Wright v The Queen [2007] NTCCA 5

PARTIES:	WRIGHT, Wayne Francis v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 26 of 2006 (20531404, 20529288)
DELIVERED:	4 May 2007
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JUDGMENT OF:	MARTIN (BR) CJ, ANGEL and MILDREN JJ
APPEAL FROM:	SUPREME COURT SCC 20531404 and 20529288, 14 June 2006, Martin AJ

CATCHWORDS:

CRIMINAL LAW – APPEAL
Appeal against sentence – robbery while armed – whether sentence manifestly excessive – whether weight given to plea of guilty manifestly inadequate – appeal allowed – re-sentenced.

Criminal Code Act 1983 (NT), s 211; *Misuse of Drugs Act* 1990 (NT), s 5 and s 9.

Kelly v The Queen (2000) 10 NTLR 39; *R v Place* (2002) 81 SASR 395, applied.

REPRESENTATION:

Counsel:

Appellant:	S Cox QC
Respondent:	R Coates

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	A
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wright v The Queen [2007] NTCCA 5
No. CA 26 of 2006 (20531404, 20529288)

BETWEEN:

WAYNE FRANCIS WRIGHT
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL AND MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 4 May 2007)

Martin (BR) CJ:

Introduction

[1] The appellant was sentenced to six years and six months imprisonment for the crime of robbery aggravated by the circumstance that he was armed with an offensive weapon, namely, a loaded syringe. In addition, 12 months imprisonment to be served concurrently was imposed for the offence of possessing morphine, together with six months imprisonment for the offence of supplying drugs, three months of which sentence was to be served concurrently with the other sentences.

[2] The appellant was also sentenced to six months imprisonment for the offence of obtaining property by deception, three months of which was to be served concurrently with the previous sentences thereby giving a total period to be served of seven years. A non parole period of three years and six months was fixed.

[3] The appellant appeals against the sentences on the basis that the individual sentences and the total period of seven years were manifestly excessive. The appellant also complains that insufficient reduction was made to reflect the early pleas of guilty.

Facts

[4] At the time of sentence in June 2006 the appellant was aged 29 years. In 1999 the appellant was severely injured at work and was prescribed morphine for pain. He was unable to walk unaided for about two years. The appellant took cannabis, heroin and amphetamines as pain relief and became addicted to drugs.

[5] The appellant met his partner in 2001 and entered into a relationship. In July 2004 the appellant's partner was pregnant and they moved to Alice Springs to start a new life together. Until early December 2005 the appellant had been employed in various establishments as a kitchen hand and groundsman.

[6] As is not uncommon, the appellant experienced difficulties in financing his drug habit. He borrowed money. On 19 September 2005, in order to obtain

funds for drugs, the appellant pawned a digital camera which he did not own and received $60. The appellant later told police he purchased the camera from an unknown person at Henley-on-Todd for $30 and thought it was worth $250. Those facts form the basis of the offence of obtaining property by deception.

[7] By late December 2005 the appellant was unable to obtain heroin in Alice Springs and was suffering from withdrawal symptoms. He sought assistance at a local drug and alcohol rehabilitation centre, but the centre was closing down for the Christmas break and the appellant was unable to undertake the necessary assessment to obtain entry into a program.

[8] The offence of robbery was committed on 26 December 2005. At that time the appellant was ill, very much underweight and lacking in strength. He was suffering from withdrawal symptoms. The learned sentencing Judge was satisfied that at the time of the robbery the appellant was suffering from impaired judgment brought about by withdrawal symptoms and ill health.

[9] The appellant called a taxi and paid the driver $20 to wait on the basis that he was intending to attend a nearby bank. The appellant entered a pharmacy and confronted a female employee ("the victim"), demanding drugs in a drawer. As the victim walked behind the counter, the appellant stood close to her and again demanded drugs from the drawer, but added "I have got a syringe and I will stick you". The appellant started to bring his right hand

toward the victim's thigh. The appellant was holding a syringe containing a clear fluid. The needle was exposed.

[10] The victim grabbed the appellant's wrist because she was afraid of being struck with the syringe. The appellant again threatened to stick the victim and demanded drugs. The victim called out to the pharmacist and the appellant again repeated his demand and threat. The pharmacist placed drugs in a bag while the appellant continued to threaten the victim.

