
CANADA / JUDGMENT

R. v. Aikman

2020 BCSC 2086

COURT

Supreme Court of British Columbia

DECIDED

31 March 2020

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2020 BCSC 2086 R. v. Aikman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Aikman,

2020 BCSC 2086

Date: 20200331

Docket: 82053-1

Registry: New Westminster

Regina

v.

Andrew James Aikman

Jayson Anthony Franklin

Before: The Honourable Mr. Justice Schultes

Oral Reasons for Sentence

Counsel for the Crown, appearing by teleconference:

L.J. Kenworthy

E. Albrecher

Counsel for the Accused Andrew Aikman, appearing by teleconference:

M.J. Swartz

Counsel for the Accused Jayson Franklin, appearing by teleconference:

V.L. de Jong

Place and Date of Hearing:

New Westminster, B.C.

March 23 and 24, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 31, 2020

Introduction

- [1] Mr. Aikman and Mr. Franklin have entered guilty pleas to a series of property-related criminal offences that they committed in August 2014, in various locations in the Fraser Valley.
- [2] Mr. Aikman has pleaded guilty to robbery and having his face masked with intent to commit an indictable offence on August 10 in Maple Ridge; breaking and entering a business premise and having his face masked with intent to commit an indictable offence on August 12 in Langley; robbery and having his face masked with an intent to commit an indictable offence also on August 12 in Surrey; possession of a stolen vehicle on August 10 in Surrey; and possession of another stolen vehicle on August 12, also in Surrey.
- [3] Mr. Franklin has pleaded guilty to breaking and entering a business premise, having his face masked with intent to commit an indictable offence on August 12 in Langley; robbery and having his face masked with intent to commit an indictable offence on August 12 in Surrey; and possession of a stolen vehicle on August 12 in Surrey.

The Circumstances of the Offences

- [4] These were dealt with in a helpful agreed statement of facts, which I will summarize.
- [5] The Maple Ridge robbery on August 10 was committed just after 2:30 a.m., at a Chevron station on Dewdney Trunk Road. Because of the time of night, the interior store area was closed to customers, but the two offenders gained entry by smashing the locked glass door. One of them pointed an object at the clerk and told him not to move. They provided him with a bin and told him to fill it with cigarettes. They also told him to hand over the money in the till. He complied with both demands. The robber who had the object used it to smash the display case for lottery tickets and took them as well. They then escaped in a stolen pickup truck. More than \$7,000 worth of cigarettes, more than \$12,000 worth of lottery tickets, and \$70 in cash were stolen.

- [6] The Langley break and enter on August 12 was committed at about 3:19 a.m. at a Shell gas station on 216 Street. It was closed at the time and the two of them entered by prying open the locked doors. This time they took more than \$3,800 worth of cigarettes. A stolen Cadillac Escalade was used for this offence.
- [7] Shortly after that, at about 3:55 a.m., they robbed a Mac's convenience store on 16 Avenue in Surrey. One of them pointed an object at the clerk and told him to kneel down and not look up. One of them (it is not clear if it was the same one who pointed the object) then remained close to the clerk to ensure that he complied. They also asked him where the safe was. Ultimately, they escaped with more than \$7,300 worth of cigarettes, a cash register, and a large safe. The Cadillac was used for the escape.
- [8] Their faces were masked or covered in some manner in all three of these incidents.
- [9] After the Mac's robbery they transferred the stolen items from the Cadillac to the pickup truck. This transfer drew the attention of the police, but they fled in the truck at a high rate of speed and the police were unable to stop them at that time.
- [10] This truck, which was worth about \$20,000, had been stolen sometime after 10:00 p.m. on August 9. It was recovered in a field in Surrey on August 13, with its windows and sunroof open, and a stolen licence plate attached to it instead of its own proper plate.
- [11] The Cadillac, which was worth about \$3,000, had been stolen sometime after 12:30 p.m. on the day it was used. It had significant damage that had not been there before it was stolen. The ignition had been punched out and the interior was contaminated with an oily residue that was consistent with being from pepper spray. It contained about 100 packages of unopened cigarettes, a tire iron, the safe from the Mac's robbery, and another safe that was also contaminated with pepper spray residue.
- [12] Mr. Aikman and Mr. Franklin were arrested on August 15, after the house they were in was placed under surveillance by the police. When a taxi arrived at this residence, Mr. Aikman came out and put three sports bags into its trunk. Then he, Mr. Franklin, and a woman got into the taxi. A short time later, the taxi stopped in front of a bank. Mr. Franklin was approaching the trunk of the taxi when he was arrested. On or near him was a backpack containing a can of pepper spray and various kinds of lottery tickets.
- [13] Mr. Aikman was removed from the taxi and also arrested. He was wearing body armour and had a backpack that contained a bandana, a mask, and a pair of shoes, all of which had been worn in the robberies and break and enters; a pair of gloves, and a hoody that had been worn by one of the participants in the Maple Ridge robbery.
- [14] In the trunk, in two of the sports bags that had been loaded into it, were a .22-calibre semiautomatic rifle in one of the bags and a pump-action shotgun in the other, both loaded. Ammunition for them was contained in their respective bags. It is part of the admissions of fact that both Mr. Aikman and Mr. Franklin were in joint possession of these guns and ammunition. Although the firearms offences on the indictment were not the subject of

guilty pleas, it was agreed that the facts relating to them could be considered as part of the overall circumstances.

