COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McCool, 2024 ONCA 457
DATE: 20240610
DOCKET: COA-23-CR-1356

Fairburn A.C.J.O., Roberts and Trotter JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Angel Rae-Ann McCool

Respondent

Étienne Lacombe, for the appellant

Greg Dorsz, for the respondent

Heard: May 16, 2024

On appeal from the sentence imposed by Justice Matthew Stanley of the Ontario Court of Justice on November 28, 2023.

Fairburn A.C.J.O.:

A. OVERVIEW

[1] At 1:00 a.m. on July 2, 2021, the respondent, a suspended driver at the time, led the police on a dangerous, high-speed chase that ended only when she drove her vehicle into a ditch. She was convicted of two offences under the *Criminal Code*, R.S.C. 1985, c. C-46: dangerous operation of a motor vehicle and flight from police. She was also convicted of two offences under the *Highway Traffic Act*, R.S.O. 1990, c. H.8: driving while licence suspended and stunt driving. She received a global sentence of 6 months' custody, to be followed by 18-months' probation.

[2] This is a Crown appeal from the sentence imposed on the *Criminal Code* convictions. The Crown maintains that the sentencing reasons reflect errors in principle and that the sentence was demonstrably unfit. I agree.

B. BACKGROUND

(1) The command, the escape, the stop, the escape, the stop

[3] Cst. Moore was working alone in small-town Ontario on the night in question. He was on patrol in his police cruiser when he observed a car parked outside of a residential address that was known to the police. The car's licence plate was registered to the respondent, who the officer was "very familiar with", in part because he had arrested her within the past year for driving while suspended.

[4] Concerned that she might try to flee, Cst. Moore used the police radio to alert another officer to what was happening. Cst. Wardell responded and proceeded to the area.

[5] Cst. Moore waited in his police vehicle until he saw the respondent leave the residence, go to her vehicle, get inside, start the car, and do an immediate U-turn, resulting in her car facing Cst. Moore's police vehicle. He activated the emergency lights on his marked police vehicle and pulled the respondent over.

[6] Cst. Moore, who was dressed in uniform, then went to the respondent's driver's side window. While standing next to the open window, he said to the respondent: "Angel, you are not supposed to be driving." Almost immediately, he saw her place the vehicle into reverse, and her car started moving. At that point, Cst. Moore issued several commands, at increasing volume, for the respondent to stop reversing the vehicle and place it into park. She ignored those commands.

[7] Cst. Moore testified about what happened next. He attempted to step back from the respondent's vehicle as she continued to reverse away. Before he removed his arm, she suddenly switched her car from reverse into drive. At this point, Cst. Moore attempted to "shove off" the respondent's car to protect himself from getting run over. Unfortunately, he somehow got "tangled" up in something through the driver's side window. Although he did not know what he had become entangled in – perhaps the seatbelt, or perhaps the respondent's body – he

described having felt trapped. He had to run beside the vehicle for what he estimated to be about 15 to 20 metres before freeing himself and falling to the ground in what he described as a “baseball slide”.

[8] Cst. Moore said that the respondent “gunned” her car back, having “put the pedal to the floor”. At no point did she demonstrate any effort to slow down, despite Cst. Moore’s continuous screams for her to stop. As he put it:

> [T]o be honest with you it is a blur, I do remember just straight screaming basically at her to stop the car…
>
> It was… like the vehicle was just picking up speed. I knew that there was – I wasn't talking her out of this decision, it was, it was game over, it was me versus getting away from the car, me versus her unfortunately. Yeah, there was, it was she gunned it for a lack of better words, she put the pedal to the floor, and it was her attempt to get away.

[9] Cst. Moore testified about how, in that moment he thought it was “game over”. Thankfully, he was not seriously injured, experiencing only deep bruising.

[10] Cst. Wardell, the backup officer who responded to the radio call for help, arrived on scene as the events were unfolding. Although Cst. Wardell and Cst. Moore described the scenario somewhat differently, both testified to the fact that Cst. Moore was, in essence, caught in the car as it was reversing away. Cst. Wardell said that it “looked like [Cst. Moore’s] arm was almost like kind of stuck in the open driver’s side window … almost like he was trying to push off or

something". Cst. Wardell said that his colleague was "dragged" for what was about 100 feet and then "went to the ground."

