COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Williams, 2024 ONCA 508
DATE: 20240626
DOCKET: COA-23-CR-0720 & COA-23-CR-1344

van Rensburg, Harvison Young and Sossin JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Wally Williams

Appellant

Wally Williams, acting in person

Joseph Wilkinson, appearing as duty counsel (COA-23-CR-0720)

Justis Danto-Clancy, for the appellant (COA-23-CR-1344)

David Morlog, for the respondent

Heard: June 6, 2024

On appeal from the convictions entered on February 2, 2023 and the sentence imposed on May 5, 2023 by Justice Chantal M. Brochu of the Ontario Court of Justice.

REASONS FOR DECISION

[1] The appellant, Wally Williams, was convicted of possession of cocaine for the purpose of trafficking, possession of fentanyl for the purpose of trafficking and

failing to comply with a condition of recognizance of bail. He was sentenced to a term of 51 months' imprisonment less pre-sentence custody ("PSC") on a *Summers* 1.5:1 day basis of 27.5 months, leaving a net sentence left to be served of 23.5 months.

[2] The appellant appeals both his convictions and sentence. He was represented by counsel on the conviction appeal. On the sentence appeal, he was self-represented but was assisted by duty counsel.

[3] For the reasons that follow, the conviction appeal is dismissed. The sentence appeal is allowed in part to the extent that an additional two months of *Duncan* credit is granted, varying the global sentence to 49 months.

FACTS

[4] On December 31, 2019, police received a call from an intoxicated female asking for help. She indicated that she was in a vehicle with the appellant. Police located the vehicle at Long Lake 58. At the time, they were aware that the appellant was on a release order with a condition not to be in Long Lake 58 and that there was an outstanding warrant for his arrest for sexual assault and other offences.

[5] Police conducted a traffic stop. The appellant immediately exited from the front passenger seat of the vehicle and reached back underneath the seat. The officer believed he was rushing to hide something.

[6] The officer arrested the appellant for the outstanding charges. He then searched under the front passenger seat and found several bags containing cannabis, crack cocaine and fentanyl. The officer re-arrested the appellant and charged him with possession for the purpose of trafficking.

[7] The appellant was brought back to the police station where he was strip searched. Police found a small bag of methamphetamine and $974.60 in cash. His cell phone was also seized and an analyzer report of its contents was prepared.

[8] The appellant was represented at trial. During the trial, his counsel brought a *Charter* application in relation to the analyzer report. However, no application was brought in relation to the search of the vehicle and discovery of the drugs. The *Charter* application was not immediately determined, as it was unclear if it would be necessary to rely on the analyzer report.

[9] The trial judge convicted the appellant. The trial judge found that the only reasonable inference from the direct and circumstantial evidence was that the appellant had the required knowledge and control of the drugs under the passenger seat. She relied on the observations of the police officer, the variety of drugs found under the seat, the suspicious actions of the appellant exiting the vehicle during the traffic stop, the items found during the strip search of the appellant, and the denominations of the cash found on the appellant. She rejected defence counsel’s assertion that another occupant of the vehicle could have put

the drugs under the seat. Given these findings, the parties agreed that it was not necessary to resolve the *Charter* application (as the analyzer report was not relied on to convict) and that the breach of bail condition charge was made out.

[10] The trial judge accepted the joint submission of counsel with respect to sentence for the possession of cocaine for the purposes of trafficking and for the breach of bail charge: 12 months and 30 days respectively.

[11] However, the parties did not agree on the length of the sentence for the fentanyl trafficking charge. The trial judge determined, based on the appellant's circumstances, the aggravating and mitigating factors, and the sentencing principles, that the appropriate sentence for that offence was 51 months, to run concurrently with the other sentences.

[12] The trial judge accepted the recommendation of both counsel that the appellant be credited for PSC of 550 days at a 1.5:1 ratio, resulting in a credit of 825 days, or 27.5 months. This left the appellant with 23.5 months to serve.

THE CONVICTION APPEAL

[13] The appellant submits that the drugs in the bags under the passenger seat were the fruits of an unreasonable search which violated his s. 8 rights and were not admissible under s. 24(2) of the *Charter*. He acknowledges that this issue was not raised at trial but argues that this is one of the exceptions in which an appellant should be permitted to raise a new issue on appeal, as set out by this court in *R. v.*

Reid, 2016 ONCA 524, 132 O.R. (3d) 26, at para. 43, leave to appeal refused, [2016] S.C.C.A. No. 432.

[14] In response, the Crown's position is that the appellant has not met his onus of satisfying the *Reid* test, which both parties accept as the governing authority. In particular, the Crown argues that the evidentiary record is not sufficient to make a s. 8 determination with respect to the search. Because the reasonableness of the drug search was not an issue at trial, the Crown did not pursue the basis for the search in any detail. For example, there was no exploration either in chief or cross-examination as to whether there could have been other reasons for the search, such as safety concerns.

[15] The onus is on the party seeking to raise a new issue on appeal: *Reid*, at para. 42. They must satisfy three preconditions:

1. The evidentiary record must be sufficient to permit the appellate court to fully, effectively and fairly determine the issue raised on appeal;
2. The failure to raise the issue at trial must not be due to tactical reasons; and
3. The court must be satisfied that no miscarriage of justice will result from the refusal to raise the new issue on appeal: *Reid*, at para. 43.

