

Date: 20150525
Docket: 14/87
Citation: *R. v. Thorne*, 2015 NLCA 27

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

BETWEEN:

SCOTT THORNE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201406G0105
2014 NLTD(G) 111

Appeal Heard: May 20, 2015

Judgment Rendered: May 25, 2015

Reasons for Judgment by Welsh J.A.

Concurred in by White and Harrington JJ.A.

Counsel for the Appellant: Derek Hogan

Counsel for the Respondent: Vikas Khaladkar

Welsh J.A.:

[1] Scott Thorne was convicted of one count each of break, entry and theft, having his face covered while intending to commit an offence, breach of recognizance and breach of probation. He was sentenced to a total of twenty months imprisonment. He seeks leave to appeal the portion of his sentence dealing with the reduction of his sentence for time served on remand. The appeal raises issues regarding the introduction of fresh evidence on appeal and the application of earned remission under the *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20.

BACKGROUND

[2] On June 15, 2014, Mr. Thorne was arrested by police during the commission of a break and entry into a restaurant (the “second offences”). On June 24, 2014, he was sentenced in provincial court to ninety days imprisonment for offences committed at an earlier date (the “first offences”). On September 30, 2014, he was sentenced for the second offences. From June 15 to June 24, he was remanded in custody.

[3] With respect to credit for the time Mr. Thorne served on remand for the second offences, the trial judge explained (2014 NLTD(G) 111):

[38] The RCMP arrested Mr. Thorne for the present offences on June 15, 2014 and he was remanded in custody to deal with them. A Provincial Court judge sentenced Mr. Thorne to 90 days in jail for other offences on June 24, 2014 and he began to serve his sentence immediately. So he was remanded for 9 days on the offences in this Court before he was detained to serve the sentence he received in Provincial Court and not because of the remand. The Crown agrees that I should credit Mr. Thorne with pre-sentence remand time of 9 days at 1.5 days each.

[39] Mr. Thorne’s counsel says I should grant Mr. Thorne credit for additional remand time, on this rationale: Mr. Thorne would be released but for the remand on August 23, 2014 after he served [two-thirds] of the 90-day sentence the Provincial Court judge gave him on June 24, 2014. So counsel says that I should credit Mr. Thorne with a further 38 days (August 23 – September 30, 2014) at 1.5 days.

[40] I disagree with counsel. I know that Mr. Thorne’s sentence would ordinarily expire on September 23, 2014, 90 days from when the Provincial Court judge sentenced him. But I do [not] know if Mr. Thorne would be eligible for parole before that. I credit him with the 9 days he was remanded for these

offences before the Provincial Court judge sentenced him and the 7 days between September 23, 2014, the end of the 90-day sentence and today's date.

[41] So, Mr. Thorne receives credit for 16 days at 1.5 days each, or 24 days

ANALYSIS

Leave to Appeal

[4] Where a convicted person appeals against sentence only, leave of the Court is required (section 675(1)(b) of the *Criminal Code*). The test to be applied is whether the appeal is "frivolous in the sense of having no arguable basis or sufficient merit" (*R. v. Murphy*, 2011 NLCA 16, 304 Nfld. & P.E.I.R. 266, at paragraph 8). That test is satisfied in this case. There is an arguable basis for Mr. Thorne's submission that there was an error in the determination of the credit he should receive for the time he was remanded in custody pending sentencing for the second offences.

The Appeal

Fresh Evidence

[5] I begin by emphasizing that the trial judge was not provided with the relevant evidence for assessing Mr. Thorne's submission that the credit for time served on remand should commence on August 23, 2014 rather than on September 23. As a result, for purposes of this appeal, Mr. Thorne has applied for leave to file fresh evidence in the form of an affidavit of Ms. Stark.

[6] The affidavit states that Ms. Stark is a Classification Officer with Her Majesty's Penitentiary in St. John's and:

1. THAT Scott Thorne was sentenced by the Honourable Judge Harold Porter on June 24th, 2014 to a total of 90 days imprisonment for two offences of possession of a controlled substance contrary to s. 4(1) of the Controlled Drugs and Substances Act.