[11] After Cst. Wardell confirmed that Cst. Moore was not seriously injured, he pursued the respondent. He was also dressed in police uniform and driving a marked police vehicle. Cst. Wardell radioed for assistance, following which two other uniformed officers, who were on duty in a marked police cruiser, responded: Cst. Sherrer and Cst. Ernikoglou.

[12] The respondent then led Officers Wardell, Sherrer, and Ernikoglou on a chase for over 15 kilometers. She travelled largely on country roads that were paved, although she also took one gravel road. The paved roads had an 80 km/hour speed limit, but she travelled at speeds of up to 140 km/hour. The pursuit lasted more than 10 minutes.

[13] The respondent was brought to a stop using a synchronized maneuver called a "rolling block". In a rolling block, one police cruiser moves in front of the suspect vehicle, while another stays behind. The officers then start to brake, forcing the fleeing vehicle to slow down until it comes to a standstill.

[14] In this case, the respondent attempted to evade the rolling block, by driving back and forth into the oncoming traffic lane. Eventually, she was brought to a stop, although not before hitting the bumper of the police car ahead of her.

[15] The three officers got out of their vehicles with their firearms drawn and instructed the respondent to get out of her car. Instead of complying, she again set her car in motion, managing to reverse away at a high speed. Soon after escaping for the second time, she lost control of her car and it slid into a ditch. The police again pursued. By this point, Cst. Moore had caught up with his colleagues.

[16] The police again approached the respondent's car with their firearms drawn and instructed her to show her hands and get out of her car. She refused. At one point she even lit a cigarette and was seen digging into her purse. The police stayed calm. Eventually, they had to physically remove her from her vehicle. Even then, she continued to resist arrest. Finally, she was handcuffed and the incident came to an end. Through sheer luck, no one was seriously injured as a result of the respondent's actions.

(2) The reasons for judgment

[17] This matter proceeded to trial. As was her right, the respondent put the Crown to its burden on everything, including the issue of identity.

[18] The respondent brought an application under the *Canadian Charter of Rights and Freedoms*, seeking a stay of proceedings for allegedly unreasonable police conduct during the arrest. The trial judge dismissed her application. Indeed, he concluded that the police used only what force was "reasonable, proportional and necessary in these circumstances".

[19] Although the respondent was originally charged with three *Criminal Code* counts – dangerous driving, flight from police, and assault with a weapon – the trial judge had a reasonable doubt on the final count.

[20] In his reasons for judgment, the trial judge accepted that in first approaching the respondent's car, Cst. Moore gave the respondent several commands to place her vehicle into park. He also accepted that the respondent intentionally placed her car into reverse and took off, knowing the officer was standing beside her driver's side window. He found that Cst. Moore "somehow had his hand stuck on the car", but that exactly how long he was "entangled with the car" was unclear. The trial judge found that the respondent was aware that Cst. Moore was there, whether or not she knew that the officer was "somehow stuck with his hand inside the car or simply holding onto the vehicle". Even so, the trial judge had a reasonable doubt on the count involving assault with a weapon. He explained his doubt as follows:

> She is clearly trying to get away, and while I accept that Officer Moore somehow had his hand stuck on the car, the lack of detail and cohesion around, among other factors, where the car was precisely, how long this action occurred for, whether it was seconds, 20 meters or more or less, and what the body position of Officer Moore was relative to the car, do not satisfy me beyond a reasonable doubt that Ms. McCool is guilty of assault with a weapon.

[21] At the same time, the trial judge had "no difficulty" finding beyond a reasonable doubt that the respondent had committed the other two offences. As it related to the count involving dangerous driving, the trial judge found as follows:

> With respect to the charge of dangerous driving, while I find that it is unclear how Officer Moore came into contact or was stuck with his hand in the car, I have no difficulty finding that he was somehow attached or beside the car and running alongside the vehicle while Ms. McCool was driving away. As I have already stated, I find that she was trying to escape, and that mode of escape was to drive her car. She was not stopping and was not going to make any attempt to do so. [Emphasis added.]

