SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gray* [2016] QCA 322
PARTIES:	**R** **v** **GRAY, Christopher John** (applicant)
FILE NO/S:	CA No 174 of 2016 SC No 1063 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 24 June 2016
DELIVERED ON:	2 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2016
JUDGES:	Margaret McMurdo P and Morrison JA and McMeekin J Separate reasons for judgment of each member of the Court, Morrison JA and McMeekin J concurring as to the order made, Margaret McMurdo P dissenting
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to five counts of drug-related offences, namely unlawful possession of the dangerous drug methylamphetamine; unlawful possession of the dangerous drug methylamphetamine, where the quantity exceeds over 2.0 grams; unlawful possession of a relevant substance 1, 4-Butanediol; possession of a digital scale for use in connection with the commission of the crime of supplying a dangerous drug; and possession of a mobile phone in connection with the commission of the crime of supplying a dangerous drug – where the applicant was sentenced to five years for the count of possession of a dangerous drug exceeding 2.0 grams and one year for the other counts, to be served concurrently – where the applicant was on parole for a previous drug offence when he committed the offences the subject of this appeal – where the applicant was held on remand for breaching the conditions of the parole, namely, committing another offence – where the applicant was therefore in custody for 471 days before he was sentenced for the commission of these offences – where the learned sentencing judge did not take the 471 days of non-

declarable pre-sentence custody into account – whether the learned judge erred and the sentence is manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 159A(1)(a)

R v Carter [2016] QSC 86, cited
R v Cone [2010] QCA 274, considered
R v McCusker [2015] QCA 179, considered
R v Skondin [2015] QCA 138, considered

COUNSEL: The applicant appeared on his own behalf
C M Kelly for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The facts and issues of this application for leave to appeal against sentence are set out in Morrison JA's reasons. The applicant was charged with five offences against the *Drugs Misuse Act* 1986 (Qld) and five related summary offences. The most serious offence (count 2) was possession of methylamphetamine, in excess of 2.0 grams, for which he was sentenced to five years imprisonment with parole eligibility on 24 February 2018, with lesser concurrent sentences on the remaining counts. He committed these offences whilst on parole for similar offending for which he was sentenced to three years and six months imprisonment in 2014. He was arrested on his most recent offences on 10 March 2015 when his parole was revoked and he began to serve the balance of the 2014 sentence. The question is whether his sentence for the present offending is manifestly excessive, given that he has been in custody since his arrest on 10 March 2015 serving the 2014 sentence.

[2] Defence counsel at sentence emphasised this factor and urged the judge to discount the sentence to take it into account. He submitted the judge should impose a three year head sentence with parole eligibility at the full-time release date of the 2014 sentence, namely 24 February 2017.

[3] It is uncontentious that the applicant's pre-sentence custody from 10 March 2015 until his sentence on 24 June 2016 was unable to be declared under s 159A *Penalties and Sentences Act* 1992 (Qld) as time served under the present sentence. Nevertheless, this pre-sentence custody was a relevant consideration in exercising the sentencing discretion. The judge had to take into account the totality principle and ensure that the total period of imprisonment to be served was not an unduly harsh and oppressive punishment.

[4] It is true that the present sentence was imposed concurrently with the last eight months of the 2014 sentence. It is also true that the applicant has only his inability to control his drug addiction and his resulting recidivism to blame for his current predicament. But his present sentence has the result that, since his arrest on the current charges, he will serve almost three years before even becoming eligible for parole. If he serves the sentence in full, a real possibility, he will have served more than six years and three months since his arrest. This result is disproportionate to the objective seriousness of his latest offending, even taking into account his criminal history and that he was on parole for like-offending at the time. The judge's sentencing remarks do not suggest his Honour fully appreciated these factors in determining the sentence, which, in my

respectful view, was manifestly excessive because of this factor. The applicant, who was self-represented in this application, did not complain about the five year head sentence. However, for the reasons given, I consider it was manifestly excessive.

[5] I would grant the application for leave to appeal against sentence, allow the appeal against sentence, vacate the sentence imposed on count 2, and instead substitute a sentence of four years imprisonment with parole eligibility fixed on 24 June 2017. This would have the effect that the applicant would be eligible for parole approximately two years and three months after his arrest for the present offending. If the sentence is served in full, he will be released after slightly more than five years and three months from that date.

