Citation: *R.* v. *Krizan*, 2016 YKTC 33

Date: 20160623
Docket: 15-00506A
15-00506C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

PETER ZIGMUND KARL KRIZAN

Appearances:

Paul Battin	Counsel for the Crown
Vincent Larochelle	Counsel for the Defence

REASONS FOR SENTENCE

[1] Peter Krizan is before the court for sentencing, having been convicted after trial of having committed offences contrary to ss. 267(a) and 733.1(1) of the *Criminal Code*. He was also convicted of having committed an offence contrary to s. 88(1) but this charge was conditionally stayed as per ***R.*** v. ***Kienapple,*** [1975] 1 S.C.R. 729.

[2] Mr. Krizan has also entered guilty pleas to having committed further offences contrary to ss. 145(3) and 733.1(1).

[3] The facts, with respect to the trial matters, as I have found them and briefly stated, are as follows.

[4] Mr. Krizan went in the early morning hours of November 7, 2015 to the trailer where his partner of approximately six years, Bonita Allison, had been staying with Ron Asuchuk. While Mr. Krizan was on the property, Mr. Asuchuk and Ms. Allison arrived in Mr. Asuchuk's vehicle. As they got out of the vehicle, Mr. Krizan approached Mr. Asuchuk to a point where Mr. Asuchuk placed his hand on Mr. Krizan's chest. Mr. Krizan was carrying an axe handle down by his side at the time.

[5] Mr. Krizan stated words to the effect that he wanted to talk to his wife and that Mr. Asuchuk should go into the house or things could get nasty or ugly. Mr. Asuchuk then went into the house.

[6] During this encounter the axe handle remained down by Mr. Krizan's side and was not brandished in any way. Mr. Krizan never attempted to touch Mr. Asuchuk. I further found that Mr. Krizan did not intend to cause any harm to Mr. Asuchuk. The assault was complete as per s. 265(1)(c) in that Mr. Krizan accosted Mr. Asuchuk while openly carrying a weapon and stating the words that he did which I found constituted a threat if Mr. Asuchuk did not leave as told to. I stated in my decision that I considered the circumstances of the assault with a weapon offence to be on the low end of such offences.

[7] The s. 733.1(1) conviction was for failing to keep the peace and be of good behaviour by committing further criminal offences, specifically the s. 267(a) offence and, although conditionally stayed, the s. 88(1) offence. At the time, Mr. Krizan was bound by a probation order issued out of the Northwest Territories on April 7, 2014 that required him to keep the peace and be of good behaviour.

[8] In addition to the probation order from the Northwest Territories, Mr. Krizan was also on a recognizance from this Court, and he pleaded guilty to two breach-related offences. The facts with respect to the s. 145(3) offence and the additional s. 733.1(1) offence are set out in an Agreed Statement of Facts. On April 2, 2016 Mr. Krizan was in a vehicle with Ms. Allison that was pulled over at a checkstop in Whitehorse at approximately 10:30 p.m. Mr. Krizan, who was in the passenger seat, admitted having consumed alcohol and was also found to be in possession of a bottle containing alcohol.

[9] At the time Mr. Krizan was bound by the terms of a Recognizance issued December 17, 2015 that required him to abide by a curfew between the hours of 10:00 pm and 6:00 a.m. daily, except with permission, which permission he did not have on that date. He was also bound by a probation order made December 16, 2015 that required him to have no contact directly or indirectly or communication in any way with Ms. Allison. Other terms of the recognizance required him to not possess or consume alcohol, to have no contact or communication with Ms. Allison and there was again a term of the probation order that required he keep the peace and be of good behaviour. Although he was also alleged to have breached these terms, no pleas were entered on these charges.

[10] Crown counsel submits that the sentences should be as follows:

- Four months for the s. 267(a) charge on Information 15-00506A;
- 45 days consecutive for the associated s. 733.1(1) charge;
- 45 days consecutive for the s. 145(3) charge on Information 15-00506C; and

- 45 days consecutive for the associated s. 733.1(1) charge.

