

COURT OF APPEAL OF YUKON

Citation: *R. v. Rutley*,
2015 YKCA 8

Date: 20150313
Docket: 12-YU716

Between:

Regina

Respondent

And

Darren Troy Rutley

Appellant

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice A. MacKenzie
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of Yukon dated January 25, 2013
(*R. v. Rutley*, 2013 YKTC 7, Dawson City Docket 11-11015)

Oral Reasons for Judgment

Appellant appearing In Person:

Counsel for the Respondent:

J.D. Cliffe, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia
March 13, 2015

Place and Date of Judgment:

Vancouver, British Columbia
March 13, 2015

Summary:

The appellant applies for leave to appeal his sentence and seeks credit for pre-sentence custody at a ratio of 1.5 days for each day spent in pre-sentence custody. In advance of his trial, he was detained in custody under s. 524(8) of the Criminal Code, R.S.C. 1985, c. C -46. On this appeal, he seeks to challenge the constitutionality of s. 719(3.1) of the Code concerning the determination of the pre-trial credit when the person is detained in custody under s. 524(8). Held: Leave to appeal denied. The constitutional issue which the appellant wishes to raise was determined by this Court in R. v. Chambers, 2014 YKCA 13, in which the Court upheld the constitutionality of the section which the appellant wishes to now challenge. That decision is binding upon us and is dispositive of the only issue the appellant raises on the appeal. credit for pre-sentence custody at a ratio of 1.5 days for each day spent in pre-sentence custody. In advance of his trial, he was detained in custody under s. 524(8) of the Criminal Code, R.S.C. 1985, c. C -46. On this appeal, he seeks to challenge the constitutionality of s. 719(3.1) of the Code concerning the determination of the pre-trial credit when the person is detained in custody under s. 524(8). Held: Leave to appeal denied. The constitutional issue which the appellant wishes to raise was determined by this Court in R. v. Chambers, 2014 YKCA 13, in which the Court upheld the constitutionality of the section which the appellant wishes to now challenge. That decision is binding upon us and is dispositive of the only issue the appellant raises on the appeal.

[1] **GOEPEL J.A.:** Darren Troy Rutley applies for leave to appeal, and if granted leave, appeals his sentence seeking credit for pre-sentence custody at a ratio of 1.5 days for each day spent in pre-sentence custody. In advance of his trial, Mr. Rutley was detained in custody under s. 524(8) of the *Criminal Code*, R.S.C. 1985, c. C -46. On this appeal, he seeks to challenge the constitutionality of s. 719(3.1) of the *Code*.

[2] Mr. Rutley was convicted of a single count of break, enter and commit aggravated assault. He was sentenced to a term of imprisonment of four years to be reduced by credit for time spent in pre-trial custody. Mr. Rutley had spent some 560 days in pre-trial custody. The trial judge noted that because Mr. Rutley had been held in custody pursuant to s. 524 of the *Criminal Code*, she was limited by law to crediting him to 1:1 credit.

[3] The sole issue Mr. Rutley raises on appeal is his entitlement to credit for pre-sentence custody. He seeks credit at the enhanced rate of 1.5:1.

[4] The pre-sentence custody in this case was calculated pursuant to the provisions of s. 719 of the *Criminal Code*. The relevant sections provide:

719.

Determination of sentence

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Exception

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

[5] In this case, Mr. Rutley's credit is governed by the s. 524(8) exception found in s. 719(3.1). That section provides:

524 (8) Where an accused described in subsection (3), other than an accused to whom paragraph (a) of that subsection applies, is taken before the justice and the justice finds

(a) that the accused has contravened or had been about to contravene his summons, appearance notice, promise to appear, undertaking or recognizance, or

(b) that there are reasonable grounds to believe that the accused has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).

[6] To succeed on this appeal, Mr. Rutley must establish that the provisions of s. 719(3.1) concerning the determination of the pre-trial credit when the person is detained in custody under s. 524(8) are unconstitutional.

[7] Mr. Rutley did not raise the constitutional issue on his sentencing hearing. Leave is required when a party seeks to advance a new issue on appeal, and appellate courts generally will only allow a new charter-based issue to be raised on

appeal in exceptional circumstances: see *R. v. Lilgert*, 2014 BCCA 493 and the cases cited therein.

[8] In this case, there is a more fundamental reason to not grant leave. The constitutional issue which Mr. Rutley wishes to raise was recently heard and determined by this Court in *R. v. Chambers*, 2014 YKCA 13, in which the Court upheld the constitutionality of the section which Mr. Rutley wishes to now challenge. That decision is binding upon us and is dispositive that the only issue Mr. Rutley wishes to raise on the appeal.

[9] In the circumstances therefore, I would not grant leave to appeal the sentence.

[10] **FRANKEL J.A.:** I agree.

[11] **A. MACKENZIE J.A.:** I agree.

[12] **FRANKEL J.A.:** Leave to appeal is refused.

“The Honourable Mr. Justice Goepel”