[6] **MORRISON JA:** On 24 June 2016, Mr Gray was convicted, on his plea of guilty, of five drug-related offences. He was sentenced to terms of imprisonment on each count, as follows:

(a) Count 1 – unlawful possession of a dangerous drug, methylamphetamine – one year;

(b) Count 2 – unlawful possession of a dangerous drug, methylamphetamine, where the quantity exceeded 2.0 grams – five years;

(c) Count 3 – unlawful possession of a relevant substance 1, 4-Butanediol – one year;

(d) Count 4 – possession of a digital scale for use in connection with the commission of the crime of supplying a dangerous drug – one year; and

(e) Count 5 – possession of a mobile phone used in connection with the commission of the crime of supplying a dangerous drug – one year;

(f) the sentences were ordered to be served concurrently.

[7] Mr Gray also pleaded guilty to five summary offences in connection with the drug offences, in respect of which he was convicted but no further punishment imposed.

[8] Mr Gray applies for leave to appeal against his sentence on the sole ground that it was manifestly excessive having regard to the 471 days of non-declarable pre-sentence custody that was not taken into account as time served under s 159A(1) of the *Penalties and Sentences Act* 1992 (Qld). On the hearing before this Court Mr Gray made no attack on the head sentence of five years.

Circumstances of the offences

[9] An agreed schedule of facts was tendered, which sets out the basic facts of the offending.[1]

26 February 2015 – count 1

[10] On 26 February 2015, police officers attended a hotel in Brisbane city on an unrelated matter. Mr Gray was seen acting suspiciously at the entrance of the hotel and on the street. He was searched and the police found two mobile telephones, $1,810,[2] a key for the hotel, and car keys for a rental car.

[11] A search of Mr Gray's mobile telephone revealed an SMS showing he had booked the hotel room the night before, and Facebook messages showing he had requested drugs.

[12] Mr Gray's co-accused, Ms Fien, was in the hotel room. A search of the hotel room revealed the following items:

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1 AB 56-58.

2 This was the subject of one of the summary charges.

(a) a small black bag containing 2.44 grams of substance in a plastic bag; the substance was analysed and found to be 1.918 grams of methylamphetamine of 75.4 per cent purity;[3]

(b) a "tick sheet" with names and numerical amounts located in a backpack;

(c) a set of digital scales;[4]

(d) a case containing a green pipe and two syringes which were capped and removed from their plastic cases in a backpack;[5] and

(e) methylamphetamine residue on the bedside table; the analysis did not reveal purity.

[13] At the time Mr Gray was on parole for an earlier offence. He did not take part in a police interview, but was, for an unknown reason, not kept in custody after being charged with this offence (count 1).[6]

10 March 2015 – counts 2-5

[14] On 10 March 2015, police were conducting patrols in a Brisbane suburb, when they saw a vehicle with a New South Wales number plate. A check determined that the car was a rental car under Mr Gray's name. Checks on Mr Gray indicated that he was wanted on a return-to-prison warrant.

[15] The following day, the police returned and found the car in the same location. Mr Gray and Ms Fien were in the car.

[16] Mr Gray was arrested and stated he was aware he was wanted on a return-to-prison warrant. When searched, at first he said he had nothing to declare, then subsequently stated he had "a bag of drugs" down the front of his pants. A small bag was located, which contained a hypodermic needle, a medication bottle, and a clip seal bag containing clear crystals. Mr Gray stated he thought the liquid was "fantasy" and that the crystalline substance was "ice."

[17] The substances were analysed as follows:

(a) the crystalline substance had a gross weight of 21.782 grams, and contained 11.827 grams of methylamphetamine; 54.3 per cent purity;[7] and

(b) the liquid substance had a gross weight of 45.902 grams, and was detected as containing the controlled substance 1, 4-Butanediol.[8]

[18] In the vehicle police found a mobile phone and a black carry-bag containing a large bundle of $50 notes, totalling $5461.00.[9] A set of digital scales was also located in the black carry-bag.[10]

[19] A warrant was obtained to access the stored communications on Mr Gray's seized phone. Messages from 1 March 2015 to 10 March 2015 show several drug-related

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3 The subject of Count 1.
4 The subject of one of the summary charges.
5 Also the subject of summary charges.
6 AB 14, lines 22-38.
7 Count 2.
8 Count 3.
9 This was the subject of a summary charge.
10 Count 4.

communications, including where Mr Gray was contacted by others wishing to source drugs.

