COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Duncan, 2016 ONCA 754
DATE: 20161013
DOCKET: C61612

Doherty, Hourigan and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jason Duncan

Appellant

Erec Rolfe, for the appellant

Susan Ficek, for the respondent

Heard and released orally: October 7, 2016

On appeal from the sentence imposed by Justice Lack of the Superior Court of Justice, sitting with a jury, on September 9, 2015.

ENDORSEMENT

[1] The appellant was convicted of aggravated assault. He and two other persons robbed a particularly vulnerable victim. In the course of the robbery, one of the co-accused struck the victim in the face causing very serious and long-term injuries. The trial judge found that the appellant "planned and set up" the robbery. The jury convicted the appellant of aggravated assault on the basis of s. 21(2) of the *Criminal Code*.

[2] The trial judge imposed a sentence of two years, less a day. In doing so, she gave effect to a submission that the appellant should be sentenced to a reformatory term to allow him to access resources that could assist him with his addiction-related problems.

[3] Taking into account presentence incarceration, the appellant received an effective sentence of five and one-half years.

[4] Counsel for the appellant submits that the sentence is too long and that the trial judge's reasons demonstrate two errors.

[5] First, he submits that the trial judge failed to give the appellant any credit for the particularly harsh circumstances in which he served his presentence incarceration. Counsel submits that not only did the trial judge not give the appellant any credit, but the trial judge in fact held that, as a matter of law, the appellant could not receive credit beyond the 1.5 days for each day credit referred to in s. 719(3.1) of the *Criminal Code*.

[6] On our reading of the trial judge's reasons, we agree with counsel. The trial judge effectively held that any credit or consideration in relation to presentence incarceration was capped at the 1.5 limit. We agree with counsel that in the appropriate circumstances, particularly 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. In this case, there was evidence that the appellant served a considerable part of his presentence incarceration in "lockdown" conditions due to staffing issues in the correctional institution. There was, however, no evidence of any adverse effect on the appellant flowing from the locked down conditions. Indeed, some of the material filed on sentencing indicates that the appellant made positive rehabilitative steps during his presentence incarceration.

[7] While the pattern of "lockdowns" endured by the appellant is worrisome, without further evidence as to the effect of those conditions, we cannot say that the appellant suffered particularly harsh treatment entitling him to additional mitigation beyond the 1.5 credit. Consequently, although we agree that the trial judge misinterpreted the relevant provision, we would not reduce the sentence to reflect any added mitigation for the conditions of presentence incarceration.

[8] The second ground of appeal is based on the sentence imposed on a co-accused. The co-accused received an effective sentence of four years. The appellant submits that his sentence should not have been any longer than the co-accused's sentence. He argues that the co-accused had a more serious criminal record and took a more active role in the aggravated assault.

[9] The trial judge considered these arguments. She also observed there were other differences between the appellant and the co-accused that supported a longer sentence for the appellant. She noted in particular that the co-accused had pled guilty, a significant mitigating factor.

[10] We see no error in the trial judge's treatments and consideration of the arguments based on parity of sentencing. We would not interfere with the sentence on that basis.

[11] Counsel are agreed that there was an error made in the calculation of the 1.5 credit for presentence incarceration and that the appellant is entitled to an additional 23 days of credit. We

would, therefore, allow the appeal to the extent of reducing the sentence by 23 days, resulting in a sentence of two years, less 24 days. Otherwise, we would not interfere with the sentence.

"Doherty J.A."
"C.W. Hourigan J.A."
"L.B. Roberts J.A."