

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Duncan, 2018 ONCA 574

DATE: 20180625

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Lauwers, Pardu and Miller JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Anthony Duncan

Appellant

Anthony Duncan, acting in person

Nader R. Hasan, appearing as duty counsel

Hannah Freeman, for the respondent

Heard: June 5, 2018

On appeal from the sentence imposed by Justice Jane E. Kelly of the Superior Court of Justice on December 5, 2017.

REASONS FOR DECISION

[1] The appellant pleaded guilty to a number of offences under the *Criminal Code*, R.S.C. 1985, c. C-46: making false documents, contrary to s. 366(1); three counts of possessing identity documents to commit an indictable offence, contrary to s. 402.2(1); two counts of using, trafficking, or possessing forged documents, contrary to s. 368(1); four counts of possession of property obtained by crime, contrary to s. 354(1); and trafficking in another person's identity information, contrary to s. 402.2(2).

[2] At the sentencing hearing, Crown counsel sought a sentence of two years less-one-day in custody and two years of probation. The appellant's counsel sought a conditional sentence of 15 months to allow the appellant to serve his sentence in the community.

[3] The sentencing judge imposed a global term of incarceration of 18 months, less

time served at 1.5 days pre-sentence credit for a total of 5 months' credit, leaving an effective remaining sentence of 13 months.

[4] Duty counsel submits that the sentencing judge made an error in failing to consider adverse immigration consequences and that, in light of the immigration consequences, a conditional sentence would be an appropriate and fit sentence.

[5] The sentencing judge did not independently opine on the immigration issue in this specific case. However, she appears to have turned her mind to the issue. Before reviewing the purpose and principles of sentencing, she noted: "Regardless of ... his or her status in Canada, the court is required to consider" s. 718 of the *Criminal Code*. Moreover, possible immigration issues were identified during sentencing submissions. Defence counsel noted that the appellant was a permanent resident and had an immigration lawyer who was preparing an opinion.

[6] The situation for the appellant, as a British citizen, is that he is now exposed to deportation to the United Kingdom at the age of about 57 (although his actual birthdate is unclear), where he has not lived since he was a young boy.

[7] The explanation given by Trotter J.A. in *R. v. McKenzie*, 2017 ONCA 128, 346 C.C.C. (3d) 477, at para. 24, applies to the appellant's situation:

The immigration consequences of the appellant's offending are extremely serious. Under s. 36(1)(a) of the *IRPA* [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27], a permanent resident is "inadmissible" on grounds of "serious criminality." When *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739 was decided, s. 64(2) provided that a removal order based on inadmissibility due to "serious criminality" could not be appealed to the Immigration Appeal Division ("IAD") "with respect to a crime that was punished in Canada by a term of imprisonment of at least two years." Upon appeal, the IAD can stay a removal order if it is satisfied "that sufficient humanitarian and compassionate considerations warrant special relief in all of the circumstances of the case": *IRPA*, s. 68 (1). This provision has since been amended by s. 24 of the *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16, which ousts the right to appeal "with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c)."

[8] Duty counsel submits that this court should now substitute a conditional sentence in order to preserve the appellant's appeal right to the Immigration Appeal Division if he is faced with a deportation order. Counsel points out that the appellant has almost served out his entire sentence, so the punitive element of the original sentence would not be diminished.

[9] The issue before this court is, as in *Pham*, whether a sentence otherwise falling within the range of fit sentences can be varied by this court to take potential deportation into account. Trotter J. noted: "Wagner J. [in *Pham*] warned (at para. 16) that the consideration of immigration consequences '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:’ *McKenzie*, at para. 34.

[10] The question for this court: was the sentence fit in light of the specific immigration consequences now made known to this court?

[11] In her sentencing decision, the sentencing judge reviewed the elements of s. 718 of the *Criminal Code*, and she reviewed both aggravating and mitigating circumstances, including his community involvement and support. She referred to the appellant’s significant criminal record, noting that he had “24 convictions for crimes of dishonesty: including public mischief, cheating at play, fraud, uttering forged documents, attempting to obstruct a peace officer, personation with intent”, among others. The sentencing judge referred to the appellant’s previous ten terms of community supervision “with four fail to comply [with] recognizance, one fail to comply [with] probation, and [a] fail to attend court.” She also noted that his “reporting habits were sporadic, as he would often either fail to report or report late.” In the final analysis, the sentencing judge noted: “Most of all, ... [the appellant] has an extensive criminal record, and there is no insight offered for his behaviour.” She specifically rejected a conditional sentence as “not appropriate”.

[12] The sentence was heavier than the sentences imposed on his associates. One, who had no previous convictions, was given a conditional sentence. The other, who had a prior conviction, received a 12-month sentence. We do not find the appellant’s sentence to be comparatively disproportionate in light of his record.

[13] Despite duty counsel’s able submissions, we are unable to find that the sentence imposed by the sentencing judge was unfit in light of the appellant’s criminal record. A conditional sentence would not have been appropriate in light of the appellant’s multiple previous failures to comply with the terms of community supervision orders. There is no principled basis on which we could reduce his sentence to a conditional sentence, despite the immigration consequences. As noted in *Pham* at para. 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.”

[14] The appeal is dismissed.

“P. Lauwers J.A.”

“G. Pardu J.A.”

“B.W. Miller J.A.”