

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Clarke, 2026 ONCA 152

DATE: 20260303

DOCKET: COA-24-CR-0157

van Rensburg, Thorburn and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Alexander Clarke

Appellant

Alexander Clarke, acting in person

Jeff Marshman, appearing as duty counsel

Frank Au, for the respondent

Heard: February 5, 2026

On appeal from the sentence imposed by Justice P. Andras Schreck of the Superior Court of Justice, on January 19, 2024.

REASONS FOR DECISION

[1] The appellant, Alexander Clarke, appeals his sentence. He claims the sentencing judge was not provided with evidence of his harsh presentence conditions and that, when those conditions are considered, the nine-year global

sentence imposed is manifestly unfit. He seeks leave to introduce fresh evidence and a one year four-month reduction in sentence. The Crown does not oppose the admission of the fresh evidence but asserts that it does not justify any reduction in the appellant's sentence.

### The Circumstances of the Offences

[2] Mr. Clarke pleaded guilty to robbery with a firearm, unlawful confinement, and disguise with intent to commit an indictable offence.

[3] The circumstances of the offences were as follows. On September 20, 2019, Mr. Clarke and another man robbed the office of a Toronto employment agency. Mr. Clarke was masked and armed with a handgun. He approached an employee in the hallway, held the handgun to her head, and forced her to open the door to the office. Once inside, Mr. Clarke and the other robber corralled the employees at gun point and stole approximately \$20,000 in cash.

### The Sentencing Judge's Decision

[4] As noted by the sentencing judge:

Mr. Clarke committed a very serious offence that posed a grave risk to the physical and psychological wellbeing of the victims.... He worked together with an accomplice to carry out what was clearly a planned robbery. His degree of responsibility is significant.

[5] At the time the sentence was imposed, Mr. Clarke had a lengthy record of prior convictions and the sentencing judge considered Mr. Clarke's criminal history to be an aggravating factor.

[6] He was first convicted of robbery in 2007 and was convicted of two further counts in 2009. In 2014 he was convicted of one count of armed robbery using a restricted firearm or prohibited firearm, three counts of robbery, two counts of fraud under \$5000, one count of assault with intent to resist arrest, and one count of failure to comply with a recognizance.

[7] This was Mr. Clarke's eighth robbery and, at the time he committed this armed robbery, he was on parole for another serious offence.

[8] The sentencing judge considered mitigating factors, including the fact that the appellant had pleaded guilty, accepted responsibility, apologized to the victims, and expressed remorse. Moreover, the appellant had taken steps to rehabilitate himself while in custody awaiting sentence, including by taking programs offered by the institution. The sentencing judge therefore rightly found that there was hope for the appellant despite his pattern of re-offending. However, the sentencing judge noted that the appellant had, in the past, repeated the same criminal conduct, even while on parole.

[9] The step principle provides that an offender should generally receive a higher sentence than his prior sentence for the same type of offence: *R. v. U.A.*,

2019 ONCA 946, at para. 12. The appellant received an eight-year sentence for the 2014 robbery convictions.

[10] The sentencing judge invoked the step principle and, after considering the aggravating and mitigating factors, imposed a global sentence of nine years, less 56.25 months credit for pre-sentence custody, resulting in a remaining sentence of 51.75 months (or four years, three months, and three weeks). He made a DNA order, a life-long weapons prohibition, and, declaring Mr. Clarke a long-term offender, imposed an eight-year long-term supervision order.

### The Issue

[11] The issue on this appeal is whether the fresh evidence concerning the appellant's pre-sentence custody conditions warrants a reduction in his sentence.

### Analysis of the “Duncan Credit” Issue

[12] A *Duncan* credit is a discretionary credit. In *R. v. Duncan*, 2016 ONCA 754, at para. 6, this court held that:

[P]articularly harsh presentence incarceration conditions can provide mitigation apart from and beyond the 1.5 credit referred to in s. 719(3.1). In considering whether any enhanced credit should be given, the court will consider both the conditions of the presentence incarceration and the impact of those conditions on the accused.

