COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lariviere, 2020 ONCA 324
DATE: 20200526
DOCKET: C68298

MacPherson, Pardu and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Brian Lariviere

Appellant

Brian Lariviere, acting in person

Gerald Chan, acting as duty counsel

Andrew Hotke, for the respondent

Heard: May 20, 2020 by Teleconference

On appeal from the sentence entered on October 4, 2019 by Justice David J. Nadeau of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant entered pleas of guilty to four criminal offences: aggravated assault (*Criminal Code*, R.S.C. 1985, c. C-46, s. 268); use of an imitation firearm in the commission of an indictable offence (s. 85(2)(a)); breach of a recognizance (s. 145(3)); and possession of a narcotic (fentanyl) (*Controlled Drugs and*

Substances Act, S.C. 2006, c. 19, s. 4(1)). After receiving credit for pre-sentence custody and stringent bail conditions, he was sentenced to 12 months' imprisonment. He appeals his sentence.

The Offences

[2] The appellant's offending happened in two stages.

[3] On April 27, 2017, the appellant participated in a home invasion robbery with three other men. They went to the house where the victim's apartment was located. At 3:55 a.m., while one of them stood watch outside, the appellant and two others, disguised with hoodies and balaclavas, and armed with knives and an imitation handgun, forced their way into the victim's apartment. They demanded that he give them drugs. When the victim resisted, he was seriously assaulted and threatened with death. The firearm was pointed at him. The victim suffered serious injuries, including orbital fractures and the permanent loss of his sight in one eye. The appellant acknowledged his participation in the offences, but denied having physical possession of the imitation firearm or directly causing the victim's injuries.

[4] Shortly after the attack, the appellant and his co-accused were apprehended. The appellant was eventually released on bail. He entered a plea of guilty to these offences and remained on bail for a considerable period of time while a *Gladue* Report was prepared.

[5] On February 22, 2019, the appellant was found unconscious in the washroom of a grocery store. He had overdosed on fentanyl. He was in possession of two more grams of the drug, in violation of his bail. This resulted in the further charges, to which he also pled guilty.

The Circumstances of the Appellant

[6] At the time of sentencing, the appellant was 25 years old. He has a number of convictions for property offences, including break and enter (x 2), as well as a prior conviction for possession of a controlled drug (which was not fentanyl). The appellant is a member of the Dokis First Nation. His circumstances were detailed in a thorough *Gladue* Report prepared for the trial judge.

The Sentencing Proceedings

[7] The appellant served 295 days of pre-sentence custody, which was credited on a 1.5:1 basis, amounting to a total credit of 14 ½ months.

[8] It was agreed between defence counsel and the Federal Crown that the appellant should receive six months' imprisonment on the drug and breach of recognizance offences, to be served concurrently to each other, and concurrent to the robbery and imitation firearm offences.

[9] The appropriate sentence for the offences related to the home invasion was contentious. The Provincial Crown submitted that an appropriate sentence would

be 30 months' imprisonment, less pre-sentence custody (i.e., an additional 15 ½ months).

[10] Defence counsel submitted that, after pre-sentence custody is applied and credit for stringent bail terms taken into account, the appellant should receive a suspended sentence.

[11] The trial judge agreed with the Crown's submission that a sentence of 30 months' imprisonment was required. He gave the appellant credit for 14 ½ months of pre-sentence custody. Applying *R. v. Downes* (2006), 79 O.R. (3d) 321 (C.A.), the trial judge credited the appellant with another 3 ½ months for stringent bail conditions. The total credit was 18 months, leaving 12 months left to serve. The trial judge imposed 6 months' imprisonment on the drug and breach offences, concurrent. He also ordered probation and made other ancillary orders.

Discussion

[12] The appellant submits that the sentence should be reduced as a result of the impact of the COVID-19 pandemic on the conditions of his detention. He contends that a slightly reduced sentence would remain a fit one. The Crown resists any reduction, arguing that the appellant is close to his statutory release date and that prison/parole authorities should be left to determine when it is appropriate to release the appellant back into the community.

[13] We see no reason to intervene. An effective sentence of three years imprisonment was appropriate. The trial judge was well aware of the seriousness of the offence. He referred to authority from this court on the appropriate length of sentences for home invasion robberies: see, for example, *R. v. Jacko*, 2010 ONCA 452, 101 O.R. (3d) 1. He applied *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 to the appellant's circumstances, recognizing the impact of the intergenerational trauma experienced by his family and how it has contributed to his drug addiction.

[14] There were mitigating factors in this case. The appellant entered pleas of guilty on both sets of charges. He expressed some remorse for his role in the terrible violence inflicted on the victim. He spent his time awaiting sentencing constructively, receiving treatment for his addiction, and finishing high school. However, the trial judge found that these considerations were outweighed by the serious injuries suffered by the victim.

[15] The appellant does not in any way suggest that the original sentence imposed was unfit.

[16] The COVID-19 pandemic does not impel us to intervene and disturb a sentence that is fit: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089. We adopt the approach from *R. v. Morgan*, 2020 ONCA 279, in which this court recognized the impact of this virus on our society, at para. 8:

> We do, however, believe that it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission.

[17] However, there is nothing about the particular circumstances of the appellant's incarceration, nor any indication of a unique or personal vulnerability, that would justify shortening the fit sentence that was imposed.

[18] We were advised that the appellant was denied parole on February 20, 2020. However, his statutory release date is fast approaching, on June 8, 2020 and he will likely be out of the prison environment by then.

Disposition

[19] Leave to appeal sentence is granted, but the appeal is dismissed.

"J.C. MacPherson J.A."
"Gary Trotter J.A."
"G. Pardu J.A."