



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Rees*, 2018 NLCA 64

Date: November 23, 2018

Docket Number: 201801H0018

BETWEEN:

KENNETH REES

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: White, Hoegg and O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Harbour Grace

Appeal Heard: October 22, 2018

Judgment Rendered: November 23, 2018

Reasons for Judgment by: Hoegg J.A.

Concurred in by: White and O'Brien JJ.A.

Counsel for the Appellant: Self-represented

Counsel for the Respondent: Iain Hollett

Hoegg J.A.:

[1] On January 29, 2018 Kenneth Rees received a four-year sentence for two break and enters and one count of possessing an instrument for the purpose of breaking and entering. He does not appeal his four-year sentence, but he does appeal the fact that he is being required to serve it consecutively to a sentence he was serving when his four-year sentence was imposed. Mr. Rees argues that the Judge did not rule that his four-year sentence was to be served consecutively to the sentence he was already serving. He maintains that when a sentencing court does not address the issue, a sentence commences on the date it is imposed.

[2] Mr. Rees's appeal is respecting sentence only. He therefore requires leave of the Court in accordance with section 675(1)(b) of the *Criminal Code*. To obtain leave, he must establish that his appeal "has an arguable basis or sufficient merit" to warrant the granting of leave (*R. v. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266, at para. 8).

[3] The Crown concedes that Mr. Rees's appeal is not frivolous and that it has sufficient merit to be considered by this Court. I agree. Accordingly, I would grant leave to appeal.

BACKGROUND

[4] On November 16, 2017, Mr. Rees was sentenced to 800 days in custody for offences unrelated to this matter. A month earlier, on October 19, 2017, he was convicted of the offences respecting this matter and on January 29, 2018 he was sentenced to four years for them. At the sentencing hearing, the Judge did not advert to the sentence Mr. Rees was already serving or say whether the four-year sentence he was imposing was to be served consecutively or concurrently to the sentence Mr. Rees was already serving.

[5] Mr. Rees argues that the statutory presumption in section 719(1) of the *Criminal Code* – that a sentence commences on the date it is imposed – applies, and that his four-year sentence commenced on January 29, 2018. Under this approach, his four-year sentence is being served concurrently with what remains of the sentence he was already serving. In practical terms, this means he will serve less time in prison than he would if he had to serve his four-year sentence consecutively to the sentence he was already serving. Spending a longer time in prison is understandably significant to Mr. Rees.

[6] The Crown takes a different position, arguing that the general law respecting concurrent and consecutive sentences requires that sentences imposed

at different times for different offences be served consecutively to each other. The Crown also references section 718.3(4) of the *Code*, which provides that a sentencing judge “shall consider directing that the term of imprisonment [he or she is imposing] be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing”.

[7] In this case, the Judge did not advert to the fact that Mr. Rees was already serving a term of incarceration for unrelated offences when he sentenced Mr. Rees for the within offences. Neither did Crown counsel nor defence counsel address the issue of section 718.3(4) of the *Code*. The Judge simply imposed sentence as follows:

“The sentence with respect to the break-in at the Carbonear Mall will be three years. The sentence with respect to the accompanying offence under section 351 will be six months concurrent. And the sentence with respect to the Marie’s Mini Mart break and enter will be one year consecutive for a total sentence of four years.”

[8] The Crown acknowledges that the Judge did not explicitly consider the issue, but argues that the Judge intended that Mr. Rees serve the four-year sentence consecutively to the sentence he was already serving. In support of its position, the Crown relies on the Judge’s notations on the backs of the two Informations stating the charges. One Information concerns the break and enter into the Carbonear Mall and possession of the break and enter instrument, and the other Information concerns the break and enter at Marie’s Mini Mart. On the backs of each of the Informations there is a section entitled “Imprisonment”. In each of these sections the words “concurrent” and “consecutive” appear with small boxes beside each word. A handwritten note following “Count 1” reads “3 yrs cons [sic]”. The box next to the word “consecutive” is then ticked and the word “all” is handwritten next to it. Next to Count 2 on the Information relating to the break and enter at the Carbonear Mall, no box is ticked but the words “6 months conc [sic]” are handwritten. The back of the Information for the second break and enter is similar. It bears a notation stating “1 yr cons [sic]”, with the “consecutive” box ticked and the handwritten word “all”.

[9] The Crown argues that the box ticking and handwriting show that the Judge intended for Mr. Rees to serve the four-year sentence consecutively to the sentence he was already serving for the unrelated matters.