[11] The events at the pharmacy and the appellant's possession of the drugs he stole from the pharmacy were the basis of the offences of armed robbery and possession of drugs.

[12] Having obtained the drugs, the appellant ran into the Todd Mall and re-entered the waiting taxi. After being driven back to Floreat Village where he paid the driver and entered the residence, the appellant phoned a friend from whom he had borrowed money and invited him to attend with clean syringes.

[13] The friend arrived a short time after the phone call and the appellant supplied his friend with a small quantity of the stolen drugs. The appellant told his friend the drugs were in repayment of money borrowed. That transaction was the basis of the offence of supplying drugs.

[14] Police located the appellant within a short time. The appellant made partial admissions, but denied that a syringe was produced during the robbery.

[15] The crime of robbery had a significant impact upon the victim. She was left very shocked and shaken and experienced a distressing reaction some hours later. The psychological effects have continued and, as at April 2006, the victim was still experiencing sleeping difficulties. The victim required counselling which was continuing in April 2006. She experienced a range of emotions and sensibly observed in her victim impact statement that the appellant needs help and rehabilitation.

[16] Leaving aside the question of appropriate reductions in order to properly reflect the pleas of guilty, there is no apparent error in the approach of the sentencing Judge. His Honour properly had regard to the objective seriousness of the offending, particularly the robbery while armed with an offensive weapon, and to the requirements of both general and personal deterrence. His Honour referred to the amateurish nature of the offending and to the role of the appellant's addiction in that offending. The appellant's poor health and impaired judgment were specifically recognised, as were the absence of prior drug related offending and the appellant's subsequent successful efforts to rehabilitate himself within the prison environment.

Sentences Manifestly Excessive

[17] On the basis of a reduction in the order of 15% for the pleas of guilty, the sentencing Judge adopted a starting point of approximately seven years and eight months for the crime of armed robbery. While the sentence was

undoubtedly severe, it is to be remembered that there is no specific tariff which the sentencing Judge was required to apply. A range of sentence was available to his Honour. The critical question is whether the starting point of approximately seven years and eight months was outside that range such that it is manifestly excessive and demonstrative of error.

[18] Counsel for the appellant accepted that the objective circumstances of the offending were serious, but pointed out that the crime was so unsophisticated that apprehension soon after commission of the crime was inevitable. The appellant used a taxi and returned to his home address. No physical violence was applied to the victim and the syringe was filled with clear liquid rather than blood. When the victim took hold of the appellant's wrist, he did not struggle and the victim was able to restrain the appellant's arm.

[19] As to personal circumstances, counsel emphasised that while addiction itself is not a mitigating circumstance, this was not an offender who committed the crime for profit. This was an addict who was in poor health and suffering from impaired judgment. His addiction had been brought about as a consequence of severe injury sustained at work. The appellant had offended against the law on only one previous occasion which did not involve violence and for which he received a sentence of six months imprisonment which was suspended. Before committing the crime the appellant had sought help and in the intervening period between the crime

and sentence had successfully rehabilitated himself from his drug addiction. The appellant is a person with good prospects of rehabilitation.

[20] Every crime of armed robbery is a serious crime. People employed in pharmacies are vulnerable victims. Both general and personal deterrence were important factors in the exercise of the sentencing discretion. But as the facts outlined demonstrate, the crime committed by the appellant was not at the upper end of the scale of seriousness for crimes of this type and there were a number of mitigating circumstances accompanying the commission of the crime.

[21] In very helpful submissions, both counsel referred to a number of sentences imposed by Judges for armed robbery and to remarks of Judges concerning the existing sentencing range for this type of offence. It is unnecessary to canvass those sentences, but it is appropriate to note the remarks of Mildren J as to the appropriate range when sentencing in the matter of *R v Chambers* (SCC 20015052; 9 March 2001). The offender had pleaded guilty to two offences of armed robbery, both offences having been committed when the offender was addicted to morphine. The addiction had arisen as a consequence of use of the drug for relief of pain caused by severe back injury sustained while playing sport. At the time of the offences the offender was carrying an unopened knife which was not shown to the victim. The offender had previously offended in a manner described by Mildren J as not involving “anything terribly serious”.

