In the Court of Appeal of Alberta

Citation: R v Ranger, 2014 ABCA 50

Date: 20140210
Docket: 1203-0188-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and –

Robert Steve Ranger

Appellant

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Judge D.R. Valgardson
Dated the 10th day of August, 2012
(Docket: 110468980P1)

Memorandum of Judgment

The Court:

I Introduction

[1] The appellant challenges an effective total sentence of imprisonment for 9.5 years (114 months) for 21 out of 28 counts against him in four categories: (a) driving offences, including dangerous driving, disqualified driving and flight from police; (b) property offences, including possession of several different forms of falsified identification documents and proceeds of crime; (c) drug offences, including possession for trafficking of four different sorts of amphetamines and cocaine; and (d) anti-justice system offences including breach of recognizance, obstruction by false self-identification, and resisting arrest.

[2] At sentencing, the defence argued for a total effective sentence of 7 years (84 months), and the Crown sought a total effective sentence of 12 years (144 months). The appellant originally filed a notice of appeal from both conviction and sentence. When he appeared before this Court without counsel, he made clear that he was not pursuing his conviction appeal and was only proceeding with a sentence appeal.

[3] None of the submissions made to the Court by the appellant challenged the underlying validity of his convictions or, for that matter, the imposition of sentence for those convictions. The appellant claimed that he had learned from his trial counsel that the sentencing judge was a former senior Crown prosecutor, was the parent of a police officer, and that she had a friendly relationship with the specific Crown counsel who appeared on his case. Yet the appellant did not present any submission that these alleged circumstances justified or required intervention against his convictions. No evidence, in affidavit form or otherwise, supporting these arguments was provided.

[4] On another matter the defence specifically agreed not to ask for any credit for 30 months of pre-sentence custody, because the appellant wished to use that credit to deal with unrelated matters scheduled for disposition in Provincial Court in August, 2012.

II Circumstances

[5] The appellant was 33 years old when, on February 22, 2010, his drug trafficking and other ongoing criminal activities were intruded upon by the police. He was driving a silver Ford Taurus with no headlights on around 2:30 a.m. and a police officer flashed his patrol car lights to get the appellant's attention. The appellant ducked into some alleyways and then out onto a main street, gaining speeds to 100 kph and going through red lights as he went west. Police yielded their ground pursuit to the Air One police helicopter but continued to follow with lights flashing, as well as calling in other officers who came from different directions.

[6] The sentencing judge described what happened next in her oral reasons for conviction (also at 2012 ABPC 237) as follows:

> The ground pursuit was called off when Air One took over. Sergeant Wilson continued at a more sensible speed to the west end of the city and observed the same silver Taurus that he believed he had been following located in an industrial site compound west of Edmonton. Constables Lang and Coughlan were following Sergeant Wilson with their emergency lights on once the Taurus pursuit was underway. Two other officers, Constable Bernardin and Constable Andrews were driving east on Stony Plain Road toward the Taurus when the Taurus followed by Sergeant Wilson with his emergency lights flashing crossed the center lane driving westbound directly at Constable Bernardin. The officer had to take evasive action to avoid being hit by the Taurus. Constable Bernardin and Andrews then turned and followed the Taurus with the other police cruisers assisting in the ground pursuit until Air One took over.
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> Air One's tactical officer at the time, Constable Pennie, testified that Air One was dispatched to assist in the police pursuit in relation to this investigation. He testified that Air One is used where there is a public safety concern, as was the case here. The ground pursuit in that event can be terminated, but the helicopter continues the surveillance. The helicopter's equipment includes an infrared camera, a FLIR, which detects heat sources, and it also contains radio communication equipment to relay information to police cruisers on the ground.
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> Constable Pennie observed the target motor vehicle as it travelled out of the city to the area of Range Road 262 and on to a business area where it became stuck in deep snow.

