COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lanktree, 2024 ONCA 506
DATE: 20240626
DOCKET: COA-23-CR-0518

van Rensburg, Harvison Young and Sossin JJ.A.

BETWEEN

His Majesty the King

Respondent

and

David Lanktree

Appellant

David Lanktree, acting in person

Stephanie DiGiuseppe, appearing as duty counsel

Jonathan Geiger, for the respondent

Heard: June 4, 2024

On appeal from the sentence imposed on April 25, 2023 by Justice Alain H. Perron of the Ontario Court of Justice

REASONS FOR DECISION

[1] The appellant David Lanktree pled guilty to a number of charges arising from two incidents that took place in October 2021 and May 2022. He was sentenced to 5 years (60 months) in prison less 9 months of *Summers* credit for pre-sentence

custody (“PSC”). With the assistance of duty counsel, he appeals from sentence alone, arguing that:

1. The trial judge erred in failing to impose a conditional sentence;
2. The trial judge erred in treating the drug problem in the appellant’s community as an aggravating factor; and
3. The trial judge erred in failing to consider *Duncan* credit in light of the harsh conditions of the appellant’s PSC.

[2] In the event the appeal is allowed and this court reconsiders the sentence, the appellant has also submitted fresh evidence of rehabilitative efforts he has made while incarcerated that he asks be taken into account.

[3] For the following reasons, the appeal is dismissed. We see no basis for interfering with the sentence imposed.

[4] The background facts are relevant to all of the grounds of appeal.

[5] The first incident happened on October 8th, 2021. Police observed a white Chevrolet truck that they recognized as the vehicle commonly driven by the appellant. As he was known to be subject to a driving prohibition, he was stopped and arrested for driving while prohibited. The officers discovered that the appellant was also subject to a weapons prohibition. They observed knives that were plainly visible on the passenger seat. A search was conducted and the officers found a variety of items including a 12-gauge shotgun, a replica handgun, and seven

knives. In addition, the police discovered 139 grams of crystal meth, and 573 methamphetamine pills. The appellant was released on an undertaking.

[6] The second incident took place on May 25th, 2022. A police officer conducting radar enforcement observed a green Ford Explorer known to be operated by the appellant's partner and the appellant. The officer believed there was a warrant out for the appellant's arrest and, after seeing the appellant in the vehicle, conducted a traffic stop. The officer confirmed there was an unendorsed warrant for the appellant's arrest. The officer attempted to speak with the appellant. The appellant refused to fully open the window and appeared to be trying to hide a backpack. The officer arrested the appellant on the outstanding warrant. His backpack turned out to contain two bags of crystal meth and 353 methamphetamine pills. He was arrested and kept in custody.

ANALYSIS

[7] The appellant's first ground of appeal is that the sentencing judge erred in failing to impose a conditional sentence. We do not agree.

[8] The sentencing judge correctly pointed out that a conditional sentence would be wholly inappropriate. The appellant had received six community-based sentences and was nevertheless continuing to offend. In addition, his extensive record included a number of breaches of recognizance, as well as weapons prohibitions and driving prohibitions.

[9] In short, the suitability of a conditional sentence is predicated on a level of trust in the individual to serve their sentence in the community. The appellant has repeatedly shown that such trust is not warranted.

[10] Nor do we agree with the appellant's second ground of appeal that the sentencing judge erred in treating the damaging effect of drug use on the community in which the appellant lives as an aggravating factor. While we agree that it would be an error in principle to do so, a fair reading of the reasons as a whole indicates that the sentencing judge did not do that. The sentencing judge referred to *R. v. Parranto*, 2021 SCC 46, 463 D.L.R. (4th) 389, where the Supreme Court of Canada discussed the seriousness of drug trafficking offences, the need to hold those who distribute drugs accountable and the need to communicate the wrongfulness of their actions. He then referred to his own observations of the harm drug trafficking has wrought on the Sturgeon Falls community, where the offences in this case were committed. He stated that the appellant was "part of the problem".