[22] In those circumstances, Mildren J observed that the "sentencing range for this type of offence is between five to six years imprisonment, less an appropriate discount for a plea of guilty and remorse". His Honour particularly noted that the offender did not remove the weapon and hold it against the victim's throat or point it directly at her. His Honour said that absent a plea of guilty and remorse he would have imposed a sentence of five years imprisonment on each count.

[23] Sentence in *Chambers* was imposed in March 2001. Two years later in the matter of *R v Bendelle* (SCC 20106693; 2 May 2003), in the context of a similar offence of armed robbery, but involving a syringe filled with blood, Mildren J made the following observations:

> "The range of sentences in this jurisdiction for armed robbery of soft targets like chemists where the defendant has pleaded guilty, where the property taken was only worth a few hundred dollars, where there is limited planning involved, where there is little or no actual violence caused is between four to five years for the head sentence. And this may be more or less depending on whether there are aggravating or mitigating circumstances. That range assumes also that the defendant has little or no relevant prior convictions."

[24] As the Director of Prosecutions noted in his written submission, an analysis of recent cases lends support for the observations of Mildren J as to the current range of sentences applicable to the circumstances under consideration. The Director conceded that, bearing in mind the personal circumstances of the appellant and the objective circumstances of the crime of robbery, a starting point of the order of seven years and eight months was

manifestly excessive and demonstrative of error in the exercise of the sentencing discretion. In my opinion that concession was correct.

[25] The other sentences were also individually manifestly excessive. The possession of the drugs was part and parcel of the crime of robbery. Possession was for a limited time and solely for self use with a small quantity to be supplied to another user of drugs to whom the appellant was indebted. Only a small quantity of the drug was supplied. This was not a commercial exercise.

[26] As to obtaining property by deception, although there is a degree of artificiality attending concern as to the precise sentence because it will necessarily be absorbed by the sentence for robbery, nevertheless it is important that sentencing courts impose appropriate individual sentences for lesser crimes and reach an appropriate total period through orders as to concurrency or accumulation. Had the offence of deception stood alone, it is likely that it would have been dealt with by way of a fine or, at the worst, a very short period of imprisonment fully suspended.

[27] For these reasons, in my opinion the appeal should be allowed. In addition, for the reasons that follow, independently of any question of the length of the sentences the appeal would have succeeded by reason of the manifestly inadequate recognition of the appellant's very early pleas of guilty.

Pleas of Guilty

[28] The pleas of guilty were indicated and entered at the earliest possible opportunity. Guilty pleas in respect of the robbery and drug charges were indicated in the Magistrates Court prior to a hand up committal and the appellant pleaded guilty to those offences at the time of the committal. A guilty plea to the deception charge was indicated in March 2006 at the second mention in the Magistrates Court. A committal was not necessary as the matter proceeded by way of ex officio indictment in the Supreme Court.

[29] The sentencing Judge noted that the appellant had indicated "at a very early stage" his intention of pleading guilty, but that recognition was hedged with the observation that the appellant had "given limited cooperation to police". His Honour then indicated that he had allowed a deduction from the sentences that would otherwise have been imposed "in the order of 15%".

[30] Counsel for the appellant contended that the reduction of only 15% "undervalued the guilty pleas". It was submitted that the pleas were indicative of the appellant's remorse and acknowledgement of his wrongdoing. The pleas not only facilitated the practical administration of justice, but having been indicated at the earliest opportunity they enabled the victim to continue her life without fear of being required to give evidence.

[31] The Director conceded that not only was the allowance of 15% low compared with the allowance generally given in the circumstances under

consideration, but in the circumstances the appellant "would have had a legitimate expectation that his early plea of guilty would have attracted a reduction in the sentence greater than 15%". Again the concession was properly made and is born out by a consideration of the authorities to which this Court was referred.

