2007 WL 4100301 (Ont. S.C.J.), 2007 CarswellOnt 7396

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R. v. **Brooks**

Her Majesty the Queen against Donovan **Brooks**

Ontario Superior Court of Justice

Himel J.

Heard: October 12, 2007
Judgment: October 12, 2007
Docket: Toronto P0696/06

Counsel: E. Jackson, for Crown

Selwyn **Pieters,** for Defence

Subject: Criminal

Criminal law --- Offences -- Firearms and other weapons -- Careless use of firearm -- Sentencing -- Adult offenders.

Criminal law --- Offences -- Firearms and other weapons -- Order prohibiting possession of firearm -- Sentencing.

Criminal law --- Offences -- Firearms and other weapons -- Possession offences -- Possession of prohibited or restricted firearm with ammunition -- Sentencing.

Criminal law --- Offences -- Firearms and other weapons -- Possession offences -- Possession of weapon for dangerous purpose -- Sentencing.

Cases considered by Himel J.:

> R. v. Danvers (2005), 2005 CarswellOnt 3808, 201 O.A.C. 138, (sub nom. R. v. D. (Q.)) 199 C.C.C. (3d) 490 (Ont. C.A.) -- considered
>
> R. v. Ferrigon (2007), 2007 CarswellOnt 3072 (Ont. S.C.J.) -- followed
>
> R. v. Francis (2006), 2006 CarswellOnt 1969, 210 O.A.C. 41, 207 C.C.C. (3d) 536, 79 O.R. (3d) 551 (Ont. C.A.) -- considered

R. v. Grant (2005), 2005 CarswellOnt 5946 (Ont. S.C.J.) -- considered

R. v. Grant (2006), 2006 CarswellOnt 3352, 209 C.C.C. (3d) 250, 81 O.R. (3d) 1, 213 O.A.C. 127, 38 C.R. (6th) 58, 143 C.R.R. (2d) 223 (Ont. C.A.) -- considered

R. v. Jabbour (2001), 2001 CarswellOnt 6533 (Ont. S.C.J.) -- considered

R. v. Kanthasamy (2007), 2007 CarswellOnt 659, 84 O.R. (3d) 664, 2007 ONCA 90 (Ont. C.A.) -- considered

R. v. Kienapple (1974), 1974 CarswellOnt 238F, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 1974 CarswellOnt 8, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 (S.C.C.) -- followed

R. v. Manning (2007), 2007 CarswellOnt 1494 (Ont. S.C.J.) -- followed

R. v. Newman (November 14, 2003), Doc. 7014/03 (Ont. S.C.J.) -- followed

R. v. Rezaie (1996), 1996 CarswellOnt 4753, 112 C.C.C. (3d) 97, 31 O.R. (3d) 713, 3 C.R. (5th) 175, 96 O.A.C. 268 (Ont. C.A.) -- referred to

R. v. Smith (2006), 2006 CarswellOnt 6144 (Ont. S.C.J.) -- considered

R. v. W. (L.W.) (2000), 134 B.C.A.C. 236, 219 W.A.C. 236, 2000 SCC 18, 32 C.R. (5th) 58, 2000 CarswellBC 749, 2000 CarswellBC 750, 143 C.C.C. (3d) 129, 252 N.R. 332, [2000] 1 S.C.R. 455, 184 D.L.R. (4th) 385 (S.C.C.) -- considered

R. v. Williams (2007), 2007 CarswellOnt 2074 (Ont. S.C.J.) -- considered

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally -- referred to

s. 109 -- referred to

s. 718 -- referred to

s. 719(3) -- referred to

Himel J.:

1

THE COURT: Donovan **Brooks** was convicted by a jury of the offences of possession of a weapon for a purpose dangerous to the public peace, possession of a loaded restricted firearm, and use firearm in a careless manner. By agreement of counsel, Mr. **Brooks** entered a plea of guilty to the offences of possession of a firearm while prohibited by an order under section 109 of the *Criminal Code* (two counts) and possession of ammunition while prohibited. All of the offences occurred on January 26, 2006. Mr. **Brooks** has been in custody since his arrest. He was first tried in April 2007, but the jury was unable to

reach a unanimous verdict and the judge declared a mistrial. His re-trial took place on August 1, 2007 before me with a jury, at which time he was convicted of these offences.

