

Criminal

Sex assault decision focuses on sentencing with respect to rehabilitative programs

By **John L. Hill**

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(August 23, 2023, 10:43 AM EDT) -- The Ontario Court of Appeal has definitively shed light on two important issues that have concerned criminal trial counsel of late: (1) Is it proper to extend a sentence when treatment programs would take longer to administer than the usual sentence would allow, and (2) is there to be a fixed calculation for enhanced pretrial custody credits?

The decision just released dealing with these questions is *R. v. J.W.* 2023 ONCA 552. This case is an appeal of a sexual assault sentencing in which J.W. was sentenced to a global sentence of nine years taking into account pretrial custody.

The facts involved in the crime are horrendous. In the early morning hours of May 2018, J.W. sexually assaulted K.G. a fellow worker at a group home where J.W. and his female victim were employed. K.G. was overpowered, vaginally raped, physically assaulted and threatened by K.G.

Upon conviction, the Crown sought an eight- to 10-year sentence while the defence asked for seven and a half years. The trial judge imposed a nine-year term. In doing so, the trial judge recognized K.W.'s traumatic upbringing, his diagnosis of fetal alcohol spectrum disorder, his diagnosis of schizophrenia and his low IQ scores.

Even though not acceding to the 10 years the Crown recommended, the defence-suggested sentence was also rejected because it would be impossible to complete rehabilitative programming within the period urged by the defence. A longer sentence would be required to assure J.W. had time to assimilate the rehabilitative tools he would need to assure society would be safe and vulnerable women would not be put at risk.

The Appeal Court reminded itself that deference was owed to a sentencing judge's decision unless erroneous considerations are made or unless the sentence is demonstrably unfit (*R. v. Lacasse* 2015 SCC 64 and *R. v. Friesen* 2020 SCC 9). Here, the court held the sentence was appropriate and in accordance with Parliament's intention as expressed in ss. 718 and 718(d) of the *Criminal Code* that the sentencing judge consider the offender's dangerousness and the length of time that it might take to complete programming.

Moreover, such a sentence would not offend the decision in *R. v. Spillman* 2018 ONCA 551 wherein Justice David Watt held that it would be an error if the sentence were to be determined only on the time needed to complete the rehabilitative process. Sentencing judges should also consider the protection of the public along with rehabilitative goals (*R. v. Knoblauch* 2000 SCC 58).

The second question dealt with in this appeal concerned enhanced credits for pretrial custody. In this case, the trial judge had given a 1.5:1 credit for 790 days when J.W. was confined at the Quinte Detention Centre but no enhanced credit for the 570 days he spent at Providence Care, a teaching hospital affiliated with Queen's University. The Court of Appeal agreed that the 1.5 credit for time spent in the provincial detention centre was warranted given the conditions of the place. In this, the

sentencing judge was properly assigning the credit as suggested in *R. v. Summers* 2014 SCC 26. However, no additional credit would be awarded for the duration of the Providence Care Hospital stay since in all likelihood conditions there were superior to those he would experience if released in the community.

Furthermore, the stay in Providence was largely due to a situation J.W. created for himself. He became adept at changing lawyers and each time that happened delay resulted in new counsel needing time to get up to speed. It would be unfair to give a bonus credit for time served in pretrial custody when a great deal of that delay was of his own making.

The reason this appeal was allowed was simply to correct a mathematical error made by the trial judge when she did the pretrial credit calculation. The trial judge had missed an additional 22 days that J.W. had served at the Quinte Detention Centre. By short-changing J.W., the Court of Appeal agreed that the 22-day error should be corrected to allow enhanced credit of 33 days on the 1.5:1 basis.

The decision in the *J.W.* case is short — 29 paragraphs — but the items addressed are of extreme importance when counsel in future cases look to questions dealing with lengthy rehabilitation prospects and the quantity and quality of pretrial custody conditions.

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