[32] There is no set range of percentage reduction appropriate for pleas of guilty. Each case must be determined according to its particular circumstances. There is no doubt, however, that pleas of guilty or indication of pleas of guilty at the earliest possible opportunity accompanied by true remorse are entitled to attract a greater reduction than late pleas which are not accompanied by true remorse. There is a range of reduction available to each sentencing Judge and it is not to the point that the Appellate Court would have given a greater reduction than the sentencing Judge. This Court is only entitled to interfere if it is satisfied that the reduction of 15% was outside the proper range of reduction available to the sentencing Judge so as to be manifestly inadequate.

[33] The significance of a plea of guilty was emphasised by this Court in *Kelly v The Queen* (2000) 10 NTLR 39. In a joint judgment, the Court observed (49):

> "[26] In our opinion, an early plea has significant value going beyond the demonstration of remorse; it promotes the speedy disposition of justice and avoids the waste of valuable court time and other resources that is inherent in a late plea. …

[27] In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances.

[28] Often, as here, the assistance given to the law enforcement authorities in investigating the offence may diminish the value of the plea given the strength of the prosecution case arising from that assistance. The combination of those two factors, however, allows for greater mitigation than would a plea without that cooperation. Public expense occurs not only in the courts, but also in the investigatory process."

[34] The importance of giving appropriate recognition to a plea of guilty was emphasised by the South Australian Court of Criminal Appeal in *R v Place* (2002) 81 SASR 395. In a joint judgment of four Judges, with whom Gray J agreed, the Court made the following observations (425[81] – [83]):

> "The authorities to which we have referred have identified compelling reasons in public policy why the extent of a reduction of sentence in recognition of a plea of guilty should be identified. Experience in this State and in New South Wales has demonstrated that the public policy objectives are not achieved unless the specific reduction is identified. Offenders and their legal advisers are able to identify in advance and with some confidence an approximate range of reduction that is likely to accompany a plea of guilty. After sentence has been imposed an offender is not left in any doubt as to whether benefit was given for a plea of guilty as full knowledge of the extent of the reduction and the reasons for it are given. The community and the appellate court are similarly well informed. The initial scepticism that accompanied the general recognition that a plea of guilty entitled an offender to a degree of mitigation has disappeared.
>
> The system is fair and practical. It has worked well in practice for a number of years. In our opinion, it would be a retrograde step to discourage sentencers from continuing with the current practice. It would be very difficult to explain to offenders and the community why the court has departed from its present practice. An explanation

> for the departure based on describing the sentencing process as an instinctive synthesis would be greeted with scepticism.
>
> For these reasons, in our opinion the current practice should continue and this Court should continue to encourage sentencing courts to identify the specific reduction given in respect of a plea of guilty. In determining the extent of the reduction, the current practice of taking into account the timing of the plea, contrition, cooperation with and assistance to the authorities should continue. We emphasise that in taking into account any subjective considerations, sentencing courts should not ignore those subjective considerations to the extent that they are relevant to other aspects of the sentencing task."

[35] In my opinion, in the particular circumstances under consideration where the indication of pleas and entry of pleas occurred at the earliest possible opportunity, and the pleas were accompanied by true remorse, the reduction of 15% undervalued the pleas to the extent that the reduction was outside the proper range available to the sentencing Judge and was manifestly inadequate. In reaching this view, I emphasise that there is no tariff or set range of percentage reduction and it is in the particular circumstances in which the appellant indicated and entered pleas of guilty that the reduction of 15% was manifestly inadequate.

Re-sentencing

[36] For the offence of robbery, aggravated by being armed with an offensive weapon, had it not been for the plea of guilty I would have imposed a sentence of five years and six months imprisonment. After allowance for the plea I would impose a sentence of four years imprisonment.

[37] As to the offence of possessing morphine, I would impose a sentence of six months imprisonment to be served concurrently with the sentence imposed for robbery. I would impose a sentence of three months imprisonment for supplying morphine and direct that it be served cumulatively upon the sentences imposed for robbery and possession of morphine. For the offence of obtaining property by deception, I would impose a sentence of imprisonment for one month to be served concurrently with the sentences imposed for robbery and possession of morphine.

[38] In my view, therefore, the appellant should be liable to serve a total period of four years and three months imprisonment. I would fix a non-parole period of two years and two months.

Angel J:

[39] I concur.

Mildren J:

[40] I concur.