[7] In her later sentencing reasons the sentencing judge added that Air One described "the fleeing vehicle was very hot and traveling very fast (at estimated speeds as high as 140 kilometres per hour)". After the appellant's vehicle got stuck, the police observed the appellant try unsuccessfully to dislodge the vehicle, and then to abandon that attempt. He was then seen to take an item from the interior of the vehicle and run northwest through the Penn West compound. He tossed that item over a fence, and then climbed over himself. He hid this item under a tank or a piece of equipment in the compound. He then climbed two additional fences before being caught and taken into custody by the dog unit and other officers.

[8] In her oral sentencing reasons, the sentencing judge described the apprehension of the appellant by the dog and other officers. She noted that Cst. Williamson, the handler for police dog Quanto, observed the appellant on the other side of a 6 foot chain link fence topped with barbed wire. The appellant ran 60 to 80 metres and initially attempted to hide. Williamson cut through the fence and entered with Quanto during which time the appellant went past some buildings and over another fence to a road and bush area. What followed (from the oral reasons):

> As Constable Williamson approached the accused, he issued police challenges saying, "City Police. Canine Unit. Stop or I'll send the dog." The officer testified that he was confident that the accused heard and saw him, as the accused looked back, but kept on running.
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> Constable Williamson chased the accused up the road and determined that he would not be able to catch the accused on foot. He testified that he usually keeps issuing challenges and that he did so at least twice more. In cross-examination the officer confirmed that there was no place for the accused to go. In fact, the accused appeared quite desperate. Constable Williamson released PSD Quanto. The dog covered the distance to the accused in about 10 seconds and engaged the accused's right forearm as the accused turned toward the dog and presented his arm. The accused stumbled back and away, but did not fall. The accused did not appear frightened or in shock. He reached around the dog's neck and appeared to Constable Williamson to be choking or to be trying to hurt Quanto's jaws or neck. Constable Williamson realized that Quanto was not having much effect. He struck the accused once he caught up with him on the side of the head. At this point, the accused fell down with Quanto still engaged and began to thrash and roll, fighting with the officer and the dog and growling - that is the accused, not the dog.
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> Constable Williamson tried to gain control by grabbing the accused's left arm, but was unable to do so. He grabbed Quanto by the harness as Constable Lang moved in to assist. As Quanto was still engaged, Constable Williamson pulled the dog back to extend the accused's right arm away from his body. A variety of knee and palm strikes were used by Constable Lang to gain control of the accused's left arm. Once Quanto was ordered to release he did so. Constable Williamson observed the accused fighting and thrashing and making guttural noises. He did not consider the accused's response to be to the pain of being bitten or, for that matter, normal.

[9] The version of Constable Lang, described by the sentencing judge, was that Lang testified that he believed the appellant was attempting to strangle the dog and that both Lang and Williamson jumped on the appellant telling him to show his hands (Lang not being sure he did not have a weapon). After several blows, the appellant did produce his hands and was cuffed. The appellant was later taken to hospital where he received x-rays and some stitches and a treatment for a bite to his arm as noted above. Before this Court, the appellant asserted that he suffered lingering injuries to his arms or shoulders or ribs, but no medical reports were provided.

[10] The appellant testified at the sentencing hearing about his arrest. The sentencing judge reported this, *inter alia*, about his evidence:

> In speaking of the use of the dog, the accused stated that he had been arrested approximately 25 times and had once before been bitten by a dog. On one other occasion he testified the dog was on scene but not released. He observed on this occasion that police could have used a taser rather than the dog and that they also wore side arms. The accused testified that he suffered injuries to his ribs, a cut to his cheek, and, of course the puncture wound to his arm. A booking photo shows his face with a cut, stitched just below his right eye. No medical records from the Misericordia Hospital or Remand Centre were produced.
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> In cross-examination, the accused acknowledged that he wanted to avoid arrest and that he was scared, he fled police, and he was motivated to retrieve and hide the bag with drugs and money in it. He insisted that his reaction in fleeing on foot was a panic response and that police ought not to have used the dog to apprehend him at all.