[11] As Mr. Krizan is entitled to credit for time in custody on remand, which counsel agree is 84 days calculated at a ratio of 1:1 as of today's date, this amount should be deducted from the 255 days of custody that Crown counsel submits is appropriate.

[12] Counsel submits that Mr. Krizan's criminal record shows a complete disregard on his part for with court orders. As such, he needs to receive a sentence that denounces his conduct and deters him from failing to comply with court orders in the future.

[13] Crown counsel submits that, in accordance with legal principles, these sentences should be served consecutive to each other.

[14] Defence counsel submits that a sentence in the time served range is appropriate, using a combination of consecutive and concurrent sentences.

Analysis

Personal Circumstances

[15] Mr. Krizan's criminal record consists of the following entries:

- Ten s. 145(s) convictions;
- One s. 811 conviction;
- Eight s. 733.1(1) convictions;
- One s. 91(2) conviction;
- Three s. 259 convictions;
- One s. 253(1)(a) conviction;
- Two s. 129(a) convictions;

- One s. 270(1) conviction;
- One s. 266 conviction;
- One s. 354(1)(a) conviction; and
- One s. 264.1(1)(a) conviction.

[16] Mr. Krizan's record of criminal convictions commenced in 2010.

[17] Mr. Krizan is 47 years of age.

[18] He is a Doctor of Veterinary Medicine with a Bachelor degree in Biology and a Masters in Wildlife and Conservation Biology.

[19] It is safe to say that the unraveling of Mr. Krizan's previous apparently pro-social life occurred within the context of his relationship with Ms. Allison. I note that in the sentencing submissions that were before Luther J. on December 16, 2015, Mr. Krizan acknowledged that his relationship with Ms. Allison has been a destructive factor in his life.

[20] It is clear that Mr. Krizan has shown a consistent pattern of failing to comply with court orders. I agree that the sentence to be imposed for the breaches of court orders must emphasize the sentencing objectives of denunciation and specific deterrence. Rehabilitation is not a leading principle of sentencing in this case although, this said, given his antecedents, there is no reason to believe that Mr. Krizan in future cannot choose to forego his current criminally-entrenched lifestyle and return to a more productive one. Rehabilitation is not, therefore, without its due place in the sentencing of Mr. Krizan.

[21] Sentencing requires a careful balancing of all the sentencing purposes, objectives and principles in crafting a fit sentence that applies to the circumstances of the offender and the circumstances of the offence.

[22] I note that Mr. Krizan was subject to a s. 524 application which, in accordance with the one remaining portion of s. 719.3 of the *Truth in Sentencing Act,* S.C. 2009, c. 29 that has not been declared unconstitutional by the Supreme Court of Canada, limits his credit for time in custody on remand to a 1:1 ratio rather than the usual 1.5:1 which takes into account the loss of statutory remission. (I note that the Supreme Court of Canada declined to grant leave to appeal the decision in ***R.*** v. ***Chambers*** 2014 YKCA 13; see, [2014] S.C.C.A. No. 534), without reasons. Mr. Chambers had died prior to the leave application being heard).

[23] Briefly stated, the objective behind this limitation on remission credit is designed to impose a consequence upon an individual who has been accused of breaching a condition of their judicial interim release (perhaps, without intention, regardless of whether the individual is ultimately convicted of having done so). In my opinion, there is inherent in this loss of likely remission credit a punitive consequence that can serve to reduce to some extent the need to impose additional jail time on an offender in order to emphasize specific deterrence and denunciation. This is not the same as actually giving the offender a reduction in sentence based on a loss of the opportunity to earn statutory remission, it simply reflects how the need to emphasize denunciation and specific deterrence in imposing sentence is somewhat mitigated due to the loss of the right to obtain enhanced credit.

[24] In Mr. Krizan's case, his failure to recognize the importance of complying with his bail conditions has caused him to lose likely 42 days credit for his time in custody. I find that this should assist in denouncing his conduct and deter him from failing to take court orders seriously in the future.

[25] I agree with Crown, having reviewed the case law, that generally sentences for breaches are imposed consecutively to other charges even when, as here, the conduct underlying the breach is identical to the conduct establishing a substantive offence. However, any such consecutive sentences must always be subject to the totality principle.