[20] Mr Gray did not take part in an interview with the police.

Mr Gray's criminal history

[21] Mr Gray had a long history of drug-related offences, commencing from the age of 16 years old. They include:

(a) possession of dangerous drugs, as a minor: 1998 (heard in the Children's Court);

(b) possession of dangerous drugs: 2006, 2007 (two charges), 2008, 2013, 2014 (three charges);

(c) possession of property suspected of having been acquired for the purpose of committing a drug offence: 2007, 2013, 2014;

(d) possession of a thing used in the commission of a crime: 2007;

(e) possession of drug related utensils such as pipes: 2007, 2013, 2014;

(f) failure to properly dispose of a needle and syringe: 2013, 2014; and

(g) receiving tainted property – property obtained by way of an act constituting a crime: 2014 (two charges).

[22] He had been sentenced to periods of imprisonment in February 2007 (12 months for possessing dangerous drugs) and April 2014 (three and a-half years for possessing dangerous drugs).

[23] In the sentencing remarks in both 2007 (Margaret Wilson J)[11] and 2014 (Boddice J),[12] the learned sentencing judges remarked that there was a commercial element to the offending, but that Mr Gray's addiction was the principal reason for his recidivist behaviour, and that little financial gain was made. All of the drug offences dealt with in the Supreme Court were confined to the substance methylamphetamine.

How the pre-sentence custody was dealt with

[24] During the sentencing hearing Mr Gray's antecedents were examined. He was 33 at the time of offending, and 34 at sentence. The sentencing remarks of Wilson J in 2007, and Boddice J in 2014 were tendered by the Crown, as was the agreed schedule of facts.

[25] At the time of offending, Mr Gray was on probation for the offences for which he was sentenced in 2014. Therefore, once he was taken into custody for the offences committed on 10 March 2015, he remained in prison to serve out the rest of that sentence, ending on 24 February 2017.

[26] In the course of the prosecutor's sentencing submissions, this exchange occurred:

> "MS BIRKETT: Your Honour will have noted that the defendant is in custody at the moment. He's currently serving the sentence from the Supreme Court. His full-time discharge date is the 24th of February 2017 in relation to that.

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11 AB 28-33.

12 AB 52-54.

> HIS HONOUR: Sorry. He's – he was on parole when he committed these offences?
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> MS BIRKETT: Yes.
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> HIS HONOUR: That was the parole pursuant to the sentence of April 2014.
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> MS BIRKETT: Yes.
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> HIS HONOUR: **So he's been returned as a result of these offences** - - -
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> MS BIRKETT: Yes.
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> HIS HONOUR: - - - **because they've breached his parole**. And when does his sentence conclude?
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> MS BIRKETT: It concludes on the 24th of February 2017, so in approximately eight months' time.
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> HIS HONOUR: Yes.
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> MS BIRKETT: **So there's no pre-sentence custody to declare in relation to these offences, because he's been serving a sentence.**
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> HIS HONOUR: Yes."[13]

[27] Nothing further was addressed on the topic by either counsel, or by the learned sentencing judge. Effectively, the 471 days of pre-sentence custody was unable to be declared under s 159A(1)(a) of the *Penalties and Sentences Act*.

[28] The prosecutor submitted that, Mr Gray having received a sentence of three and a-half years for the previous offence of aggravated possession of methylamphetamine, a more severe penalty should be imposed for this offence. No specific period of imprisonment was suggested.[14]

[29] Defence counsel submitted that having regard to his early plea of guilty, steps that he had taken towards rehabilitation, and his good work history, a sentence of three years, with parole eligibility after 24 February 2017, should be imposed.[15] This, it was submitted, would take into account the totality of the time served, with respect to the other matters.

Approach of learned sentencing judge

[30] The sentencing remarks reveal that the learned sentencing judge took the following matters into account:[16]

(a) he had a "very worrying criminal history"; commencing in the Supreme Court in 2006, with convictions for possessing methylamphetamine, and most recently in April 2014;

(b) he was on parole when he committed the current offences;

(c) the nature of the offending as set out in the schedule of facts;

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13 Emphasis added.
14 AB 16.
15 AB 19.
16 AB 22-23.