[11] The sentencing judge rejected other allegations made by the appellant about being hit with a flashlight or kicked by the police. She found no further force was used once he surrendered. She found the appellant was warned three times that the dog would be released before that occurred. She found the use of the dog was objectively reasonable and she was not persuaded that the police used excessive force in the arrest. She found that the appellant's behaviour was unusual and, further, that "The accused was determined to escape, notwithstanding the physical setting in which he was apprehended, and it was difficult for the officers to assess his motivation or his condition at the point of arrest." It is noteworthy that even after the rough arrest, the appellant initially attempted to persuade the police that his name was Cory Huculak, which was one of the false identifications in his possession.

[12] On the issue of police violence in his arrest, the appellant, from counsel table on the appeal to this Court (without an affidavit) repeated the assertions that he made to the sentencing judge that he was kicked in the face by a police officer and also that he was beaten with a flash light by the police. He said that this violence was gratuitous and unnecessary as was the release of the dog to apprehend him. He did agree that he did try to choke the police dog to make it let go of his arm.

[13] In support of his contention that the police were excessively violent, the appellant referred the Court to the photograph taken of him following his arrest which was marked as an exhibit. The Court notes that the photograph does reveal that the appellant suffered facial injuries. According to her reasons, the sentencing judge saw the same photograph. This Court is not in a position to re-try the evidence that the sentencing judge considered in drawing inferences about the cause of those injuries. Nonetheless, the issue of whether the violence of the arrest should be treated in mitigation of sentence is discussed under the Analysis below.

[14] As to the drugs and money seized from the appellant, the sentencing judge noted that in the gym bag hidden on the Penn West property was $31,910 in Canadian funds and $4,620.00 in US funds. As for the drugs, the trial judge's reasons set out that they were "cocaine, methamphetamine, ecstasy or 3, 4-methylenedioxyamphetamine, and ketamine". Her summary of that evidence concerning the drugs was as follows:

> As the black bag was unpacked at the west end police station, a number of items were removed. There were sandwich bags held together by an elastic band, identification documents in the names -- just the surnames -- of Buchanan, Thompson, and Huculak. The photos attached to identification documents for Thompson and Huculak are photographs of the accused. Two scales were located, one in the black bag and one in a blue travel bag inside the black bag. A creased playing card was located in the blue travel bag. A cell phone was found in the black bag. Nine small drug dime bags were located in a zip lock bag inside the blue travel bag.
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> In the black bag were the following quantities of cash: $120 Canadian in the black bag, $24,350 in the blue bag, $7,400 -- both of those Canadian -- in the blue bag. In US funds there were four separate quantities: $3,100, $2,700, $300, and $20. And oddly, there was a Uruguayan 20-dollar note in the blue bag. The quantities of drugs were not all in a single bag, so what occurred was that each of the separate bags relating to each of the drugs found were weighed and sampled. There was an 8-gram bag of cocaine and benzocaine in the black bag, a 12-gram bag of cocaine in the black bag, a 56-gram bag of cocaine and benzocaine in the black travel bag, a 14-gram bag of cocaine in the black bag, a 26-gram bag of cocaine in the black bag, a 24-gram bag of cocaine in the black bag, and a 50-gram bag of cocaine also in the black bag. The total amount of cocaine was 190 grams.
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> There was also taken from the same black bag a plastic bag containing 18 grams of methamphetamine, a second plastic bag contained 44 grams of methamphetamine, and a plastic bag containing 4 grams of methamphetamine for a total of 66 grams of methamphetamine. In addition, there were quantities of ketamine: A 2-gram bag of ketamine, a 30-gram bag of ketamine and benzocaine, and a 4-gram bag of ketamine for a total of 36 grams of that drug. In addition, there was a plastic bag containing 98 and a half purple pills analyzed to contain ecstasy, or 3, 4-methylenedioxyamphetamine,and a second plastic bag containing approximately 81 pills of the same drug. That was a total of 179 and a half pills of ecstasy.

[15] In relation to this point, the appellant contended to the Court that some form of property report which was prepared (presumably by the police) associated with his apprehension and booking would show that in actuality the amount of money seized from him was not a total of approximately $37,000 but in actuality a total of approximately $42,000. Similarly, the appellant asserted that he had in his possession when pursued and arrested a somewhat greater quantity of contraband drugs than was described at trial.

