal of sentence is dismissed. The appeal of the underlying convictions is dismissed as abandoned.

"R.G. Juriansz J.A."
"David Watt J.A."
"L.B. Roberts J.A."