COURT OF APPEAL FOR YUKON

Citation: *R. v. Maxwell-Smith*,
2013 YKCA 12

Date: 20130903
Docket: 12-YU711

Between:

Regina

Appellant

And

Christopher John Maxwell-Smith

Respondent

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from: Territorial Court of Yukon, November 6, 2012
(R. v. Maxwell-Smith, 2012 YKTC 107, Whitehorse Registry 10-00258
10-00258A; 10-00258B; 10-00258C)

Oral Reasons for Judgment

Counsel for the Appellant:	E. Marcoux
Counsel for the Respondent:	G.R. Goffin
Place and Date of Hearing:	Vancouver, British Columbia September 3, 2013
Place and Date of Judgment:	Vancouver, British Columbia September 3, 2013

Summary:

The offender was sentenced to imprisonment of two years less a day in respect of the offences of impaired driving causing death, breach of recognizance and failure to attend court. The offender had been in custody for 8 ½ months prior to his sentencing. The offender would have been deported with no right of appeal if the length of the prison sentence was two years or more. The sentencing judge gave concurrent sentences of one month imprisonment for the breach of recognizance and failure to attend court, and made them concurrent to the sentence for the offence of impaired driving causing death. The Crown appealed the length of the sentence for the offence of impaired driving causing death and the concurrent nature of the other two sentences.

Held: appeal dismissed. The sentence for the offence of impaired driving causing death was not demonstrably unfit, and it was not shown that the sentencing judge allowed the deportation issue to inappropriately dominate the sentencing process. The judge did err by failing to state the effective sentence and the amount of credit given in respect of the pre-sentence custody, but this error did not lead the judge to impose a sentence different from the sentence she would have imposed had she complied with s. 719(3.3) of the Criminal Code. The judge also erred in making the sentences for the offences of breach of recognizance and failure to attend court concurrent to the sentence for the offence of impaired driving causing death, but it would not be in the interests of justice to increase the overall sentence by one month.

[1] **TYSOE J.A.**: On November 6, 2012, Mr. Maxwell-Smith was sentenced by a Territorial Court judge in respect of three offences: (i) causing the death of a person while his ability to operate a motor vehicle was impaired by alcohol; (ii) breaching a term of his recognizance by failing to report to his bail supervisor; and (iii) failing to attend court as required to do so. He was sentenced to imprisonment of two years less a day on the first offence and one month on each of the second and third offences, with the second and third sentences to be served concurrently with each other and with the sentence on the first offence. The Crown applies for leave to appeal and, if granted, appeals the length of the first sentence and the concurrent nature of the second and third sentences.

[2] In July 2010, Mr. Maxwell-Smith was working as part of a six man scaffolding crew at Pelly Crossing, Yukon. After work and some drinking one evening, the crew decided to travel to Carmacks. Although he only had a learner's licence, Mr. Maxwell-Smith decided to drive the crew's van. He lost control of the van while driving at an excessive speed in a construction area approximately 17 kilometres south of Pelly Crossing. One of the passengers was ejected from the vehicle and died from the injuries he sustained.

[3] Mr. Maxwell-Smith was charged under ss. 255(3) and 255(3.1) of the *Criminal Code* in connection with the incident. He pleaded not guilty and elected to be tried by a Territorial Court judge.

[4] Mr. Maxwell-Smith was granted judicial interim release pending his trial. He moved to Ontario, and failed to report to his bail supervisor and to attend court for his first trial date. I gather a warrant for his arrest was issued, and he turned himself into the Ontario police on January 23, 2012. He was brought back to the Yukon, remaining in custody from January 23, 2012 until his sentencing.

