
CANADA / JUDGMENT

R. v. Anderson

2014 BCSC 1519

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1519 R. v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Anderson,

2014 BCSC 1519

Date: 20140702

Docket: 95764

Registry: Kamloops

Regina

v.

Joadth Michael Anderson,

Travis Arthur Kelly,

James Phillip Patrick Paulin

Before: The Honourable Madam Justice Fenlon

Oral Reasons for Sentence

(Re Accused Travis Kelly)

Counsel for the Crown:

W.H.S. Burrows

Appearing on his own behalf:

T. Kelly

Place and Date of Hearing:

Kamloops, B.C.

June 4, 2014

July 2, 2014

Place and Date of Judgment:

Kamloops, B.C.

July 2, 2014

- [1] THE COURT: On April 3, 2014, Travis Arthur Kelly was convicted following a trial by judge alone of what is commonly referred to as a home invasion. In particular, Mr. Kelly was convicted of:
- 1) breaking and entering to commit theft contrary to s. 348(1)(b) of the Criminal Code;
 - 2) masking his face with intent to commit an indictable offence contrary to s. 351(2) of the Criminal Code;
 - 3) unlawfully confining contrary to s. 279(2) of the Criminal Code; and
 - 4) assault with a weapon contrary to s. 267(a) of the Criminal Code.
- [2] The offences occurred in the early hours of January 23, 2013. The offences are fully described and reported in the decision of R. v. Anderson, 2014 BCSC 577. Accordingly, I will summarize them only briefly.
- [3] Mr. Kelly and three others entered a home known to be occupied. The intruders wore masks and gloves and carried bear spray and a machete. They assaulted the male occupant and forced him and the three female occupants to lie face down on the main floor of the house. The intruders stole electronic equipment from the living room and demanded the occupants' cell phones and wallets before fleeing. The intruders took turns holding a machete against the neck of the male occupant. The impact of the offences on the victims was significant. All of the occupants were in their early to mid-20s. Although none submitted a victim impact statement, it was evident from their testimony at trial that they were severely shaken by the events that evening. One of the occupants testified that she moved out of the house shortly after the events occurred because of the anxiety she felt being in the house.
- [4] I turn now to the circumstances of the offender.
- [5] Mr. Kelly was 25 at the time of the offence, 26 as of the date of sentencing. He was on probation at the time of the offences following conviction for uttering threats and assaulting a police officer. Mr. Kelly has a significant criminal record beginning in Youth Court at age 13 when he was convicted of robbery. Mr. Kelly has had only brief periods at large between

convictions since then. Those convictions include four prior robberies, two as a youth, the one I have alluded to at age 13 in 2001 and a second in 2002 at age 14. In 2007, he was convicted of robbery and received a global sentence of 11 months. In January 2009, he received the equivalent of a three-year sentence for another robbery involving forcible confinement. Mr. Kelly was convicted of weapons offences in 2004, 2007, 2011, and 2014, the latter occurring after the events giving rise to the present offences. Mr. Kelly has had a number of convictions for assault causing bodily harm and for threatening in each of 2005, 2007, 2008, 2012, and 2014. He was also convicted of attempting to obstruct justice for which he is currently serving a two-year sentence.

- [6] Mr. Kelly was born in Abbotsford, British Columbia, but is Haida through his father who is a member of the Old Masset Village Council. Old Masset is a small fishing village located on Graham Island, the largest of the Haida Gwaii archipelago. In accordance with s. 718.2(e) of the Criminal Code, I must take into account Mr. Kelly's aboriginal background and consider all available sanctions other than imprisonment that are reasonable in the circumstances. A Gladue report was prepared on Mr. Kelly. It indicates that he identifies with his aboriginal heritage despite never having been to Old Masset and not being registered as a band member. Mr. Kelly is the oldest of four children and the only aboriginal child born to Karen Kelly when she was 17 years old. At the time of Mr. Kelly's birth, his mother was separated from his father, Fred Johnston. Mr. Kelly's maternal grandmother, Judy Kelly, took custody of him until his mother turned 19.
- [7] When Mr. Kelly was seven, he was removed from his mother's home by the Ministry of Children and Family Development due to his mother's drinking. He spent the next 10 years living in various foster placements, group homes, and with his grandmother. Mr. Kelly became a continuing care ward in 2001 at the age of 13. Mr. Kelly's father did not apparently practice his aboriginal culture, according to Mr. Kelly's mother. Mr. Kelly's father drank heavily and was never involved in Mr. Kelly's life. Mr. Kelly saw his father once before elementary school and a second time when he was about 10 years old. Mr. Kelly does not know his paternal grandparents.
- [8] It was Mr. Kelly's maternal grandmother who introduced him to the culture and traditions of his aboriginal heritage and allowed him to attend a weekly aboriginal youth group with a neighbourhood friend. Mr. Kelly attended weekly for about two years and it was there that he learned about some aboriginal traditions such as sun dances, sweats, and drumming. Throughout this time, he was also involved with an aboriginal youth worker from the John Howard Society and, once or twice a week, would take part in cultural activities such as drum-making, sweats, and making dream catchers.
- [9] At the age of 18, Mr. Kelly was released from juvenile detention and went into the Ministry's independent living program for about two months. He was evicted for failing to pay his rent, was angered at being locked out and, according to a presentence report, decided he "was going to be bad". The majority of the next four years, from 2006 to 2010, were spent in jail.