[10] The Crown also argues that the Judge’s comments at the sentencing hearing show that he intended for Mr. Rees to serve his sentence consecutively to the sentence he was already serving. In particular, the Judge commented that

the Crown was taking a lenient position on sentencing and explained the well-established rationale between consecutive and concurrent sentences in ordering that the sentence for the second break and enter before him be served consecutively to the first.

ANALYSIS

[11] Section 719(1) of the *Code* reads:

A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

[12] Section 718.3(4) of the *Code* reads:

The court that sentences an accused shall consider directing

(a) that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; and

(b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when

(i) the offences do not arise out of the same event or series of events,

(ii) one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or

(iii) one of the offences was committed while the accused was fleeing from a peace officer.

[13] It is established law that sentences commence on the dates they are imposed unless decided otherwise (*R. v. McCarthy*, 2005 NLCA 36, 248 Nfld. & P.E.I.R. 14, at para. 11 and *R. v. Crocker* (1991), 93 Nfld. & P.E.I.R. 222, 292 A.P.R. 222 (Nfld. C.A.), at para. 27). See also *Carter v. Canada (Correctional Service)*, 2001 BCSC 1462, *R. v. Duguid* (1953), 107 C.C.C. 310, 17 C.R. 370 (Ont. C.A.) and *R. v. Deschamp* (1983), 57 N.S.R. (2d) 271 (N.S.C.A.).

[14] Section 718.3(4) requires, by use of the word “shall”, a sentencing judge to “consider” directing that a sentence he or she is imposing be served consecutively to one which the offender is already serving. The wording of the section is curious, for unless a court states how the sentence it is imposing is to be served in relation to one the offender is already serving and gives its reasons

why, the offender, as well as a reviewing court, are hard pressed to know whether the court has considered the issue. Unless something is said, it can be difficult to discern whether the judge and counsel simply forgot to address the issue or whether the court considered the issue and decided to take no action. To avoid confusion, it is important that “whether the trial judge imposes concurrent or consecutive sentences, he should state that he is doing so. Otherwise the sentences will be served concurrently” (*Crocker* at paragraph 30).

[15] In this case the Crown is urging the Court to divine the Judge’s intentions from his words at the sentencing hearing and the handwritten markings on the backs of the two Informations.

[16] On review of the record and the backs of the two Informations, I am not convinced that the Judge’s intentions can be determined. To my mind it is just as possible that the ticks in the boxes next to the word “consecutive” and the handwritten word “all” next to the word “consecutive” on each Information is an indication that the Judge meant for the two break and enter sentences to be served consecutively to each other and nothing more. The fact that the sentence Mr. Rees was already serving for unrelated matters was not mentioned by the Judge, or counsel during submissions, makes that scenario quite possible.

[17] As for the Judge’s remarks, they were made entirely within the context of the matters before him. While it is clear the Judge appreciated the general law respecting concurrent and consecutive sentences, it is equally clear that he applied this law in relation to the offences before him. His application of the law to the sentencing issues before him does not necessarily mean that he must have ordered the four-year sentence he was imposing to be served consecutively to the sentence Mr. Rees was already serving. Had he considered whether the sentence he was imposing should be served consecutively to the one he is already serving, the Judge would doubtless have wanted to take into account the total effect of making the four-year sentence consecutive (*R. v. Barrett*, 2012 NLCA 46, 324 Nfld. & P.E.I.R. 246, at para. 36). Moreover, the Judge would likely have wanted to consider submissions from Mr. Rees and from Crown counsel on the issue.

[18] In any event, a divining exercise is an undesirable and inappropriate method for determining whether a Judge has ordered an offender to serve a sentence concurrently or consecutively. Such a determination has a significant effect on an offender, and the proper administration of justice entitles an offender to know that there has been consideration of the issue as required by section 718.3(4).

[19] This is not to say that such a determination can never be discerned from the record of a sentencing hearing or the backs of Informations. There may be cases where it is obvious from remarks a Judge made at sentencing or notations made on the backs of the Informations which may lead to only one conclusion. However, that is not the case here. In this case the record does not provide the degree of certainty respecting the Judge's intentions to justify concluding that he ordered Mr. Rees to serve his four-year sentence consecutively to the sentence he was already serving. There is no indication that the Judge turned his mind to the issue at all at the hearing, and the markings on the backs of the Informations are ambiguous.