[26] In ***R. v. Hutchings,*** 2012 NLCA 2, a five-member panel of the Newfoundland and Labrador Court of Appeal sat to clarify the application of the totality principle in circumstances broadly similar to these. Green C.J.'s lengthy analysis canvasses the state of the law across the country and sets out the approach by which a sentencing judge should address totality when sentencing for multiple offences:

> 20 The first step in sentencing in the context of multiple convictions is therefore to determine the appropriate sentence for each individual offence, applying the full range of applicable sentencing principles. The sentences so arrived at should presumptively be imposed consecutively.
>
> 21 The second step is to consider whether some or all of the offences are related in a manner such that they can be considered a single criminal adventure. If so, those that are so regarded should generally be made concurrent with the heaviest sentence arising out of that single criminal adventure. It is not always easy to determine what offences constitute a single criminal adventure. …
>
> …
>
> 25 The third step in the context of multiple offences, following the application of the proper principles respecting consecutive and concurrent

> sentences in accordance with the second step, is to consider and apply the totality principle. This Court has said on previous occasions that whenever an accused is being sentenced for multiple convictions, this principle is theoretically engaged: R. v. E.W., per Welsh J.A. at para. 78. If the totality principle would be offended by keeping the remaining sentences consecutive, after following the second step, then the sentencing court should further adjust the overall sentence by either making additional sentences concurrent or if that does not achieve an appropriate result, by shortening some of the individual sentences.
>
> 26 It is worth stressing that the totality analysis takes place at the end of the sentencing process. It involves, as has been called, "one last look" (R. v. Reader (M.), 2008 MBCA 42 at para. 26) or "a final look" (R. v. Adams, 2010 NSCA 42 at para. 23) at the overall sentence to determine whether the total punishment is "just and appropriate" and "not excessive"(R. v. English (E.) (1994), 122 Nfld. & P.E.I.R. 15 (Nfld. C.A.) at, respectively, paras. 30 and 36) and is reflective of the overall culpability of the offender. In R. v. S. (A.T.), Rowe J.A., writing for a unanimous court specifically considered and rejected the so-called "Hatch approach" (after the Nova Scotia Court of Appeal decision in R. v. Hatch (1979), 31 N.S.R. (2d) 110) which involves first determining the global sentence to be imposed based on an assessment of the overall culpability of the offender and then parceling out individual sentences so as to constitute in total what the pre-determined global sentence is to be. Among the reasons given for rejecting this approach is that the resulting individual sentences will not necessarily be reflective of the seriousness of each individual offence and may lead to misunderstanding, from the point of view of precedent, as to the range of sentences for particular types of offences when applied in other cases. It also complicates appellate review in cases where some, but not all, of the individual sentences are challenged.

[27] Totality is an aspect of proportionality, which is a fundamental principle of sentencing. The “last look” taken is to ensure that the total sentence is just and appropriate and “does not exceed the overall culpability of the offender”. An unduly long or harsh sentence runs afoul of the principle of proportionality, and a consideration of what is unduly long or harsh engages considerations of length and quality of sentence. Relevant considerations include: the gravity of the offences, the number of offences, the culpability of the offender, victim impact, the offender’s record and the

offender's future prospects (Hutchings, para. 75). A sentence can be unduly long or harsh without being "crushing".

[28] The Court in ***Hutchings*** summed up the approach in a nine-step process as follows:

> 84 The foregoing analysis, as well as the fact that the Ruby formulation which was referred to in *M.(C.A.)*, pre-dated ss. 718.1 and 718.2(c), requires a restatement of the applicable approach. I would state the following as guidelines for the analytical approach to be taken henceforth:
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> 1. When sentencing for multiple offences, the sentencing judge should commence by identifying a proper sentence for each offence, applying proper sentencing principles.
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> 2. The judge should then consider whether any of the individual sentences should be made consecutive or concurrent on the ground that they constitute a single criminal adventure, without consideration of the totality principle at this stage.
>
> 3. Whenever, following the determinations in steps 1 and 2, the imposition of two or more sentences, to be served consecutively, is indicated, the application of the totality principle is potentially engaged. The sentencing judge must therefore turn his or her mind to its application.
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> 4. The approach is to take one last look at the combined sentence to determine whether it is unduly long or harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender.
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> 5. In determining whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offence and the degree of responsibility of the offender, the sentencing court should, to the extent of their relevance in the particular circumstances of the case, take into account, and balance, the following factors:
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>   (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;