Procedural History

- [15] The background of this matter is unusual. On July 20, 2017, following a trial in provincial court, both Mr. Aikman and Mr. Franklin were convicted of all of the counts that I have referred to. In addition, they were convicted of unlawfully occupying a vehicle knowing that there was a firearm in it, and of unlawful possession of the two firearms. They were sentenced to a total of seven years' imprisonment, less credit for pretrial custody. That credit is an issue in the current sentencing that I will return to.
- [16] Mr. Aikman appealed all of the convictions, on the basis of a breach of his Charter rights during the detention and search that led to the finding of crucial evidence.
- [17] Mr. Franklin did not appeal his convictions for the robbery and face-mask offences in Maple Ridge or for the Surrey possession of stolen vehicle on August 10. As a result, his sentences for those offences remain in effect. His appeal was based on various deficiencies and legal errors in the reasons for judgment, which the Crown essentially conceded.
- [18] Both Mr. Aikman and Mr. Franklin were successful in their appeals. A new trial was ordered for Mr. Aikman on all counts and for Mr. Franklin on the counts that he had appealed. They re-elected to a judge-alone trial in this Court. A substantial voir dire had been scheduled to begin on March 23, the day that they entered their guilty pleas.

Mr. Aikman's Circumstances

- [19] He is now 33 years old. His criminal record began in 2001. Relevant previous convictions include a robbery in 2006, as well as convictions for property offences such as theft, possession of stolen property, and possession of house-breaking tools. He also has a conviction for breaking and entering, but the offence was committed after the one for which he is now being sentenced. Other convictions potentially bearing on his risk to the public were one for possessing a weapon, three for uttering threats, five for assault, and two each for dangerous driving and either flight from a police officer or resisting arrest.
- [20] On the question of his ability to follow court directions, it is noteworthy that he has 20 convictions for breaching orders, including conditional sentences. He was on probation at the time of the current offences, following sentences of time served (with the application of credit for pretrial custody) on a number of offences that he had dealt with on July 22, 2014.
- [21] Before the seven years that he originally received for the current offences, his longest previous sentence was credit for eight months of time served, which he received for an uttering threats conviction in 2004.
- [22] His counsel explained his background, which has been challenging.

- [23] His father left the family before he was born. His mother was not able to look after him, so he was placed in foster care from the age of five to about 14, when he began to live with his grandmother. Tragically, he was physically abused while in he was in foster care.
- [24] He was diagnosed with attention deficit disorder or attention deficit hyperactivity disorder at the age of six. As an older teenager, he was also diagnosed with fetal alcohol syndrome.
- [25] As sometimes occurs with youth who suffer from unsupported learning disabilities, he dropped out of school in Grade 10 and began to use illicit substances - beginning with crystal methamphetamine at age 14 and progressing to heroin during the year that the present offences were committed.
- [26] In keeping with that lifestyle, he began to associate with a peer group who were involved in gang activity, although his counsel stressed that he was not associated with gangs at the time of these offences. His use of body armour was a self-preservation effort as a consequence of having been shot in two separate incidents - the first in what may have been a case of mistaken identity as he was leaving the home of a friend, and the other when he made the ill-fated decision to resist an attempt to rob him at gunpoint.
- [27] His life is not without its positive indications, however. He has two children with whom he maintains contact, and he has a positive ongoing relationship with his stepfather. He has obtained his high school graduation while in custody and had completed a so-called primer program for a more intensive rehabilitation program in the federal system, which was interrupted when his appeal succeeded and he was sent back to provincial remand.
- [28] He began to pursue counselling to address his traumatic childhood experiences in 2007, but his addiction issues prevented him from following through with it, which is unfortunate. When he is released, he hopes to seek out construction work through a cousin who works in that industry.

Sentencing Positions for Mr. Aikman

- [29] The Crown seeks an effective overall sentence of seven years once again, consisting of seven-year sentences for the robbery and the breaking and entering, and two-year sentences for the remaining offences, all to be served concurrently. He has been in custody for 1,590 days on this matter. The Crown concedes that this credit should include the time he spent serving his sentence before his successful appeal, based on the authority of *R. v. Gunning*, 2008 BCCA 22, at paras. 8 to 9. At the usual credit of one-and-a-half days for every one served, he is therefore entitled to credit for six years, six months, and 15 days. With his credit for pretrial custody updated to today from the guilty pleas last week, he would receive an actual sentence under the Crown's submission of five months and 15 days.
- [30] The Crown submits that the aggravating factors are Mr. Aikman's lengthy previous criminal record; the violence that formed part of these offences, including the weapons and threats used in the robbery; the degree of planning demonstrated by the use of disguises and stolen

vehicles; and the fact that he was on probation at the time that he committed them. While his guilty pleas were not entered at the earliest possible opportunity, the Crown concedes that they are still a mitigating factor, representing an acknowledgement of responsibility and avoiding the need for a lengthy voir dire and trial, with numerous witnesses.

