IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***C. R. Savage***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Appellant	)	***K. L. Jones***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
DERRICK SCOTT COUTU	)	*Decision pronounced:*
	)	***October 20, 2020***
(Accused) Respondent	)	
	)	*Written reasons:*
	)	***November 3, 2020***

MAINELLA JA (for the Court):

Introduction

[1] This case is primarily about an arrest where the accused was wearing the wrong outfit and was in the wrong place at the wrong time.

[2] While moving a stash of illegal weapons, the accused crossed paths with police in fresh pursuit of male and female robbery suspects. His appearance, clothing and footwear had similarities to the male suspect, thereby drawing the police's attention. He panicked and gave the impression he was about to run. That made things worse. He was arrested. A loaded

sawed-off rifle, two throwing stars and an air pistol with a silencer were found in his backpack.

[3] The good news was the accused was quickly cleared of the robbery when the police had the time to scrutinise the subtleties of a surveillance video. The bad news was he was charged for the contents of his backpack and for contravening two prohibition orders made under section 109 of the *Criminal Code* (the *Code*).

[4] When his case got to trial, the accused won a battle but lost the war. The judge declared the arrest illegal and the warrantless search of the backpack unreasonable, but the weapons evidence was not excluded because, to do so, would bring the administration of justice into disrepute.

[5] The judge thought a fit sentence would total five and one-half years in prison except for the fact that he was "alarmed" by the police conduct. He thought the arrest was a "deliberate disregard" of the accused's rights. Relying on his experience as a judge, he said this was another example of the Winnipeg Police Service's pattern of systematically ignoring the rights of citizens. He decided to send what he called a "message" to the police by reducing the total sentence by six months to five years.

[6] The Crown seeks leave to appeal the sentence. It has raised three main grounds regarding: (1) the legality of the arrest; (2) the reduction of the sentence based on state misconduct; and (3) the imposition of concurrent sentences for five counts of possession contrary to a prohibition order (see section 117.01 of the *Code*).

[7] After hearing the appeal, we allowed it and ordered an increased sentence totalling six years' imprisonment (less credit of 16.5 months for pre-trial custody) and stated that our reasons would follow. They now do so.

Standard of Review—Sentence Appeal

[8] The right to vary a sentence under section 687 of the *Code* is limited. The weighing of sentencing objectives and principles in light of the circumstances of the offence and the offender is an exercise of discretion. Accordingly, an appellate court may vary a sentence only when it is demonstrably unfit or it is apparent from the sentencing judge's reasons that an error in principle was made that had an impact on the sentence (i.e., a material error). In either case, the appellate court must sentence afresh based on its own sentencing analysis but, in doing so, it must afford deference to the sentencing judge's findings of fact or identification of aggravating and mitigating factors to the extent that they are not affected by an error in principle (see *R v Friesen*, 2020 SCC 9 at paras 25-29).

Legality of the Arrest

Background

[9] A man armed with a machete robbed a Winnipeg convenience store of a small amount of money. He then fled on foot with an accomplice who was believed to be a female wearing a black jacket. Police arrived at the store within minutes of the robbery and obtained a description of the suspects from the store owners and hastily viewed a surveillance video.

[10] The male suspect was described as about 30 years old; five feet, 10 inches tall; and medium build with a lighter skin tone. He was wearing

black Nike shoes with a white swoosh, dark clothing, and a black winter jacket with a hood and a small logo over the left breast. His face was covered and he was wearing gloves, carrying a knife and had a laptop bag.

[11] A canine unit with supporting officers began to track the suspects from the store about 10 minutes after the robbery. The police dog detected a fresh scent of a person on foot and another on a bicycle. She led the officers to a discarded laptop bag and then onto a residence a further street away. Police were at the residence about 30 minutes after the robbery had occurred. From the police dog's behaviour, the dog handler believed the suspects had entered the residence through the east side door but, due to the passage of time, he could not say for certain if they were still inside. He deployed the police dog to look for scent tracks and she found one leaving the rear door of the residence. The dog handler also observed a fresh bicycle track in the snow leaving the front yard of the residence heading west.

[12] The officers observed two individuals come into the back yard of the residence leaving from a vehicle that had just pulled up in the back lane. One of these individuals was believed to be a female and was wearing a grey jacket. The other was the accused.