(b) the number and gravity of the offences involved;

(c) the offender's criminal record;

(d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;

(e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

6. Where the sentencing judge concludes, in light of the application of those factors identified in Step 5 that are deemed to be relevant, that the combined sentence is unduly long or harsh and not proportionate to the gravity of the offences and the offender's degree of responsibility, the judge should proceed to determine the extent to which the combined sentence should be reduced to achieve a proper totality. If, on the other hand, the judge concludes that the combined sentence is not unduly long or harsh, the sentence must stand.

7. Where the sentencing court determines that it is appropriate to reduce the combined sentence to achieve a proper totality, it should first attempt to adjust one or more of the sentences by making it or them concurrent with other sentences, but if that does not achieve the proper result, the court may in addition, or instead, reduce the length of an individual sentence below what it would otherwise have been.

8. In imposing individual sentences adjusted for totality, the judge should be careful to identify:

(a) the sentences that are regarded as appropriate for each individual offence applying proper sentencing principles, without considerations of totality;

(b) the degree to which sentences have been made concurrent on the basis that they constitute a single criminal adventure; and

(c) the methodology employed to achieve the proper totality that is indicated, identifying which individual sentences are, for this purpose, to be made concurrent or to be otherwise reduced.

> 9. Finally, the sentencing judge should indicate whether one or more of the resulting sentences should be further reduced to reflect any credit for pre-trial custody and if so, by how much.

[29] With respect to Mr. Krizan's breach of probation for failing to keep the peace and be of good behaviour in the context of the November 7, 2015 offences, I note that the commission of the substantive offence forms the basis for the breach charge for failing to keep the peace and be of good behaviour.

[30] It is well-established that, despite the factual nexus between these offences, they are not subject to the ***Kienapple*** principle, given the additional aspect of the non-compliance with a court order with respect to the breach charge. There is no doubt in law that Mr. Krizan is guilty of two separate offences and subject to two distinct sentences. There is also no doubt, as is well-canvassed in ***Hutchings**,* that the preferred approach in caselaw has been to impose consecutive sentences for breaches.

[31] Having said that, I echo the observations of Rosborough J. in ***R.*** v. ***Omeasoo**,* 2014 ABPC 79:

> 23 Having the legal right to charge a person with a variety of criminal offences addressing the same conduct does not mean that it is necessary or even desirable to charge the person with all those offences. For instance, one may fail to keep the peace and be of good behaviour (a term of a probation order) by breaching another term of that probation order such as a 'curfew' or 'non-contact' provision. *Reductio ad absurdum* one could be charged with breaching a probation order by breaching a probation order.

[32] Rosborough J. cited the pre-*Charter* decision of Stevenson D.C.J., in ***R.*** v. ***Chinn*** (1977), 11 A.R. 18 (Dist. Ct.) for the proposition that the recognition that double convictions may be recorded does not mean that double punishments may be imposed,

in the sense that the two offences should not be considered unrelated for the purposes of sentencing.

[33] In ***Chinn****,* the offender had been sentenced for a theft and given a nominal one-day sentence for a keep the peace breach that was charged as a result of the theft. In ***Omeasoo*** in paras. 32 to 35, Rosborough J. commented on what occurred in ***Chinn*** as follows:

> 32 The Crown appealed from the sentence imposed for breaching the probation order. Its position was described by the appeal court in these terms (at para. 8):
>
> > The Crown urges that breach of probation is serious and provided some statistics to show that there were a significant number of cases of violation of s. 666. It is said that the offence is of such a nature as to demand imprisonment except in extenuating circumstances. This argument does raise a question of principle.
>
> In the end, the Crown's position was rejected and the sentence imposed at first instance affirmed.
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> 33 More importantly, for the purpose of this case, Stevenson D.C.J. went on to consider what would constitute a fit punishment for breach of probation by committing the index offence (at para. 16):
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> > Assuming for a moment that in considering the fitness of the sentence I should look at the sentence that I would have imposed in the same circumstances, I am inclined to the view that I would have imposed a nominal sentence. Recognizing the elements of deterrence and denunciation I would, I think, be obliged to consider what had been done by the sentencing judge. Moreover, any other sentence would run perilously close to violating the fundamental principle that no one is to undergo double punishment. In saying that the ***Kienapple*** decision did not apply to this kind of case, the Court is recognizing that double convictions may be recorded. That is not the same thing as saying that double punishments may be imposed. None of the judgments of the ***Kienapple*** case throw any doubt upon the principle that double punishments are not to be

> imposed. The *maxim nemo debet bis punire pro uno delicto* remains an expression of principle.

> 34 ***Chinn*** was decided in 1977; 5 years before proclamation of the *Canadian Charter of Rights and Freedoms* ('*Charter*'). Inclusion in the *Charter* of s.11(h) reinforces the importance of ensuring that any sentence imposed for breaching a court order by committing the index offence does not amount to double punishment. Chinn has been followed in ***R. v. Strickland*** (1978),16 A.R. 187 (Dist.Ct.).
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> 35 It is my view that the most efficient way of doing so in this particular charging scenario is to follow the practice suggested by the court in ***Chinn***. That is to say, the fact that the Offender was on judicial interim release ought to be considered as an aggravating factor when sentencing the offender for the index offence. The sentence for failing to keep the peace and be of good behaviour by committing that index offence should be nominal.

[34] This reasoning was adopted by Cooper J. in ***R.*** v. ***Osuitok****,* 2011 NUCJ 19 in addressing an argument about the potential unfairness that can arise when the Crown proceeds on multiple charges for the same offence:

> 36 It is further argued that if an accused is charged with both a substantive offence and a breach based on the same conduct, where the breach is considered aggravating on the substantive offence, the penalty for the breach should be nominal (R. v. Chinn (1977), 11 AR 18 (Dist Ct), 38 CCC (2d) 45) and that the same should hold true for multiple breaches arising from the same circumstances. Indeed, the same principle would apply. If, in the case at Bar, the Court were to sentence Mr. Osuitok on the breach of undertaking for attending the residence and for contacting LA and, in the course of that sentencing, were to consider it an aggravating factor that he was intoxicated at the time and was thereby in further breach of his conditions, any subsequent sentence on the charge for breaching his condition by drinking alcohol would have to be nominal.
>
> 37 The Court understands concerns regarding the laying of multiple charges and how there can be inconsistencies depending upon who is doing the pre-charge screening. However, as stated by the Court in R. v. Poker, 2009 NLCA 33 at para 16, 287 Nfld & PEIR 22:
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> > [...] it is important to bear in mind that whether the Crown chooses to proceed with a charge is a matter within the Crown's discretion

> and is not a matter for judicial supervision. The judicial function relates to the disposition of charges, rather than to the decision to proceed with them.

[35] In ***Omeasoo*** and some other cases decided by Rosborough J., including ***R.*** v. ***Robillard**,* 2015 ABPC 126 and ***R.*** v. ***Boysis***, 2015 ABPC 67, the nominal sentence was an extremely low fine, ranging from $1 to $4 (see ***Robillard***, at para. 27). In ***Chinn*** the sentence was one day to be served concurrent to a penitentiary sentence. In ***Hutchings*** the Court did not consider the one-day consecutive sentences imposed by the sentencing judge for two breaches of probation adequate and imposed two month jail sentences on both charges but made these concurrent with the federal sentence imposed for other offences in accordance with the principle of totality.

