



THE UPDATE

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SENTENCE - CONDITIONAL SENTENCE - COLLAPSE

R. v. Bachmeier - Nov. 26, 2007 ABCA 374 per Watson, Hillier, Gill, JA - T. Judge: Wheatley, PCJ:

Appeal from an order collapsing a conditional sentence. Accused originally received a 12 month CSO for break and enter. Approximately 9 months left on sentence when accused breached by being charged with shoplifting.

Held: Appeal allowed, CSO reinstated.

“The record before us does disclose a statement of the sentencing judge that it is his invariable practice when granting a conditional order, to issue a strong warning that any breaches will require proof of exceptional circumstances why it should not be collapsed because the conditional sentence order is considered to be a significant ‘break’ in itself ... Section 742.6(9) of the Code does not contemplate any automatic consequence arising out of every breach. It is the role of the sentencing judge to consider all of the options set out under the Code.

G. Worobec - Defence Counsel

SENTENCE - DRUGS - COCAINE TRAFFICKING - 42 MONTHS

R. v. Sawatsky - Nov. 21, 2007 ABCA 353 per Martin, Hawco, Park, JA - T. Judge: Brown, PCJ:

Crown appeal from 2 years less 1 day CSO imposed after accused pled guilty to trafficking in cocaine. Dial-a-dope operation. 5 sales of small amounts. 25 year old accused with 37 prior convictions, including numerous convictions for disobeying court orders and drug offences.

Held: Appeal allowed, 42 month sentence (less credit) imposed.

Accused, given his record, was an unqualified recipient of a conditional sentence. “Those who organize and manage dial-a-dope schemes to traffic in drugs, such as cocaine, methamphetamine and ecstasy, should usually be sentenced to terms of actual incarceration.” Sentence for the operation of a dial-a-dope enterprise ought to generally be in the 3 year range. “Non custodial sentences in response to such offences offer little to nothing by way of general deterrence.”

M. Bates - Defence Counsel

SENTENCE - DRUGS - CSO COCAINE TRAFFICKING

R. v. Jaber - Nov. 30, 2007 ABCA 383 per Paperny, Kent, Phillips, JA - T. Judge: Kirkpatrick, PCJ:

Appeal from 18 month jail sentence imposed following accused’s guilty pleas to cocaine trafficking and possession of stolen property. Single sale of .8 of a gram of cocaine for \$80. Minor criminal record.

Held: Appeal allowed, 2 years less 1 day CSO.

“The sentencing judge ... expressed the view that conditional sentences were inadequate punishments for drug traffickers and that conditional sentences ought not to be available for cocaine traffickers ... The Crown acknowledges that there is no presumption against imposing a conditional sentence.” Errors in law required Court of Appeal to sentence afresh. Conditional sentence appropriate given: guilty plea, positive PSR, family support, and amount of cocaine sold.

A. Sanders - Defence Counsel

SENTENCE - THEFT FROM EMPLOYER - 2 YEARS JAIL

R. v. Fulcher - Dec. 3, 2007 ABCA 381 per Cote, Bielby, Acton, JA - T. Judge: Sanderman, J

Crown appeal of 2 years less 1 day CSO imposed following accused’s guilty plea to fraud over \$5000. 33 year old accused was an employee of a subsidiary of a large life insurance company. Over a 13 month period accused took out approximately 40 loans on clients’ life insurance policies. Accused then forged the clients’ signatures on these cheques. \$268,948 stolen. Restitution not paid, but accused did enter into consent civil judgments. No record.

Held: Appeal allowed, 2 years jail (less credit) imposed.

Aggravating factors included: sophisticated crime, large sum stolen, profit motive. “This courts’ decision in *R. v. McKinnon* 2005 ABCA 8, explains the overwhelming importance of general deterrence in cases of systematic embezzlement from employers ... absent truly exceptional circumstances, the sentencing goals of deterrence and denunciation demand a sentence of imprisonment rather than the imposition of a conditional sentence for crimes of embezzlement.”

F. Cook - Defence Counsel

SENTENCE - THEFT FROM EMPLOYER - 2 YEAR CSO

R. v. Fraser - Nov. 30, 2007 ABCA 386 per Watson, Greckol, Gill, JA - T. Judge: Bielby, J:

Defence appeal of 1 year jail sentence imposed after accused pled guilty to fraud over \$5000. Accused wrote 43 unauthorized cheques, stealing \$132,160 from her employer. No record. Accused was highly cooperative with police. Full restitution paid. On appeal, accused challenged trial judge’s statements that “exceptional circumstances” were required to take the case out of what she characterized as “a mandatory period of incarceration.”

Held: Appeal allowed. 2 years less 1 day CSO imposed.

“It is understandable that, in light of the weight of case authority, the trial judge would then construe the grant of conditional sentences in such cases as ‘rare’. Nonetheless, rarity does not state a penological principle. but merely summarizes experience. It is arguable that the trial judge overstated the legal position by her use of the term ‘mandatory’.” Mitigating factors weighed in favour of a conditional sentence.

D. Knisely - Defence Counsel

YOUTHS - SENTENCE - SERIOUS VIOLENT OFFENCE

R. v. D.N. - Nov. 23, 2007 ABCA 370 per Paperny, O’Brien, Martin, JA - T. Judge: Mitchell, PCJ:

Youth (originally charged with robbery) pled guilty to assault with a weapon. Youth participated in the grabbing of another young person outside of a mall, and held a knife to his throat, while a companion instructed the victim to empty his pockets. Trial judge designated the offence as a serious violent offence, and imposed a 6 month custodial sentence.

Held: Appeal allowed, 6 month sentence upheld, serious violent offence designation overturned.

Not all violent offences are properly classified a serious violent offence. No physical injury caused, and only sparse evidence of psychological harm. Burden on Crown to prove beyond a reasonable doubt that the offence qualifies for the designation. “For example, if DN was only threatening or intimidating the complainant, that would not support a designation of SVO: see *R. v. T.(V.J.)* (2007) 218 CCC (3d) 563.”

B. McLaren - Defence Counsel

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