

CANADA / JUDGMENT

# R. v. Brown

2020 BCCA 234

## COURT

British Columbia Court of Appeal

## DECIDED

18 August 2020

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2020 BCCA 234 R. v. Brown COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Brown, 2020 BCCA 234 Date: 20200818 Docket: CA46934 Between: Regina Respondent And Derick Brown Appellant Before: The Honourable Mr. Justice Butler The Honourable Mr. Justice Abrioux The Honourable Mr. Justice Grauer On appeal from: An order of the Provincial Court of British Columbia, dated April 2, 2020 (R. v. Brown, Abbotsford Dockets 89556-1; 89603-1-B and Victoria Docket 178689-2-C). Counsel for the Appellant: B. Movassaghi Counsel for the Respondent: C. Lusk Written Joint Statement Filed: Vancouver, British Columbia August 11, 2020 Place and Date of Judgment: Vancouver, British Columbia August 18, 2020 Written Reasons of the Court Summary: The appellant applies for his sentence to be adjusted to account for time in pre-sentence custody that was inadvertently not brought to the sentencing judge's attention. Held: Appeal allowed. The sentence is reduced from eight months to 205 days. Reasons for Judgment of the Court:

- [1] The appellant seeks an extension of time to appeal his sentence, leave to appeal the sentence and that his appeal be allowed only to the extent that two eight-month concurrent sentences be reduced to 205 days in custody to include credit for pre-sentence custody. There is some urgency to the appeal as the appellant's release date would be August 18, 2020 if the appeal is allowed.
- [2] The appellant was sentenced on April 2, 2020. He asks that his time to appeal be extended to July 24, 2020. The Crown does not oppose the granting of an extension of time for leave to appeal and does not oppose the granting of leave to appeal. The Crown also agrees that the appellant is entitled to credit at a ratio of 1.5:1 for 26 days he spent in pre-sentence custody.
- [3] The parties sought to have this appeal determined in writing. Pursuant to s. 26(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, we directed that argument be submitted in writing. Counsel presented a helpful joint statement to explain the somewhat unusual circumstances that led to the oversight in bringing pre-sentence custody to the attention of the sentencing judge and the error that resulted from that oversight. The parties submit that the appellant should be credited with 39 days of pre-sentence custody that would reduce the sentence to 205 days in custody. For the reasons that follow, we agree.

- [4] The appellant pleaded guilty to three offences that occurred on November 4, 2019 in Victoria, British Columbia when he assaulted the complainant while wearing a face mask. He was detained in custody from the date of the offences until the guilty plea. On April 2, 2020, he received concurrent eight-month sentences for Counts 2 and 3 of Information 178689, the indictable offences of assault causing bodily harm (contrary to s. 267(b) of the Criminal Code, R.S.C. 1985, c. C-46) and disguising his face with intent to commit an indictable offence (contrary to s. 351(2) of the Criminal Code). These are the sentences under appeal.
- [5] At the same time that he was sentenced for the Victoria offences, he was sentenced for two offences committed on December 14, 2018 in Abbotsford, British Columbia: assault with a weapon and breach of probation. The sentencing judge approached the sentencing in what the parties describe as a global fashion: the eight-month concurrent sentences were imposed for the Victoria offences, and the appellant was sentenced to "time served" for the Abbotsford offences.
- [6] The appellant spent 26 days in custody from February 24, 2019 to March 21, 2019 when he was arrested for the Abbotsford offences (Period 1). He was then granted bail but detained in custody following the Victoria offences. He remained in custody from November 4, 2019 until he was sentenced on April 2, 2020 (Period 2). Through inadvertence, the judge was not advised by the parties of the Period 1 pre-sentence custody. Accordingly, he received no credit for that time in custody.
- [7] The judge indicated that he would have imposed a sentence of 7.5 months for the Abbotsford offences but sentenced him to "time served". At a ratio of 1.5:1, the time spent in Period 2 is slightly more than 7.5 months. The sentence imposed was illegal as the time spent in pre-sentence custody was recorded as part of the actual sentence rather than credited against a fit sentence as determined by the sentencing judge: see *R. v. Mizen*, 2009 BCCA 253 at para. 20. However, that sentence is spent and an appeal of that sentence has no utility. The 26 days in custody from Period 1 should have been credited against the sentence for the Abbotsford sentences but were not. The appellant says that if the judge had been aware of the Period 1 pre-sentence custody when sentencing him, he would have credited the appellant for that additional time in custody against the sentence imposed for the Abbotsford offences. Had that been done, there would have been 26 additional days of pre-sentence custody from Period 2 that would have been credited against the sentence for the Victoria offences, those under appeal.
- [8] The appellant further asserts, and the Crown agrees, that there is no basis to argue he would not receive early remission. Accordingly, if the judge had been aware of that additional time in custody, the appellant should have received credit at a ratio of 1.5:1: *R. v. Summers*, 2014 SCC 26. Had that been done, the appellant would have received credit for 39 days and the appellant would have been sentenced to 205 days of imprisonment for the Victoria offences.

- [9] We agree that the error made in sentencing the appellant for the Abbotsford offences led to the appellant being denied credit for pre-sentence custody that he should have received for the sentences for the Victoria offences.
- [10] In the circumstances, the time for filing the notice of appeal is extended to July 24, 2020; leave to appeal is granted; and the appellant's sentence on Counts 2 and 3 of Information 178689 is reduced from eight months to 205 days including the credit for pre-sentence custody. "The Honourable Mr. Justice Butler" "The Honourable Mr. Justice Abrioux" "The Honourable Mr. Justice Grauer"

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