[22] On this basis alone, the trial judge found that the essential elements of dangerous driving at the initial scene had been established beyond a reasonable doubt.

[23] As for the charge of flight from police, defence counsel acknowledged during closing submissions that if the request for a stay of proceedings failed, then on the evidence a conviction would follow. He also acknowledged the same thing when it came to the offences under the *Highway Traffic Act*. Accordingly, the trial judge spent little time analyzing the essential elements of those offences. They were clearly met on the factual record in this case.

(3) The sentencing proceeding

[24] The Crown asked for a 2.5-year custodial sentence. The defence asked for a 12- to 24-month conditional sentence, or a 90-day intermittent custodial sentence.

[25] The trial judge rejected that a conditional sentence was appropriate in the circumstances, noting the respondent's "continued disregard for both court orders and provincial directions" as reflected in her criminal and driving records. At that point, the respondent had already accumulated eight convictions on her driving record for driving while suspended. She also had a lengthy criminal record, which I will return to later, including convictions for failing to comply with probation orders, failing to attend court, and failing to comply with a recognizance.

[26] Although the trial judge found that deterrence and denunciation were of paramount importance in sentencing the respondent, he also noted that she had experienced life struggles because of her involvement with the Children's Aid Society when she was young. He found that she had genuine rehabilitative potential and, in the end, determined that a 6-month custodial sentence was fit, along with an 18-month probation order and a 5-year driving prohibition.

C. ANALYSIS

(1) Overview

[27] The appellant acknowledges that appellate courts owe great deference to sentences imposed by trial judges, but says that deference should give way here for two reasons: (1) the trial judge's reasons are infected by errors in principle; and (2) the trial judge imposed a demonstrably unfit sentence.

[28] Deference to sentencing judges will give way where a sentence is impacted by an error in principle, a failure to consider a relevant factor, or an erroneous consideration of aggravating or mitigating factors: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 43-4; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 26. A sentence will be found to be demonstrably unfit where it unreasonably departs from the principle of proportionality, a sentencing principle that trains its focus upon the seriousness of the crime and the offender's degree of responsibility: *Lacasse*, at paras. 41, 53; *Friesen*, at para. 26; *Criminal Code*, s. 718.1; *R. v. Parranto*, 2021 SCC 46, 463 D.L.R. (4th) 389, at para. 38. In either case, where deference gives way on appeal, it falls to the appellate court to perform its own sentencing analysis to determine a fit sentence. This analysis requires an application of the sentencing principles to the facts as found by the trial judge, provided that those facts are not themselves infected by error: *Friesen*, at paras. 27-8; *Lacasse,* at para. 43.

(2) Misapprehension of the appellant's criminal record

[29] As I will explain, the trial judge made two errors that had a clear impact on the respondent's sentence: he misunderstood the length of her prior custodial sentences, and he mischaracterized her criminal record as "unrelated".

(a) The appellant's prior custodial sentences

[30] In his reasons for sentence, the trial judge said that the longest period of time in custody the respondent had served was in 2017, when she received a global sentence of four months. However, the trial judge was mistaken. In fact, the respondent had been sentenced on two occasions to terms longer than four months.

[31] The respondent, whose criminal record is long and varied, was sentenced to 18 months in custody on January 16, 2019: 2 months on a fail to attend court, consecutive to the equivalent of a 16-month sentence[1] for possession of a Schedule I substance for the purpose of trafficking. The respondent also received 18 months' probation to follow her custodial term.

[32] In addition, on June 7, 2017, the respondent received a global sentence of 6 months, followed by 12 months' probation. On that occasion, she was given 60 days on top of 120 days presentence custody for fail to comply with a probation

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[1] 11 months in addition to 5 months of presentence custody.

order. She also received the equivalent of a 141-day concurrent sentence on that same date for (1) obstructing a peace officer; (2) identity fraud; (3) possession of property obtained by crime under $5,000 (x4); (4) fail to comply with a recognizance; (5) fail to comply with a probation order; and (6) possession of a Schedule I and a Schedule II substance.