[11] As the Supreme Court instructed in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 90:

> Although the fact that a type of crime occurs frequently in a particular region is not in itself an aggravating factor, there may be circumstances in which a judge might nonetheless consider such a fact in balancing the various sentencing objectives, including the need to denounce the unlawful conduct in question in that place and at the same time to deter anyone else from doing the same thing. It goes without saying, however, that the

> consideration of this factor must not lead to a sentence that is demonstrably unfit.

[12] In our view, the sentencing judge did not stray from this guidance. Read in context, and in light of the trial Crown's emphasis on the importance of denunciation and deterrence given the significant harm that drugs and drug trafficking have wrought on the Sturgeon Falls community, the sentencing judge did not use that reality as an aggravating factor relative to the sentence that he imposed on this individual offender. Rather, he was using it to underline the importance of denouncing the trafficking, as is evident from his comments surrounding his discussion of the Sturgeon Falls community:

> ["The] court [in *Parranto*] also commented generally on the seriousness of drug trafficking offences, particularly for Schedule one substances, and the role in sentencing in advancing public safety, holding those who distribute drugs accountable, and communicating the wrongfulness of poisoning peoples and communities". Drugs have affected many people throughout this country … If there wouldn't be mules, [there] wouldn't be drugs in our community. He gets them there. He is part of the problem. [Emphasis added.]

[13] Finally, the appellant argues that the sentencing judge erred in failing to consider the harsh conditions of the appellant's PSC as a mitigating factor. The appellant spent a total of 175 days in PSC, split between the North Bay jail and the Central North Correctional Centre. At the sentencing hearing, defence counsel submitted that the appellant was in lockdown for 68 days in total: 14 days at the North Bay jail and 54 days at Central North. Some of these lockdown periods lasted

for seven days at a time. Defence counsel requested enhanced credit of three to one for the lockdown periods (68 days), and the regular *Summers* credit for the remaining 107 days in PSC. This would have credited the appellant with 365 days of PSC.

[14] The sentencing judge noted in his reasons that defence counsel was asking that the appellant "be given all kinds of enhanced credits because of lockdowns and other reasons at the jail." However, he declined to accept these submissions because the appellant was in custody of his own doing by re-offending while released, and because "the reality is lockdowns at the jail is something that everyone needs to live. It is not right, but it is reality." The sentencing judge gave the appellant a 1.5:1 credit for the PSC.

[15] *Duncan* credit is discretionary and is entitled to deference on appeal: *R. v. U.A.*, 2019 ONCA 946, at para. 15; *R. v. McLean*, 2023 ONCA 835, at para. 4. It is best treated as a mitigating factor: *R. v. Marshall*, 2021 ONCA 344, at para. 52.

[16] The sentencing judge considered and rejected granting additional credit beyond *Summers* credit although he did not expressly refer to it as *Duncan* credit. He pointed out that the appellant had initially been released on an undertaking, and it was only because of the second incident that he served so much PSC. In other words, the sentencing judge declined to exercise his discretion to grant additional credit.

[17] In arriving at a global sentence of 60 months, minus 9 months of *Summers* credit, the sentencing judge considered the relevant sentencing principles as well as the aggravating and mitigating factors. It is clear from his reasons and from the sentencing submissions that he was alive to the possibility of additional credit. He clearly considered and rejected the parties' submissions, including trial counsel's request for additional credit beyond *Summers* credit. In the circumstances of this appellant, he did not see the harshness of the conditions as a mitigating factor. We see no basis for interfering with the trial judge's exercise of discretion in declining to grant additional *Duncan* credit.

[18] Given these findings, there is no need for this court to consider the fresh evidence filed by the appellant.

[19] The appeal is dismissed.

"K. van Rensburg J.A."
"A. Harvison Young J.A."
"L. Sossin J.A."