COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Covil, 2024 ONCA 292
DATE: 20240422
DOCKET: COA-23-CR-0742

Benotto, Coroza and Dawe JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Matthew Covil

Appellant

Matthew Covil, acting in person

Ian Kasper, appearing as duty counsel

Erica Whitford, for the respondent

Heard: April 10, 2024

On appeal from the sentence imposed on May 11, 2023 by Justice Helen A. Rady of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant pleaded guilty to charges of breaching a s. 161 *Criminal Code* prohibition order, mischief, and obstructing a peace officer. He was convicted after trial of a further charge of distributing child pornography.

[2] The Crown sought a global sentence of between five and seven years of imprisonment, while the defence sought a sentence in the four to five year range. Counsel were agreed that the appellant was entitled to 43.5 months *Summers* credit for his time in pre-sentence custody. They also agreed that he should receive some further *Duncan* credit for his time spent under particularly harsh prison conditions but disagreed on the amount. The Crown submitted that a reduction of between 3 to 6 months would be appropriate, while the defence proposed a 14.5 month reduction.

[3] The sentencing judge imposed an effective global sentence of 6 years of imprisonment (72 months), which she reduced to 24.5 months after giving the appellant the agreed-on 43.5 months of *Summers* credit, plus a further 4 months of *Duncan* credit.

[4] The appellant appeals against his sentence only.

[5] On appeal, Mr. Kasper, acting as duty counsel, advanced two arguments on the appellant's behalf. His first argument is that the sentencing judge's brief reasons do not adequately explain her reasons for imposing an effective six year global sentence.

[6] The sentencing judge's oral reasons for sentence are very brief: less than five full pages transcribed. This does not automatically mean that her reasons were insufficient. As Laskin J.A. observed in *R. v. S.J.D.* (2004), 186 C.C.C. (3d) 304 (Ont. C.A.), at para. 28, quoting from Doherty J.A.'s reasons in *R. v. Lagace* (2003), 181 C.C.C. (3d) 12 (Ont. C.A.), at para. 32:

> "[T]he adequacy of reasons is not measured by the inch or the pound", but instead by whether the reasons explain the basis for the decision and allow meaningful appellate review of it.

[7] However, in this case we conclude that the sentencing judge's reasons fell short of achieving this objective. In particular, they do not meaningfully explain why a sentence of six years of imprisonment was necessary to achieve the applicable sentencing objectives, having regard to the sentencing authorities relied on by the parties.

[8] The defence placed particular reliance on *R. v. McCaw*, 2023 ONCA 8, 165 O.R. (3d) 179, which also involved a repeat offender. This court allowed a Crown sentence appeal, set aside the conditional sentence imposed at trial, and substituted an effective three year sentence of imprisonment. The sentencing judge in the case at bar adverted to the defence's reliance on *McCaw,* but then stated: "I note that Mr. McCaw pleaded guilty to possession in that case". These were indeed both distinguishing factors, in that the appellant had pleaded not guilty, and was convicted at trial of distribution rather than merely of possession.

However, these differences did not automatically justify giving the appellant a sentence twice as long as that imposed in *McCaw*. This is particularly so since the accused in *McCaw* was sentenced on the basis that he had "used email accounts to upload [child pornographic] videos", conduct that was similar to the appellant's proven acts of using his cell phone to transmit several child pornographic videos to other people.

[9] The sentencing judge also treated the appellant's breach of a s. 161 *Criminal Code* forbidding him from using the internet as "obviously of great concern to the court" and "a seriously aggravating factor". This is a further factor that distinguishes the case at bar from *McCaw,* since while the accused in that case had two previous child pornography convictions, he does not seem to have been subject to a s. 161 order when he committed the offences for which he was being sentenced. However, this was not a factor that distinguished the case at bar from the primary case relied on by the Crown at trial, *R. v. Parent,* [2019] O.J. No. 6752 (O.C.J.), where the accused was also convicted of committing a child pornography offence while subject to a s. 161 order, and received a global 5 year sentence. Like the appellant, the accused in *Parent* also had prior convictions for physical sexual offences against children.

[10] The sentencing judge did not refer to *Parent* in her reasons. However, Crown counsel at trial had distinguished *Parent* on the basis that the accused in that case had entered an early guilty plea. Crown counsel on appeal, Ms. Whitford,

distinguishes *Parent* further on the basis that the accused in that case had pleaded guilty to possession of child pornography rather than distribution.

[11] While we agree that these are both distinguishing features, we see their impact as limited. Although the accused in *Parent* entered a guilty plea to a charge of possessing rather than distributing child pornography, he was sentenced on the basis that he had uploaded multiple illegal image files on Skype. Moreover, while his early guilty plea was a mitigating factor that the appellant cannot claim, there were other aggravating factors that are not present in the appellant's case.

[12] For instance, the accused in *Parent* was found to have a collection of more than 1,000 unique child pornographic image and video files. In contrast, the police found one child pornographic image file and four video files on the appellant's cell phone. The sentencing judge noted that although in the case at bar "the size of the pornography collection was not large", she added that "nevertheless the content was vile – as these images tend to be – and it was, in fact, distributed". While we do not doubt that both of these things are true, the accused in *Parent* was found to have distributed a much larger number of child pornographic image files that are unlikely to have been any less vile.

[13] In our view, the sentencing judge's reasons did not adequately explain to the appellant why an effective six year sentence was justified in his case. While Ms. Whitford articulated several bases on which the sentencing judge could

perhaps have justified imposing a longer sentence on the appellant than was imposed on the offenders in *McCaw* and *Parent*, the problem is that these submissions are not moored to anything the sentencing judge actually said in her reasons. The appellant should not have to guess why he received the sentence that he did.

[14] In view of our conclusion that the sentencing judge's reasons do not allow for meaningful appellate review, it becomes our task to impose a fit sentence on the appellant, without deferring to the sentencing judge's conclusions. This makes it unnecessary for us to address Mr. Kasper's second argument that the sentencing judge made a further error by giving the appellant insufficient *Duncan* credit for his time spent in pre-sentence custody under particularly harsh conditions.

[15] In our view, taking into account all of the aggravating and mitigating factors, including the time the appellant spent under harsh pre-sentence custody conditions, a fit effective sentence would be one of five years imprisonment, or 60 months. This can be achieved by adjusting the sentence imposed on the distribution of child pornography charge, while leaving the shorter concurrent sentences on the other charges unchanged.

[16] Since it is common ground that the appellant is entitled to 43.5 months of *Summers* credit, this results in a net sentence of 16.5 months going forward, calculated from the date of sentencing (May 11, 2023). Since the appellant has

now served 11 months of the sentence imposed, his remaining sentence from today's date is 5.5 months.

[17] Leave to appeal sentence is granted and the sentence appeal is allowed in accordance with these reasons.

"M.L. Benotto J.A."
"S. Coroza J.A."
"J. Dawe J.A."