[33] Therefore, contrary to the trial judge's suggestion, the respondent had been previously sentenced to terms longer than four months' custody. Accordingly, rather than sentencing the respondent to her longest term of imprisonment, as the trial judge believed he was doing, he in fact sentenced her to a term of imprisonment that was 12 months shorter than her longest previous sentence.

[34] Although the respondent does not dispute the accuracy of her actual criminal record, she maintains that the trial judge, who had her full criminal record before him, should be presumed to have accurately understood the record. His misidentification of the previous longest term of custody should be seen as nothing more the judge misspeaking or making a typographical error. And, in any event, this small mistake is said to have had no impact on the appropriateness of the sentence.

[35] Respectfully, I disagree.

[36] This was not an instance of the trial judge misspeaking or making a typographical error. The fact that the trial judge appears to have attempted to

impose a longer period of custody than the respondent had ever previously served underscores his misunderstanding, one that clearly impacted the sentence that was imposed.

(b) The appellant's prior record was related

[37] A second error also impacted the respondent's sentence: in rejecting the Crown's position of 2.5 years, the trial judge mischaracterized the respondent's criminal record as being unrelated to the crimes for which she was being sentenced. He stated:

> I am not satisfied that the sentence suggested by the Crown is appropriate. There is no denying that this is a serious offence, however, Ms. McCool does not have a related criminal conviction.

[38] Again, I respectfully disagree. Although the respondent had not previously been convicted of flight from police, she was a repeat offender when it came to convictions rooted in defying authority. Indeed, two of the convictions on her criminal record were for obstruction of the police. Further, as previously reviewed, she had multiple convictions for failures to abide by court orders and directions. To state the obvious, defying police commands in the context of an arrest and, instead, leading them on a wild and extremely dangerous chase is a form of obstructing the police.

(3) The sentence was also demonstrably unfit

[39] In addition, the six-month custodial term in this case was demonstrably unfit, in that it reflects an unreasonable departure from the principle of proportionality – so much so that it serves to damage the credibility of the criminal justice system in the eyes of the public and diminish respect for the rule of law. Having regard to the gravity of the offence, combined with the respondent's degree of moral responsibility, this matter cried out for a penitentiary term.

[40] The gravity of the offence here is obvious on its face. Police perform a fundamental role in protecting and maintaining a civilized, democratic society. Among other things, they are charged with the responsibility of preserving the peace, preventing crimes, and assisting victims of crime: *Police Services Act*, R.S.O. 1990, c. P.15, s. 42. It is difficult to overstate the disorder, not to mention the risk to public safety, that would result from people routinely flouting police direction as the respondent did. Actions like hers place the police and public at grave risk and undermine legal authority. There are legally available mechanisms by which the execution of police authority can be challenged and by which the police can be held accountable. Obstructing the police in the execution of their duties is not one of them.

[41] A six-month custodial term, particularly in light of the respondent's clearly aggravated level of moral responsibility, was demonstrably unfit.

(4) A fit sentence

[42] It is necessary to resentence the respondent.

[43] It remains a mystery how no one was seriously injured by the appellant's attempts to flee the police. The caselaw amply testifies to the grave risk of harm that arises in similar cases of flight from police: see generally *R. v. S.K.*, 2019 ONCA 776, 148 O.R. (3d) 1; *R. v. AM*, 2023 ABKB 563; *R. v. Jiwa*, 2012 ONCA 532, 295 O.A.C. 180. The fact that no one was injured in this case in no way diminishes the gravity of the respondent's conduct or the moral responsibility that she must accept.

[44] The respondent was an eight-time suspended driver without insurance when she got behind the wheel of her car on the night in question. Indeed, she was suspended from driving at the very time she committed this crime. And she had an additional 39 convictions on her driving record.