- [31] The Crown supported its position by referring to Court of Appeal decisions involving sentences that were imposed in what are suggested to be comparable circumstances. Within the range of approximately two to nine years for robbery with violence committed by young men that was identified in *R. v. Brogan*, 1999 BCCA 278 at para. 10, the Crown's cases fall at the higher end - between six and nine years.
- [32] In *Brogan*, the Court dismissed an appeal from a sentence of eight years for two robberies while armed with a pellet gun, which was indistinguishable to the victims from a real gun. There were also convictions for being masked while committing the offences and one conviction for hostage taking. The major aggravating feature identified by the Court was the callous way in which the offender terrorized one of the cashiers - by holding the gun to her head, counting down and threatening to shoot her if she did not provide the money. That offender was 30 years old and had a minor criminal record. The only real question on appeal was whether the serious sexual abuse that he had suffered as a young person, which was not disclosed to the sentencing judge but came out on appeal, would have resulted in a sentence of six years rather than eight if it had been known at that time. The Court concluded that it was too soon to tell, but that the offender's circumstances should be taken into account when considering his eligibility for parole.
- [33] *R. v. Burleigh*, 2015 BCCA 245, found the Court allowing an appeal from a total sentence of 10 years, varying it to an effective one of nine years, minus credit for pretrial custody. That offender had committed seven robberies over a 12-day period, brandishing what turned out to be an imitation gun and concealing his face in some manner in each of the robberies. An aggravating feature was the final robbery, in which he had pointed this imitation gun at a police officer, who then disarmed him at gunpoint. Convictions for having his face masked, using an imitation firearm, and assault with an imitation firearm in relation to the final incident, accompanied the robbery convictions. The offender was 48 years old and had battled addiction for many years, with intermittent periods of sobriety. These offences were the product of a relapse. The Court concluded that the sentencing judge had erred by failing to apply the principle of totality to reduce the aggregate sentence produced by the consecutive sentences, and in failing to apply the pretrial custody to all of the counts. That had resulted in an effective sentence of 11 years, which was disproportionate.
- [34] A slight technical modification to an effective sentence of seven-and-a-half years for seven robberies, based on unjustified credit for pretrial custody, was the outcome in *R. v. Heatley*, 2015 BCCA 453. The robberies were of fast food restaurants and a liquor store, committed over a period of about four months, all while masked. The offender was convicted after a trial, in contrast to many of the authorities that have been cited that were the result of guilty pleas. A weapon was displayed in only one of the robberies, but there were significant

aggravating factors in that his girlfriend's young children had been in the getaway car at the time of the first robbery and he was on probation for three previous robberies when he committed these ones. He was 25 years old when he committed the offences and was addicted to heroin. He had been abused as a young child before being adopted by a supportive family. The Court noted, as I have, that unlike many of the cases forming the range that he was relying on, there had been no guilty plea in mitigation. The substance of his appeal was dismissed, but the Court still reduced it slightly to achieve the net four-year sentence, after credit for pretrial custody, that the sentencing judge had intended.

- [35] In *R. v. J.J.Q.G.*, 2013 BCCA 51, the Court dismissed a defence appeal from an effective sentence of six years, following a guilty plea, for a single count of robbing a bank. While in the midst of what was described as a drug bender, the offender had handed a note demanding \$15,000 to a bank teller. He was 26 years old at the time of sentencing, was addicted to heroin, and had a criminal record extending over several years that involved property crime. The Court found that he lacked a stable support system, had not made any meaningful efforts towards drug rehabilitation, and that any remorse he had demonstrated for the robbery seemed lukewarm at best. The Court concluded that these factors weighed against a sentence at the lower end of the range, although they conceded that the sentence that had been imposed was at the higher end for this particular type of offence and circumstances.
- [36] Lastly, the case of *R. v. T.A.N.*, 2012 BCCA 498, saw the Court dismiss a defence appeal from an eight-year sentence, for two bank robberies committed about two weeks apart. The offender said he had a gun and would use it in the first robbery and "I mean it" to emphasize his seriousness in the second one, but a weapon was never produced to the tellers. Significantly, he had nine previous robbery convictions (out of a total of 18 previous convictions), which had been committed in three sprees, and he was on parole for his last robberies and unlawfully at large from a halfway house when he committed the current ones. He was 29 years old at the time of sentencing and had had a difficult childhood as a result of having been placed in foster care at the age of eight. The Court rejected the submission that the sentencing judge had erred in increasing his sentences so markedly from the four-and-a-half years he had received for the last ones, concluding that the shorter sentences he had received had failed to rehabilitate him. The moderating effect of the so-called step-up principle therefore had no application.
- [37] In contrast, Mr. Aikman's counsel submitted that fit sentences for him here would be substantially lower than what the Crown is seeking: four years on the robberies, two to three years on the break and enter, and six months to one year on the masking and possession of stolen property counts. Although any effective sentence that is five months and 15 days less than what the Crown is seeking will yield a sentence of time served, I took his counsel to be saying that the sentence should nonetheless be imposed on a principled basis, even if the outcome falls very substantially below his existing credit for pretrial custody.

