

CANADA / JUDGMENT

R. v. Anderson

2020 BCCA 297

COURT

British Columbia Court of Appeal

DECIDED

28 October 2020

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2020 BCCA 297 R. v. Anderson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Anderson,

2020 BCCA 297

Date: 20201028

Docket: CA46857

Between:

Regina

Respondent

And

David Robert Anderson

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraph 66 on November 2, 2020.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated

May 8, 2020 (R. v. Anderson, Kelowna Docket 52553-6-C; 61808-1; 62151-1;

and 62409-1).

Counsel for the Appellant:

V. de Jong

Counsel for the Respondent:

S. Gillespie

Place and Date of Hearing:

Vancouver, British Columbia

September 18, 2020

Place and Date of Judgment with

Written Reasons to Follow:

Vancouver, British Columbia

September 18, 2020

Place and Date of Written Reasons:

Vancouver, British Columbia

October 28, 2020

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice DeWitt Van-Oosten

Summary:

The appellant pleaded guilty to 15 offences and received a global sentence of 56 months' imprisonment. After taking into account pre-sentence custody, the resulting sentence was 13 months' "new time". The sentencing judge considered the principle of totality and reduced the "new time" to 11 months. The appellant appealed his sentence on two grounds: (1) that the sentencing judge erred in failing to properly consider the issue of consecutive versus concurrent sentences; and (2) erred in his application of the totality principle, resulting in a sentence that was demonstrably unfit. Held: Appeal dismissed. The sentencing judge was alive to the material issues on sentencing and turned his mind to the principle of totality. In the circumstances of this case, the sentence imposed was fit.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] This sentence appeal was dismissed with reasons to follow, which are set out below.

I. Background

[2] David Anderson pleaded guilty to 15 offences involving theft from vehicles, identity theft and driving offences, committed in Vernon, Richmond and Surrey, B.C. The Richmond and Surrey charges were waived to Vernon for guilty pleas. Some of the offences were committed with a co-accused, Desiree Fisher.

A. The Offences

[3] The facts in this case are long and complex. They are set out below in chronological order, followed by a chart.

[4] In and around spring of 2017, the Surrey RCMP Crime Reduction Team had been targeting Mr. Anderson and conducting surveillance of him. The police observed Mr. Anderson driving a white Cadillac SUV, license plate GE867B.

[5] On May 26, 2017, Mr. Anderson was pulled over in a traffic stop. He was subsequently served a driving prohibition under the Motor Vehicle Act, R.S.B.C 1996, c. 318.

[6] On June 19, 2017, Mr. Anderson broke into the vehicle of John Quan wearing latex gloves, black clothes, and a black baseball cap. The vehicle was parked at the badminton centre in Richmond. He was caught on Mr. Quan's dashcam footage, which was later provided to police (who were able to identify the man in the footage as Mr. Anderson). The footage caught Mr. Anderson opening the trunk of the vehicle and removing a black bag; inside the bag were sunglasses, shoes, an identification pass and other items. Mr. Anderson then entered the driver's side of a white Cadillac SUV and drove off. This forms the basis for Count 1 on Richmond Information 61808-1.

[7] Mr. Anderson was subsequently arrested for the offence of driving while prohibited on June 26, 2017. This forms Count 2 on Surrey Information 22402-1.

[8] On October 19, 2017, Zachary Campbell's truck was broken into and his wallet was stolen, which contained his credit card, social insurance card and identity documents. When he went to the bank to inform the bank of the theft and cancel the credit card, Mr. Campbell found out that \$15,000 had been taken out of his account.

[9] On October 21, 2017, Mr. Anderson attended Ann-Louise Jewelry and made a credit application using the name and identification of Zachary Campbell. Mr. Anderson wished to purchase a watch valued at \$6,800.00, but did not want to pay with credit card. Mr. Anderson, while fraudulently impersonating Mr. Campbell, was granted a credit line of \$7,500.00 and subsequently received two watches valued at \$7,649.98. Mr. Anderson paid the approximately \$150.00 differential using a debit card with no name on it. This forms the basis for Count 2 on Richmond Information 62409-1.

- [10] On October 21, 2017, the real Mr. Campbell received a call from the Ann-Louise Jewelry store. The store clerk wanted to make sure that Mr. Campbell received the receipt for his purchase. Mr. Campbell informed the store that he made no such purchase.
- [11] Some time in October 2017, in Surrey, Joshua Watts' identity documents were stolen. They were later used by Mr. Anderson in Vernon to obtain credit at the Hudson Bay store, as well as rent a U-Haul, as described below.
- [12] On November 10, 2017, Mr. Anderson was caught on dashcam footage again, this time breaking into the vehicle of Chaojie Li. On this occasion, Mr. Anderson was seen opening the trunk of the vehicle and stealing several items, including Dolce & Gabbana sunglasses valued at approximately \$400.00. The vehicle itself was damaged in the course of the break-in to the extent that Ms. Li could no longer open the driver's side door handle. The damage to Ms. Li's vehicle amounted to \$1,784.15 in repairs.
- [13] The dashcam footage provided by Ms. Li was circulated to Surrey RCMP. Four officers identified Mr. Anderson. This forms the basis for Count 2 on Richmond Information 62151-1.
- [14] On November 20, 2017, James LaPierre's wallet, including identification documents, was stolen while he was inside a gym. Subsequently, Mr. LaPierre's stolen identification documents were used to fraudulently obtain a \$50,000.00 automobile bank loan and purchase a white Jeep Cherokee from a dealership in the Lower Mainland. Mr. LaPierre only discovered the fraud on his identity when he was checking his credit report. This is the white Jeep Cherokee later seized by the police in connection to the offences committed by Mr. Anderson and Ms. Fisher. This forms the basis for Count 10 on Vernon Information 52553-C-6, as discussed below.
- [15] On the evening of January 3, 2018, Sarah Sewchuk's vehicle was parked at Fitness West Gym in Vernon. At approximately 6:30 p.m., the rear passenger window of Ms. Sewchuk's vehicle was smashed and Ms. Sewchuk's purse was stolen. The purse contained identity documents and credit/debit cards. The possession of Ms. Sewchuk's identity documents and bank cards forms part of the basis for Counts 8 and 20 on Vernon Information 52553-C-6.
- [16] Around 6:00 a.m. in the morning of January 5, 2018, also at Fitness West Gym in Vernon, Mariah Esau's vehicle window was smashed, and Ms. Esau's purse was stolen. The purse contained identity documents, \$200.00 in cash, credit/debit cards, and health cards for both herself and her daughter. A witness spotted a white Jeep driving away. The possession and use of Ms. Esau's identity documents and bank cards forms the basis for Counts 5 and 14 on Vernon Information 52553-C-6.