[16] Accordingly, the appellant insinuated that some of the money and drugs went missing as between the seizure and the trial. He claimed that some document received in disclosure supported this suggestion. The Court asked Crown counsel to locate any relevant property reports to see if there was any material discrepancies indicated thereby. Crown counsel did so and provided the Court with three documents: (a) an excerpt of the trial testimony of Cst. Brad Andrews, the exhibit handler; (b) the exhibit tracking sheet of Cst. Andrews dated February 22, 2010; and (c) a chart excerpted from the report of Det. Guy Pilon, offered as an expert witness. Crown Counsel, rightly, offered no analysis of this material. He was not asked to do so. On review of this material, the Court finds nothing in it which is of relevance to the sentence imposed in this case.

[17] The further question whether the appellant's trial counsel would have been apprised by the appellant or would otherwise have become aware before trial of any discrepancy in the amount of drugs or money seized by the police was not resolved before this Court. On that point, the Court observes that even if some of the money or drugs was not properly accounted for, that does not attenuate in any manner the culpability of the appellant. The Court is not suggesting that any such accounting discrepancy exists; simply that it is not apparent how such discrepancy would assist in the determination of the gravity of the offence or the degree of responsibility of the offender within the meaning of s. 718.1 of the *Code*.

[18] In the Ford Taurus when searched, the police found additional items including a plastic wallet containing a birth certificate in the name of Allen Fandrick, and a grey safe in the trunk, a computer, household items, and woofers from the backseat of the car. Fandrick had stolen from him four passports, including his own, and those of his two daughters and son. The safe and contents belonged to Fandrick. On the appellant's person he had $970 in cash and keys and passports.

[19] The Crown led expert evidence that persuaded the sentencing judge that the drugs were possessed for the purpose of trafficking. They were valued at $2,160 for the ketamine, $15,200 for the cocaine, $6,600 for the methamphetamine, and depending upon where the pills were sold, between $895 and $3,580 for the ecstasy. The appellant admitted in his evidence that he was involved in drugs for the money and was not an addict.

[20] The criminal record of the appellant was also noted by the sentencing judge. It commenced in 1994 in youth court with theft and escaping lawful custody. He had convictions for possession for the purpose of trafficking and breach of disposition and obstruction of a peace officer in April, 1997 in Quebec, resulting in imprisonment for 3 months and 1 year probation. In 1999, again in Quebec, were convictions in January for break and enter, and in September for personation, and breach of probation. On September 18, 2000 he was sentenced in Edmonton for trafficking, possession for the purpose of

trafficking, possession of crime proceeds, breach of recognizance, failing to appear and obstruction of a peace officer.

[21] His criminal record continues from there with a pattern observed by the sentencing judge. There were convictions on different dates in 2001 for possession of stolen property and for assault and causing a disturbance, and for possession of stolen property, assault, assaulting a peace officer, and various forms of breaches of recognizance in April, 2002. On June 21, 2002, he was convicted of possession of stolen property and dangerous driving in Surrey British Columbia and got 2 months in prison. On August 12, 2002, he was convicted of theft and attempted theft, dangerous driving, flight from police and disqualified driving and sentenced to a global 2 years imprisonment.

[22] This was followed by possession of stolen property on February 24, 2003 and 60 days consecutive, and later revocation of statutory release in 2004. On September 26, 2005, back in Edmonton, the collection of crimes was again possession of stolen property, dangerous driving, flight from police, disqualified driving, for what appears to be perhaps as much as 30 months (the record is not clear). There was a disqualified driving conviction in Edmonton on August 3, 2007, and then further convictions on February 6, 2009 at Edmonton for break and enter, disqualified driving, flight from police and dangerous driving for a total of imprisonment of 5 years, less a credit of 52 months given for pre-sentencing custody (which the appellant told this Court amounted to 26 months of actual time in prison), leaving a net of 7.5 months plus a driving prohibition for 3 years.