2 The circumstances of the offences were that on January 26, 2006, a person at the Lawrence Square Mall in Toronto reported to a security guard that a man had a gun in his possession. The security guard called police who happened to be conducting an investigation at the time in a store close by. Police went to the Food Court area of the mall and observed a man now known to be Mr. **Brooks**. As they approached him, he took off down the escalator and out the mall. Police chased him through a parking lot and into a residential area. Police observed him drop an object to the ground. Ultimately, they caught up with him, a scuffle ensued and Mr. **Brooks** was brought to the ground and placed under arrest. Police located a gun nearby on the ground. The handgun was loaded with six rounds of ammunition and was in a cocked position. No other weapons or ammunition were found on Mr. **Brooks**' person. Mr. **Brooks** was not a registered holder of a gun licence.

Positions of the Parties on Sentence:

3 The position of the Crown on sentence is that Mr. **Brooks** has been convicted of extremely serious offences and should be sentenced to a global sentence of nine to ten years with credit for time served on a two for one basis, thus reducing the balance of the sentence by approximately three years. The Crown argues that the criminal record of Mr. **Brooks** is an aggravating factor. The record includes a Youth Record from 2001 for Armed Robbery for which he received 30 days open custody followed by probation after serving 157 days of pre-sentence custody and a mandatory prohibition order, robbery for which he received 30 days open custody followed by probation of 18 months in addition to 157 days of pre-sentence custody concurrent, and fail to comply with recognizance for which he received 30 days open custody followed by probation for 18 months concurrent. In 2002, he was found guilty of assault peace officer (two charges) and was sentenced to 30 days probation on each charge concurrent. His adult record consists of convictions for robbery (two charges) and escape lawful custody for which he received 208 days plus 3 years probation concurrent on each charge and a mandatory s. 109 order in 2003 and, in 2004, robbery for which he received 7 months in addition to 164 days of pre-sentence custody and two years probation and a s. 109 order and for robbery and fail to comply with probation order 7 months concurrent on each charge. Crown counsel also filed as evidence at the sentencing hearing the transcript of the guilty plea and facts agreed upon concerning the offences in 2004 and points to the violence and *modus operandi* involved in these offences.

4 The position of the defence is that Mr. **Brooks** has been in custody continuously since his arrest on January 26, 2006 (620 days) and should be credited with time served on a two for one basis for 484 days and the balance on a three for one basis because of the harshness of the conditions during his pretrial custody, including days when he was in a cell with two other inmates when the cell was designed for two people and days when the range he was on were in lockdown mode. Counsel submits that with enhanced credit, the appropriate sentence is one day plus time served for a total of just over 3.5 years. In support of this position, defence counsel has produced records from the Toronto Don Jail indicating when Mr. **Brooks**' range was in lockdown and when he was in a cell with two other inmates, the Toronto East Detention Centre and Maplehurst (the three major facilities in which he has been detained. Mr. **Brooks** also testified about his detention since arrest and prior to sentence.

Decision:

5 The fundamental purpose of sentencing is set out in s. 718 of the *Criminal Code*. It is to ensure respect for the law and to promote a just, peaceful and safe society. I am to consider the sentencing objectives referred to in this section which are: denunciation of unlawful conduct; deterrence of the offender and other persons from committing offences, separating offenders from society where necessary, rehabilitation of offenders, providing reparation for harm done to the victims or to the community, promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims and the community.

6 A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender. When imposing sentence, I am to take into account certain factors which may increase or reduce the sentence

because of aggravating or mitigating circumstances. The sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, where consecutive sentences are imposed, the combined sentences should not be unduly long or harsh, that the offender should not be deprived of liberty if less restrictive sanctions are appropriate and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, particularly aboriginal offenders.

7 Now before I sentence, Mr. **Brooks**, I would ask you if you have anything further to say before I pass sentence.

THE ACCUSED: No, Your Honour.

THE COURT: All right, thank you.

8 As I have indicated, a proper sentence must take into account both the circumstances of the offence and the offender.

9 In the case of Mr. **Brooks**, I consider the evidence filed at this hearing, including Mr. **Brooks**' criminal record, the transcript of the prior charges, the pre-sentence report, the evidence from the three detention facilities concerning Mr. **Brooks**' pre-trial custody, Mr. **Brooks**' testimony and submissions of counsel. And I find the following circumstances are particularly relevant:

(1) Mr. **Brooks** is 23 years of age. He was born on June 9, 1984. His parents divorced a number of years ago and he has three maternal half brothers and a younger half sister and a stepsister. He has a good relationship with his siblings. Mr. **Brooks** has a five year old daughter and she lives with her mother. There was no evidence led that Mr. **Brooks** supports the child. Mr. **Brooks** says he is anxious to see his child. Mr. **Brooks** is now in a relationship of over two years with Tamara Afflick who has attended court on a number of occasions and is supportive of Mr. **Brooks**.