[13] The accused had the same stature as the male suspect and was wearing black Nike shoes with a white swoosh, dark clothing and a black winter jacket with a hood. His face was difficult to see. He was carrying a backpack. One of the officer's yelled, "police, show me your hands." The accused began to walk backwards and tried to "gingerly" remove his backpack. The officer thought the accused was "potentially going to start running away". Based on his experience, this behaviour "heightened" his

belief that the accused was the male suspect. The officer then arrested the accused and the backpack was searched incidental to the arrest.

[14] The other individual with the accused turned out to be a man, not a woman. Once the accused had been arrested, the video surveillance at the store was reviewed again, but with the opportunity to carefully watch the robbery from multiple camera angles. Although the accused's appearance, clothing and footwear were similar to the male suspect's, the "very fine details" of the video provided sufficient reason to exclude him.

[15] The judge decided that, given the totality of the circumstances, the arresting officer's grounds to arrest were "far short of being objectively reasonable." He said that the description of the male suspect versus the accused did not exactly "match." He highlighted two differences with the accused's black winter jacket and that of the male suspect: the accused's jacket had fur on the hood and a white logo on it. That was a misstatement of the evidence; the accused's jacket had no logo on it. He commented that, because the stature of the accused and the male suspect was "common", that did not lead to any suspicion. Finally, he noted that the person with the accused was a male wearing a grey jacket as opposed to a female wearing a black jacket. In his view, "at best," the officer had a reasonable suspicion that could have allowed for a detention for investigative purposes.

Discussion

[16] In an appeal involving the legality of an arrest, the underlying findings of fact, including whether the police officer had an honest subjective belief in the existence of grounds for arrest, is a question of fact reviewable for palpable and overriding error. Whether the correct legal principles were

stated and there was no misdirection in their application is a question of law reviewable for correctness. Whether the facts, as found by the trial judge, amount to reasonable grounds under section 495(1)(a) of the *Code* is a question of law reviewable on a standard of correctness (see *R v Shepherd*, 2009 SCC 35 at para 20; *R v Farrah (D)*, 2011 MBCA 49 at para 7; and *R v Biccum*, 2012 ABCA 80 at para 10).

[17] The power to arrest pursuant to section 495(1)(a) of the *Code* was summarised as follows in *R v Penner*, 2019 MBCA 8 (at para 4):

> A lawful warrantless arrest pursuant to section 495(1)(a) of the *Criminal Code* has both a subjective and objective component. The officer who makes the decision to arrest must subjectively have reasonable and probable grounds on which to base the arrest and those grounds must be objectively justifiable to a reasonable person placed in the position of the officer (see *R v Storrey*, [1990] 1 SCR 241 at 250-51; and *R v Latimer*, [1997] 1 SCR 217 at para 26). The appropriate standard of proof is one of reasonable probability, not proof beyond a reasonable doubt or a prima facie case (see *R v Debot*, [1989] 2 SCR 1140 at 1166). In applying that standard, the trial judge must assess the totality of the circumstances in a practical, non-technical and common-sense way, mindful of the knowledge, experience and training of the officer (see *R v Sinclair*, 2005 MBCA 41 at para 14; and *R v McKay*, 2009 MBCA 121 at para 30).

[18] In assessing the totality of the circumstances of an arrest, it is important to bear in mind "that the police are often required to make split-second decisions in fluid and potentially dangerous situations" based on the available information which may be imperfect, evolving or even turn out to be wrong (*R v Aucoin*, 2012 SCC 66 at para 40; see also *R v Golub* (1997), 117 CCC (3d) 193 at para 18 (Ont CA); and *R v Bakajika*, 2015 ONCA 2 at para 5). That was the situation here. There were language barriers with the

store owners, there was no time to do anything more than briefly look at the surveillance video and the male suspect was armed.

[19] The point at which credibly-based probability replaces suspicion is often unclear and debatable (see *R v Pilbeam*, 2018 MBCA 128 at paras 11-12). While police officers must evaluate discrepancies and uncertainties in information before acting upon it, the mere existence of discrepancies or uncertainties is not fatal to there being reasonable grounds to arrest (see *R v Williams*, 2009 ONCA 35 at para 5; and *R v Omeasoo et al*, 2019 MBCA 43 at paras 42-43). A belief can be objectively reasonable even if it turns out to be wrong (see *R v Chapman*, 2020 SKCA 11 at para 59 (WL Can)).