- [10] In June 2010 while living at Georgia Court in Kamloops, a community-based residential facility for day parolees, he met his present partner, Stephanie Bernier. They have a one-year-old daughter, Isabella, born March 14, 2013, while Mr. Kelly was in jail. Ms. Bernier also has a son, Kian, born December 28, 2011, who was conceived during another relationship while Mr. Kelly was in jail. Both Mr. Kelly and Ms. Bernier confirmed that Mr. Kelly considers Kian to be his son. Ms. Bernier takes the children to see Mr. Kelly about once a week at the Kamloops Regional Correctional Centre. When Mr. Kelly is released from jail, his plan is to reside in Kamloops with Ms. Bernier and their children. He states that his goal is eventually to own a small business after taking courses at Thompson Rivers University.
- [11] While on day parole in 2010, Mr. Kelly worked with Neskonlith Indian Band Elder Mr. Patrick Adrian for about three months. Mr. Adrian holds a contract with Correctional Services of Canada to provide outreach support for aboriginal offenders. Mr. Kelly met with Mr. Adrian about every two weeks and would like to work with Mr. Adrian again. Mr. Adrian, in turn, indicates that he would be willing to work with Mr. Kelly once he is released. Mr. Kelly also states that while in jail he would like to work with an aboriginal liaison and is willing to attend relationship counselling with Ms. Bernier and would like to have the option of attending drug and alcohol counselling.
- [12] A presentence report described Mr. Kelly as aggressive, disrespectful, and verbally abusive towards staff at Corrections centres. However, while in the community, he has what is described as an adequate history of reporting to his probation officer and attendance at programs as directed. As an adult, Mr. Kelly has spent most of his in-custody time at Kamloops Regional Correctional Centre. He has been disciplined for numerous institutional charges and has been placed on a special handling protocol which limits his mobility and activities within the custody centre. There is a high level of conflict between Mr. Kelly and institution staff. As a result Mr. Kelly states adamantly that he would prefer a jail sentence over two years so he may be assigned to a federal penitentiary rather than a provincial custody centre.
- [13] In a presentence report, Mr. Kelly is described as someone who frames his behaviour as the result of other people's actions and does not take responsibility for his conduct. Mr. Kelly does not speak of or demonstrate remorse for his actions, including these offences.
- [14] The position of the Crown is that Mr. Kelly should receive a minimum sentence of six years and a maximum of eight less credit for 152 days. None of the offences carries a mandatory minimum. Count 1, breaking and entering, has a maximum of life. Count 2, masking, carries a maximum of 10 years. Counts 3 and 4, unlawful confinement and assault with a weapon, both carry a 10-year maximum sentence. Crown seeks six to eight years on Count 1 and concurrent sentences of one year for masking, three years for unlawful confinement, and three years for assault with a weapon. Crown submits that all sentences should be served concurrently, but consecutive to the sentence Mr. Kelly is currently serving in relation to other offences.