[23] Against this, the appellant was said by the sentencing judge to have a supportive girlfriend, and some ability to engage in pro-social behaviour as he had been an obedient prisoner who had kept himself busy as a cleaner while in prison. The appellant repeated this in mitigation to this Court. The appellant also explained to this Court that he had since lost his girlfriend and "I lost pretty much everything I got in my life" while he was in custody. He said that schooling he had been taking had upgraded his scholastic level, and was "way more positive" for him. On the other hand, the appellant said that there were some programs that he had declined to take while in custody after sentencing but before the appeal which would have necessitated his making some admissions. For those programs, he suggested that his view that he ought not to make admissions while his appeal was outstanding was, in effect, used against him.

III Sentence and Grounds of Appeal

[24] The specific dispositions as to the driving offences by the sentencing judge were as follows:

> Given the nature, the quantity, and the value of the drugs, as well as the related record of the accused, a fit sentence for the drug offences is one of 6 years imprisonment, concurrent on each. However, applying the totality principle, I reduce that figure to one of 5years. Therefore, on counts 10, 11, 12, and 13, the sentence is 5 years imprisonment.
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> On count number 9, which deals with the proceeds relating to drug trafficking, a sentence of 3 years concurrent is imposed. I do not alter

> that 3 year concurrent sentence, as it does not affect the total sentence of 5 years for that block of offences.

[25] The dispositions as to the driving offences were 1 year for flight, 2 years consecutive for dangerous driving and 2 years concurrent for disqualified driving, explained as follows.

> For the driving offences, given the criminal record of the accused and the nature of the offences I would ordinarily impose a global sentence of 4 years. However, in this case, applying the principle of totality, I reduce the global sentence for those offences to one of 3 3 years consecutive to the 5 years on the drug offences.

[26] The dispositions as to the property offences were either 12 months or 6 months as she specified in relation to various counts. She summarized as follows:

> Given the nature and number of the offences and the related record of the accused, the global sentence that I would otherwise impose is one of 18 months consecutive. Applying the totality principle, I once again reduce that global sentence to 12 months consecutive.

[27] The dispositions as to the justice offences were summarized as follows:

> Compliance with court orders is a serious matter, and the accused has a history of offences which include noncompliance with court orders. It is essential that such offences be discouraged, and it is necessary, in my view, to impose a consecutive sentence. In the ordinary course I would impose the sentence of 12 months incarceration. However, applying the totality principle, I reduce that to a sentence of 6 months consecutive globally as follows; count number 4, which is the resist arrest, the sentence is 3 months consecutive, and on counts 27 and 28, two breaches of recognizance, the sentence is 3 months concurrent on each, but consecutive to the balance.

[28] As a result, the sentencing judge then ended up with a total of 9 years and 6 months. There does not appear to be any issue on appeal as to the corollary dispositions. The appellant's notice of appeal to this court did not set out any grounds of appeal. In his oral submissions to the Court, the appellant argued for reduction in his sentences on the following grounds:

> (a) as indicated above, that the sentencing judge was in what he calls a "conflict of interest" which may well have influenced her approach to sentence.
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> (b) that prior to trial he was offered a sentence of imprisonment for 6 years if he entered guilty pleas, failing which Crown counsel would seek sentences totaling 8 years, and, in actuality, Crown

counsel unfairly escalated the submission to imprisonment totaling 12 years, which he submitted may also have influenced the sentencing judge improperly;

(c) that the unnecessary violence inflicted upon him by the police should be taken into account to reduce his sentence by 12 to 18 months;

(d) that the misconduct of the police as to missing drugs or money should be taken into account in some manner;

(e) that the unfairness shown to him as a serving prisoner should be taken into account in some manner;

(f) that the sentences in Alberta, particularly for drug crimes, were disproportionate, and that a fit sentence for the drug offences should have been 3 years rather than the 5 years calculated by the sentencing judge;

(g) that he had been in prison some 15 years since his teens which had cost him dearly, that his attitude was now different, and that he should receive consideration for his prospects of a change of life course.

[29] Each of these points is dealt with below.