- [17] Less than two hours later, at approximately 7:30 a.m. on January 5, 2018, Pamela van Klee's rear passenger window was smashed while her vehicle was parked at Vernon Recreation Centre. Ms. van Klee's purse was stolen. The purse contained identity documents, credit/debit cards, blank cheques, an address book and an epi pen. The possession of these identity documents and bank cards forms the basis for Counts 8 and 14 on Vernon Information 52553-C-6.
- [18] Around the same time, at approximately 7:30 a.m. on January 5, 2018, also at Vernon Recreation Centre, Judy Goplen's passenger side window of her vehicle was smashed and items were stolen. These included: a laptop computer, tote bag, bottle of wine, identity documents, business documents, and data for the business that Mr. and Ms. Goplen own (Cobblestone Clinic). The possession of these items forms the basis for Count 14 on Vernon Information 52553-C-6.
- [19] On the evening of January 5, 2018, at approximately 7:30 p.m., the front passenger window of Ryan Williams' vehicle, parked at Priest Valley Arena, was smashed and a laptop was stolen from inside the vehicle.
- [20] At approximately 8:00 a.m. in the morning of January 6, 2018, Marion Deboersap, who had parked her vehicle at Kal Tire Place, exited Kal Tire Place and confronted a hooded male attempting to gain access to the car. The man covered his face with his hood and got into a white Jeep Cherokee. Ms. Deboersap video recorded while the white Jeep Cherokee fled the parking lot. Police were able to identify the license plate of the white Jeep Cherokee (B.C. license plate PL815T).
- [21] Like the Vernon Recreation Centre, Fitness West Gym and the Priest Valley Arena, Kal Tire Place is a community sports and recreation facility.
- [22] That same day, January 6, 2018, at 5:30 p.m. (just before store closing), Mr. Anderson and his co-accused, Desiree Fisher, entered the Hudson Bay store in Vernon. Their presence was captured on surveillance video. They selected bedding products, including a mattress and box spring. Ms. Fisher applied for a credit application and obtained Hudson Bay store credit using stolen identity documents belonging to Mariah Esau. Mr. Anderson participated in the fraudulent purchase of merchandise from the Hudson Bay store. Mr. Anderson provided the Hudson Bay with the name and personal identity information of Joshua Watts. The total purchase price at the Hudson Bay store came to \$2,699.98. Mr. Anderson and Ms. Fisher did not take the purchased products immediately, but informed staff that they would return later to pick it up. The fraudulent application for credit and subsequent purchase from the Hudson Bay forms the basis for Count 6 on Vernon Information 52553-C-6.
- [23] On the evening of January 6, 2018, at approximately 7:00 p.m., the window of a truck belonging to Stephanie Brenner was smashed. Ms. Brenner's purse was stolen. The purse contained her wallet, identity documents, credit/debit cards and a MacBook computer. The truck was parked at Iron Heart Gym in Vernon, while Ms. Brenner was inside. Video surveillance shows a white Jeep Cherokee, license plate PL815T, circling the parking lot of

the Iron Heart Gym and stopping for a period of time. Ms. Brenner viewed this footage after the break-in. The theft from Ms. Brenner's vehicle forms the basis for Count 9 on Vernon Information 52553-C-6.