[16] All three of these conditions must be met.

[17] In this case, the first precondition, the sufficiency of the evidentiary record, is not met. This, as with all limbs of the *Reid* test, is the appellant's onus to meet: *Reid*, at para. 42.

[18] The appellant submits that the record is sufficient because the officer who saw the appellant get out of the car and place something under the seat said, in response to a question in chief, that he saw this as a "search incident to arrest", and that because the arrest at that point was regarding the outstanding charges of sexual assault, uttering threats and extortion, there was no basis for the search.

[19] The central issue at trial was the appellant's knowledge and control of the drugs founds under the passenger seat. This is clear from a review of the trial record.

[20] However, other than the police officer's comment about a "search incident to arrest", there were no further questions of the police officer in chief or cross-examination relating to the reasons for the search that resulted in the discovery of the drugs.

[21] Had the s. 8 issue regarding the search been raised at trial, the following evidence would be in the record:

1. What objects the officer was searching for;
2. Their connection to the outstanding charges; and
3. Whether there were any safety concerns informing the search.

[22] Without this evidence, the record is not sufficient to permit this court to fully, effectively and fairly determine the s. 8 issue.

[23] Given that the appellant has failed to establish the first precondition of the *Reid* test, it is not necessary to consider the other preconditions.

THE SENTENCE APPEAL

[24] The appellant does not take issue with the length of the global sentence imposed. Rather, he submits that the trial judge erred in failing to consider and grant additional *Duncan* credit in recognition of the harsh conditions he served, particularly in the Thunder Bay District Jail where, he states, the conditions are especially harsh and crowded. On consent, the appellant filed fresh evidence containing his PSC lockdown records which was not before the sentencing judge. This sets out the specific days during which he was subject to segregation and lockdowns in PSC, from December 31, 2019 to May 5, 2023.

[25] The appellant acknowledges that the trial judge deducted *Summers* credit for PSC in arriving at the net sentence of 23.5 months. However, he submits that he is entitled to a further *Duncan* credit to account for the particularly harsh conditions in the Thunder Bay jail where he spent a considerable amount of his PSC. He submits that an additional 70.5 days of *Duncan* credit should be awarded, although he acknowledges that the amount and award of *Duncan* credit is discretionary.

[26] Neither the Crown nor trial counsel raised or referred to the possibility of additional credit to reflect the time spent in particularly harsh conditions in the Thunder Bay jail and in lockdown before the sentencing judge. The sentencing judge considered the submissions made by counsel but did not refer to the question of whether any additional *Duncan* credit would be warranted in the appellant's circumstances. In considering mitigating factors, she stated that the only mitigating factor present was the fact that the appellant was being sentenced as a first offender.

[27] Before this court, the Crown submits that the prison conditions were part of the considerations which informed the *Summers* credit submissions that the appellant receive 1.5:1 credit for his PSC. The Crown submits that the trial Crown and trial counsel were agreed as to the *Summers* credit, which included a consideration of the harsh conditions. We do not agree. There is nothing in the record to indicate that they had considered the possibility of additional *Duncan* credit in light of the harsh conditions. A review of the transcript of the sentencing submissions does not support that argument. Trial counsel referred generally to the conditions in the Thunder Bay jail and to the fact that the appellant had spent 550 days in PSC, much of which was during the height of the COVID-19 pandemic. However, in requesting *Summers* credit of 1.5:1, trial counsel said nothing to suggest that there might have been some basis for additional credit. This was reinforced by the Crown who stated that he agreed with trial counsel that the

appellant was entitled to credit of 1.5:1. Indeed, the impression left by their submissions is that no such possibility exists. Rather, it appears that neither counsel nor the sentencing judge turned their minds to the question of additional *Duncan* credit.

[28] *Duncan* credit is discretionary and is most properly treated as a mitigating factor in arriving at the appropriate sentence: *R. v. Marshall*, 2021 ONCA 344, at para. 52. Although it was not raised by the parties, given that the *Summers* credit submissions referenced the harsh conditions in the Thunder Bay jail, the sentencing judge should have considered whether enhanced credit was warranted. Based on the fresh evidence submitted by the appellant, we would do so.

[29] Unlike *Summers* credit, *Duncan* credit is not a deduction from the otherwise appropriate sentence: *Marshall*, at para. 52. In our view, given that no other issues are raised with respect to the sentencing judge's determination of the appropriate sentence, and recognizing the particularly harsh conditions of much of the appellant's PSC as a mitigating factor, we would grant 2 months of *Duncan* credit, varying the global sentence to 49 months.

DISPOSITION

[30] The appeal from the convictions is dismissed. Leave to appeal the sentence is granted and the sentence is varied so that additional credit for PSC of 2 months

is granted, reducing the global sentence from 51 months to 49 months. This means that the appellant had 21.5 months, rather than 23.5 months, to serve from the time he began serving his sentence.

"K. van Rensburg J.A."
"A. Harvison Young. J.A."
"L. Sossin J.A."