[20] As was explained by Kalmakoff JA (*ibid*):

> . . . [T]he inference drawn by the officer need not be the only inference that may be drawn from the available information, or even the most compelling one, as long as it is a reasonable inference to have drawn. The presence of other plausible, innocent explanations for police-observed behaviour does not automatically negate reasonable grounds to believe . . ..

(See also *R v Henareh*, 2017 BCCA 7 at para 52.)

[21] In our respectful view, the judge erred in concluding that the arresting officer's grounds to arrest were not objectively reasonable.

[22] The judge misapplied the totality-of-the-circumstances test by failing to consider all of the relevant circumstances known to the arresting officer. When confronted by the police, the accused reacted in a way suggesting he was about to flee. The arresting officer relied on this fact in his decision-making, as he was entitled to do. Flight or other suspicious behaviour is a factor a police officer can rely upon to support other grounds

to arrest where the *indicia* of it occurs before the decision to arrest is made (see *R v Jackson*, 2011 ONSC 5516 at paras 64-65).

[23] We are satisfied that the totality of the circumstances provided reasonable grounds to arrest the accused. The dog-track evidence put the accused in the pool of potential suspects. While it is true that the accused's stature was not suspicious, it did not exclude him from being the male suspect because the two were similar in height and build. The timing here was not too long to make the male suspect's description stale, but long enough to allow him to have done more than simply run into the residence in question. The differences between the black-hooded winter jackets worn by the male suspect and the accused were trivial. Both the accused and the male suspect were wearing dark clothing. Importantly, the accused's footwear appeared, at a distance, identical to that described to be worn by the male suspect. The arresting officer explained that his experience was that, while it is not uncommon for robbery suspects to change their clothing after a robbery to evade capture, they "don't often change their footwear". Finally, the accused's suspicious behaviour when confronted by the police supported the other grounds.

[24] The cumulative effect of these circumstances, viewed contextually, commonsensically, and in light of the arresting officer's experience and training, established that the arresting officer objectively had reasonable grounds to arrest the accused (see *Tontarelli v R*, 2009 NBCA 52 at para 62).

Sentence Reduction Based on State Misconduct

[25] Given our conclusion that the arrest was lawful and there being no dispute that, in that eventuality, the search of the backpack incidental to the

arrest was reasonable within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) (see *Cloutier v Langlois*, [1990] 1 SCR 158 at 180-83), it was a material error for the judge to reduce the accused's sentence for state misconduct in the form of a *Charter* breach (see *R v Nasogaluak*, 2010 SCC 6 at paras 2-5, 47-52).

[26] Also, there is no state misconduct here that would justify a sentence reduction without a *Charter* breach (*ibid* at paras 53-55). The situation here is unlike *Nasogaluak,* where the police used excessive force in making an arrest and then compounded the situation by failing to get Mr. Nasogaluak proper medical attention when he was in clear need of it. While the police did make a mistaken identity, they treated the accused professionally, fairly and acted diligently to exclude him from the robbery. There was no misconduct relevant to the circumstances of the offence or the offender which could be used as a mitigating factor on sentence.

[27] Before moving onto the next issue, something must be said about the judge's comments about systematic state misconduct. It was inappropriate for the judge to act on his personal knowledge/belief on the contentious fact that what occurred in this case was part of a routine pattern or systematic abuse of *Charter* rights without more (see *R v Lynxleg*, 2002 MBCA 101 at paras 38-40). In acting as he did, the judge placed himself in the position of a witness whose evidence could not be tested (see *Regina v Myshrall* (1971), 4 CCC (2d) 156 at 159-60 (NBSC (App Div))).

[28] It is noteworthy that the accused made no allegation of a systematic pattern of illegal arrests by the Winnipeg Police Service. Judicial notice of such a contentious adjudicative fact could not be taken without strict

compliance with the criteria for judicial notice (see *R v Spence*, 2005 SCC 71 at paras 59-62). Counsel for the accused appropriately conceded that the situation here does not meet either threshold for taking judicial notice of a systematic abuse of *Charter* rights (see *R v Find*, 2001 SCC 32 at para 48).

Imposition of a Concurrent Sentence for Possession Contrary to a Prohibition Order

Background

[29] The judge provided no insight in his reasons as to how he decided which offences would be concurrent and which would be consecutive.

