COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Plante, 2018 ONCA 251
DATE: 20180315
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Pardu, Benotto and Nordheimer JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

John Robert Plante

Appellant

Lindsay Daviau, duty counsel for the appellant

Grace Choi, for the respondent

Heard: March 6, 2018

On appeal from the sentence imposed on August 1, 2017 by Regional Senior Justice Michelle Fuerst of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant fled from police at high speed. He pleaded guilty to one count of flight from police and another count of driving while disqualified. The sentencing judge concluded that a two year sentence less credit on a one for one basis for presentence custody was appropriate. The appellant submits that the sentencing judge erred in failing to credit his pretrial custody of 283 days on an enhanced 1.5:1 ratio (424.5 days) against the sentence imposed.

[2] The sentencing judge refused this enhanced credit, deducting only the actual pretrial custody served:

> I have considered the defence request that Mr. Plante receive enhanced credit for his presentence in custody. On five previous occasions Mr. Plante was a statutory release violator. I conclude that he is not a candidate for parole or early release. I have not been provided with information about overcrowding at the detention centre or other conditions that might have made Mr. Plante's presentence detention more onerous. The defence has not met its onus to demonstrate that enhanced credit should be awarded for the presentence in custody.

[3] The appellant has a lengthy criminal record and has been sentenced to federal penitentiary terms on multiple occasions. While his record indicates that he has violated the terms of his statutory release for these sentences, there was no evidence of the nature of those violations, which could have amounted to anything from being out past a curfew, consumption of alcohol, or serious additional criminal activity. Federal corrections authorities may revoke statutory release given to an offender serving time in a penitentiary for a breach or apprehended breach of a condition of his release. Section 135(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, provides:

> **135 (1)** A member of the Board or a person, designated by name or by position, by the Chairperson of the Board or by the Commissioner, when an offender breaches a condition of parole or statutory release or when the member or person is satisfied that it is necessary and reasonable to suspend the parole or statutory release in order to prevent a breach of any condition thereof or to protect society, may, by warrant,

> **(a)** suspend the parole or statutory release;
>
> **(b)** authorize the apprehension of the offender; and
>
> **(c)** authorize the recommitment of the offender to custody until the suspension is cancelled, the parole or statutory release is terminated or revoked or the sentence of the offender has expired according to law.

[4] The sentencing judge imposed a sentence of less than two years, meaning that it would be served in a provincial institution, and the provincial regime governing parole and early release (or earned remission) would apply. As noted in *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 24, "[p]rovincial inmates are entitled to 'earned remission', absent bad conduct, credited at 15 days *per* month as calculated under the Federal *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20, s. 6" (incorporated by reference to Ontario reformatories by ss. 28 and 28.1 of the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22) and further, at para. 25, "[i]n practice, the 'vast majority of those serving reformatory sentences are released on 'remission'…at approximately the two-thirds point in their sentence'" (citation omitted).

[5] Section 32(2)(4) of R.R.O. 1990, Reg. 778, the general regulation under the *Ministry of Correctional Services Act*, provides that where a provincial inmate has committed a misconduct of a serious nature, the Superintendent may impose "forfeiture of a portion or all of the remission that stands to the inmate's credit but no such forfeiture shall exceed 15 days without the Minister's approval." The

definition of misconduct generally encompasses misbehavior within the institution (s. 29(1)).

[6] This earned remission is different from parole, which s. 41 of the regulation provides may be granted after one third of a sentence has been served. In deciding whether an inmate is suitable to be granted parole, the Ontario Parole Board may consider any information it considers useful and relevant regarding the character, abilities and prospects of the inmate, including particulars of the trial, conviction and sentence, criminal record, background and living conditions, rehabilitative progress in the institution and medical information (s. 44).

[7] A prisoner who is sentenced to 18 months jail, but does not obtain parole is released after 12 months because of earned remission, unless institutional misconduct results in forfeiture of remission. Twelve months of presentence custody is equivalent to an 18 month sentence in these circumstances. According to *Summers*, this differential alone justifies enhanced credit at a ratio of 1.5:1.

[8] As pointed out in *Summers*, at para. 27, enhanced credit at 1.5:1 “ensures that an offender who is released after serving two thirds of his sentence serves the same amount of time in jail, whether or not he is subject to pre-sentence detention” and further, at para. 71, “the loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5:1, even if the conditions of detention are not particularly harsh, and parole is unlikely. Of course, a lower rate

may be appropriate when detention was a result of the offender's bad conduct, or the offender is likely to obtain neither early release nor parole" (emphasis added).

[9] We agree that the appellant was, because of his criminal record, unlikely to obtain parole. The issue is whether he would be eligible for earned remission, which would result in his release after serving two thirds of his sentence.

[10] The sentencing judge was wrong to equate re-committal for violation of the terms of statutory release under the federal system with misconduct while serving a sentence within a provincial institution which would lead to a loss of earned remission under the provincial system. There was no evidence here of institutional misconduct which would likely lead to a prolongation of the appellant's incarceration past the two thirds mark of his sentence. This was an error in principle that had an impact on the sentence (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44). The sentencing judge did not have the benefit of the arguments made on appeal.

[11] As indicated in *Summers*, at para. 79: "

> Generally speaking, the fact that pre-sentence detention has occurred will usually be sufficient to give rise to an inference that the offender has lost eligibility for parole or early release, justifying enhanced credit. Of course, the Crown may respond by challenging such an inference. There will be particularly dangerous offenders who have committed certain serious offences for whom early release and parole are simply not available. Similarly, if the accused's conduct in jail suggests that he is unlikely

> to be granted early release or parole, the judge may be justified in withholding enhanced credit.

[12] We would accordingly reduce the global sentence of one year and 82 days by a further 142 days, resulting in a total sentence of 305 days, which we allocate 200 days to the flight charge on count 2, and 105 days consecutive to the driving while disqualified charge on count 3. In all other respects the decision of the sentencing judge is confirmed.

"G. Pardu J.A."
M.L. Benotto J.A."
"I.V.B. Nordheimer J.A."