- [38] In support of this position, his counsel made three essential points about the sentence being sought by the Crown: (1) it does not reflect the mitigating effect of Mr. Aikman's guilty pleas; (2) it does not reflect the absence of the firearms counts as part of the actual sentence; and (3) it does not reflect the accurate range for these specific types of robberies.
- [39] On the effect of Mr. Aikman's guilty plea, counsel referred to cases dealing with sentencing at a second trial. The fitness of the original sentence should be considered, and if it is inordinately low or new facts have emerged, the judge can impose a longer sentence the second time. However, in the absence of such factors, courts should avoid imposing a sentence that is so much longer that it raises the perception that the offender has been punished for running a successful appeal: *R. v. Frechette*, 2000 BCSC 560 at paras. 41 to 43, citing *R. v. W.(R.S.)* (1992), 74 C.C.C. (3d) 1 (Man. C.A.) at pp.14-15. (To the same effect, Mr. Franklin's counsel cited *R. v. Balbar*, 2015 BCSC 1953 and *R. v. Snelson*, 2015 BCSC 1882. Justice Dley noted at para. 7 of *Snelson* that "it would be an exceptional case where a sentence would be increased after a retrial".)
- [40] More generally, there is no question of the importance of a guilty plea as a mitigating factor. Counsel emphasizes that while these pleas were not early in the overall scheme of the charges, the process of discussing them was ongoing once the matter was set for a new trial in this Court. A resolution by guilty pleas was a certainty, subject only to the availability of counsel, from the end of February onwards, thus ensuring that valuable court resources were saved. Of equal importance, these pleas reflect an acceptance of responsibility and a show of remorse by Mr. Aikman for his participation.
- [41] On the effect of the current absence of the firearms counts, Mr. Aikman's counsel noted that the defence conceded at the first sentencing that the firearms counts would need to be consecutive because they were not part of a linked endeavour with the other offences. The only question was how that was to be effected.
- [42] The Crown at that sentencing emphasized the need to deter the possession of guns and to deter gun violence and sought an effective sentence of four years consecutive to the robbery counts, although through an error by the sentencing judge the sentences actually imposed did not reflect the common position of consecutive offences.
- [43] As counsel put it, according to the authorities the possession of loaded firearms out in society cannot be without consequences, and if one treats the original sentences here as not taking into account their presence in the overall length of custody that Mr. Aikman received, the sentences for the firearms would have been just that, serious offences without any consequences.
- [44] As a recent example of the severity with which courts view firearms possession, even as a standalone matter, counsel cited the decision in *R. v. Leblanc*, 2019 BCSC 536. Despite the sympathetic circumstances of the offender having purchased a handgun that he believed had been stolen from the mother of one of his employees, in an effort to recover it for her, he was nonetheless subject to a firearms prohibition and had a record that included offences

of violence, which led him to receive total sentences of three years' imprisonment. The facts that the gun was loaded and that it was seized from a hotel room where staff members could have accidentally accessed it were significant aggravating factors.

- [45] Finally, Mr. Aikman's counsel submits that an accurate canvass of the comparable appellate decisions reveals a base in the range of three years for the type of robberies that Mr. Aikman and Mr. Franklin engaged in. He argues that there is a hierarchy of seriousness of robberies from street level, (essentially muggings), through convenience stores and onto financial institutions at the higher end, which is generally reflected in the range of sentences imposed for them.
- [46] For example, in *R. v. Davidson*, 2009 BCCA 485, the Court reduced an effective sentence following a guilty plea for a 25-year-old drug-addicted offender who had robbed a drug store of prescription medication with an imitation firearm, from four years to three years. This was despite a lengthy criminal record that included a previous conviction for robbery in youth court, although there were also numerous breach convictions. Similar to Mr. Aikman, that offender's longest previous imprisonment had been for nine months. Noting that longer sentences were normally imposed when offenders were older and/or there were more aggravating circumstances, the Court concluded that a sentence of four years could not be supported.
- [47] *R. v. Rosov*, 2006 BCCA 276, is put forward by the defence as an example of very aggravated circumstances that still did not increase the sentence to the range being sought by the Crown. In that case, the 25-year-old addicted offender had committed three bank robberies while on a conditional sentence for four previous robberies and, in the course of escaping from the final one, had stolen a vehicle and driven over its owner's leg. The majority of the Court of Appeal, with the Chief Justice dissenting, increased his sentence from two years to four years.
- [48] In *R. v. Robertson*, 2002 BCCA 579, four knifepoint robberies by an offender with 48 previous convictions over a 23-year period, although none for violent offences, resulted in a sentence of two years less a day and three years' probation, on a Crown appeal. This was in substitution for the illegal sentence of one year in custody, followed by one year less a day as a conditional sentence, that had been imposed by the sentencing judge.
- [49] Finally, in *R. v. Bell*, 2005 BCCA 403, a 38-year-old drug-addicted offender, who had a lengthy property-related record with a small number of convictions related to violence or threats, and who had robbed two gas stations on consecutive days with an imitation firearm, had her appeal from sentences of two years on the firearm offences and one year consecutive for the use of the imitation firearm dismissed. A significant aggravating factor was the fact that she had pointed her imitation gun at the stomach of one of the clerks during the robbery, putting him in fear of his life.

- [50] Considering the Crown's cases through this lens, Mr. Aikman's counsel notes that they all involve significant aggravating factors that are not present here: the callous terrorizing of the clerk in Brogan, the seven robberies committed in Burleigh and Heatley, and the nine prior robbery convictions in T.A.N. Even the six-year sentence that was upheld in J.J.Q.G. for a single robbery was acknowledged to be at the high end of the range for its circumstances.
- [51] The last legal principle that I am asked to consider in relation to Mr. Aikman arises from the provincial offence of possessing unlicensed body armour for which he was held in custody following his arrest with the firearms in the taxi. The present charges were not approved right away and Mr. Aikman made inquiries about whether they would be forthcoming, before finally deciding to plead guilty to the body armour matter in October 2014. This used up time in custody that he could have applied to the present sentences if they had been available. Notably, the Crown submitted at the last sentencing that he should be credited with four months' pretrial custody for that period, although the sentencing judge may not have given effect to it. *R. v. Orford*, 2017 BCSC 2039 at para. 8, is said to provide authority for me to now consider how that time would have counted if Mr. Aikman had been able to deal with all of the matters together.
- [52] If, despite this, I remain persuaded that a sentence that would result in additional custody for Mr. Aikman should be imposed, his counsel provided extensive material, including an unsworn affidavit from Mr. Aikman that the Crown very fairly did not take issue with, that suggests that the current COVID-19 pandemic will have a very significant impact on the well-being of prison inmates, both those on remand and those serving prison terms. Counsel argues that it would be appropriate to exercise my discretion to impose a sentence of time served in substitution for any short remaining custodial period, in light of the serious risk of infection to inmates, the current absence of any programming, the limited medical facilities available in custody, and the numerous hours that prisoners currently spend on lockdown.

