

CANADA / JUDGMENT

R. v. Babiy

2020 BCSC 2330

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Babiy,

2020 BCSC 2330

Date: 20200615

Docket: 53375-2

Registry: Vernon

Rex

v.

Dale Christopher Lloyd Babiy also known as Dale Christopher Loyd Coatsworth

Before: The Honourable Mr. Justice Betton

Oral Reasons for Sentence

Counsel for the Crown:

L. McPheeters

Counsel for the Accused:

T. Zanatta

Place and Date of Trial/Hearing:

Vernon, B.C.

January 6, 2020

June 15, 2020

Place and Date of Judgment:

Vernon, B.C.

June 15, 2020

[1] THE COURT: Dale Christopher Lloyd Babiy is before me this morning to be sentenced having pled guilty to a single count on a six-count indictment. The charge to which he pled guilty is that he:

. . . on or about January 25, 2019, at . . . Vernon, . . ., did possess a loaded restricted firearm, a Glock 9mm handgun, without being the holder of an authorization or a licence under which he may possess the restricted firearm in that place and a registration certificate for the firearm, contrary to Section 95(1) of the Criminal Code.

[2] The circumstances, which were expressly acknowledged by Mr. Babiy through his counsel and he himself, are that on that date the police had received an anonymous complaint of a drunk driver in a red Cadillac. On attendance they noted a vehicle, and observed Mr. Babiy to be in the passenger seat. Police activated their emergency lights. The Cadillac departed initially travelling normally and within appropriate speeds, but soon after sped up and drove erratically before ultimately losing control and crashing in or near a creek in the downtown Vernon, B.C., area. The driver was identified as a Lorne Ryan, a friend of Mr. Babiy's. Mr. Babiy was the passenger.

[3] The two were directed by police not to exit the vehicle, and as the police officer observed Mr. Babiy's motions, the officer saw Mr. Babiy's hand move towards his hoodie and then noted the barrel of a gun pointed in the direction of the investigating officer. Soon after, other police officers that arrived on the scene took appropriate precautions. The gun was removed from the vehicle, and later Mr. Babiy and Mr. Ryan. Mr. Ryan was significantly intoxicated and stated as much to the police. The weapon was the Glock 9mm and had in it a magazine with 10 rounds.

[4] Mr. Babiy was taken to the hospital. He was diagnosed with a fractured skull and had inner ear damage. He continues to suffer with some of the effects, at least from the inner ear damage.

[5] Mr. Babiy's situation is complicated by his prior criminal history. That is summarized in the presentence report, which was marked as an exhibit, and it is set out in the JUSTIN convictions report, which is also marked an exhibit. Of note, his first conviction at the age of 16 as a youth was for carrying a prohibited device or ammunition. I am told that that was pepper spray. The presentence report notes accurately that since then he has had 25 other convictions.

- [6] Of particular relevance to these matters is a conviction for a robbery involving the use of a firearm. The offence date was January 18, 2015, and the sentence date was August 10, 2017. He was given credit for time served. The appropriate sentence was four years and he was given credit, as I understand it, and served 293 days. Again of some relevance is the fact that he was given a 10-year firearms prohibition and placed on probation for 18 months. Those latter two orders both were in effect and binding upon him at the time of this offence.
- [7] There are numerous property offences and breach offences, breaches of various court orders contained in his record, the combined effect of which is described in the presentence report and by counsel before me as having resulted in him either being sentenced or in custody on a remand for a significant portion of his time, certainly since he became an adult.
- [8] He will be 27 in two days time. He is a single individual with no children. His family background is not a happy one by and large, although it shows some greater promise at the current time than it did in his youth. He has four full siblings and three older half siblings. His father spent much of his time in jail, and as a result he has little connection with his father. His mother spent much of the accused's early days travelling around to live in areas close to where his father was incarcerated and was not a very involved mother. As a result, his upbringing was not a particularly good one. In more recent time, I am told he has a more positive relationship with his mother, with some of his older half-siblings, and with his sister.
- [9] He has learned in relatively recent years of his Métis heritage. His mother only learned of that some 10 years ago, and since that time she has become engaged in the Métis community and with some of her Aboriginal heritage. Mr. Babiy has expressed an interest in the same, something that he has pursued as he has been able to while incarcerated, and hopes and intends to do once he is released.
- [10] Mr. Babiy has been in custody since his arrest in January of 2019. The calculation of counsel is that it is 506 days of actual time. Counsel agree, and I see no reason to question, that he should be credited at a rate of one-and-a-half days for each day of actual time, which translates by counsel's math, which I have not checked and take no issue with, to having effectively been in custody for 759 days.
- [11] His time in custody has been influenced by the COVID pandemic. Prior to that, Mr. Babiy was active in various programming, and I have marked as an exhibit on these sentence proceedings a collection of certificates and acknowledgements of his engagement in various programs available through the Okanagan Correctional Centre. That has been interrupted by COVID with the reduction or elimination of much of the programming that would otherwise exist while in custody and on remand.