[13] As this court recently observed in *R. v. Brown*, 2025 ONCA 164, although still often referred to as a “*Duncan* credit”, since *R. v. Marshall*, 2021 ONCA 344,

the correct way to consider the effect of harsh conditions of pretrial custody is as a mitigating factor to be taken into account together with all other mitigating and aggravating factors in determining the appropriate sentence, and not as a deduction from an otherwise fit sentence.

[14] A sentencing judge's "highly discretionary" determination of the impact of harsh pre-sentence custody conditions is owed considerable deference: *R. v. Deiaco*, 2019 ONCA 12, at para. 4. This court will intervene only if there is an error of law, error in principle, or the sentence is demonstrably unfit: *Brown*, at para. 13. Where there was no request for consideration of harsh pre-sentence custody conditions at first instance, this court may decide to admit fresh evidence on appeal and to consider the matter, however no reduction will be warranted if the sentence is otherwise fit: see, e.g., *R. v. Guerrero*, 2025 ONCA 14, at para. 6.

[15] Mr. Clarke's lockdown records at the Toronto East Detention Centre and the Toronto South Detention Centre for his pre-sentence custody period were produced to the Pro Bono Inmates Appeal Program and the Crown pursuant to an order obtained in July 2025. The records, together with an email confirming the periods of Mr. Clarke's triple bunking were filed as proposed fresh evidence. The Crown prepared a breakdown of the time Mr. Clarke spent under lockdown ("the Breakdown"). Mr. Clarke does not dispute the Breakdown. Both parties agree that

it is in the interest of justice that the Breakdown and underlying lockdown and housing records from the detention facilities be admitted. We agree.

[16] The Breakdown shows that Mr. Clarke spent 1280 days in pre-sentence custody during which he was subject to 383 days of lockdown. Of this total, 130 days were partial lockdown days where the lockdown lasted between one to four hours per day. The duration of lockdown on the remaining 253 days is not specified. The Crown argued Mr. Clarke was only subject to four full-day lockdowns. He was also triple bunked for 114 days.

[17] Mr. Clarke provided no evidence of the conditions he endured while under lockdown and the impact on him, although this matter was adjourned at the December inmate sittings to enable him to provide an affidavit. Specifically, it is not clear to what extent exercise, television access, showers, or access to programming were limited, especially in light of the evidence of partial lockdown days and lockdowns of unspecified duration. What we do know is that Mr. Clarke completed at least fifteen programs and obtained various certificates while in pre-sentence custody.

[18] While the impact of lockdowns is to some extent “self-evident”, this court cannot infer in this case that the appellant suffered particularly harsh treatment entitling him to additional mitigation beyond the 1.5 *Summers* credit without further evidence as to the effect of the lockdowns.

[19] Moreover, in our view, the fresh evidence filed does not impact the fitness of the sentence, which was on the lower end for an armed robbery conviction: *R. v. Sithravel*, 2023 ONCA 748; *R. v. Treleaven*, 2019 ONCA 593, *R. v. Wolynech*, 2015 ONCA 656, 330 C.C.C. (3d) 541. A seven-year sentence is the minimum sentence for a second or subsequent armed robbery pursuant to s. 344(1)(a)(ii) of the *Criminal Code*. This was Mr. Clarke's eighth robbery and several of his prior convictions were armed robberies. He was on parole when he committed these offences. He was not deterred by his last sentence of eight years for armed robbery. Any reduction to account for the appellant's pre-sentence custody conditions in the circumstances of this case would render the appellant's sentence unfit.

### Conclusion

[20] For these reasons leave to adduce fresh evidence is granted and the sentence appeal is dismissed.

"K. van Rensburg J.A."

"Thorburn J.A."

"S. Gomery J.A."