Mr. Franklin's Circumstances

- [53] He is now 39 years old. His criminal record, which began in 1996 as a youth, is even more substantial and contains more related offences than Mr. Aikman's: nine previous robberies, three break and enters, and numerous counts of possessing breaking and entering tools or stolen property and theft. Like Mr. Aikman, he has two convictions for dangerous driving, and he also has three for resisting a police officer. His seven previous breaches include breach of parole in 2008 and a breach of a conditional sentence order after these offences in 2015, which used up some of the pretrial custody that otherwise would have been applied to his original sentences on these matters. He was on bail for three outstanding property offences when he committed the current offences, and before that he had committed nine other property offences to that point in 2014. His longest previous sentence was a federal sentence of two years in 2004 for five robberies, an assault, and possession of house-breaking instruments.

- [54] Like Mr. Aikman, he had an extremely difficult childhood.
- [55] His mother drank alcohol while she was pregnant with him and this appears to have had significant developmental effects on him. He struggled in school and until he was incarcerated in the federal system, he was not able to read or write. His mother was largely absent as a parenting figure because of her own serious struggles, which I will describe, and he mainly lived with his much older brothers. He began drinking alcohol at nine and using crack cocaine at 13. This later progressed to crystal methamphetamine, and when he was doing his 2004 federal sentence, to snorting and then smoking heroin.
- [56] He has engaged with several recovery programs and was able to maintain a period of sobriety between 2011 and 2013, during which he was employed with one of his brothers installing bank vaults, but unfortunately he relapsed. Because of his struggles with addiction, the rest of his work history is quite limited.
- [57] To his credit, he has been sober since his arrest in this matter in 2015 and has engaged enthusiastically with the essential skills to success program within his institution, taking all of the courses offered within it, as well as several other programs. Of great significance, he has completed a high intensity aboriginal ICPM program and was on the verge of completing another program in the same series before it was "shuttered", I infer as part of the current health situation.
- [58] He has also had academic success while in custody in his English and math courses, of which he is justifiably proud, given the challenges that he originally faced in his schooling.
- [59] He has a 14-year-old son from a common law relationship, with whom he has maintained contact while in custody. His intermittent sobriety was a barrier to regular contact between them when he was not in custody.
- [60] Mr. Franklin is an Indigenous person and there is a Gladue report available from the original sentencing. His mother is a member of the Nlaka'pamux First Nation, which is located near Spences Bridge, and she was a survivor of the notorious Indian residential schools, where she was repeatedly sexually abused. This left her suffering from clinical depression, among other afflictions, and she was often bedridden during his childhood. She herself indicated that during her pregnancy she was drinking "morning, noon, and night", as she described it, to cope with depression and flashbacks from her traumatic childhood experiences.
- [61] Sadly, Mr. Franklin expressed to the report writer at that time that he had lost touch with his Indigenous heritage and had not visited that First Nation, of which he too is a registered member. It is encouraging that he has engaged with the Indigenously-based high-intensity programs in the federal system, and one hopes that he can increase this level of connection.

Sentencing Positions for Mr. Franklin

- [62] With respect to his sentence, the Crown cites the same aggravating features as were relied on for Mr. Aikman, with the exception that the Gladue factors arising from his Indigenous background mitigate the current offences and the effect of his substantial related record for robbery.
- [63] The Crown has very fairly tailored a specific position for Mr. Franklin to reflect the unusual circumstances that he finds himself in, as a result of not having appealed the convictions for which he is now serving sentences. They seek a global sentence of 23-and-a-half months of custody, consisting of concurrent sentences of that length on the Langley break and enter and the Surrey robbery, and six-month concurrent sentences on the remaining counts. Since 23-and-a-half months is approximately what he has left to serve on the unappealed sentence, it would put him in the same position as if either his conviction appeal had been entirely unsuccessful or he had successfully appealed all of his convictions (and in the latter case, I take it, in the same position as Mr. Aikman with respect to the time served as a result of his successful appeal).
- [64] Crucially in that regard however, the Crown submits that it is not open to Mr. Franklin to make use of the period of pretrial custody that was applied to the effective seven-year sentence imposed by the original judge, so as to reduce it to an actual sentence of five years and three months. They rely on *R. v. Hoelscher*, 2017 ABCA 406 at para. 29, and *R. v. A.D.P.*, 2005 BCCA 625 at para. 34, for the proposition that pretrial custody credited to a particular offence cannot be taken into account again for a second offence, and that to do so represents an error in principle.
- [65] Mr. Aikman's counsel does not dispute the sentence the Crown seeks, since she has confirmed that it will have no detrimental effect on his current eligibility for release and it is ultimately, in all the circumstances, "a fit and fair sentence", as she put it. However, she wished to point out that (1) there is no technical barrier to Mr. Franklin being credited with the same pretrial custody that applied to the current counts when he was also sentenced on them and, as Mr. Aikman's counsel did, (2) the Crown's range of sentence is somewhat inflated in light of the actual circumstances of these offences and the case authorities.
- [66] With respect to the crediting of pretrial custody in the first sentence, counsel submits that A.D.P. can be distinguished on its facts. The trial judge in that case erroneously credited pretrial custody for a period of time in which the offender had been serving a conditional sentence, which does not address Mr. Franklin's situation. In this case, he received less credit for pretrial custody than Mr. Aikman, because part of his time in custody before the sentencing was on a terminated conditional sentence.
- [67] Similarly, counsel points out that the key point of *Hoelscher* is that there must be a real and substantial connection between the offence for which the offender was in custody and the one for which he was sentenced before time spent on the former can be taken into account in the latter. This is made clear in the authority that was cited on this point by *Hoelscher* - *R.*

v. Rupchand, 2006 BCCA 11 at para. 11, where the error was giving credit on one offence for time spent in custody on a separate offence that would have normally given rise to a consecutive sentence. Here, counsel maintains that the pretrial custody was taken off of all of Mr. Franklin's offences, and he continued serving the ones he did not appeal on that basis. No principle would be offended by now entitling him to credit for the time he spent in custody on other counts that were part of the same group of related offences.