- [15] Defence counsel submits that a sentence of three to five years less pretrial custody served of 152 days is the appropriate sentence. Defence seeks credit for the days served in pretrial custody at 1.5 days for each day.
- [16] Crown counsel referred me to a number of sentencing decisions involving home invasions which I have considered including *R. v. Bernier*, 2003 BCCA 134, *R. v. Vickers*, 2007 BCCA 554, and *R. v. Moore*, 2008 BCCA 129. I have also considered the additional cases that defence counsel referred to, *R. v. Brossault*, 2009 BCSC 464, *R. v. Dang*, 2002 BCCA 304, and *R. v. Ali*, 2012 BCSC 340, as well as *R. v. Navas-Rivas*, 2013 BCSC 2176.
- [17] The principles that must be considered in sentencing are set out in ss. 718, 718.1, and 718.2 of the Criminal Code. I am not going to read those into the record, but they inform this decision. The primary considerations include denouncing unlawful conduct, deterring the offender and other persons from committing offences, separating the offender from society where necessary, assisting in rehabilitation of the offender, and promoting a sense of responsibility in the offender. There are, of course, numerous objectives to sentencing and I may not have listed them all here, but I have considered them all.
- [18] It is also a principle of sentencing that similar sentences imposed on similar offenders for similar offences are to be imposed in similar circumstances. That causes me to consider and refer to the sentence of a co-accused, one of the other participants in these offences, Kirstin Hunt. She pleaded guilty to the offences and received one year in custody followed by probation. I find Ms. Hunt's circumstances are markedly different from those of Mr. Kelly's, however, because Ms. Hunt entered a guilty plea immediately, suffered from addictions, was in poor physical health, and in a very frail mental state. Therefore, while the offences are similar, the offenders are not.
- [19] In terms of aggravating and mitigating circumstances, aggravating factors in this case include the following. First, Mr. Kelly and his co-offenders knew the home was occupied and they intended to engage the occupants. Mr. Kelly wore a mask and others carried a weapon. While there was no evidence that Mr. Kelly himself carried the machete, there was evidence that he carried bear spray. Gratuitous violence was involved in the striking of Mr. Stanley. It also appears that Mr. Kelly was an enthusiastic planner, texting others to recruit them to join in the mobbing. Mr. Kelly participated in these offences while on probation and has an extensive criminal record for violence to which I have already alluded. Mitigating factors are his relative youth and his willingness to participate in counselling programs and support from the aboriginal community.
- [20] On the facts of this case and given the circumstances of the offender, I am satisfied that the primary consideration on sentence must be deterrence, denunciation, and protection of the public. At the same time, Mr. Kelly is a relatively young man at the age of 26, has expressed a desire to turn his life around and to rejoin his young family. The sentence I impose must give due regard to the possibility of Mr. Kelly's rehabilitation and the impact of his aboriginal background.

- [21] Mr. Kelly, would you please stand.
- [22] I hope that your expression of your intention to turn your life around and assume responsibility for yourself and your family is sincere and that you will turn away from the path that you have been following to this point. At age 26, you are at a crossroads, Mr. Kelly. It is now or never.
- [23] For these offences, I am satisfied that if you had not spent time in pretrial custody, an appropriate sentence would be six years on Count 1, one year on Count 2, three years on Count 3, and three years on Count 4 to be served concurrently. Defence counsel and Crown counsel agree that you have 152 days to your credit for time spent in custody prior to sentencing in relation to these offences. I am satisfied that you should be given credit of one-and-a-half days for each day of presentence custody. I come to that conclusion because you wished to participate in programs, but were unable to do so because you were kept in isolation. While you brought some of that on yourself through your uncooperative behaviour and breach of KRCC rules, I take into account the fact that your culpability for that behaviour is lessened by the fact that you have attention deficit and hyperactivity disorder and were not on medication while at KRCC.
- [24] Giving you credit, then, of 228 days or seven-and-a-half months, the resulting sentence for each offence is as follows: Count 1, five years and four-and-a-half months; Count 2, four-and-a-half months; Counts 3 and 4, two years and four-and-a-half months. All sentences are to be served concurrently, but of course, consecutive to the sentence you are presently serving for another offence.
- [25] You may be seated now, Mr. Kelly.
- [26] In addition, you are prohibited under s. 109(3) of the Criminal Code from possessing any firearms, crossbow, restricted weapon, ammunition, and explosive substance for life.
- [27] As assault with a weapon is classified as a primary designated offence under s. 487.04 of the Criminal Code, you are ordered to provide such samples as are necessary for the DNA databank pursuant to s. 487.05(1) of the Code. I note that you have not put before me anything to show under s. 487.051(2) that a DNA order would have a grossly disproportionate impact on your privacy and security of person.
- [28] The victim fine surcharge under s. 737 of the Code is waived in light of your financial circumstances and incarceration.
- [29] I will begin first by asking Mr. Burrows if there is anything requiring clarification?
- [30] MR. BURROWS: No, not from the Crown's perspective, thank you.
- [31] THE COURT: Mr. Kelly, do you have any questions about the sentence?
- [32] THE ACCUSED: No.

[33] THE COURT: All right. Your counsel will be provided with the result. In the circumstances, I am going to provide a typed copy of my reasons to your counsel, as well, so that she has the reasons in full before her when she returns and can discuss them with you.

[34] THE ACCUSED: Okay.

[35] THE COURT: I will have the registry send those to her today. Thank you.

The Honourable Madam Justice L.A. Fenlon

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