IV Analysis

Disqualification of the Sentencing Judge

[30] It is well settled that a presumption of integrity applies to trial judges who are sworn to execute their duties impartially and without fear or favour: see e.g. ***R v S (RD***), [1997] 3 SCR 484; ***R v Teskey,*** 2007 SCC 25, at para. 19, [2007] 2 SCR 267 ***Cojocaru v BC Women's Hospital and Health Centre,*** 2013 SCC 30 at paras. 14 to 22, 357 DLR 4th 585 ("There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced."). This presumption is not casually set aside based upon the subjective impressions of a party to the proceedings who may believe he has been hard done by. The appellant had no evidence to support the suggestion that the sentencing judge was any sort of personal friend of Crown counsel. The Court cannot take judicial notice of that averment nor of whether there is a police officer amongst the sentencing judge's sons or daughters. The Court does not even have evidence to support the statement that counsel for the appellant told the appellant this.

[31] The Court *is* aware that the sentencing judge is a former senior Crown counsel for the federal Department of Justice although we are not certain how long ago she was appointed to the Bench. The Crown counsel who handled this matter, including on appeal, were also counsel for the federal

Department of Justice. This fact of her prior employment as Crown Counsel would have been well known to the appellant's trial counsel. If the appellant's trial counsel knew or believed that the other circumstances thus mentioned were true, and if counsel felt those facts were disqualifying, it fell to counsel to make an application to her to disqualify herself and to support that application. That did not happen. The appellant has not suggested that his counsel was ineffective or that counsel disobeyed his instructions in any manner.

[32] There is nothing to support this objection to the sentencing judge's participation in this matter. There is nothing upon which to base any inference that her prior employment or another about her family or circle of friends had anything to do with the sentences imposed. She explained her sentences in detail and those withstand scrutiny and meet the three functional objectives of intelligibility, reviewability and accountability. This proposed ground to justify a reduction in the sentence is rejected as it is entirely unsupported by any evidence and without merit.

Unfairness by Crown Counsel

[33] This argument is based on the unsworn allegation of the appellant that Crown counsel suggested that a set of guilty pleas would result in a joint submission for 6 years imprisonment, whereas a trial would involve a sentence of 8 years imprisonment. There is no evidence of this offer, and even if made, no evidence concerning what the precise offer[s] actually were. Be that as it may, and even were there evidence of such a discussion, it has no implications for the validity of the sentence imposed by the sentencing judge. This is not a situation where, in reliance on a position solemnly taken by Crown Counsel about the Crown's position as to sentence, the appellant did anything to his prejudice. On the contrary, he did not accept the proposal, if made, and the matter went to trial. This proposed ground of appeal to justify a reduction in the sentence is rejected as it is without merit.

Police Brutality

[34] Unlike the previous two proposed grounds for a reduction in the sentence, the sentencing judge had this issue raised with her by counsel.

[35] She dealt in her oral sentencing reasons with the potential relevance in sentencing of the fact that the appellant's ultimate arrest following a foot pursuit involved participation of a police dog and police officer stun tactics that were quite violent, mentioning the first two of the following authorities: ***R v Nasogaluak***, 2010 SCC 6, [2010] 2 SCR 206; ***R v Gangl***, 2011 ABCA 357, 515 AR 337; ***R v Witvoet***, 2013 ABCA 76, 43 MVR 6th 34; ***R v Hanna***, 2013 ABCA 134, 544 AR 135. We note in passing that the Supreme Court has recently had before it cases touching upon police violence: see ***R v MacDonald***, 2014 SCC 3, ***R v Davis***, 2014 SCC 4. While the Supreme Court affirmed the outcome of the dissent in this Court in the case of ***Davis***, the Court did not address the various public policy issues therein discussed. So we say nothing about those.

[36] The first problem with the appellant's position in relation to this ground of appeal is that his testimony at sentencing in connection with this subject was rejected. Absent palpable and overriding

error, it is not open to this Court to substitute a different conclusion, especially on a matter as situation specific as a credibility finding. The finding of fact by the sentencing judge was that the degree of force used to apprehend the appellant was not unreasonable. Against the record as she summarized it, the Court has no basis to overrule that conclusion. In light of that conclusion, there is no justification for interfering with the sentences on that basis. The appellant was direct enough to specify that in his submission his sentence should be reduced by 12 to 18 months for this reason. The Court rejects that submission.