- [68] Mr. Franklin's counsel pointed out that sentences of two years have been imposed on an Indigenous offender with a non-violent criminal record who committed robberies of a convenience store and gas station armed with a syringe in *R. v. Rousseau*, 2016 BCSC 1593, and in the case of an unrelated person, also named Rousseau, in a decision reported at 2019 BCPC 178 two years less a day for committing three robberies, two with a large knife and one with an explicit threat to kill the clerk, along with other property offences.
- [69] In contrast, a sentence of the same length being sought by the Crown here was imposed on an offender for 10 counts of robbery and three counts of using an imitation firearm in *R. v. Al-Isawi*, 2017 BCCA 163. That decision is cited to illustrate how aggravated circumstances should be before a sentence in that range will be appropriate.

Discussion

- [70] I will begin with some observations that are common to both offenders.
- [71] The circumstances of these offences are serious. Wherever they fit in the hierarchy that has been identified, all robberies by definition carry with them at least the implied threat of violence, and the practical reality is whenever they are committed, they instill considerable fear in the vulnerable and usually poorly-paid store employees who occupy the front line in retail businesses that are so frequently robbed.
- [72] Denunciation and general and specific deterrence must therefore be important considerations, to express the societal message that such conduct cannot be tolerated, no matter what addictions and personal dysfunction may have led offenders to situations in which they are disposed to commit them.
- [73] More aggravated in this case than a mere implied threat was the Surrey robbery, in which an employee was compelled to kneel and not look up as the robbery was carried out, with one of the robbers standing close by. This would likely have placed the employee in a particular degree of fear about what he was going to experience next.
- [74] Concealing one's appearance to escape detection is also worthy of denunciation and deterrence.
- [75] The smash-and-grab break and enter, while not subjecting a person to violence, still exhibits a reckless disregard for the property of others.

- [76] The knowing utilization of the vehicles of innocent citizens to carry out offences is also offensive to the sense of public safety and security in its own way, as the victim impact of one of these vehicles' owners shows, although it ranks lower in the range of seriousness.
- [77] The possession of the loaded firearms, while not part of the offences (and I stress that the offenders are not being sentenced for them), is still relevant to show their overall reckless and dangerous lifestyle at the time, and the activities that they were immersed in when they were arrested.
- [78] Sentencing similar offenders to similar sentences for similar offences is obviously an essential principle, and considering appellate authorities helps to ensure that it is adhered to, although never to the exclusion of the individualization that is the core of the sentencing process. Considering the cases provided, I have to agree with the defence that those relied on by the Crown either contain aggravating features in terms of the offence itself or the offender's background that are not present here, or in the case of J.J.Q.G., are at the high end of the range for a single robbery, even of a bank.
- [79] As the defence suggests, a much smaller number of robberies committed by a person with some sympathetic personal circumstances can attract sentences in the two years less a day to three-year range on a guilty plea, even if a weapon was produced and there is a past criminal history, although not usually for previous robberies.
- [80] Sentences in excess of four years seem to be reserved largely for greater numbers of robberies, aggravated behaviour in carrying them out, older offenders or offenders with directly-related and recent records.
- [81] Thus, I am satisfied in Mr. Aikman's case that the sentence sought by the Crown does not sufficiently take into account his guilty pleas, even at this relatively late stage, the absence of the firearms offences that it was common ground at the original sentencing were to be consecutive to the other counts and, as I have just explained, the range of sentences applicable to these particular offences even with their aggravating features and his unenviable criminal record.
- [82] On a guilty plea, in the absence of any presentence custody, I would have considered a sentence for him globally in the range of four to four-and-a-half years. Since his presentence custody markedly exceeds it, I will simply sentence him to one day in jail concurrent on all counts, with reflection on the record of pretrial credit in the amount of six years, six months, and 15 days served.
- [83] Unlike conditional sentences, probation is technically available when pretrial custody takes what otherwise would have been a sentence in excess of two years below that level. Nevertheless, I concur with the Crown's implicit acknowledgment that Mr. Aikman's history makes him a poor candidate at this point for community supervision, and I will not attach a probation period to the one-day sentences.

