



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

Citation: *R. v. Summers*, 2023 NLCA 20

Date: July 27, 2023

Docket Number: 201901H0083

BETWEEN:

BLAIR SUMMERS

APPLICANT/APPELLANT

AND:

HIS MAJESTY THE KING

as represented by the Attorney

General of Newfoundland and Labrador

FIRST RESPONDENT

AND:

HIS MAJESTY THE KING

as represented by the Attorney

General of Canada

SECOND RESPONDENT

Coram: D.E. Fry, C.J.N.L., F.J. Knickle and D.M. Boone JJ.A.

Application Heard: July 27, 2023

Decision Rendered: July 27, 2023 (Orally)

Memorandum of Disposition Filed: July 28, 2023

Counsel for the Appellant: Sandra Fry

Counsel for the First Respondent: Dana E. Sullivan

Counsel for the Second Respondent: Trevor N. Bridger

MEMORANDUM OF DISPOSITION

Boone J.A.:

- [1] Blair Summers pleaded guilty and was convicted of three counts of possession of drugs for the purposes of trafficking, and one count of break and entry. A Provincial Court judge sentenced him to five years imprisonment on the drug charges, and three years concurrent for the break and entry (“the Provincial Court sentence”). The Provincial Court judge ordered that sentence to be served consecutively to a sentence of four years and eight months that Mr. Summers was serving for other offences (described in the majority decision as the “February and March offences”).
- [2] Mr. Summers appealed the Provincial Court sentence. Welsh, J.A., with Boone, J.A. concurring but Knickle, J.A. dissenting, set aside the Provincial Court sentence and substituted a sentence of seven years imprisonment to be served concurrently with the sentence for the February and March offences.
- [3] The Provincial Court judge gave Mr. Summers credit for time served prior to sentencing at a rate of 1.5:1 (a total of 208 days). Mr. Summers now applies for clarification as to whether the majority intended that he would still receive credit for pre-sentence custody to be applied against the seven year sentence substituted on appeal.
- [4] The operative part of the formal Order filed following the disposition of the sentence appeal provided:
 - 1. Leave to Appeal is granted;
 - 2. The Appeal is allowed;
 - 3. The sentence imposed by the trial judge is set aside and a substitute sentence of seven years imprisonment to be served concurrently with the four year and eight month sentence imposed for the February and March offences.
- [5] Mr. Summers’ application is taken pursuant to the *Court of Appeal Criminal Appeal Rules* (2002), s. 26(2):

26(2) Any party to an appeal who wishes the order amended to express better the intent of the decision of the Court may apply to the Court, which may correct or otherwise amend the formal order, and the amended order shall then without a change of date, be signed and entered by the Registrar as the formal order disposing of the appeal.

- [6] The panel that heard the appeal included Welsh, J.A., who has since retired. Although two members of a panel may constitute a quorum under the *Rules*, should the remaining two justices hear the application and disagree, no order could issue from the Court and the application would remain unresolved.
- [7] At the request of the parties and with their consent, a third justice was added to the panel pursuant to section 39 of the *Court of Appeal Act*, and associated rules, which provide that the Court may adopt the practice or procedure that is necessary to permit the proceedings to continue.
- [8] An application under Rule 26(2) asks the Court to amend or correct its Order, not its decision. It is not an opportunity for the Court to correct an error in its decision.
- [9] The manifest intention of the majority decision was that only the period of imprisonment of five years as determined by the trial judge needed to be addressed. It was never the intention of the majority to disturb the remand credit, and always the intention of the majority that the increase of five years imprisonment to seven years imprisonment would be subject to the remand credit. No other aspects of the original sentence, including credit granted by the trial judge for pre-sentence custody, were in issue on appeal. The majority clearly expressed this intention in the following paragraphs of the decision: 4, 12, 31, 32, 53-57 and 62.
- [10] The application is allowed. The Order is amended to state:
 - 1. Leave to Appeal is granted;
 - 2. The Appeal is allowed;
 - 3. The five year sentence of imprisonment as determined by the trial judge is set aside and substituted with a sentence of seven years imprisonment, less remand credit as granted by the trial judge, to be

served concurrently with the four year and eight month sentence imposed for the February and March offences.

D.M. Boone J.A.