2. THAT Scott Thorne's sentence expired on August 22nd, 2014.

[7] Before considering whether the affidavit should be entered as fresh evidence, it is necessary to address deficiencies in the information provided in the affidavit. While Ms. Stark states that she is a classification officer, she provides no information as to the relationship of that position to the

authority to swear that Mr. Thorne would have been granted earned remission on the ninety-day sentence, and that he would have been released on August 23, if he had not been remanded in custody for the second offences. Neither is there any information to indicate that she was the classification officer appropriate to provide information regarding Mr. Thorne.

[8] At the hearing in this Court, counsel for Mr. Thorne provided explanatory information which was accepted by counsel for the Crown. On that basis, and for purposes only of this case, I would accept that Ms. Stark was qualified to provide the information that Mr. Thorne would, in the ordinary course, have been released on August 23, 2014. In future, the relevant evidentiary information should be provided in a complete affidavit.

[9] I turn, then, to consideration of Mr. Thorne's request to enter Ms. Stark's affidavit as fresh evidence. The principles to be applied are set out in *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487:

[14] ...

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

...

[15] ... [F]ailure to meet the due diligence criterion should not be used to deny admission of fresh evidence on appeal if that evidence is compelling and it is in the interests of justice to admit it.

[10] Regarding the first criterion, in *R. v. R.R.W.*, 2011 NLCA 45, 308 Nfld. & P.E.I.R. 197, Green C.J.N.L., for the Court, noted:

[24] Appellate courts have often admitted new evidence not called at trial due to the inadvertence of counsel. ... The party seeking the admission of the new evidence must, however, establish that the omissions of counsel were not simply “the result of reasonable professional judgment”

[11] In this case, it is accepted that the failure to adduce Ms. Stark’s affidavit at trial was the result of an inadvertent error by counsel. The remaining three criteria for admission of fresh evidence are satisfied. Accordingly, in the circumstances, I would grant leave to file Ms. Stark’s affidavit for purposes of the appeal.

Determination of Commencement of Time on Remand

[12] Section 6 of the *Prisons and Reformatories Act* provides for “earned remission” while a sentence of imprisonment is being served. For purposes of this appeal, subsection (1) specifies that a prisoner “shall be credited with 15 days of remission of the sentence in respect of each month” served. Subsections (4) and (5) provide:

(4) Every prisoner who, having been credited with earned remission, commits any breach of the prison rules is, at the discretion of the person who determines that the breach has been committed, liable to forfeit, in whole or in part, the earned remission that stands to the credit of the prisoner

(5) Where remission is credited against a sentence being served by a prisoner ..., the prisoner is entitled to be released from imprisonment before the expiration of the sentence.

[13] In the circumstances, the information provided by Ms. Stark leads to the conclusion that Mr. Thorne should be credited with earned remission with respect to the sentence for the first offences, and that he should be considered to have been remanded in custody regarding the second offences as of August 23, 2014. The Crown concedes this point.

[14] In submitting that he should be credited with 1.5 days for each day he was imprisoned from August 23, 2014 until he was sentenced for the second offences, Mr. Thorne relies on *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575. Karakatsanis J., for the Court, explained:

[70] ... Judges should continue to assign credit on the basis of the quantitative rationale, to account for the lost eligibility for early release and parole during pre-sentence custody, and the qualitative rationale, to account for the relative harshness of the conditions in detention centres.

[71] The loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, and parole is unlikely. Of course, a lower rate may be appropriate when detention was a result of the offender's bad conduct, or the offender is likely to obtain neither early release nor parole. ...

[15] In this case, the trial judge granted Mr. Thorne credit of 1.5 days for each day he served while on remand. As a result of this decision, that period of time has been extended by the addition of the days from August 23 to completion of the ninety-day sentence for the first offences. The same level of credit of 1.5 days for each day served would apply to those additional days.

SUMMARY AND DISPOSITION

[16] I would grant leave to appeal and to file fresh evidence by way of Ms. Stark's affidavit on the basis that the evidence is compelling and it is in the interests of justice to admit it. I would allow the appeal. I would credit Mr. Thorne with 1.5 days for each day served while on remand; that is, the days before he was sentenced for the first offences together with the days served from August 23, 2014 until he was sentenced for the second offences.

[17] I would emphasize the importance of ensuring a complete affidavit is provided to the sentencing judge (see paragraphs 7 and 8, above).

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.