Drugs and Money Seized Not Properly Accounted

[37] Crown counsel indicated to the Court at the hearing of the appeal that the contraband and money was subject to forfeiture to the Crown on application. The sentencing judge did not deal with that matter because, according to the appellant's counsel, another hearing was set for that. So the issue of forfeiture is not before this Court. Generally speaking, forfeiture and punishment are aimed at different, if somewhat complementary, objectives, although the language of the relevant statute must be considered: see e.g. ***R v Craig***, 2009 SCC 23, [2009] 1 SCR 762. The appellant did not assert that the alleged disappearance of money or drugs caused him to suffer a sanction which he otherwise would not have suffered. So that does not figure in calculation of a proportional sentence.

[38] The upshot of the appellant's position appears to be that, as with the allegedly excessive force of the police, they acted improperly in some manner with respect to the seized items, which colours the process and which colouring should be removed by a reduction in his punishment. Again, this serious allegation is advanced by the appellant without any evidence to support it. That alone would doom this ground of appeal. As noted above, the panel made an inquiry of Crown counsel about this and received an answer. The answer shows nothing of relevance. In any event, we are unaware of any cases of high authority that have recognized let alone adopted any such trade-off or counterclaim concept in mitigation of sentence by high authority. This proposed ground of appeal is also without merit.

Unfairness in Sentence Administration

[39] The appellant's position on this topic was not entirely clear, but it did seem to amount to a suggestion that his standing on his rights while in prison after sentencing and before the appeal had operated in some way to his detriment. If any complaint he has in that respect is such as to justify a complaint through the corrections administration then that would seem to be avenue to follow. The Court ordinarily assesses the fitness of the sentence on how it is structured, not how it might be administered. This ground of appeal is rejected.

Drug Sentence Too Long

[40] The defence position on this before the sentencing judge was consistent with the appellant's position before this Court. Defence counsel argued that this was not the wholesale amount starting point of 4.5 years but the commercial amount starting point of 3 years, referring to the guidance contained in ***R v Lau***, 2004 ABCA 408, 357 AR 312. The sentencing judge found that this case fit

within the guideline respecting wholesale trafficking as in ***Lau***. She gave clear reasons for so finding at paras. [46] to [47] of her decision. We detect no reversible error in her approach in that respect.

[41] That said, this Court must still determine whether or not her conclusion that an overall sentence of 6 years was proportional to the gravity of the offence and the degree of responsibility of the appellant.

[42] The drug offences involved different forms of illicit drugs. The harm and potential harm to the community was multiplied by that circumstance. The appellant demonstrated an acquired familiarity with those drugs and the market for them even in his testimony as to sentence. Further, a substantial revenue stream must have been involved. This was evidenced by the appellant carrying almost $40,000 when in flight and of multiple national currencies. The sentences there were made concurrent to each other. Against a starting point of 4.5 years imprisonment for wholesale dealing, for a person who had previously trafficked in drugs, who was not an addict, who was in it for the money, and who was 33 years old, a total sentence of 5 years was in no way excessive, nor does it reflect error in principle. This ground of appeal is rejected.

Totality and Fitness Overall

[43] Although the appellant did not express his last argument in terms of totality, it is evident that his submission was that he had come to realize that his criminal lifestyle was a treadmill that had led him nowhere constructive, and that he had lost everything while spending much of his life in prison. He urged the Court to show him some leniency.

[44] We understand this to be a submission that, taken all together, the sentences adding up to 9.5 years were unduly long and harsh within the meaning of s. 718.2(c) of the *Code*. That position was also consistent with the submission made on his behalf by his counsel to the sentencing judge. This submission should be viewed in context. It has already been noted that the sentences on the drug offences were accumulated and reduced for totality.

[45] Similarly, the driving offences were treated as parts of an overall transaction. While a collection of concurrent and consecutive sentences were imposed on those, it is evident that the sentencing judge aimed at a total result there. In her calculations, a total of 4 years imprisonment for those offences could have applied. As noted above, she reduced "this figure to 3 years in view of the totality principle". The appellant had a pattern of engaging the police in high speed chases. By his own admission he had been arrested many times. As a flagrant recidivist in relation to this type of offence, it is evident that the sentences had to rise significantly at least for the objective of individual deterrence. Having regard to the totality reduction given here, there is no excess and no error in principle in the approach of the sentencing judge on this set of offences.