(2) Mr. **Brooks** completed Grade 10 and has taken some Grade 11 and 12 courses in high school. He did not complete his diploma while in custody. He says he took a course for two weeks but it was discontinued.

(3) Mr. **Brooks** was living with his maternal grandmother prior to his incarceration. He had lived with each of his parents for periods of time in the last several years.

(4) Mr. **Brooks** has a previous Youth record and a criminal record as detailed above.

(5) Mr. **Brooks** has been in custody since January 26, 2006, subject to a detention order. He has been detained mainly in three different institutions.

(6) **Brooks** was not working prior to his arrest but has had different jobs in the last few years which included distributing brochures for an employment agency and working at Kentucky Fried Chicken during the summers of 2001 and 2004. Mr. **Brooks** advised the probation officer that he hopes to work at a barbershop upon his release. During his sentencing hearing, he testified that he has a job available to work with a friend in roofing and tiling but did not provide any details concerning the employment such as hours, salary, location and who the employer is. He also testified that he has an opportunity to work with his uncle in the United States doing alarm and security installation. No details were provided to the court. He wishes to be a father to his daughter but provided no plan for his living arrangement.

10 With respect to the circumstances of the offence, Mr. **Brooks** has been convicted of a number of offences relating to the possession of a handgun loaded with six rounds of ammunition. While no one was hurt, the potential for danger to the community was enormous. The loaded handgun, based upon the jury's finding, was handled in a careless manner as it was tossed to the ground. It could easily have fired whether intentionally or accidentally and

could have caused a great deal of harm. Furthermore, Mr. **Brooks** was found guilty of possession of a restricted firearm when he had been on two prior prohibition orders under s. 109 of the Criminal *Code* and a previous probation order. The earlier convictions on his significant youth and adult record showed a propensity for violence and a disregard for court orders.

11 In order to denounce the conduct of possession of weapons, and to deter others as well as the accused specifically, in a number of cases, the courts have imposed significant sentences which demonstrate that deterrence and protection of the public are of paramount concern. Crown counsel relies upon a number of authorities which emphasize the seriousness of firearms offences, particularly where the offender was subject to a prohibition order. In *R. v. Danvers*, [2005] O.J. No. 3532 (Ont. C.A.), the court wrote at para. 78:

> There is no question that our courts have to address the principles of denunciation and deterrence for gun related crimes in the strongest possible terms. The possession and use of illegal handguns in the Greater Toronto Area is a cause for major concern in the community and must be addressed.

12 In *R. v. Grant*, [2005] O.J. No. 4599 (Ont. S.C.J.), Nordheimer J. imposed a sentence of six years in addition to time served of 14 months which was credited at 28 months for possession of a loaded semi-automatic handgun on an offender who was subject at the time to four orders prohibiting him from possessing weapons and ammunition. Justice Nordheimer wrote as follows at para. 37:

> It should go without saying that the possession by any person of a loaded handgun would, of itself, be of very serious concern. However, the possession of a handgun by a person who is not only subject to multiple court orders against the possession of guns, but who is, at the same time, out in the community on a release that prohibits the possession of guns, would inevitably outrage even the most hardened or cynical members of this community.

13 In *R. v. Ferrigon*, [2007] O.J. No. 1883 (Ont. S.C.J.), Molloy J. sentenced the offender to a total of six and a half years consisting of five years for possession of a loaded prohibited firearm, carrying a concealed weapon, breach of recognizance and careless storage of a weapon, plus 18 months for breach of prohibition order (two counts) with 46 months of credit for pre-trial custody.

14 Similarly, in *R. v. Manning*, [2007] O.J. No. 1205 (Ont. S.C.J.), Epstein J. sentenced a twenty-four year old offender who pleaded guilty to carrying a concealed weapon, possession of a loaded prohibited firearm knowing it was unauthorized and violation of previous prohibition orders. There were a number of aggravating factors including the criminal record of Mr. Manning and the circumstances of the offences. The sentence imposed was five years with credit of 28 months for pretrial custody for the possession offences, and on the breach of prohibition orders a further one year consecutive to the other sentence for a total of six years.

15 The defence pointed to authorities which he argues supported a lesser sentence. In particular, in *R. v. Grant*, [2006] O.J. No. 2179 (Ont. C.A.), the Ontario Court of Appeal upheld the sentence imposed by the trial judge on an eighteen year old offender who had marijuana and a loaded revolver on his person near a school zone. He was convicted of all five offences and sentenced as a youthful first offender to 18 months' imprisonment which was reduced to twelve months on account of his pre-trial custody.