- [24] Later that same night, at approximately 9:00 p.m. on January 6, 2018, Ms. Brenner was in the parking lot of the Best Buy in Vernon. She was on the phone with Cst. Beaulieu concerning the theft that had just taken place from her truck. Ms. Brenner spotted a white Jeep Cherokee, license plate PL815T, and began to follow it while reporting this to Cst. Beaulieu. The white Jeep Cherokee then fled (it ran a red light and failed to stop at a stop sign as it headed up Silver Star Road). The police attempted to locate the white Jeep Cherokee but were, at the time, unsuccessful.
- [25] Approximately 30 minutes later, around 9:30 p.m., Ms. Brenner returned to the Best Buy parking lot. Ms. Brenner spotted the white Jeep Cherokee, license plate PL815T, once again entering the Best Buy parking lot. Ms. Brenner updated the police.
- [26] Mr. Anderson parked the white Jeep Cherokee and remained inside. Ms. Fisher went inside the Best Buy store and used Mariah Esau's identity documents to fraudulently complete credit applications. Ms. Fisher then purchased (by fraudulent means) \$3,676.36 of electronics from Best Buy. Mr. Anderson was party to the fraudulent purchase of merchandise from Best Buy. The fraudulent application for credit and subsequent purchase from Best Buy forms the basis for Count 5 on Vernon Information 52553-C-6.
- [27] Mr. Anderson exited the white Jeep Cherokee and knocked on the front window of the Best Buy store to elicit Ms. Fisher's attention. Ms. Fisher immediately left the store without the fraudulently purchased merchandise. Ms. Brenner watched Ms. Fisher get into the passenger side of the white Jeep Cherokee. Ms. Brenner reported her observations to the police.
- [28] Cst. Heideman then entered the Best Buy parking lot in a fully marked police vehicle. Subsequently, the white Jeep Cherokee fled up Silver Star Road. The police made pursuit. Cst. Beaulieu headed a different route in the hope of intercepting the white Jeep Cherokee. The white Jeep Cherokee came up behind Cst. Beaulieu's police vehicle, prompting Cst. Beaulieu to activate his emergency lights. Cst. Beaulieu's police vehicle was narrowly missed by the fleeing white Jeep Cherokee. After that, the police lost sight of the white Jeep Cherokee.
- [29] On January 6, 2018, Mariah Esau received a phone call from her cousin, Marie Esau. Marie informed Mariah that an employee from the Hudson Bay store had contacted Marie Esau on social media in an effort to locate Mariah Esau. The employee from the Hudson Bay store informed Marie that an individual had obtained \$2,200.00 of credit at the Hudson Bay store, under the name Mariah Esau. The employee became suspicious of the individual applying for credit under Mariah Esau's name and began to search for Mariah Esau on social media. The employee found Marie Esau and contacted her. Following the phone call with her cousin, Mariah Esau alerted the police.

- [30] On January 7, 2018, at around 2:00 a.m. Cst. Beaulieu located the white Jeep Cherokee, license plate PL815T, in Vernon. The vehicle was unoccupied. The police entered the residence where the white Jeep Cherokee was located and found Mr. Anderson and Ms. Fisher inside. Ms. Fisher identified herself to the police. Mr. Anderson produced no identity documents but identified himself as "Fred McKave" (Mr. McKave's firearms license had been stolen in Langley in 2017 and was later recovered from the white Jeep Cherokee). Mr. Anderson was not arrested at that time because he had given a false name.
- [31] The police seized the white Jeep Cherokee and conducted a search and a forensic examination. The fraudulent history of the purchase of the white Jeep Cherokee was discovered at this point. As mentioned previously, the offence relating to the white Jeep Cherokee forms the basis for Count 10 on Vernon Information 52553-C-6.
- [32] The police discovered numerous stolen items inside the white Jeep Cherokee, including:
- a rear licence plate 776TWK, which had been stolen on November 25, 2017 from Diane Sorace's vehicle;
 - a front B.C. licence plate;
 - BCAA cards in the name of Larrah Esau (Mariah Esau's daughter);
 - a photo firearms licence of Fred McKave (which the police determined was not the person in the residence who had identified himself as Fred McKave);
 - an RBC bank card in the name of Vance Jefferson;
 - a social insurance card in the name of Pamela van Kleek;
 - a brown purse containing documents and identification in the name of Sarah Sewchuk;
 - a laptop bag with a Samsung laptop and chequebook in the name of Ryan Williams inside the bag;
 - a hammer, slim jim, knife with a scabbard, bottle of wine, a large machete knife, two cans of bear spray, and a tool box with various tools;
 - a Puma gym bag containing several items, including:
 - significant quantities of mail and business documents for the Goplens and the Cobblestone Clinic (their business);
 - a USB stick for the Cobblestone Clinic;
 - black women's sunglasses;
 - a Subaru key fob belonging to Judy Goplen; and
 - a chequebook, library card, medical insurance card belonging to Pamela van Kleek.

- [33] Ms. Fisher and Mr. Anderson's fingerprints were found on items inside the white Jeep Cherokee.
- [34] On January 7, 2018, Ms. Brenner went to Best Buy and informed the staff that her purse had been stolen. She inquired into whether anyone had used her identity documents at the store. The manager was then alerted to the suspicious credit purchase made by Ms. Fisher the night prior.
- [35] On January 7, 2018, following the conversation with her cousin and the police, Mariah Esau went to the Hudson Bay store with her passport. The same day, Ms. Esau went to Best Buy and informed the manager that her purse had been stolen and that she had been alerted to the fact that her identity documents had been fraudulently used at Best Buy.
- [36] On January 7, 2018, around 1:30 p.m., Mr. Anderson entered the Stor-It Place and fraudulently rented a U-Haul cube truck using the identity documents of Joshua Watts. Mr. Anderson's U-Haul rental transaction was captured on video surveillance. The fraudulent rental of the U-Haul truck forms the basis for Count 7 on Vernon Information 52553-C-6.
- [37] On January 7, 2018, around the same time Mr. Anderson was fraudulently renting the U-Haul, a Hudson Bay store employee alerted the police that Ms. Fisher, claiming to be Mariah Esau, and Mr. Anderson were coming to the Hudson Bay store to pick up the previously fraudulently purchased bedroom products.
- [38] On January 7, 2018, around approximately 2:45 p.m., Cst. Ternan called the phone number given to the Hudson Bay store under the credit application by "Joshua Watts". Cst. Ternan asked to speak with "Josh". Mr. Anderson claimed to be Josh, and informed Cst. Ternan that he was coming to the Hudson Bay store to pick up the merchandise. Mr. Anderson, speaking as Josh, informed Cst. Ternan that he was in a hurry. Mr. Anderson requested more credit from the Hudson Bay store to purchase bed sheets. Mr. Anderson informed Cst. Ternan that he would be arriving in a U-Haul that he had rented.
- [39] On January 7, 2018, at approximately 4:15 p.m., Ms. Fisher and Mr. Anderson drove to Best Buy. Mr. Anderson remained in the U-Haul truck (in the driver's seat) while Ms. Fisher entered Best Buy to pick up the fraudulently purchased merchandise. The Best Buy staff attempted to stall Ms. Fisher while waiting for the police. The Best Buy staff observed the U-Haul parked outside the store.
- [40] Multiple police vehicles arrived at Best Buy and attempted to box in the U-Haul. Cst. Ternan used his police vehicle to block the front of the U-Haul while Cst. Isles used his police vehicle to block the back of the U-Haul. Mr. Anderson drove the U-Haul forward and rammed a civilian's parked vehicle, moving it almost a full parking space and damaging its taillights. Mr. Anderson then reversed and rammed into Cst. Isles' police vehicle and then fled the Best Buy parking lot. The police pursued Mr. Anderson in the U-Haul.