[46] Similarly, the property offences were treated as a collection of overlapping crimes, even though, strictly speaking, each required specific and intentional criminal conduct in the acquisition and deployment of false identities. The appellant even tried to use one of the false identities in dealing

with the police on his arrest. The sentences there were made concurrent to each other. They did not have to be. The total reached there was none too severe for planned crimes.

[47] The justice system offences, namely breach of probation, obstruction of the police and resisting arrest were given sentences that were not only concurrent to each other, but concurrent to other sentences. Again, the appellant had an established pattern for this sort of offence since he was a youth. There is nothing inordinate about the dispositions here.

[48] There was no error in principle to make the sentences chosen for the categories consecutive to one another. Rather, the opposite is true. It is correct that, at the end of her analytical process, the sentencing judge did not additionally take yet another 'last look' as to totality as perhaps she might have under s. 718.2(c) of the *Code*. Nonetheless, she had already dialed back on the sentences for each of the categories of offences which engaged a series of last looks in each category. Ultimately she still had to achieve a result which was proportional to the overall culpability of the appellant: see ***R v May***, 2012 ABCA 213, 533 AR 182; ***R v Tettersell***, 2012 ABCA 57, 524 A.R. 88.

[49] Totality is a concept which serves the principle of proportionality in two principal ways. It serves proportionality when it is used in the common law sense of examining a collection of crimes as an overall single transaction with various crimes as aggravating features. The totality concept in its common law applications also serves proportionality when it is deployed as to offenders amenable to rehabilitation (younger persons usually) and to property offences. That application arises when the crimes are separate, but the sentencing court concludes they are properly to be regarded as overlapping and reflective of, in effect, a package of conduct. In both common law applications, the totality concept also serves the principle of restraint which exists at common law and is also reflected in ss. 718.2(d) and (e) of the *Code*.

[50] By comparison, the totality concept in its statutory application as set out in s. 718.2(c) of the *Code* is against sentences that *should* in principle be consecutive. Accordingly, this application of totality is primarily in service of the principle of restraint and is secondarily in service of the principle of proportionality. This application does not operate to wipe out punishment for serious aggravating factors: see *e.g.* ***R v Lemmon***, 2012 ABCA 103, at para. 23, 524 AR 164 ("We must remember that the ultimate objective is a sentence that reflects the gravity of the offence and the degree of responsibility of the offender, not a mindless application of sentencing principles."). In the end, totality in either its common law or statutory applications is in service of achieving a fit sentence: ***R v Khawaja***, 2012 SCC 69 at para. 126, [2012] 3 SCR 555 ("The only restriction imposed by the totality principle is that the sentence not exceed the overall culpability of the offender."). ***Khawaja*** and ***Lemmon*** are aligned.

[51] As it happens, the outcome here also accords with the perspective of the Sentencing Council for England and Wales in its Consultation paper *Overarching Guidelines Consultation: Allocation, Offences Taken Into Consideration and Totality* (September, 2011), at page 16, where the Council indicated that the

> "key principle is that the court must impose a sentence that reflects the seriousness of the totality of offending behaviour. The existence of multiple offences generally increases the seriousness of the criminality and so can increase the severity of the sentence."

The Council also stated, that

> "the fundamental principle of totality is that when sentencing for multiple offences, the overall sentence should be just and proportionate. That means the principle of totality could result in a reduction or an increase to the overall sentence, or to constituent parts of it."

[52] In conclusion on this final ground of appeal of the appellant, there is no justification for interference with the individual sentences or with the global result.

IV Conclusion

[53] The appeal is dismissed.

Appeal heard on January 21, 2014

Memorandum filed at Edmonton, Alberta
this 10th day of February, 2014

Authorized to sign for: Martin J.A.

Watson J.A.

Authorized to sign for : Veldhuis J.A.

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