- [84] It is regrettable that this places him back in the community without any correctional supports, but it would be wrong in principle to impose additional custody, or to impose a probation order that seems virtually certain to be breached. Mr. Aikman must understand by now, I expect, that his extensive pretrial custody has created a very unusual situation, and that further offences of the same nature could in fact support sentences well beyond those that the Crown has sought in this case.
- [85] This conclusion makes it unnecessary to give effect to his counsel's resourceful submissions on the unique dangers of COVID-19 in a custodial setting and how that might impact the sentencing process, or to consider how his pretrial custody on the body armour charge could have been utilized more beneficially if the current charges had been in existence at that point.
- [86] In the case of Mr. Franklin, I agree with the Crown's commendably fair position. Although his record is much more serious and closely related to the current offences than Mr. Aikman's, his particular circumstances as an Indigenous person, especially the direct effect on his childhood and intellectual development of the legacy of residential schools, lessen his moral blameworthiness meaningfully. A sentence of 23-and-a-half months concurrent to each other and his existing sentences is as generous an application of the Gladue principles as could possibly be envisioned, even taking into account the moderate range for robberies put forward by the defence.
- [87] I do not agree that the totality principle is engaged here, however, since the Crown's position has the sentences running concurrently to each other and, more importantly, concurrently to the sentences he is serving. Totality is engaged when, after apportioning concurrent and consecutive sentences, the court considers the fitness of the overall aggregate sentence thus produced. The Crown's fair approach has made that unnecessary here.
- [88] As I mentioned earlier, it is highly beneficial that Mr. Franklin has been connected with Indigenously-based programs within the federal system, which is the second component of the Gladue analysis, and one hopes that the current effects of COVID-19 will be mitigated to the point that his involvement in that high-intensity programming can resume before he is released.
- [89] While Mr. Franklin's acceptance of the 23-and-a-half months would be sufficient to resolve the matter, since the point was fully argued, I will go on to say that I do not agree with the Crown's position that allowing him to claim his pretrial custody up to the point of his original sentence would offend the principles in the cases they have cited. In my estimation, he is not using dead time on a previous offence to offset his sentence on a current one. He has made no election to allocate that time only to the conviction he did not appeal and such an election cannot be imputed to him. Rather, as I perceive it, he is seeking credit for time he spent while in custody for all of the offences when he was facing them as a single unit. In other words, he also served that time in relation to the present offences.

- [90] Thus, whatever sentence I were to impose here, he would be entitled to the same credit of one year and nine months that he received on the unappealed sentences. However, the reason that he does not get to utilize his time served in relation to the successful appeal, as Mr. Aikman does, is that such credit can only be granted in relation to the same offences. Serving a sentence on other offences, even if they were charged at the same time, does not qualify. The authority for that is *R. v. Keepness* (2014), 317 C.C.C. (3d) 267 (Sask. C.A.) at para. 72, leave to appeal to the Supreme Court of Canada refused, 2014 SCCA 511, citing *R. v. Wilson*, 2008 ONCA 510 at paras. 24, 42, 43, and 45, although Wilson did acknowledge that the fact of the custody could be a mitigating factor.
- [91] Thus, I sentence Mr. Franklin to the following: Count 3, 23-and-a-half months; Count 4, six months; Count 5, 23-and-a-half months; and Counts 6, 10, and 11, all six months. All sentences are to be served concurrently to each other and concurrently to the sentences he is now serving.
- [92] I will also make the following unopposed ancillary orders.
- [93] The robberies are mandatory DNA orders and pursuant to s. 487.051 of the Criminal Code, both offenders will provide the numbers of samples of bodily substances that are reasonably required for the purposes of forensic DNA analysis.
- [94] Pursuant to s. 109(2)(b) and 109(3), they are both prohibited from possessing the items listed in those subsections for life.
- [95] And pursuant to ss. 490.1(1)(a) and 490.1(1)(b), the offence-related property and firearms seized by the RCMP in this investigation, which are to be itemized in a list provided to the clerk of the court by Crown counsel, are forfeited to the Crown.
- [96] I wish to express my appreciation for the very thorough and helpful submissions made by all counsel in this matter. We can adjourn. Thank you.
- [97] THE CLERK: Order in court.
- [98] MR. SWARTZ: Sorry, My Lord.
- [99] THE COURT: Yes? Yes?
- [100] MR. SWARTZ: I do have -- I wish to address the court [indiscernible/teleconference] at this time.
- [101] THE COURT: Yes, Mr. Swartz?
- [102] MR. SWARTZ: I do have one concern. You've identified the appropriate range on a global basis of four to four and a half years, then have credited him with the actual time that he spent in custody. It raises a concern twofold from my perspective. One is Mr. Aikman does have an outstanding matter that has arisen as a result from a breach of bail and effectively that would disentitle him, it would appear on the face of it, to use any of the credit to which he [indiscernible] in custody on that towards this new sentencing, despite your view that an

appropriate global sentence is between four and four-and-a-half years. The second concern I have, as well, is that there's no individualization for the counts, whereas even the Crown, on their own submissions, conceded that the face masking, for example, and possession of stolen property ought to attract a lower sentence.

[103] THE COURT: All right, thank you. Does either Crown want to say anything about either of those issues?

[104] MR. SWARTZ: I can say this, My Lord. I'm less concerned about the individualization of counts as opposed to the record for time -- to be reflected -- actually reflect the appropriate range that the court deems appropriate.

[105] THE COURT: All right, thank you. Mr. Albrecher or Ms. Kenworthy, do you want to say anything?

[106] MR. ALBRECHER: No, nothing from myself, My Lord.

[107] THE COURT: All right. Well, I hear what you are saying, Mr. Swartz, and I have thought about it. I think the matter resolves by the technical issues that the court records, by virtue of the Criminal Code and the manner in which sentences are recorded within the court system. The items recorded are the actual sentence and the amount of pretrial custody credited.

[108] I do not consider the sentence that I would have imposed, had there been no pretrial custody, to be an official part of that component. It does not really bear on it. I am just simply indicating where I thought it would fall. I do not consider it to be part of my role to spare him other parts of that that he might like to spend on something else. I am not being facetious, I just do not think that is part of what my function is here. He has served that and that is all allocated. It is most unfortunate for him that it exceeds the sentence that I might have imposed, but I do not think I can do anything about it. I think it is the role of counsel probably to say that, as part of my reasons, either relaying what I have said or getting them transcribed, that that is the sentence I would have imposed and if there is a discretion that the judge on another matter wants to exercise, they are permitted to do so.