- [441] Cst. Taylor observed the U-Haul driving southbound on Highway 97. He pulled over and exited his police vehicle to deploy the spike belt. Mr. Anderson swerved to avoid the spike belt. The driver's side front tire of the U-Haul made contact with the spike belt, but Mr. Anderson continued driving southbound.
- [442] During the vehicle pursuit taking place in relation to Mr. Anderson, Cst. Ternan entered the Best Buy store and arrested Ms. Fisher. At this time, Ms. Fisher was attempting to finalize the fraudulent purchases of electronic merchandise. Upon arrest, Ms. Fisher identified herself to police.
- [443] Ms. Fisher was taken to the police detachment where she was searched. Mariah Esau's designer purse and wallet were found on her. Inside the purse was Mariah Esau's wallet containing her identification, driver's license, social insurance card, bank card, and B.C. health card.
- [444] Cst. Ternan again called Mr. Anderson's cell phone. Cst. Ternan informed Mr. Anderson that Ms. Fisher had been arrested and was in jail. Cst. Ternan advised Mr. Anderson to turn himself in. Mr. Anderson believed he was speaking to a friend named "Colton". Mr. Anderson informed "Colton" that he would not stop for the police and that he wanted money and drugs. Mr. Anderson asked "Colton" to bring him cash and heroin.
- [445] Police received information that the U-Haul was parked in the Butcher Boys parking lot on 48th Avenue. When Cst. Rutten entered the parking lot on 48th Avenue, Mr. Anderson fled in the U-Haul.
- [446] Cst. Ternan was on the phone with Mr. Anderson. Mr. Anderson, believing he was still talking to his friend Colton, said that he was parked in a driveway at 5900 Old Kamloops Road. When police approached, Mr. Anderson again fled in the U-Haul. Cst. Rutten and Cst. Gravel followed Mr. Anderson.
- [447] As the police followed Mr. Anderson in the U-Haul, they observed Mr. Anderson throwing bags out of the U-Haul. Cst. Gravel stopped along the side of one road and picked up a duffle bag that Mr. Anderson had thrown from the U-Haul. It contained a laptop bag with a computer and a camera inside the bag.
- [448] Cst. Taylor stopped his police vehicle on Old Kamloops Road to again attempt to deploy the spike belt. Cst. Taylor left his driver's side door open and was in front of his police vehicle. Mr. Anderson crossed the centre line and steered in the direction of Cst. Taylor. Cst. Taylor was forced to jump into the ditch to avoid being struck by the U-Haul that Mr. Anderson was driving. Mr. Anderson hit the open driver's door of Cst. Taylor's police vehicle, damaging it to the extent that it would no longer shut. Subsequently, Mr. Anderson drove the U-Haul over the spike belt.

- [49] Mr. Anderson was still speaking with Cst. Ternan and still believed he was speaking with "Colton". Before hanging up, he told "Colton" that the police had popped his tires. Cst. Ternan called Mr. Anderson again. Mr. Anderson answered, asking where Colton was.
- [50] Eventually, Mr. Anderson lost control of the U-Haul and it spun off the road into a ditch. Cst. Rutten drove his police vehicle into the front passenger side of the U-Haul to immobilize it. He then approached the passenger side of the U-Haul with his police service dog. Sgt. Margison arrested Mr. Anderson. The facts depicting Mr. Anderson's driving on January 7, 2018 form the basis of Counts 15, 16, and 17 on Vernon Information 52553-C-6.
- [51] A cursory search of the U-Haul revealed drugs, drug paraphernalia, an iPhone tucked under the seat and a laptop on the passenger seat. Cst. Ternan called Mr. Anderson's phone again and Cst. Thickson observed the iPhone ringing, answered it and spoke to Cst. Ternan. After a further search of the U-Haul, the following items were located and seized:
- several cards in the name of Mariah Esau;
 - a silver MacBook Pro laptop belonging to Stephanie Brenner that had been hooked up in the U-Haul in the front seat;
 - Joshua Watts' stolen B.C. safe hearing card inside a backpack; and
 - 19 grams of suspected heroin and 15 grams of suspected marihuana.
- [52] On January 8, 2018, a civilian turned in a purse that was located on Okanagan Landing Road, which had been thrown from the U-Haul during the police pursuit. That purse contained:
- identity documents of Stephanie Brenner;
 - a TD bankcard and bank documents of Sarah Sewchuk;
 - an ASUS tablet;
 - a B.C. driver's licence and an account statement in the name of Mark McDonnell;
 - the Best Buy credit application with the receipt in the name of Mariah Esau fraudulently obtained by Ms. Fisher;
 - the Best Buy TV display tag;
 - a chequebook in the name of Pamela and Rick van Kleek;
 - a TD bankcard belonging to Desiree Fisher; and
 - a medical prescription in the name of Desiree Fisher.
- [53] Cst. Ternan conducted a warned statement with Ms. Fisher. Ms. Fisher told the police that she had been handed a stolen purse with Mariah Esau's identity documents. She also told police that she was picking up fraudulently purchased items from the Hudson Bay store and Best Buy. She said the fraudulent purchases were made to cover drug debts.