[5] Mr. Maxwell-Smith was tried in July 2012 and, by reasons for judgment dated August 10, 2012 and indexed as 2012 YKTC 76, the trial judge found him to be guilty of both offences. The judge found that Mr. Maxwell-Smith's blood alcohol concentration at the time of the offences was between134 and 158 milligrams of

alcohol per one hundred millilitres of blood. A stay was entered on the less serious of the two offences under s. 255(3.1) pursuant to the principles set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[6] At the time of the sentencing, Mr. Maxwell-Smith was 27 years of age and had no criminal record. He was a citizen of the United Kingdom and had come to North America in 2007. He worked in the scaffolding industry and was a supervisor at the time he was taken into custody. He had difficulty coming to terms with the death of his co-worker, becoming depressed and seeking counselling. Defence counsel advised the sentencing judge that a sentence of two years or more would lead to Mr. Maxwell-Smith's automatic deportation with no right of appeal.

[7] In considering the appropriate sentence to impose on Mr. Maxwell-Smith, the sentencing judge reviewed the sentencing principles set out in ss. 718.1 and 718.2 of the *Criminal Code*, R.S.C. 1985, c. C-46. She also reviewed numerous authorities involving sentences for the offence of impaired driving causing death, including the appellate authorities of *R. v. Junkert*, 2010 ONCA 549 (5 years upheld), *R. v. Ramage*, 2010 ONCA 488 (4 years upheld), *R. v. Ruizfuentes*, 2010 MBCA 90 (6 years reduced to 4 ½ years), *R. v. Charles*, 2011 BCCA 68 (3 years upheld) and *R. v. Homer*, 2003 BCCA 15 (3 years upheld).

[8] The sentencing judge directed her mind to the credit to be given in respect of the time Mr. Maxwell-Smith spent in custody prior to his sentencing. She commented that the evidence "would appear to support that there have not been any issues with respect to him, while on remand, that would have affected his ability to earn the remission time that would ordinarily be provided to an individual serving a sentence". She then continued as follows:

> [55] The time in custody, by my rough calculations from the numbers that were provided to me, would indicate that Mr. Maxwell-Smith has served approximately nine and a half months on remand or, if credit from the time that I remanded him on the 10th of August to the present time is considered to be appropriate to be credited at one and a half to one, it would be closer to 11 months of total time of credit. I consider that the time that he has been on remand in respect of this matter, whether

> calculated at straight one for one, or at one and a half to one credit, is a relevant factor in respect of the appropriate sentence in this matter.

[9] The judge concluded as follows:

> [56] … In regard to the principles of sentencing that I have set out, the evidence that I heard in this case, and the findings contained in the decision following the trial on August 10, 2012, the submissions of both counsel, and the contents of the Pre-Sentence Report, I have determined that the appropriate sentence in this matter, on the charge under s. 255(3), impaired driving causing death, is a sentence, commencing today, of two years less a day. On the charge under s. 145(3) as amended, breach of the conditions of your bail, I impose a period of one month in jail concurrent. On the charge under s. 145(2)(b), failing to attend court as required, I impose a period of one month in jail concurrent.

[10] We are advised that Mr. Maxwell-Smith was released on day parole on July 8, 2013, and has been working for the past two months. We are also advised that a deportation order in respect of Mr. Maxwell-Smith has been issued and that he has appealed it.

[11] On appeal, the Crown says that, contrary to the direction given by the Supreme Court of Canada in *R. v. Pham*, 2013 SCC 15, the judge allowed the deportation issue to inappropriately dominate the sentencing process. In addition, the Crown says that the judge erred by imposing concurrent sentences for the breaches by Mr. Maxwell-Smith of his obligations to report to his bail supervisor and to attend court on the first trial date, and that the sentence is unfit.

[12] The well-known standard of appellate review in respect of sentence appeals was set out in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, at para. 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only interfere to vary a sentence imposed at trial if the sentence is demonstrably unfit.

At para. 92, Chief Justice Lamer elaborated that a sentence is demonstrably unfit if it "is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes".