[30] The judge agreed with the Crown that the sentence for the offence of possession of a loaded prohibited firearm (see section 95(1) of the *Code*) should be five years' imprisonment. He determined that the sentences for carrying a concealed weapon (the air pistol with a silencer—see section 90(1) of the *Code*) and possession of a prohibited weapon (the throwing stars—see section 92(2) of the *Code*) would be six months consecutive to the section 95(1) offence. He sentenced the accused to six months concurrent on each of the section 117.01 offences. As previously mentioned, he then reduced the total sentence by six months for state misconduct.

Discussion

[31] The general rule in applying section 718.3(4) of the *Code* is "that if the offences are sufficiently interrelated to form part of one single, continuous criminal transaction, a concurrent sentence is called for. However, if the offences are separate and distinct, then a consecutive sentence is to be

imposed" (*R v Wozny*, 2010 MBCA 115 at para 46; see also *R v RJ*, 2017 MBCA 13 at para 13).

[32] We see no reason why the sentences for the sections 90(1) and 92(2) offences were made consecutive. The weapons were in the backpack with the loaded sawed-off rifle. The threat to public safety posed by these weapons, while serious, was not comparable to the loaded sawed-off rifle.

[33] In contrast, consecutive sentences for the section 117.01 offences should have been ordered. We agree with the following comments of the Ontario Court of Appeal in *R v Claros*, 2019 ONCA 626 (at paras 51-52):

> More importantly, the fact that two offences relating to the breach of a prohibition order occur in close succession, or even at the same time, is not a basis for imposing concurrent sentences. The principle that such offences should be served consecutively is intended to ensure that disregard of firearm prohibition orders, imposed in the interest of public safety, does not go unpunished. This principle also recognizes the fact that the breach of a prohibition order is different behaviour than the associate offences, engaging different social interests . . ..
>
> Similarly, two or more separate violations of prohibition orders generally require their own distinct sentences, unless there is cogent reason to do otherwise given the principles and objectives of sentencing. As I have said, there is no bulk discount.

(See also *R v Vroom*, 2016 NBCA 43 at para 23.)

[34] Prohibition orders are designed to protect the public by reducing the misuse of weapons (see *R v Wiles*, 2005 SCC 84 at para 9). Parliament has recognised the severity of contravening a prohibition order by setting the maximum term of imprisonment at 10 years. Accordingly, there must be "serious consequences" for a person subject to a prohibition order who chooses to violate it (*R v Grant*, 2005 CarswellOnt 5946 at para 38 (Sup Ct

J)). Sentencing courts should not treat contravening a prohibition order in a manner like failing to attend court or to comply with a condition of judicial interim release or probation; it is not a run-of-the-mill breach offence.

[35] The situation here was aggravated as there was not one, but two prohibition orders being contravened. As *Vroom* and *Claros* explain, the nature and objectives of the section 117.01 offence are different than associate offences, such as section 95(1). Also important is the accused's background. The accused, 39 years of age at the time of sentencing, has a long criminal record which included prior convictions for crimes of violence and non-compliance with court orders. The pre-sentence report was largely negative. He had longstanding gang affiliations. He had previously served two lengthy penitentiary sentences for robbery offences involving violence or the use of a firearm. Given that a sawed-off firearm is a common and often deadly tool for criminal activity, there was an overwhelming public safety interest here to punish the accused separately for defying the two prohibition orders. The judge committed a material error by giving the accused a "free ride" (*RJ* at para 13; see also *R v McIvor*, 2019 MBCA 34).

[36] In our view, a fit sentence for these section 117.01 offences, given all of the circumstances, would have resulted in a penitentiary sentence. That said, it would be inappropriate to jump the Crown's recommendation of one year consecutive. Given the Crown's position, it is unnecessary to say more other than we are satisfied that a total six-year sentence would not be crushing for this mature offender. The *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688) (the accused is Métis) and mitigating factors in this case are not of significance and do not give reason to not increase the accused's sentence.

Disposition

[37] In the result, leave to appeal sentence is granted and the Crown's appeal is allowed. The accused's sentence is varied to be as follows:

- section 95(1) of the *Code*—five years' imprisonment;
- section 90(1) of the *Code*—six months' imprisonment, concurrent;
- section 92(2) of the *Code*—six months' imprisonment, concurrent; and
- section 117.01(1) of the *Code* (x5)—one year's imprisonment on each count, concurrent to one another, but consecutive to the section 95(1) sentence.

[38] The total sentence of six years' imprisonment will be reduced by credit for pre-trial custody as determined by the judge (16.5 months). The ancillary orders previously made will remain.

"Mainella JA"

"Chartier CJM"

"leMaistre JA"