- [54] Mr. Anderson and Ms. Fisher were in possession of the stolen identity documents, credit/debit cards and property of Mariah Esau, Larrah Esau, Sarah Sewchuk, Stephanie Brenner, Pamela van Kleek, Judy Goplen, Cobblestone Clinic, Mark McDonnell, Fred McKave and Ryan Williams. As mentioned previously, the possession of these various stolen items forms the basis of Counts 8 and 14 on Vernon Information 52553-C-6.

B. Mr. Anderson's Background

- [55] Mr. Anderson is 34 years old. He was raised for most of his childhood and adolescence in White Rock, B.C. According to Mr. Anderson, he has a supportive family and enjoyed a good upbringing. He began to encounter trouble in life and with the law when he began to struggle with addiction. He was expelled from school because of drugs. As a result, Mr. Anderson's education has not exceeded Grade 10.
- [56] Mr. Anderson has acquired a fairly lengthy criminal record. That record begins in 2005 and continues until 2016, with the majority of the offences taking place between 2011 and 2012. According to Mr. Anderson, like the offences at issue in this appeal, those offences are directly related to his drug addiction. The offences taking place between 2011 and 2012 include: two convictions for unauthorized use of credit card data; one conviction for possession of stolen property over \$5,000.00; two convictions for possession of stolen property under \$5,000.00; two convictions for theft under \$5,000.00; one conviction for possession of break-in tools; one conviction for possession of a prohibited weapon; one conviction for possession for the purpose of trafficking in drugs. In May 2012, Mr. Anderson served two years less a day for 18 counts of fraud, possession of stolen property and breaches.
- [57] Mr. Anderson's criminal record and ongoing struggle with addiction have acted as barriers to steady, reliable employment. Mr. Anderson worked as a car salesman for approximately four years in his early twenties. However, as a result of his previous fraud conviction he lost his car dealing license.

C. Mr. Anderson's Addiction and Rehabilitative Efforts

- [58] Desiree Fisher, Mr. Anderson's co-accused, told police that the fraudulent purchases and possession of stolen identity documents were made to cover drug debts. In the sentencing proceedings, the Crown argued that this was an aggravating factor, though not specifically with regards to Mr. Anderson. At sentencing, defence counsel submitted that, considering all the circumstances relevant to Mr. Anderson's sentence appeal, the commission of offences to fuel an addiction ought not to be seen as an aggravating factor.

- [59] The period of pretrial custody leading up to Mr. Anderson's sentencing appeal was the longest period of sobriety that he has experienced since his struggles with addiction began. At the time of the sentencing for the current offences, Mr. Anderson was on suboxone and planning on continuing substitution therapy. Mr. Anderson has attempted to partake in available rehabilitative programming while incarcerated, albeit limited by the resources within the system.
- [60] Mr. Anderson has several certificates for courses and programs he has completed in pursuit of his rehabilitation. These include: the Life Skills course; the Substance Abuse Management core program; and various units of Essential Skills for Success program, which deals with substance abuse, healthy relationships, employability skills, money management and housing needs.
- [61] Mr. Anderson is willing to continue with drug counselling and programming as directed in the community.
- [62] Upon release from custody, Mr. Anderson plans to live with friends while he seeks employment and a long-term place of residence.

D. Victim Impact Statements

- [63] With respect to the offences committed by Mr. Anderson and Ms. Fisher, Stephanie Brenner and Mariah Esau both made victim impact statements that served as exhibits in the sentencing proceedings.
- [64] Ms. Brenner stated that the purse stolen from her vehicle was inherited from her now-deceased mother, who had passed away a year prior to the incident. From Ms. Brenner's statement, it is apparent that the bag itself contained immense personal significance, which rendered it irreplaceable. In addition to the purse, Ms. Brenner's laptop was stolen and damaged beyond repair. Ms. Brenner described the weeks-long impact this had on her ability to work as a realtor, an occupation heavily reliant on a personal computer.
- [65] Ms. Esau described the psychological effect the offence has had on her and her daughter, as both of their identification documents were found among the stolen property possessed by Mr. Anderson and Ms. Fisher. She stated that she feels fear walking to her vehicle at night or being alone with her child. Ms. Esau described feeling violated by the theft of her identity, and that this invasion has had lasting emotional and psychological effects. Additionally, Ms. Esau's vehicle sustained over \$1,000.00 worth of damage. For reasons relating to her insurance coverage, Ms. Esau was forced to pay the entire sum. Finally, the \$200.00 cash stolen from Ms. Esau's wallet had been a Christmas present from Ms. Esau's parents.

