Federal Court  Cour fédérale

Date: 20100629

Docket: T-1445-09

Citation: 2010 FC 710

Ottawa, Ontario, June 29, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

PETER RANDOLPH STUART

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The applicant received a first sentence of life imprisonment with eligibility for parole after 12 years but, while he was serving his first sentence, he received a second sentence (additional sentence) of 53 months for the growing, possession and trafficking of cannabis, as well as for possession of various prohibited firearms.

[2] The applicant considers this additional sentence to have merely symbolic value, given that it was to be served concurrently with his first sentence.

[3] Subsection 120.2(2) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA) establishes that any additional sentence must be considered for purposes of calculating eligibility for parole from the day on which the sentence was imposed.

[4] Justice Allen Linden, writing for the Federal Court of Appeal in *Cooper v. Canada (Attorney General)*, 2002 FCA 374, 295 N.R. 184, stated the following:

> [9] ...The provision plainly does not distinguish between offences that occurred prior to the life sentence (as here) or afterwards. It is the time of the sentence that matters here, not the time of the offence. This is consistent with the situations dealt with in sections 120.2(1) and 120.2(2). [Emphasis added.]

[5] [7] The second aspect of a section 7 analysis is whether there has been a denial of the principles of fundamental justice. In deciding this question, not only must the interest of an offender be considered but the interest of society is also evaluated (see C*unningham, supra*, at page 499 per McLachlin J.). The provision in issue in this case is a balanced one, which recognizes that there are some consequences for those who are sentenced more than once, that is, an extension of their parole ineligibility period. It is a measure that is carefully balanced by Parliament and can in no way be considered overly harsh to offenders.... [Emphasis added.]

(As stated by Justice Linden in the Federal Court of Appeal decision in *Cooper*, above).

II. Judicial procedure

[6] This is an application for judicial review of a decision by the Chief, Sentence Management at the Leclerc Institution dated July 31, 2009, concerning an application, dated July 24, 2009, with regard to the calculation of the applicant's parole eligibility dates (establishing the applicant's day parole eligibility date to be 2012-01-28 and the applicant's full parole eligibility date to be 2015-01-18 for the purposes of subsections 119(1.1) and 120.2(2) of the CCRA).

III. Introduction

[7] The application for judicial review is based on the following:

- The July 31, 2009 decision of the Chief, Sentence Management of the Correctional Service of Canada is based on an erroneous finding of fact without regard for the relevant material in the applicant's specific file:

According to the applicant:

- The sentence imposed on February 5, 2007, by the Honourable Jean Sirois, J.C.Q. punishes offences committed on the same date and at the same place and arising from the same facts as the life sentence with eligibility for parole after 12 years imposed by the Honourable Fraser Martin on March 18, 2003.
- This is therefore not a new offence committed by the applicant on a different date, and an unfairness results since Martin J.C.Q. took these offences into account and increased the time before the applicant becomes eligible for parole from 10 years to 12 years.
- Further, when the sentence was imposed on February 5, 2007, it was clear that Sirois J.C.Q. was imposing a symbolic sentence on the applicant, indicating that the 53-month sentence for the growing of marijuana and possession of firearms would not change the applicant's parole eligibility date since the applicant was serving a life sentence.

The applicant is of the opinion that:

- The July 31, 2009 decision of the Chief, Sentence Management of the Correctional Service of Canada is erroneous in law in many respects:
    - The narrow interpretation of the application of subsections 119(1.1) and 120.2(2) of the CCRA has the effect of creating an unfairness for the applicant and only the court is empowered to remedy this miscarriage of justice by means of a review.
    - Because of the decision of the Chief, Sentence Management of the Correctional Service of Canada, the applicant was not reclassified to a lower security institution, which would have allowed him to continue serving his sentence in a minimum security institution.
    - The July 31, 2009 decision results from a misinterpretation of subsections 119(1.1) and 120.2(2) of the CCRA regarding the sentence imposed in relation to the calculation of the day parole eligibility date and the full parole eligibility date.
    - The full parole and day parole eligibility dates are a right and not a privilege.
    - Both the full parole eligibility date and the day parole eligibility date should be calculated as if there were one global sentence.