[109] It does no violence to what I have done today to envision a judge later making something else of it, based on your submissions, but I do not think that I can record less than the time actually served as the time served for these sentences in the absence of some authority to do so. So I hear what you are saying, but I think it is best submitted to any other judges who may deal with Mr. Aikman in the future, that I gave him all the credit that was there to give, because I do not think I have any discretion to give less, but if he had no pretrial custody, I would have imposed a lesser sentence out of the gate. I think that is about the best I can do unfortunately.

- [110] MR. SWARTZ: My Lord, I could be wrong and perhaps the clerk could assist, but I believe that there is a way for it to be reflected on the record that it shows the one day at sentence, time -- then to reflect on that the actual sentence that would have been imposed, so i.e., the four or four and a half years, and then below that would be then -- what it would read in JUSTIN would be actual time in -- in pretrial custody and then would reflect the six-and-a-half-year mark. But I think there actually is a way to do that.
- [111] THE CLERK: I have [indiscernible] I have it noted that credit for pretrial custody is six years, six months, and 15 days, that is --
- [112] THE COURT: Yes.
- [113] THE CLERK: -- how I have documented it.
- [114] THE COURT: Yes. I guess what Mr. Swartz is asking is do you have any discretion to add any other qualifying information, such as what the sentences would have been in the absence of --
- [115] THE CLERK: I don't --
- [116] MS. KENWORTHY: My Lord, if I may?
- [117] THE COURT: Yes.
- [118] MS. KENWORTHY: This is Louise Kenworthy for the Crown. I certainly in the past have seen -- and I can't point Your Lordship to any decisions on this point, because I was not aware it was going to arise, but I do believe Your Lordship has the discretion to only sort of make use of time Mr. Aikman has served in custody to the extent that is necessary to impose on him what Your Lordship sees to be the fit sentence. So it is not my experience that Your Lordship is required to use up all, if I can put it bluntly, all of the time Mr. Aikman has served in custody and [indiscernible/teleconference] credit for all of this, if Your Lordship does not believe that that amount of time is [indiscernible] sentence.
- [119] THE COURT: All right. Well, I think what I will say is this; I am going to leave it as it is, but I will say that I am not functus for the purposes solely of expressing on the record more fully why and how the time has been allocated. My current view, which I will retain an open mind about, is that it is not a question of allocation or discretion on my part, it is just that is the time he has served, so that is what goes on the record, and that it is not part of my role to be saving him time for other purposes, particularly when I was not asked to as part of the submissions. But if counsel wants to reconvene before me on that specific issue, I would entertain further submissions. I say, even if the warrant of committal goes, I retain for myself the jurisdiction on this specific issue of allocation of pretrial custody. And I am prepared, on full submissions supported by authority, to consider doing that, because I certainly do not want to prejudice Mr. Franklin or Mr. Aikman if it is the fair and proper thing not to, and I commend the Crown for their recollection that it has been done in some other situation. But I also do not want to go off half-cocked when my understanding of the

recorded official information is what is the sentence and how much pretrial custody was credited.

[120] If there is a third bit of information that should form part of it or there is some authority for only allocating part of it, I am happy to hear about it and I am happy to consider it, but I will not hold up the process now. I will just say that that can be adjourned generally for counsel to reconvene at whatever point they find appropriate[1]. Okay, thank you very much.

[121] MS. KENWORTHY: My Lord, if I may --

[122] THE COURT: Yes?

[123] MS. KENWORTHY: -- just address one other matter [indiscernible].

[124] THE COURT: Yes.

[125] MS. KENWORTHY: There are counts on the indictment, and those to which Mr. Aikman and Mr. Franklin did not plead guilty, the outstanding counts, if we could just direct a stay of proceedings on those.

[126] THE COURT: Thank you very much, Ms. Kenworthy. We will now adjourn.

"Schultes J."

[1] Based on further written submissions, I issued the following memorandum on April 9, 2020, directing that Mr. Aikman's sentences be recorded in the following manner:

Count 1: Amount of time spent in custody: 1560 days; Sentence that would have been imposed before any credit was granted: 4 years concurrent; amount of time credited: two years and eight months x 1.5 days; sentence imposed: 1 day

Count 2: Amount of time spent in custody: 1560 days; Sentence that would have been imposed before any credit was granted: 2 years concurrent; amount of time credited: one year and four months x 1.5 days; sentence imposed: 1 day

Count 3: Amount of time spent in custody: 1560 days; Sentence that would have been imposed before any credit was granted: 4 years concurrent; amount of time credited: two years and eight months x 1.5 days; sentence imposed: 1 day

Count 4: Amount of time spent in custody: 1560 days; Sentence that would have been imposed before any credit was granted: 2 years concurrent; amount of time credited: one year and four months x 1.5 days; sentence imposed: 1 day

Count 5: Amount of time spent in custody: 1560 days; Sentence that would have been imposed before any credit was granted: 4 years concurrent; amount of time credited: two years and eight months x 1.5 days; sentence imposed: 1 day

Count 6: Amount of time spent in custody: 1560 days; Sentence that would have been imposed before any credit was granted: 2 years concurrent; amount of time credited: one year and four months x 1.5 days; sentence imposed: 1 day

Count 10: Amount of time spent in custody: 1560 days; Sentence that would have been imposed before any credit was granted: 2 years concurrent; amount of time credited: one year and four months x 1.5 days; sentence imposed: 1 day

Count 11: Amount of time spent in custody: 1560 days; Sentence that would have been imposed before any credit was granted: 2 years concurrent; amount of time credited: one year and four months x 1.5 days; sentence imposed: 1 day

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