II. Table of the Offences and Sentences

- [66] Mr. Anderson entered a guilty plea to 15 offences, and was sentenced to 11 months' "new time". This table breaks down those offences and the sentences imposed by the judge.

Location/

Count

Date

Offence

Facts

Sentence Received

Richmond 61808-1 Count 1

19-Jun-2017

Break and enter and theft from vehicle

The trunk of John Quan's vehicle was broken into and items stolen.

2 months' jail

Surrey 224024-1 Count 2

26-Jun-2017

Driving while prohibited

Surrey RCMP observed Mr. Anderson driving while under prohibition

\$500 fine and a one-year driving prohibition

Richmond 62409-1 Count 2

21-Oct-2017

Fraudulent personation

Mr. Anderson personated Zachary Allan Campbell at Ann-Louise Jewelry receiving two watches valued at \$7,649.98.

20 months' jail, concurrent

Richmond 62151-1 Count 2

10-Nov-2017

Mischief

Chaojie Li's vehicle is broken into and several items were stolen.

2 months' jail, concurrent

Vernon 52553-C-6 Count 6

6-Jan-2018

Fraud

Fraudulent use of Joshua Watts identification at the Hudson Bay. Purchased \$2,699.98 of bedroom products.

24 months' jail, consecutive to the Richmond/ Surrey offences, but concurrent to the Vernon property offences

Vernon 52553-C-6 Count 9

6-Jan-2018

Theft

Theft from the vehicle of Stephanie Brenner.

6 months' jail, concurrent

Vernon 52553-C-6 Count 5

6-Jan-2018

Fraud

Mr. Anderson stayed in the vehicle while Ms. Fisher entered the Best Buy and used Mariah Esau's identity documents to purchase \$3,676.36 of electronics equipment.

24 months' jail, concurrent

Vernon 52553-C-6 Count 7

7-Jan-2018

Fraud

Mr. Anderson fraudulently rented a U-Haul truck using the stolen identification of Joshua Watts.

24 months' jail, concurrent

Vernon 52553-C-6 Count 8

7-Jan-2018 (when documents were discovered)

Possession of identification documents

Possession of the identification documents of Joshua Watts, Fred McKave, Sarah Sewchuk, Mark McDonnell, Pamela van Kleek and Stephanie Brenner.

24 months' jail, concurrent

Vernon 52553-C-6 Count 10

7-Jan-2018 (when white Jeep Cherokee was seized by police)

Possession of stolen property

Possession of the white Jeep Cherokee, fraudulently obtained on 20 November 2017 using the identification documents of James LaPierre.

24 months' jail, concurrent

Vernon 52553-C-6 Count 14

7-Jan-2018 (when items were discovered)

Possession of stolen property

Possession of the stolen property of Stephanie Brenner, Pamela van Kleek, Fred McKave, Mariah Esau, Larrah Esau, Judy Goplen, the Cobblestone Clinic, Ryan Williams and Mark McDonnell.

24 months' jail, concurrent

Vernon 52553-C-6 Count 20

7-Jan-2018 (when items were discovered)

Possession of stolen property

Possession of bank cards belonging to Sarah Sewchuk.

12 months' jail, concurrent

Vernon 52553-C-6 Count 15

7-Jan-2018

Dangerous driving

Mr. Anderson used a U-Haul vehicle to ram one civilian vehicle and one police vehicle in an attempt to evade the police. A chase ensued and Mr. Anderson steered the vehicle directly at Cst. Taylor, who was forced to jump into a ditch to avoid being hit by the U-Haul.

12 months' jail, consecutive to all other counts, but concurrent to Counts 16 and 17

Vernon 52553-C-6 Count 16

Flight from police

12 months' jail, consecutive to all other counts, but concurrent to Counts 15 and 17

Vernon 52553-C-6 Count 17

Failure to stop at an accident with intent to escape liability

12 months' jail, consecutive to all other counts, but concurrent to Counts 15 and 16

III. Issues on Appeal

[67] Mr. Anderson submits that the sentencing judge erred by misstating the respective positions of the parties, both in his application of the totality principle and concomitantly in his consideration of consecutive and concurrent sentences. Mr. Anderson also submits that the sentence is demonstrably unfit.

A. Standard of Review

[68] In *R. v. Friesen*, 2020 SCC 9 at para. 26, the Court once again reiterated the standard of review for a sentence appeal: an appellate court can only intervene to vary a sentence if: "(1) the sentence is demonstrably unfit, or (2) the sentencing judge made an error in principle that had an impact on the sentence." Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor.

[69] Furthermore, not every error is material; it must impact the sentence. If the error was material, the appellate court is no longer bound by deference, but will make its own determination of a fit sentence in all of the circumstances.

B. Issue 1: The Totality Principle and Consecutive Versus Concurrent Sentences

i. Legislative Framework

[70] There are several statutory provisions in the Criminal Code that are relevant to the discussion of totality:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

718.3 (4) The court that sentences an accused shall consider directing

(a) that the term of imprisonment that it imposes be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing; and

(b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when

(i) the offences do not arise out of the same event or series of events,

(ii) one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or

(iii) one of the offences was committed while the accused was fleeing from a peace officer.