[45] Despite her suspension, she voluntarily got behind the wheel of her car. Rather than obeying Cst. Moore's directions that she put her vehicle in park, she decided to take off with Cst. Moore entangled in her car. Quite simply, she did not care whether he was in harm's way or not.

[46] Although the trial judge had a reasonable doubt about the count involving assault with a weapon, it does not change the fact that the respondent seriously

endangered Cst. Moore's life. Nor does it change the fact that it was largely the product of chance that he was not more seriously injured than he was.

[47] The respondent's conduct, as detailed above, reflects utter disregard for police authority and the rule of law. Accordingly, it must attract a denunciatory sentence – one that sends a message to others that this conduct simply will not be tolerated.

[48] As for the respondent's moral blameworthiness, it is significant. Not only did her driving reflect serious moral blameworthiness, placing the police and public's safety at risk over such a lengthy period, but the time she spent in her car, following having come to rest in the ditch, aggravated her degree of blameworthiness. Even then, she did not submit to the police direction. Rather, she sat there while smoking a cigarette, essentially mocking the officers, each of whom stood there with their firearms drawn attempting to bring this dangerous situation, all of the respondent's own making, to an end.

[49] Although deference is owed to aggravating and mitigating factors in a sentencing decision, that is only true to the extent that they are not infected by legal error. Here, I note three that are problematic.

[50] First, the trial judge said that it was somewhat mitigating that the respondent admitted certain elements of the offences even though she did not enter a guilty plea. What is not recognized is that the respondent only admitted those elements

after the Crown closed its case, and even then, only in the event that the trial judge dismissed the *Charter* application. The respondent admitted nothing at a point when doing so could have streamlined the trial or saved the court's time. To the contrary, she put everything, including identity, in issue. While this should not have acted as an aggravating factor, the respondent's approach to the trial and admissions was hardly a mitigating one.

[51] Second, the trial judge suggested that the respondent accepted at least "some responsibility in continuing to flee from the police." Having read the cross-examination of the respondent, it is difficult to understand what exactly the respondent accepted responsibility for. She testified that she only took flight because Cst. Wardell drew his firearm. The trial judge rejected that suggestion, instead finding that the respondent was simply intent on fleeing. The respondent was also clear in her testimony that she had not driven in an erratic or reckless way and, in fact, suggested that she had "cautiously fled" the traffic stop. This is not a case where the respondent has shown either remorse or insight. Although those failures do not act as aggravating factors, they do not form grounds for mitigation.

[52] Third, the trial judge used the respondent's curfew condition on her bail – 10:00 p.m. to 6:00 a.m. – as a mitigating factor, even though she was able to leave home after curfew with a surety. There is no evidence that the respondent suffered hardship as a result of the curfew. And, perhaps most importantly, the respondent

breached a condition of her bail, leaving defence counsel in a position where he could only say that the respondent had “been generally good” in complying with her release conditions. Therefore, the curfew condition could hardly be treated as mitigating her sentence.

[53] The respondent was 36 years old at the time she was sentenced. Although she had experienced life struggles, having been taken into the care of the CAS as a child, she graduated from high school and raised two children. And while she had experienced recent loss in her life, including the loss of her father, uncle and brother, that loss does not outweigh the incredible seriousness of her repeat conduct, which endangered others.

[54] The respondent must understand that driving under suspension will not be tolerated and that lawful police directions must be followed. Driving is a privilege, not a right.

D. CONCLUSION

[55] I would grant leave to appeal sentence and allow the appeal. Although the Crown’s submission of a 2.5-year sentence would have been acceptable at the time of sentencing, the respondent has just recently finished her 6-month term. In these circumstances, I would impose an additional 18 months’ less a day incarceration.

[56] All other aspects of the respondent’s original sentence remain the same.

[57] The respondent will surrender into custody at the location from which she was released within 48 hours of release of this decision, failing which a bench warrant will issue for her arrest.

Released: June 10, 2024 “J.M.F.”

“Fairburn A.C.J.O.”
“I agree. Roberts J.A.”
“I agree. Gary Trotter J.A.”