[13] In *Pham*, the Supreme Court of Canada considered the issue of the effect of collateral immigration consequences. In that case, when he sentenced the offender to two years' imprisonment, the judge was unaware that it would lead to his deportation. In reducing the sentence to imprisonment of two years less a day, Mr. Justice Wagner said the following:

> [13] Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.
>
> [14] The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> [15] The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.
>
> [16] These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

[14] Mr. Justice Wagner also adopted the statement of Mr. Justice Doherty in *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.) at para. 156 that "the risk of deportation cannot justify a sentence which is inconsistent with the fundamental purpose and the principles of sentencing identified in the *Criminal Code*".

[15] Thus, while the risk of deportation is a factor that a sentencing judge may take into account, the sentence imposed by the judge must nevertheless be a fit sentence. On appeal, it remains the role of the appellate court to determine if the sentence was demonstrably unfit.

[16] I agree with the Crown that the sentences for the second and third offences should not have been made concurrent to the sentence for the first offence. The test for imposing a concurrent sentence for an additional offence is "whether the acts constituting the offence were part of a linked series of acts within a single endeavour": see *R. v. G.P.W.* (1998), 106 B.C.A.C. 239, as affirmed in *R. v. Li*, 2009

BCCA 85. While Mr. Maxwell-Smith's failure to report to his bail supervisor and his failure to attend court on the first trial date could be considered to be a series of acts linked to his decision to move to Ontario, they were not sufficiently linked to the offence of impaired driving causing death in order to justify a sentence concurrent to the sentence for that offence.

[17] If one considers that an additional sentence of one month for the second and third offences was given to Mr. Maxwell-Smith and that a credit of nine and one-half months was given for Mr. Maxwell-Smith's pre-sentence custody, then the effective sentence given for the offence of impaired driving causing death was two years, eight and one-half months.

[18] In two of the appellate decisions cited by the sentencing judge (*Charles* and *Homer*), sentences of three years were upheld. In the recent decision of *R. v. Smith*, 2013 BCCA 173 at para. 60, Madam Justice Bennett stated that the range of sentence for the offence of impaired driving causing death is from 18 months to eight years. The sentence imposed in this case was well within that range, and I am not persuaded that it was demonstrably unfit.

[19] Nor do I agree with the Crown's characterization that the deportation issue inappropriately dominated the sentencing process. The judge was entitled to take the risk of deportation into account as long as it did not lead her to impose an unfit sentence.

[20] It was an error for the sentencing judge to have failed to specify the effective sentence she was imposing for the offence of impaired driving causing death before giving credit for the period of time Mr. Maxwell-Smith spent in custody prior to the sentencing. Section 719(3.3) of the *Criminal Code* requires the court to state the term of imprisonment that would have been imposed before a credit for pre-sentence custody is given, the amount of the credit and the length of the sentence. It does not appear to me, however, that this error led the judge to impose a sentence that was different from the sentence she would have imposed had she had complied with s. 719(3.3). The approach taken by the judge is not one that should be encouraged

but, in the circumstances of this case, it is not a basis upon which the appeal should be allowed.

[21] There was a discrete error on the part of the sentencing judge in making the sentences for the second and third offences concurrent to the sentence for the first offence. She made this error after determining the appropriate sentence for the first offence. There is merit in the view that the overall sentence for the three offences should be increased by one month as a result of this discrete error (for example, sentences are often revised on appeal when the sentencing judge has committed a discrete error in giving credit in respect of pre-sentence custody). However, taking into account the factors discussed in *R. v. Taylor*, 2013 NLCA 42 at paras. 46-67 and, in particular, the factors that Mr. Maxwell-Smith would be returned to jail for a relatively short period of time and that his immigration status is a special circumstance, it is my view that it would not be in the interests of justice to increase the sentence.

[22] I would grant leave to appeal, but I would dismiss the appeal.

[23] **CHIASSON J.A.**: I agree.

[24] **GROBERMAN J.A.**: I agree.

[25] **CHIASSON J.A.**: Leave to appeal is granted. The appeal is dismissed.

"The Honourable Mr. Justice Tysoe"