ii. Misapprehension of the Positions of the Parties

- [71] Mr. Anderson submits that the sentencing judge misapprehended the positions of the parties. The Crown agrees that this appears to have occurred but that, at the end of the day, it was not an error that impacted the sentence.
- [72] At the sentencing hearing, the Crown took the position that an appropriate sentence for the Vernon offences was 33 to 36 months' imprisonment: 24 months for the various fraud and identity theft offences (to be served concurrently), and nine to 12 months for the dangerous driving and flight from police offences (to be served concurrent with each other but consecutive with the property offences). The Crown also sought a sentence of 18 to 24 months for the Surrey/Richmond offences, but took no position as to whether the sentence should be served concurrently or consecutive to the sentences for the Vernon offences.
- [73] Defence counsel did not dispute the sentencing ranges set out by the Crown. However, defence counsel took the position that the appropriate sentence would be "time served", and that anything greater would offend the principle of totality. Defence counsel took no firm position as to whether the sentences should be served consecutively or concurrently-- however, they did propose that one method of reaching a sentence of "time served" would be to impose a sentence of 30 months' imprisonment for the Vernon fraud/property offences and a sentence of 12 months' imprisonment for the Vernon driving offences (with the sentences for the Lower Mainland offences to be served concurrently).
- [74] The sentencing judge (incorrectly) stated that the Crown had taken the position that the sentences for the Vernon offences and the Lower Mainland offences should be served consecutively, and said that defence counsel "appeared to accept" that they "should be consecutive." He also mistakenly summarized the defence position as seeking a sentence of 12 months' imprisonment for the Lower Mainland offences, and 30 months' imprisonment consecutive to the Vernon offences, resulting in a "time served" sentence.
- [75] Mr. Anderson submits that the judge treated the sentencing submission as a "joint submission", which it clearly was not. I disagree. The judge was aware that Mr. Anderson's position, after the lengthy period of pre-sentence custody was taken into account, was "time served", and that was clearly not the position of the Crown. While the judge may, at one point in his reasons, have misstated the parties' respective positions, it was not a misstatement that impacted the sentence. He was clearly alive to the defence position.

iii Imposition of Concurrent and Consecutive Sentences and the Totality Principle

- [76] The next error alleged is that the sentencing judge reduced the sentence of 13 months to 11 months after pre-sentence detention had been factored in, rather than looking at reducing the sentence based on the 56 months' sentence before the reduction. Mr. Anderson says that two months looks reasonable when considering 13 months, but is too little when you look at the entire sentence.

- [77] In my view the sentencing judge did not make this error. He did not reduce the 13-month sentence; he reduced the sentence for fraudulent personation from 20 to 18 months to address the totality principle.
- [78] Mr. Anderson submits that, in any event, the sentencing judge did not properly emphasize the totality principle, and should have imposed concurrent sentences to arrive at "time served", or 42 months' imprisonment.
- [79] After reviewing the facts, circumstances and applicable sentencing principles, the sentencing judge held that the "most significant issue" in the sentencing hearing was whether the sentences imposed on Mr. Anderson ought to be consecutive or concurrent. The sentencing judge considered that the decision of whether the driving and property offences ought to be consecutive "turns on the question of whether the acts constituting the offences were part of a linked series of acts within a single endeavour." He noted that the issue of consecutive sentences can implicate the totality principle.
- [80] The sentencing judge held that the legally-protected interests arising out of the driving offences and the fraud offences were "entirely different"; the interests protected by one were that of physical integrity, while the other related to privacy and property interests. Finding as such, he concluded that the sentences for the two separate categories of offences ought to run consecutive to one another.
- [81] The imposition of concurrent and consecutive sentences and the application of the totality principle go hand in hand. Prior to the amendment of s. 718.3 (4), the Criminal Code provision, then s. 717(4)(c)(ii), was general in terms of the imposition of consecutive sentences. Section 718.3(4) codified the common law that developed under the former section, that generally when more than one offence arises out of the same time frame, sentences should be concurrent. For example, in *R. v. Caissie*, [1993] B.C.J. No. 703, this Court said, at paras. 37 and 39:
- [37] Notwithstanding the latitude given in s. 717(4)(c)(ii) courts have applied those provisions by holding, generally, that consecutive sentences are imposed where multiple convictions do not arise out of either a single episode or out of events which occur at approximately the same time. Conversely, if multiple convictions arise out of a single episode or out of events which occur at approximately the same time, concurrent sentences will generally be imposed: see *R. v. Beam* (Nov. 12, 1981) Van. Reg. No. CA811044 (C.A.) at p. 5; and *R. v. Armstrong*, [1988] B.C.J. No. 2595 (Dec. 9, 1988) Victoria Reg. No. V00834 (C.A.) at p. 4.
- [39] However, the general principle is not absolute: the existence of special circumstances may constitute an exception to the general rule above described: see *R. v. Camphaug* (1986), 28 C.C.C. (3d) 125 (B.C.C.A.), and *R. v. Bateman*, [1988] A.J. No. 287 (March 16, 1988), Calgary Reg. No. 19431 (Alta. C.A.).
- [82] This Court, most recently, considered the imposition of consecutive versus concurrent sentences in *R. v. Robertson*, 2020 BCCA 65 at paras. 90 and 91:

- [90] The test for determining whether concurrent or consecutive sentences are appropriate is "whether the acts constituting the offences were part of a linked series of acts within a single endeavour": *R. v. G.P.W.* (1998), 106 B.C.A.C. 239 at para. 35; *R. v. Bamdad*, 2013 BCCA 87 at para. 24, 334 B.C.A.C. 204; *Li* at para. 42. Some of the factors to consider are: "the nature and quality of the criminal acts; the temporal and special dimensions of the offences; the nature of the harm caused to the community or to the victims; the manner in which the criminal acts were perpetrated; and the offenders' role in the crimes": *R. v. Potts*, 2011 BCCA 9 at para. 89, 266 C.C.C. (3d) 279 (per Rowles J.A.).
- [91] However, even when a link is present, consecutive sentences can be imposed when the offences committed protect different societal interests. *R. v. McCrea*, 2008 BCCA 227, 256 B.C.A.C. 312, and *R. v. Reynard*, 2015 BCCA 455 evince this. In *McCrea*, this Court held consecutive sentences were appropriate for the offences of robbery, dangerous driving, and resisting arrest, all of which occurred on the same day. In *Reynard*, this Court held that consecutive sentences were appropriate for the offences of possession of child pornography, distribution of child pornography, and child luring. In both cases, this Court cited with approval the judgment of the Court of Appeal of Ontario in *R. v. Gummer* (1983), 38 C.R. (3d) 46, allowing a Crown appeal against concurrent sentences imposed after convictions for dangerous driving and failing to remain at the scene of an accident, and ordering those sentences to be served consecutively. In *Gummer*, Justice Martin stated (at 49):

We do not consider the rule that sentences for offences arising out of the same transaction or incident should normally be concurrent necessarily applies where the offences constitute invasions of different legally-protected interests.

See also: *R. v. Kandola*, 2014 BCCA 443 at paras. 40-41, 317 C.C.C. (3d) 166, upholding consecutive sentences imposed on a Canada Border Services officer for importing cocaine and breach of trust.

- [83] Thus, even if the offences did occur on the same day, or even as a series of events, concurrent sentences may not be appropriate if there are different legal interests at stake. Here, for example, the "smash and grab" of items from cars refers to property interests. However, Mr. Anderson did not stop there. He proceeded to steal the victim's identity to fraudulently obtain credit, putting both the victim and the vendors he defrauded at financial risk.
- [84] The flight from the police and the accompanying charges in relation to the driving are statutorily identified as appropriate for consecutive sentences (see s. 718.3(4)(b)(iii)).
- [85] The sentencing judge broke the offences down into three categories: (1) the Richmond/Surrey offences, for which he imposed 20 months' concurrent imprisonment (total); (2) the Vernon property offences, for which he imposed 24 months' imprisonment (total), consecutive to the Richmond/Surrey offences; and (3) the Vernon driving offences, including fleeing from the police, for which he imposed 12 months' imprisonment, consecutive to the Richmond/Surrey offences and the Vernon property offences. On appeal, Mr. Anderson

submits that the Vernon offences were part of the same "spree" as the Richmond/Surrey offences. I do not agree. On a basic level, they were distinct in terms of time and place, which alone is sufficient to remove the offences from the same "spree". As well, different legal interests were at play in the Vernon offences, as noted above.

- [86] The concurrent and consecutive sentences were rational and, in my view, fit sentences. Indeed, he would not have been wrong to impose a lengthier sentence for the driving offences.
- [87] The totality principle, now codified in s. 718.2(c) of the Criminal Code, is essentially that a sentence may be greater than the sum of its parts, and thereby violate the principle of proportionality. Its proper application ensures that the aggregate sentence for multiple convictions is not excessive or "unduly long or harsh".
- [88] The principle of proportionality underlies all sentencing philosophy (see s. 718 of the Criminal Code). In *R. v. (M.)C.A.*, [1996] 1 S.C.R. 500 at para. 42, the Court said the following in relation to the totality principle:
- [42] In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing*, *supra*, at pp. 44-45:

The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

- [89] For the older offender, the totality principle applies to ensure that the total sentence generally does not exceed the offender's life expectancy (*C.A.M.* at para. 74). In addition, too much time may "deprive the offender of any hope of rehabilitation" (*R. v. Johnson*, 2012 ONCA 339 at para. 18).

- [90] In essence, when considering the question of whether to impose consecutive or concurrent sentences, the sentencing judge determines: first, an appropriate sentence for each offence and, next, whether the sentences should be consecutive or concurrent. Finally, the judge assesses the overall moral culpability of the offender in relation to the offences and determines whether the sentence is proportionate or whether it is unduly long or harsh. If it is the latter, then the judge will adjust the length of the sentence sufficiently to be satisfied that the sentence is proportionate (see e.g., *R. v. Li*, 2009 BCCA 85; *R. v. Joseph*, 2010 BCCA 525).
- [91] In this case, Mr. Anderson committed a large number of offences over a number of months, moving through different communities. Stealing and using a person's identity is a serious crime. The effects on the victim may be devastating. He has a significant record for similar offences. In addition, he drove like an unskilled, out-of-control race car driver, threatening the lives of police officers and citizens. His failure to cause serious injury was only by good luck and happenstance.
- [92] In other words, Mr. Anderson has a high moral culpability with respect to the offences he committed. His argument that he was drug-addicted and paying off drug debts offers no mitigating explanation of the crimes, nor does it explain his dangerous driving.
- [93] In my view, there was no need to reduce the aggregate sentence imposed on the basis of totality. In all the circumstances, I consider the sentence to be fit without the reduction. Mr. Anderson does not fall into the category of the sentence exceeding his life expectancy, nor is it a sentence that extinguishes his rehabilitative opportunities.
- [94] The judge turned his mind to the totality principle, properly applied the principle in respect of the Richmond offences, and adjusted the sentence accordingly. I do not see any error in principle.

C. Issue 2: Demonstrably Unfit Sentence

- [95] Given my observations above, it is clear that I do not view the sentence as demonstrably unfit in all the circumstances.
- [96] Leave having been granted on July 29, 2020, I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice DeWitt Van-Oosten"

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