(d) the aggravated circumstance of the quantity of methylamphetamine found, namely "more than five times the aggravated limit";

(e) that it was for a commercial purpose;

(f) the timely plea of guilty;

(g) his personal circumstances: his stable family life, and that he left high school in grade 10 to pursue an apprenticeship;

(h) his ability to demonstrate a capacity for rehabilitation: remaining drug-free for substantial periods, undertaking courses in jail, studying whilst in jail, and commencing counselling in jail;

(i) the fact that the offending occurred on two separate dates within two weeks of each other, and the second occasion after he had been detained by police; and

(j) the need for personal and general deterrence.

[31] The head sentence of five years was imposed on count 2. The other counts each attracted one years' imprisonment. A conviction was recorded on the summary charges, with no further punishment imposed. The sentences were to be served concurrently, and concurrently with the sentence he was serving at the time. A parole eligibility date was set at 24 February 2018, one third of the head sentence.

[32] The learned sentencing judge did not directly address the 471 days of pre-sentence custody, but evidently did not take it into account when imposing the sentences.

Discussion

[33] The contention on appeal was that the period of 471 days of non-declarable pre-sentence custody should have been taken into account, and treated as if it were declarable. The fact that it was not was said to make the sentence manifestly excessive. The effect of taking the period of 471 days into account would be to move the parole eligibility date from 24 February 2018 to 13 December 2016.

[34] Section 159A(1) of the *Penalties and Sentences Act* 1992 (Qld) provides:

> "(1) If an offender is sentenced to a term of imprisonment for an offence, any time that the offender was held in custody in relation to proceedings for the offence **and for no other reason** must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders."[17]

[35] In the present case, Mr Gray was in custody for breaching his parole conditions for the offences for which he was sentenced in April 2014. He was therefore required to serve the entirety of his previous sentence, finishing on 24 February 2017.

[36] Therefore s 159A(1) did not require that the learned sentencing judge take the pre-sentence custody into account. However the learned sentencing judge could, as a matter of discretion, take it into account.[18]

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17 Emphasis added.

18 *R v Fabre* [2008] QCA 386, at [11] per Fraser JA, Keane and Muir JJA concurring. See also *R v Lappan* [2015] QCA 180, at [19]; *R v Maksoud* [2016] QCA 115, at [40]-[42]; *Geale v Tasmania* [2009] TASSC 28, at [18], [60]-[63].

[37] As was recognised by Mullins J in *R v Carter*:[19]

> "[35] In the normal course, where an offender who is being sentenced has been held on remand, but cannot get the benefit of presentence custody which is not otherwise attributable to any sentence, but for some other reason is not declarable under s 159A, it is usual for the sentencing judge to take that non-declarable presentence custody into account by reducing the sentence and/or the period before which the offender is eligible for parole."

[38] The learned sentencing judge took into account that the time spent in custody was principally for Mr Gray's breach of parole. His Honour evidently took the view, with which I respectfully agree, that the breaches were serious given that: (i) the first involved an offence of possession of methylamphetamine for a commercial purpose; and (ii) the second breach occurred only two weeks after having been arrested, then released, and involved the same sort of offence. His Honour also recognised the need for general and personal deterrence. That latter was an important consideration because of the pattern of offending from 2014 to the present offences.[20] Those matters evidently were the basis upon which the discretion was exercised against giving full allowance for the pre-sentence custody.

[39] However, in my view, it is apparent that the learned sentencing judge, whilst not expressly adverting to the period of pre-sentence custody, did make some allowance for it.

[40] First, the sentences were ordered to be served concurrently with those then being served. At the time of sentence they still had about eight months to run.[21] It was open to the learned sentencing judge to order that they be served cumulatively, but his Honour declined to take that course.

[41] Secondly, his Honour set the parole eligibility date at one-third of the five-year head sentence. That meant that parole eligibility arose only one year after the then existing sentences were completed. In that way the learned sentencing judge recognised Mr Gray's plea of guilty and efforts at rehabilitation.

[42] In my view it cannot be demonstrated that the sentencing discretion miscarried in respect of the treatment of pre-sentence custody.

Comparable cases

[43] Mr Gray submitted that the cases of *R v McCusker*,[22] *R v Skondin*[23] and *R v Cone*[24] supported his contention that the sentence was manifestly excessive because of the way that pre-sentence custody was treated.