IV. Facts (which, according to the applicant's evidence, demonstrate the merits)

[8] Between 1998 and 2001, the applicant was actively involved in a major marijuana production and sales business worth several million dollars (Applicant's Record (AR) at pp. 50-51, Indictment at p. 53, Court of Québec decision).

[9] On July 26, 2001, as part of his operations, the applicant participated in a shootout that took place in a building belonging to his partner (AR at pp. 53-54, Court of Québec decision).

[10] This shootout followed an argument concerning a debt of $30,000 he owed to the person tending one of his marijuana plantations and resulted in two deaths and in the injury of another person (AR at pp. 53-54, Court of Québec decision).

[11] After the killings, the police officers who responded on the scene discovered numerous documents linking the applicant and his partners to the plantations, the sum of $100,000, 11 kilos of marijuana, used equipment used in growing marijuana and an arsenal of firearms (AR at p. 54, Court of Québec decision).

[12] On February 26, 2002, the applicant was charged with the murders and attempted murder of the three victims of the killing of July 26, 2001, and was convicted (AR at p. 23, Indictment).

[13] On March 18, 2003, he was sentenced to life imprisonment, with eligibility for parole only after 12 years (AR at p. 47, decision of Fraser J.C.Q.).

[14] On October 31, 2005, the applicant was also charged with conspiracy to grow, possess and traffic cannabis, as well as with possession of various prohibited firearms related to his illicit activities between 1998 and 2001. He pleaded guilty to these charges (AR at p. 50, Indictment).

[15] On February 5, 2007, he was sentenced to 53 months (AR at p. 52, Court of Québec decision).

[16] On July 24, 2009, the applicant, through his counsel, filed an application with the Chief, Sentence Management to calculate his parole eligibility dates (AR at p. 18, reference: communication with the Chief, Sentence Management).

[17] On August 25, 2009, the Chief, Sentence Management informed the applicant by letter that his parole eligibility date was determined to be January 28, 2015 (AR at p. 16, letter from the Chief, Sentence Management).

[18] As explained in this letter, the additional sentence of 53 months, imposed on February 5, 2007, was added to the remaining period of ineligibility in relation to his life sentence (with eligibility for parole after 12 years) from the day on which the sentence was imposed (AR at p. 17, letter from the Chief, Sentence Management).

[19] In fact, his additional sentence had the effect of delaying his parole eligibility date (AR at p. 17, letter from the Chief, Sentence Management).

[20] On August 31, 2009, the applicant applied for judicial review to contest this calculation because he considered the 53-month sentence should not be taken into consideration as an additional sentence for the purposes of calculating his eligibility for parole.

V. Issue

[21] Is the parole eligibility date determined by the Chief, Sentence Management of the Correctional Service of Canada consistent with subsections 119(1.1) and 120.2(2) of the CCRA?

VI. Analysis

[22] The Court is in full agreement with and is adopting the position of the respondent in answering yes to the issue: the parole eligibility date determined by the Chief, Sentence Management of the Correctional Service of Canada is consistent with subsections 119(1.1) and 120.2(2) of the CCRA.

[23] Determination of the applicant's parole eligibility date is governed by section 120.2 of the CCRA, which reads as follows:

Additional concurrent sentence	**Peine supplémentaire concurrente**
120.2 (1) Subject to subsection (2), where an offender who is serving a sentence receives an additional sentence that is to be served concurrently with any portion of the sentence the offender was serving when the additional sentence was imposed, the offender is not eligible for full parole until the day that is the later of	**120.2** (1) Sous réserve du paragraphe (2), le délinquant dont la peine d'emprisonnement n'est pas expirée et qui est condamné à une peine d'emprisonnement supplémentaire à purger en même temps qu'une partie de l'autre n'est admissible à la libération conditionnelle totale qu'à la plus éloignée des dates suivantes :
(*a*) the day on which the offender has served the	*a*) la date à laquelle il a accompli le temps

period of ineligibility in relation to the sentence the offender was serving when the additional sentence was imposed, and

