COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Westcott, 2025 ONCA 291
DATE: 20250417
DOCKET: COA-23-CR-1175

MacPherson, Sossin and Monahan JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Michael Westcott

Appellant

Michael Westcott, in person

Brandon Chung, as duty counsel

Nicholas Hay, for the respondent

Heard: April 8, 2025

On appeal from the sentence imposed by Justice Kathleen A. Baker of the Ontario Court of Justice on August 25, 2023.

REASONS FOR DECISION

[1] The appellant appeals his sentence on the basis that it significantly exceeded the sentence requested by the Crown.

[2] The appellant pled guilty to two counts of break and enter with intent, possession of a prohibited weapon, failure to comply with a release order and

failure to appear. The Crown sought a global sentence of 19 to 21 months, while the defence proposed a sentence of 19 months.

[3] After considering the relevant aggravating and mitigating factors, the sentencing judge imposed a global sentence of 31 months, prior to taking into account *Summers* credit for pre-sentence custody.

[4] Duty counsel fairly concedes that, in light of *R. v. Nahanee*, 2022 SCC 37, 474 D.L.R. (4th) 34, because this was a contested sentencing hearing as opposed to one in which there was a joint submission, the sentence should only be set aside if two conditions are met: (i) the sentencing judge failed to provide adequate notice to the parties that she was considering imposing a sentence that exceeded the Crown's request; and (ii) the sentencing judge committed an error in principle that impacted the sentence.

[5] With respect to the notice requirement, duty counsel argues that although at one point during the Crown's sentencing submissions the sentencing judge indicated that she was "having trouble" with the sentence the Crown was proposing with respect to two of the offences, the sentencing judge did not advise that she was considering a global sentence that exceeded that proposed by the Crown. As such, duty counsel argues that the sentencing judge failed to provide proper notice, as required by *Nahanee*.

[6] Duty counsel further argues that the sentencing judge committed two errors in principle that impacted the sentence: first, she failed to properly consider the principle of totality and, second, she failed to properly take into account of the impact of harsh conditions of pretrial custody as a mitigating factor.

[7] We agree with duty counsel that the sentencing judge failed to provide adequate notice of the fact that she was considering imposing a global sentence that exceeded that proposed by the Crown. To be sure, *Nahanee* does not require a sentencing judge to provide notice in a particular form, and notifying the parties can be as simple as saying that the sentencing judge is considering imposing a higher sentence than the Crown is seeking. While the sentencing judge in this case did indicate concerns with the sentence proposed in respect of two of the offences, at no point did she suggest that she was contemplating a global sentence exceeding that proposed by the Crown.

[8] Although the sentencing judge erred in this respect, she did not commit either of the errors in principle alleged by duty counsel on behalf of the appellant.

[9] The sentencing judge specifically considered the issue of totality, noting that the cumulative sentence must not exceed the overall culpability of the offender and must not extinguish their potential for rehabilitation. In this case, the sentencing judge found that the appellant's overall culpability was high. She noted, in particular, his extensive criminal record, which included 92 offences dating back to

1999. A number of these were violent offences, including convictions for assaulting a peace officer. The sentencing judge noted that the appellant "just doesn't seem to be getting the message" and that "[i]ncorrigible criminality comes at a price to not only the community, but also to the offender once the law catches up with that individual."

[10] The sentencing judge also found the circumstances of the offences to be aggravating. She described the residential break and enter offence as very serious, since it was incredibly intrusive and upsetting to the owner of the residence who was present. The sentencing judge was also troubled by the fact that the appellant had possessed a prohibited weapon – a taser – in a public restaurant that was frequented by families and children.

[11] In the sentencing judge's view, the principle of totality is not intended to constitute a "volume discount for repeat offenders where offences are distinct in time and place." In the sentencing judge's view, the global sentence had to reflect the aggravating nature of the offences and the high moral culpability of the appellant. It was on this basis that she imposed a global sentence of 31 months.

[12] We see no error in principle in the manner in which the sentencing judge approached the principle of totality. Nor, in our view, is there any additional information or argument that could have been put forward in this regard had counsel for the appellant been aware of the fact that the sentencing judge was

contemplating a global sentence that exceeded that proposed by the Crown. We therefore dismiss this ground of appeal.

[13] With respect to the enhanced credit to be given to the harsh conditions of pretrial custody, sometimes referred to as "*Duncan*" credit,[1] the sentencing judge indicated that she was acutely aware of the dismal conditions in the facilities where the appellant had been detained while awaiting trial. She observed that these conditions are not respectful of any kind of human dignity. At the same time, she noted that any reduction in sentence on account of harsh pretrial detention cannot justify imposing a sentence that is unfit. In her view the sentence of 31 months was the minimum required to properly reflect the nature of the offences and the appellant's moral culpability.

[14] We see no error in the sentencing judge's analysis or findings. As this court observed in *R. v. Marshall*, 2021 ONCA 344, at para 52, pretrial incarceration conditions are a mitigating factor to be taken into account with the other mitigating and aggravating factors in arriving at an appropriate sentence. As such, even where the incarceration conditions are harsh, they cannot justify the imposition of a sentence which would be unfit. This is precisely the manner in which the sentencing judge approached the issue, and the weight she attached to the

---

[1] See *R. v. Duncan*, 2016 ONCA 754. Such credit is in addition to so called "Summers" credit, the 1.5 days credit for each day in pretrial custody provided for by s. 719(3.1) of the *Criminal Code*, R.S.C., 1985, c. C-46: see *R. v. Summers*, 2014 SCC 26, 371 D.L.R. (4th) 581.

conditions of the appellant's pre-sentence custody is a discretionary determination that was hers to make.

[15] We make one final observation. The sentences that were proposed by the Crown and defence were almost identical. In these circumstances, it might be argued that the sentencing judge ought to have regarded the proposed sentences as in effect a joint submission, subject to the stringent public interest test set out in *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204.

[16] As Moldaver J. pointed out in *Nahanee*, there is a fundamental difference in principle between joint submissions and contested sentencing hearings. There are unique benefits that flow from joint submissions. They provide the parties with a high degree of certainty that the sentence jointly proposed will be the sentence actually imposed, and avoid the need for lengthy, costly and contentious trials. They save precious time, resources and expense which can be channelled into other court matters and, in fact, enable the justice system to function efficiently and effectively. The stringency of the public interest test in *Anthony-Cook* is designed to protect these unique benefits.

[17] Contested sentencing following a guilty plea do not offer the same certainty and efficiency that flow from joint submissions. As such, the most the accused can reasonably expect in a contested sentencing is that the sentence is likely, but not certain, to fall within the ranges proposed by counsel. This is so even where there

are only minor differences between the sentences proposed by the Crown and defence: *Nahanee*, at paras. 27, 31.

[18] We therefore conclude that the sentencing judge did not err in principle in imposing a global sentence of 31 months, prior to taking into account *Summers* credit. We grant leave to appeal sentence but dismiss the sentence appeal.

"J.C. MacPherson J.A."
"L. Sossin J.A."
"P.J. Monahan J.A."