[36] With respect to the April 2016 offences, Mr. Krizan faces breach charges relating to a recognizance of bail and a probation order for being out past curfew and for having contact with Ms. Allison. These are properly considered two separate offences, and it is undisputable that Mr. Krizan breached two distinct conditions that the court imposed on him. This is not a situation where Mr. Krizan has been charged twice, under two different orders, for the same misconduct. While technically multiple charges for breaching identical conditions of different orders is punishable by multiple discrete sentences, again, the principle of totality would assume some prominence. I am not diminishing the importance of complying with court orders, but in certain circumstances and particularly for certain offenders, such as those with Fetal Alcohol Spectrum Disorder, it would simply be unduly harsh to approach each condition in isolation. Breach charges that come before the court for sentencing often reflect an accused's

addictions, cognitive impairments or lack of community supports, and I note as well that the Yukon has a significantly higher rate of administration of justice charges than the national average; in 2014 StatsCan recorded 2,300.74 administration of justice charges per 100,000 population, compared to a national average of 483.67 and a BC average of 357.87.

[37] Having said that, I am not, on the evidence before me prepared to find that Mr. Krizan's breaches are in any meaningful way attributable to his addictions. He does not suffer from any cognitive limitations that I am aware of. He presents as a well-educated and generally intelligent and articulate person.

[38] For him the moral culpability is high.

[39] I have noted with respect to the s. 267(a) offence that it is on the lower end of the spectrum for s. 267(a) offences. I also take into account Mr. Krizan's being bound by conditions at the time on the probation order to keep the peace and be of good behaviour. As I stated previously this is an aggravating factor. In all the circumstances I am satisfied that a sentence of 60 days is appropriate.

[40] I find that, in the circumstances of the November 7, 2015 offences and considering the observations made in ***Omeasoo*** and ***Chinn***, Mr. Krizan should receive only a nominal sentence for breaching his probation by failing to keep the peace. Mr. Krizan's failure to keep the peace and be of good behaviour is the result of him having committed the assault with a weapon. He is being sentenced for the assault, and I consider it an aggravating feature that he was on probation at the time. I am also cognizant of the s. 88(1) charge that was conditionally stayed.

[41] Given this, with respect to the 2015 s. 733.1(1) charge, the sentence will be one day consecutive. This is not a sentence that has been reduced on the basis of the principle of totality. It reflects what I consider to be appropriate in the circumstances.

[42] With respect to the s. 733.1(1) charge from April 2, 2016, I am satisfied that a sentence of 45 days is the appropriate sentence. Breaches of no-contact orders are to be taken seriously due to what are generally the underlying reasons for such conditions to be imposed. I note, however, the circumstances in which this condition was imposed and the apparent complicity by Ms. Allison in the breach.

[43] With respect to the s. 145(3) curfew-related charge I am satisfied that a sentence of 30 days is appropriate.

[44] Based upon the principle of totality, in light of my consideration of the circumstances of the offences and of Mr. Krizan, however, I reduce the 45-day sentence for the s. 733.1(1) to 30 days and for the s. 145(3) to 15 days. These sentences are to be served consecutive to each other and to the sentences imposed for the ss. 267(a) and 733.1(1) offences.

[45] Mr. Krizan's 84 days in pre-trial custody will be credit as follows:

- 267(a) 60 days time served;
- 733.1(1) one day time served; and
- 733.1(1) 23 days time served, leaving a remanet of 7 days.

[46] These sentences will be followed by the 15 days on the s. 145(3) charge.

[47] Mr. Krizan will be placed on probation for a period of 12 months. The terms of the probation order will require Mr. Krizan to:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify the court, in advance, of any change of name or address, and, promptly, of any change in employment or occupation.

4. Have no contact directly or indirectly or communication in any way with Ron Asuchuk; and

5. Not attend at any known place of residence, employment or education of Ron Asuchuk.

[48] Mr. Krizan will provide a sample of his DNA as the s. 267(a) is a primary designated offence.

[49] As the Crown has proceeded by indictment on the s. 267(a) charge there will be the mandatory firearms s. 109 prohibition. This will be for a period of ten years.

[50] The victim surcharges are a total of $600.00. As per the submissions of counsel for Mr. Krizan, I order these to be payable forthwith, note Mr. Krizan to be in default and direct that he serve his default time concurrent to the time he will be serving in custody. A warrant of committal will issue to that effect.

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COZENS T.C.J.