

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lawrence, 2018 ONCA 676

DATE: 20180803

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Benotto, Trotter and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Leston Everest Lawrence

Appellant

Leston Everest Lawrence, acting in person

Erin Dann, appearing as duty counsel

Deborah Calderwood, for the respondent

Heard: July 11, 2018

On appeal from the sentence imposed by Justice Peter K. Doody of the Ontario Court of Justice on February 2, 2017, with reasons reported at 2017 ONCJ 66.

REASONS FOR DECISION

OVERVIEW

[1] After a judge alone trial, the appellant was convicted of several charges relating to the theft and money laundering of gold from the Canadian Mint, where he was employed.

[2] The sentencing judge conditionally stayed some of the charges to avoid double punishment. He ultimately sentenced the appellant to two years and six months in custody on the remaining charges for which the appellant was convicted, namely: conveying gold out of the Canadian Mint contrary to *Criminal Code*, s. 459(c); laundering proceeds of crime contrary to *Criminal Code*, s. 462.31(1)(a); and breach of trust by a public official contrary to *Criminal Code*, s. 122.

[3] The sentencing judge made a restitution order pursuant to *Criminal Code*, s. 758 in the amount of \$190,000. He imposed a fine in lieu of forfeiture in the same amount pursuant to *Criminal Code*, s. 462.37(3). Finally, he ordered that the appellant serve a further consecutive term of two years and six months in prison if he does not pay the fine in lieu of forfeiture within three years of the expiration of any term of imprisonment.

[4] The appellant initially appealed his conviction but has now abandoned that appeal. He has also chosen to limit his request for leave to appeal sentence to the quantum of the restitution order and the quantum of the fine in lieu of forfeiture order. If his challenge to the quantum of the fine in lieu of forfeiture succeeds, the appellant also seeks to have the period he must serve in lieu of payment shortened. Finally, he asks this court to extend his time to pay the fine in lieu of forfeiture.

THE RESTITUTION ORDER

[5] The appellant was found to have stolen and sold “gold pucks” produced by the Canadian Mint. At the time of the crime, the gold pucks had a value of \$165,451.14.

The value of gold increased pending the completion of the appellant's trial. At the time of sentencing the pucks had a market value of modestly more than \$190,000.

[6] In relevant part, s. 738(1)(a) requires a sentencing judge to consider making a restitution order in "an amount not exceeding the replacement value of the property as of the date the order is imposed". The sentencing judge relied on *Criminal Code*, s. 738(1) to impose a restitution order that would represent the market value of \$190,000.

[7] With the assistance of duty counsel, the appellant submits that the sentencing judge erred when quantifying the restitution order. Duty counsel's main submission is that the replacement value and market value differ in this case. Since the Canadian Mint buys gold products in bulk at a discount, the replacement value is less than \$190,000, and so the amount of the restitution order should be reduced.

[8] We would not give effect to this argument, which was made for the first time on appeal. The stolen gold pucks had been refined by the Canadian Mint and were more than 99% pure. That is what required replacement. The replacement value of the stolen products was the market value.

[9] Duty counsel further submits that the sentencing judge erred in the exercise of his discretion to award replacement value restitution by not applying the principle of restraint in establishing the quantum of the restitution order, by failing to recognize that the Canadian Mint is not a particularly vulnerable victim, and by not properly

considering the appellant's ability to pay the amount of restitution ordered. We would not give effect to these arguments either.

[10] Restitution orders are made to make the victim whole. The discretion of a sentencing judge to provide replacement value restitution to accomplish that objective does not offend the principles of restraint.

[11] In our view, there is no merit in the vulnerability argument. It was recognized in *R. v. Castro*, 2010 ONCA 718, 102 O.R. (3d) 609, that large institutions may be less vulnerable than others, and that this can affect whether to make a restitution order. There is no requirement, however, that restitution orders must be lower for institutional victims. The sentencing judge in this case was alive to the nature of the breach of trust that the appellant's acts entailed and he properly adjudged that breach of trust to be serious.

[12] On the facts as found at trial, it was open to the sentencing judge to quantify restitution based on replacement value.

[13] Nor did the sentencing judge fail to consider the appellant's ability to pay the restitution he ordered. During the sentencing hearing, all parties proceeded on the basis of the appellant's counsel's assurance that the appellant could pay restitution. In any event, where, as here, a breach of trust is particularly egregious, a restitution order may be imposed even where repayment does not appear to be likely: *R. v. Wa*, 2015 ONCA 117, at para. 12.

THE FINE IN LIEU OF FORFEITURE

[14] In our view, the sentencing judge erred by using the market value of the gold as the amount of the fine. The purpose of a fine in lieu of forfeiture is to deprive an offender of the proceeds of crime. *Criminal Code*, s. 462.37(1) provides for the forfeiture of property that is the proceeds of crime. Pursuant to *Criminal Code*, s. 462.37(3), the fine in lieu of forfeiture is to be the value of the proceeds of crime. The value of the proceeds of crime is not necessarily the value of the property: *R. v. Lavigne*, 2006 SCC 10, [2006] 1 S.C.R. 392, at paras. 10 and 16. The fine is dealt with separately from, and in addition to, the punishment for committing a crime: see *Lavigne*, at para. 26.

[15] The sentencing judge found that the proceeds of crime was the money the appellant received in exchange for the gold. At para. 56 he said: “The pucks were sold, producing cash which was proceeds of crime.” Based on this finding, the sentencing judge was bound to set the amount of the fine at \$130,206.19.

TIME OF INCARCERATION IN DEFAULT OF PAYMENT

[16] Notwithstanding that we are lowering the fine in lieu of forfeiture, we do not disturb the time of two and one-half years in custody that the appellant will have to serve if that fine is not paid. As indicated, the sentencing hearing proceeded on the representation that the appellant could pay restitution. Yet he has not paid any restitution to date.

[17] The appellant admitted that he has yet to sell his house because he prefers to wait for it to increase in value. He offers no repayment plan. We see no basis for lowering the default sentence should the appellant choose not to pay the fine.

THE REQUEST FOR EXTENSION OF TIME TO PAY

[18] For the same reasons, we do not extend the time that the appellant will have to pay the fine in lieu of forfeiture of three years as ordered by the sentencing judge.

CONCLUSION

[19] Leave to appeal is granted with respect to the restitution order and the fine. The appeal as to the restitution order is dismissed. The appeal as to the fine in lieu of forfeiture is allowed, and the fine is reduced to \$130,206.19.

[20] The conviction appeal is dismissed as abandoned.

“M.L. Benotto J.A.”

“G.T. Trotter J.A.”

“David M. Paciocco J.A.”