(*b*) the day on which the offender has served

(i) the period of ineligibility in relation to any portion of the sentence that includes the additional sentence as provided by subsection 139(1) and that is subject to an order under section 743.6 of the *Criminal Code* or section 140.4 of the *National Defence Act*, and

(ii) the period of ineligibility in relation to any other portion of that sentence.

d'épreuve sur la peine qu'il purge au moment de la condamnation à la peine supplémentaire;

b) la date à laquelle il a accompli, d'une part, le temps d'épreuve requis par rapport à la partie de la période globale d'emprisonnement, déterminée conformément au paragraphe 139(1), qui est visée par une ordonnance rendue en vertu de l'article 743.6 du *Code criminel* ou de l'article 140.4 de la *Loi sur la défense nationale* et, d'autre part, le temps d'épreuve requis par rapport à toute autre partie de cette période globale d'emprisonnement.

Where sentence in addition to life sentence

(2) Where an offender who is sentenced to life imprisonment or for an indeterminate period receives an additional sentence for a determinate period, the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

Peine d'emprisonnement à perpétuité

(2) Le délinquant qui est condamné à une peine d'emprisonnement supplémentaire pour une période déterminée alors qu'il purge une peine d'emprisonnement à perpétuité ou pour une période indéterminée n'est admissible à la libération conditionnelle totale qu'à la date à laquelle il a accompli le temps d'épreuve auquel il est assujetti au

(*a*) any remaining period of ineligibility to which the offender is subject; and

(*b*) the period of ineligibility in relation to the additional sentence.

Where reduction of period of ineligibility for parole

(3) Where, pursuant to section 745.6 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* or subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, there has been a reduction in the number of years of imprisonment without eligibility for parole of an offender referred to in subsection (2), the offender is not eligible for full parole until the day on which the offender has served, commencing on the day on which the additional sentence was imposed,

(*a*) the remaining period of ineligibility to which the offender would have been subject, after taking into account the reduction; and

(*b*) the period of ineligibility in relation to the additional sentence.

1995, c. 22, s. 18, c. 42, s. 34; 1997, c. 17, s. 23(F); 1998, c. 35, s. 113; 2000, c. 24, s. 39.

moment de la condamnation ainsi que le temps d'épreuve sur la peine supplémentaire.

Nouveau calcul en cas de réduction du temps d'épreuve

(3) En cas de réduction du temps d'épreuve sur la peine d'emprisonnement à perpétuité en vertu de l'article 745.6 du *Code criminel*, du paragraphe 140.3(2) de la *Loi sur la défense nationale* ou du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le délinquant visé au paragraphe (2) n'est admissible à la libération conditionnelle totale qu'à la date à laquelle il a accompli le temps d'épreuve auquel il aurait été assujetti, compte tenu de la réduction, à la date de la condamnation à la peine supplémentaire ainsi que le temps d'épreuve sur la peine supplémentaire.

1995, ch. 22, art. 18, ch. 42, art. 34; 1997, ch. 17, art. 23(F); 1998, ch. 35, art. 113;

2000, ch. 24, art. 39.

[Emphasis added.] (La Cour souligne).

[24] The applicant received a first sentence of life imprisonment with eligibility for parole after 12 years, but while he was serving his first sentence, he received a second sentence (additional sentence) of 53 months for the growing, possession and trafficking of cannabis, as well as for possession of various prohibited firearms.

[25] According to subsection 120.2(2) of the CCRA, his eligibility for parole must be calculated by adding the period of ineligibility in relation to his additional sentence of 53 months to the remaining period of ineligibility in relation to his life sentence (with eligibility for parole after 12 years) from the day on which the sentence was imposed. (The remaining period of ineligibility in relation to his life sentence, from the day on which the additional sentence was imposed, was 2,378 days, to which 536 days must be added, which takes us to January 28, 2015, as his parole eligibility date.)