16 In *R. v. Smith*, [2006] O.J. No. 4008 (Ont. S.C.J.), Dambrot J. sentenced a 22 year old offender with a significant youth and adult criminal record and who had been on an order prohibiting him from possessing firearms to a global sentence of three years for various gun offences. The offender had been in custody for approximately twelve months since his arrest on the offences. Justice Dambrot considered as mitigating factors that the offender was young, had a supportive family and had not been sentenced to a lengthy period of imprisonment in the past. He noted that, "the total sentence should neither crush the offender nor be disproportionate to the seriousness of his overall conduct."

17 In *R. v. Williams*, [2007] O.J. No. 1354 (Ont. S.C.J.), Stinson J. imposed a sentence of four and a half years as a global sentence for drug and weapons related offences committed by what he described as a "mature adult" with a relatively minor criminal record. Justice Stinson said at para. 25 and I quote:

> An examination of the various cases reveals that the length of the sentence imposed depends on the mitigating and aggravating circumstances relevant to the offender and the commission of the offence.

18 In his text, *Sentencing*, Sixth Edition, (Toronto: Butterworths, 2004), Clayton Ruby writes at p. 23:

> ....It is the weight attached to the aggravating and mitigating factors which shapes and determines the sentence imposed. This is an individual process. In each case, the court must impose a fit sentence for this offender, for this offence in this community.

19 An appropriate sentence must reflect the circumstances of the offence and the offender and must address the objectives set out in the *Criminal Code*. In cases involving gun offences, the objective of denunciation and deterrence are paramount as well as the protection of the public through the separation of the offender from society. Like my colleagues, I take the issue of illegal gun possession and the violation of weapons prohibition orders very seriously. Persons who choose to violate our laws in this respect are committing extremely serious offences in circumstances with potentially very grave consequences. That kind of conduct cannot be tolerated in our society and must attract significant sanction.

20 For all of these reasons, I am of the view that an appropriate sentence in this case is a global sentence of five and a half years. The following aggravating factors are significant in my mind:

> (1) that Mr. **Brooks** ran from police with a loaded weapon which he was carrying in a busy shopping mall and discarded in a residential area in a careless manner;
>
> (2) that the handgun had six rounds of ammunition and was in a cocked position suggesting that Mr. **Brooks** was prepared to use it;
>
> (3) that Mr. **Brooks** also had marijuana on his person and the combination of guns and drugs often creates a potentially lethal situation;
>
> (4) that Mr. **Brooks** has a serious related prior criminal and youth record including offences of violence and was on two previous s. 109 orders at the time of these offences;
>
> (5) that Mr. **Brooks** does not have specific plans about where he will live and what he will do when he is released from custody.

21 By way of mitigating factors, Mr. **Brooks** is still relatively young, has a young child and has his life ahead of him. The potential for rehabilitation is there and a sentence must take that factor into account. Mr. **Brooks** has already received punishment for his acts. He has spent a significant amount of time in custody in three institutions. He testified in court on this sentencing hearing and I was impressed with his responses to questions put to him. While he does not express remorse per se, he is prepared to accept the consequences of the jury's verdict, receive his sentence and get on with his life. He describes himself as having learned from the experience and is prepared to make a new start. However, he did not present concrete plans which may have supported the prospects of rehabilitation.

22 I now turn to the question of the amount of credit given for pre-trial and presentence custody. Section 719(3) of the *Criminal Code* provides that when imposing sentence, a court may take into account any time spent in custody by the person as a result of the offence. In *R. v. W. (L.W.)* (2000), 143 C.C.C. (3d) 129 (S.C.C.), the

Supreme Court held that while pre-trial detention is not intended as punishment when it is imposed, it is deemed part of the punishment following the offender's conviction because of the operation of section 719(3). Courts have rejected a mathematical formula for crediting pre-trial custody and have opted for a determination on a case by case basis: see *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.). In *R. v. W. (L.W.)*, the court wrote at 148:

> ...The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act* apply to period of detention. 'Dead time' is 'real' time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

23 In the case of *R. v. Jabbour*, [2001] O.J. No. 3820 (Ont. S.C.J.), at para. 65, Watt J., discussed the question of enhanced credit for pre-trial custody having noted the factors of the nature of the facility, "especially the periods of triple-celling, minimal recreation time and the constant threat of health hazards..."