[20] In all likelihood the Judge inadvertently failed to consider the issue. Such an oversight was the case in *McCarthy* (see paragraph 15). However, this inadvertence does not change the fact that it was an error for the Judge to omit to indicate how the four-year sentence he was imposing was to be served in relation to the sentence Mr. Rees was already serving, and explain why.

[21] In this case, the Judge's inadvertence and his lack of consideration of section 718.3 lead to uncertainty from which Mr. Rees must benefit. The fact that a consecutive sentence would have been legally appropriate is irrelevant, for a concurrent sentence could also have been legally appropriate. To be clear, it is my decision that because of the Judge's failure to address the issue and the ambiguity in the markings on the backs of the Informations, the sentence, as ordered by the Judge, was concurrent (*Carter* at paragraph 10 and *Crocker* at paragraph 30). In this regard, see *R. v. Hasiu*, 2018 ONCA 24, 358 C.C.C. (3d) 503, at paras, 41-49, to the effect that an offender benefits from a court's failure to consider section 718.3(4).

[22] Given my conclusion that the Judge ordered a concurrent sentence, the Court must consider the Crown's submission that imposing a concurrent sentence is an error which this Court should rectify by ordering that the four-year sentence be served consecutively to the sentence he was already serving. To so order would have the effect of increasing the time Mr. Rees would spend in prison.

[23] Mr. Rees, not the Crown, brought this sentence appeal. Nevertheless, there is jurisdiction under section 687 of the *Code* to increase a sentence on an appeal by the offender (*R. v. Hill* (1975), [1997] 1 S.C.R. 827, 58 D.L.R. (3d) 697). The Crown acknowledges that an offender is entitled to notice if the Crown is seeking to increase his or her sentence on appeal, but submits that this

notice has been provided. Accordingly, the question is whether this Court should disturb the concurrent four-year sentence.

[24] The Supreme Court of Canada recently considered the analytical approach to sentence appeals in the case of *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089. *Lacasse* confirmed that, unless a sentence is “demonstrably unfit”, appellate interference will only be warranted if the sentencing judge committed an error in principle, failed to consider a relevant factor, or overemphasized appropriate factors.

[25] *Lacasse* emphasizes the need to protect the discretion of sentencing judges by taking steps to ensure the term “error in principle” is not trivialized (paragraph 43) by “open[ing] the door to intervention by an appellate court” (paragraph 42) with the mere identification of an error. The Court went on to rule that while the three errors listed above are pre-conditions for appellate intervention, there is the additional requirement that it must appear from the trial judge’s decision that such an error had an impact on the sentence (paragraph 44). It is only when this is so that an appellate court should replace the sentence with what they consider appropriate.

[26] In this case, the Judge committed an error in principle by failing to consider whether the sentence should be consecutive or concurrent to time already being served. The remaining question is whether it appears from the decision that the failure to consider the issue of a consecutive or concurrent order impacted the sentence.

[27] In this case it cannot be said that a consecutive sentence would be the only appropriate sentence. In considering the section 718.3(4) issue, the Judge could also reasonably have concluded that the four-year sentence be served concurrently (*Barrett*). Accordingly, I am unable to conclude from the Judge’s decision that his failure to explicitly consider whether the sentence should be consecutive or concurrent affected the sentence.

[28] As such, it is appropriate to let the matter rest on the section 719(1) presumption that Mr. Rees’s sentence commenced on January 29, 2018 to be served concurrently with what remains of the sentence he was already serving. To the extent that this was the outcome sought by Mr. Rees, Mr. Rees’s appeal is allowed. I add only that it may have been more appropriate to have had the issue determined by way of a *habeas corpus* application. In this regard see *Carter; Stashewsky v. William Head Institution (Director)*, 1988 CarswellBC 1633 (W.L. Can.) (B.C.C.A.); and *Smith v. Mission Institution* (1996), 80

B.C.A.C. 33 [1996] B.C.W.L.D. 2419 (B.C.C.A.). Judicial review of the incarcerating institution's decision to require Mr. Rees to serve his four-year sentence consecutively could also be pursued, although the difference in standard of review may be a concern. However, in the circumstances, it is in the interest of justice to decide the issue as brought by Mr. Rees.

[29] In the result, service of Mr. Rees's four-year sentence imposed on January 29, 2018 commenced on that date and will continue until it expires.

L. R. Hoegg J.A.

I concur: _____

C. W. White J.A.

I concur: _____

F. P. O'Brien J.A.