[44] *McCusker* involved an offender who had been sentenced in November 2010, and under that sentence was entitled to be released on court-ordered parole on 10 September 2013. When his parole release date arrived he was then on remand for a murder charge. Therefore, the court-ordered parole could not be acted upon.[25] When he was sentenced for

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19 [2016] QSC 86, at [35].
20 AB 23 line 9-13.
21 It was 245 days, from 24 June 2016 to 24 February 2017.
22 [2015] QCA 179.
23 [2015] QCA 138.
24 [2010] QCA 274.
25 By virtue of *Corrective Services Act* 2006 (Qld), s 199.

manslaughter, the only time that was taken into account was the difference between the end date of the previous sentence and the date of sentence for manslaughter. It was contended that the entire time between the court-ordered parole date and the date of sentence should have been taken into account.

[45] McMeekin J concluded that the only reason the offender had remained in custody past the court-ordered parole date was because he was on remand for the offence of murder. Otherwise he was entitled to be released. Therefore the time was declarable under s 159A and had to be taken into account.[26]

[46] That aside, the argument that there was, to adopt the language of s 159A(1) of the *Penalties and Sentences Act* 1992 (Qld), some reason other than that the offender was "held in custody in relation to the proceedings for the offence", was considered to be technical:[27]

> "It is obvious that the only reason for Mr McCusker's incarceration after 10 September 2013 was that he faced a charge of murdering Mr Dive. Hence, the argument that there was some reason other than that "the offender was held in custody in relation to proceedings for the offence" before the Court – that offence being the murder charge – was technical at best. In justice, whether declarable or not, there was no reason why that time in custody should not have been treated – in full – as time served under the sentence imposed for the unlawful killing of Mr Dive. In not doing so I consider that her Honour fell into error. A peculiar feature of the case is that in the statement of agreed facts put before the primary judge it was said that this period of incarceration "should be considered to be time spent in custody as a result of this charge". That position was not maintained for reasons that remain unclear."

[47] The same cannot be said of Mr Gray. In my view, the circumstances of *McCusker* are distinguishable from the present case.

[48] In *Skondin* the offender was on bail for drug offences when he committed the offence of manslaughter. The non-declarable pre-sentence custody of 784 days was taken into account at trial and maintained on appeal. The appeal did not involve any contention as to the issue of pre-sentence custody. That renders *Skondin* of no relevance here.

[49] *Cone* did not involve any consideration of the period of declared pre-sentence custody. I refer to it for a more general purpose, related to the question of manifest excess.

[50] It is the most factually similar to Mr Gray's case. It involved a plea of guilty to four drug offences. The offender was on parole for an attempted arson offence when he committed the first group of offences the subject of the appeal. He was released on parole. When the second group of offences the subject of the appeal were committed he was on bail in respect of the first group of offences.

[51] There were sentences of:

(a) four and a-half years for supplying methylamphetamine and possessing methylamphetamine with a circumstances of aggravation; and

(b) concurrently with that sentence, two years for possession of property obtained from the supply of dangerous drugs; and

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26 *McCusker* at [19]-[26], Morrison and Philippides JJA concurring.

27 *McCusker* at [15]; internal footnote omitted.

(c) in addition, 15 months for possession of methylamphetamine and cannabis, with a circumstance of aggravation; that was to be served cumulatively with the sentence for four and a-half years.

[52] The sentences were reduced on appeal, the four and a-half years to three and a-half years, and the 15 months to nine months.

[53] The overall criminality in *Cone* is less than in this case. The offender in *Cone* was found on two occasions with 5.398 grams and 2.333 grams of methylamphetamine as opposed to Mr Gray's 1.918 grams and 11.827 grams. Although the offender in *Cone* did have a substantial criminal history, he not display the same recidivist behaviour in relation to drug offences as Mr Gray.

[54] In my view *Cone* supports the sentence imposed here. I am unpersuaded that the sentence was manifestly excessive.

Conclusion

[55] For the reasons expressed above I would refuse the application for leave to appeal against the sentence.

[56] I propose the following order:

1. The application for leave to appeal against sentence is refused.

[57] **McMEEKIN J:** I agree with the reasons of Morrison JA and the order proposed by his Honour.