24 In the case of *R. v. Francis*, [2006] O.J. No. 1287 (Ont. C.A.), Weiler J.A. discussed the basis for enhanced credit for pre-sentence custody and the judge's overall exercise of discretion to impose a sentence that is not a minimum sentence.

25 In *R. v. Kanthasamy* (2007), 84 O.R. (3d) 664 (Ont. C.A.), the court considered among a number of issues, the question of credit for pre-trial custody. The appellant had argued that the trial judge erred in failing to allow a three for one credit for two periods of pre-trial custody totalling five months during which the institution suffered overcrowding, several lockdowns and reduced programs. The court wrote:

> ...While there was evidence about the general conditions in the institution during the time the appellants were there, there was no evidence about the particular situation of the appellants. The trial judge reviewed the relevant authorities and refused to exercise his discretion in favour of a greater credit. He did not err in assessing the pre-trial custody on a global basis, and determining that a two for one credit on the entire period of pre-trial custody was adequate.

26 In this case, counsel for Mr. **Brooks** led evidence concerning the nature of his detention since his arrest. In my view, the evidence led by the defence of lockdowns on the units showed that they occurred on a sporadic basis for a variety of reasons. These were not situations where, for example, there was a labour strike resulting in lockdowns and where the liberty of inmates was severely restricted on a continuous basis for a period of time. There were also records presented which indicated when Mr. **Brooks** was sleeping in cells along with two other inmates and testimony that generally, two inmates would be detained in that size cell. The question is whether that detention can be described as "harsher, more oppressive than the norm" that would warrant enhanced credit for time served: see *R. v. Newman*, [2003] O.J. No. 5574 (Ont. S.C.J.) at para. 16. I am satisfied for the 19 occasions that Mr. **Brooks** was detained with two others in a cell and slept on the floor next to the toilet, that constitutes harsh conditions and I exercise my discretion and find that Mr. **Brooks** should receive enhanced credit for those 19 days.

27 I have carefully considered the sentencing principles set forth in s. 718 and I am of the view that the sentence recommended by Crown counsel fails to take into account the factor of rehabilitation; the sentence recommended by the defence fails to meet the objectives of denunciation and deterrence. In my view, a global sentence of five and a half years would meet the fundamental purpose and principles of sentencing.

28 The offences of possession of a weapon or possession of ammunition contrary to a s. 109 order, are, in my view, clearly separate offences from gun possession offences although they arise out of the same circumstances. Parliament deliberately created such offences in an effort to deter such behaviour. I adopt the reasoning outlined by my colleagues in the decisions of *R. v. Ferrigon*, *supra*; *R. v. Manning*, *supra*; and *R. v. Newman*, *supra*; that a

sentence for breach of a prohibition order should be consecutive to the sentence for possession of a weapon. I adopt the analysis discussed by Justice Epstein in *Manning* as follows at para. 22:

> In this case, the offences are not different as to time, place, nature and victims, however, they do serve different societal interests. Just as the Court of Appeal in Grummer held that dangerous driving and failing to remain protect different societal interests, here too, the offences of unlawful possession and breach of a court order serve different interests.

29 In conclusion, with respect to the offences upon which Mr. **Brooks** was convicted by the jury, I apply the principle set out in *R. v. Kienapple* (1974), 15 C.C.C. (2d) 524 (S.C.C.) and stay the conviction of weapon dangerous. I sentence Mr. **Brooks** to the offences of possession of a loaded restricted firearm without a licence and careless use of a firearm.

30 Mr. **Brooks**, for those convictions, I sentence you to four and a half years for each of these convictions, such sentences to be served concurrently; for the offences of possession of a firearm and possession of ammunition while prohibited, you are sentenced to a period of twelve months imprisonment concurrent for each offence. Such sentences are to be served consecutively to the possession of loaded restricted firearm and careless use sentences. That would be a total of five and a half years or 2,007 days. As for credit for time served of 620 days, you are credited 601 days on a two for one basis and 19 days on a three for one basis for a total of 1,259 days or three years and 164 days for pre-trial custody. Therefore, in addition to time served, you will serve 748 days or two years and eighteen days in custody.

31 In addition to these sentences, there shall be a s. 109 order for life prohibiting you from possessing weapons or ammunition as defined by the *Criminal Code*. I also order forfeiture of the gun and ammunition.

32 Is there anything further?

MS. JACKSON: Nothing, thank you, Your Honour.

THE COURT: Thank you.

MR. **PIETERS:** Thank you, Your Honour.

33 -- Court adjourns at 10.45 a.m.

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