[26] The applicant contends that his 53-month sentence should not be considered an additional sentence for the purposes of determining his eligibility for parole under subsection 120.2(2) of the CCRA because he considers that this sentence was related to offences committed on the same date and arising from the same circumstances as the offences for which he is serving a life sentence (first sentence).

[27] In other words, the offences giving rise to the additional sentence were already included and considered in his first sentence, and both sentences should be viewed as one sentence.

[28] The applicant also considers this additional sentence to have merely symbolic value, given that it was to be served concurrently with his first sentence.

[29] Subsection 120.2(2) of the CCRA establishes that any additional sentence must be considered for purposes of calculating eligibility for parole from the day on which the sentence was imposed.

[30] Consequently, sentence managers at the Correctional Service of Canada do not exercise any discretion when determining eligibility for parole.

[31] The Act, as enacted by Parliament, must be applied by the Sentence Manager of the Correctional Service of Canada.

[32] Justice Linden, writing on behalf of the Federal Court of Appeal in *Cooper*, above, specified the following:

> [9] The Trial Judge was also right in holding that the provision being attacked was neither ambiguous nor overbroad (see *Dimaulo, supra*). While it may not be easy to apply in all cases, as witness the error made in this case, the section is certainly not so ambiguous as to be declared unconstitutional. Nor am I persuaded that it is overbroad because it covers all additional offences for which sentences are imposed, not only those committed while on parole; counsel's argument that legislative history indicates such a limitation was meant to be adopted is not borne out by the language chosen by Parliament. The provision plainly does not

> distinguish between offences that occurred prior to the life sentence (as here) or afterwards. It is the time of the sentence that matters here, not the time of the offence. This is consistent with the situations dealt with in sections 120.2(1) and 120.2(2). [Emphasis added.]

[33] In addition, Justice Linden found that Parliament's rationale for proceeding in this way did not deny fundamental justice and is therefore not contrary to the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.). In this regard, he stated the following in *Cooper*, above:

> [7] The second aspect of a section 7 analysis is whether there has been a denial of the principles of fundamental justice. In deciding this question, not only must the interest of an offender be considered but the interest of society is also evaluated (see C*unningham, supra*, at page 499 per McLachlin J.). The provision in issue in this case is a balanced one, which recognizes that there are some consequences for those who are sentenced more than once, that is, an extension of their parole ineligibility period. It is a measure that is carefully balanced by Parliament and can in no way be considered overly harsh to offenders. The section adds to the period of ineligibility flowing from the first sentence, the additional period of ineligibility flowing from the second or later concurrent sentences. It is a measured and proportional consequence of being made subject to additional concurrent sentences, giving some effect to them. The appellant in this case, therefore, who has already been sentenced to life imprisonment, is impacted by the provision. Otherwise there would be no effect whatsoever as a result of a second concurrent sentence, nor, indeed, for any additional concurrent sentences for crimes committed while in prison or elsewhere. In my view, therefore, the extension of ineligibility period provided for in this provision is appropriate and fair and, hence, does not deny fundamental justice.

VII. Conclusion

[34] For these reasons, the Chief, Sentence Management had to take into account the applicant's additional sentence imposed by the Court from the day on which the sentence was imposed in determining eligibility for parole and had no discretion to interpret it otherwise.

[35] Nevertheless, despite the applicant's argument, the facts clearly show that the offences resulting in the second sentence pertained to periods and crimes that were different from those that resulted in the first sentence.

[36] Thus, for all these reasons, the parole eligibility date as determined by the Chief, Sentence Management of the Correctional Service of Canada is consistent with subsections 119(1.1) and 120.2(2) of the CCRA.

[37] The applicant's application for judicial review is therefore dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed, with costs.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, LLB

SOLICITORS OF RECORD

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