- [12] Similarly, he had been engaging in Aboriginal activities within the Aboriginal community in custody. That too, I am told, has been largely restricted or eliminated by measures taken to manage concerns about the COVID-19 pandemic.
- [13] Nonetheless, generally Mr. Babiy has apparently done well in custody and has done the best that he can within the constraints of being in custody and the additional constraints associated with the COVID pandemic. I intend to recognize that as a positive factor in considering the appropriate sentence here.
- [14] He has limited work history, and what it is is in the construction industry, because of the amount of time that he has been in custody over the years.
- [15] By all accounts, with his probation officer and his eldest half-siblings, there has been a more positive attitude developed with his most recent time in custody. It is hoped, Mr. Babiy, that that is something that is meaningful and will be long lasting because the pattern that you have created over recent years has obviously been completely unproductive for you and has served no one -- yourself, your family, or the community - with anything but grief and difficulty. So if you can find a way past that, embrace your Aboriginal heritage and move forward in a more productive manner, everyone is better served by that.
- [16] Sentencing for offences of this nature has been the subject of some considerable comment by the courts over the years. Recently Parliament had imposed mandatory minimum penalties. Those were struck down by the Supreme Court of Canada in 2015 in a decision of *R. v. Nur*, 2015 SCC 15. Despite striking down the mandatory minimum, the Court did note, among other things, through the then Chief Justice, gun-related crimes pose grave danger to Canadians. There the Court found that the mandatory minimum created a risk in certain circumstances of grossly disproportionate sentences and struck down the minimum. In that particular case, however, Mr. Nur received a 40-month sentence - I think that is accurate - and that was upheld by the Supreme Court of Canada, despite striking down the mandatory minimums.
- [17] Mr. Nur was a 19-year-old aged individual who was attending high school and generally performing well and hoped to eventually attend university. He had part-time jobs, volunteered in the community, was viewed by teachers and past employers as having considerable potential, one even describing him as an exceptional student and athlete who excelled in the classroom. On the particular occasion that gave rise to the offence, a staff member noted an individual outside who looked threatening. The neighbourhood had had very high levels of crime and gun violence was a serious problem. The supervisor put the community centre on lockdown and called the police. When the police attended they saw four men standing outside. Mr. Nur was among them. When the police approached, the men scattered and Mr. Nur was ultimately arrested. He had thrown something on the ground and that was ultimately determined to be a .22 calibre semi-automatic handgun with an oversized ammunition clip. There were 23 bullets in the clip and one in the chamber.

[18] Counsel here referred me to a decision of our Court of Appeal in *R. v. Holt*, 2015 BCCA 302. There Madam Justice Newbury for the court noted at para. 18:

[18] . . . In my view, the possession of a loaded firearm does pose a serious threat, and a growing one, to communities across Canada. There is no reason why British Columbia courts should take this threat less seriously than other Canadian courts now do.

She noted, at para. 19, a 40-month sentence was upheld in the Nur case almost without challenge, and noted that:

[19] . . . the comments of courts in other recent appellate decisions, but most especially the proliferation of guns in the Lower Mainland generally, indicate that a re-alignment of the "range" is in order in British Columbia. I would say that Mr. Holt falls at the bottom end of the "criminal" range, and that a sentence of close to three years is called for.

[19] The reference to a criminal range was a reference to comments from the Supreme Court of Canada, the so-called outlaw or true criminal scenarios where a person is possessing a prohibited weapon or a restricted weapon in some matter in furtherance of criminal activity. Those are distinct from some other circumstances where the offence does not have that sort of categorization.

[20] As I referenced, Mr. Babiy is of Métis heritage, something of which he learned relatively recently. The sentencing of individuals of Aboriginal background has also received considerable attention from the courts, most notably in the Supreme Court of Canada in the decisions of *R. v. Gladue* [1999], 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13.

[21] In our Court of Appeal in *R. v. Elliott*, 2015 BCCA 295, the court referenced those decisions and noted some of the following comments which I find useful. At para. 10:

[10] An offender's Aboriginal heritage can affect an appropriate sentence in two ways. First, the "unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts" may bear on the "moral blameworthiness" of the offender: *R. v. Ipeelee*, 2012 SCC 13 at paras. 72-73 [emphasis added]. Courts must take judicial notice of the history of colonization and racism that has embedded systemic difficulties and social and economic deprivation within the Aboriginal community: [citation omitted].

. . .

[12] The second way in which an Aboriginal offender's background can affect the sentencing decision is in the "effectiveness of the sentence itself": [citation omitted]. Aboriginal offenders may enter the criminal justice system with a "fundamentally different world view", such that traditional incarceration does not achieve the purpose of assisting in rehabilitation in the same way it would for a non-Aboriginal offender: [citation omitted]. This must be taken into account when crafting sentences.

[22] I also note paras. 15 and 16 of Elliott:

[15] Although Gladue mandates that a sentencing judge consider the unique circumstances of Aboriginal offenders, this does not presuppose that all Aboriginal offenders will receive an otherwise different sentence. I note the following passage from Ipeelee at para. 83:

Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[16] A sentencing judge must take judicial notice of the systemic and background factors that affect all Aboriginal persons in Canada, including lingering institutional racism and the historical effects of past policies and injustice. But this does not mean that every offence committed by an Aboriginal offender is motivated by or a consequence of these factors to any extent. Nor does every offender with some Aboriginal heritage hold a worldview that reduces the rehabilitative effects of incarceration. In every case, the sentencing judge must create a fit sentence for this particular offender committing this particular crime.

[Emphasis in original.]

[23] It is difficult in the circumstances as they have been presented to me regarding Mr. Babi to identify how his Aboriginal heritage might affect the appropriate sentence in either of the two manners described.

[24] The first refers to any systemic or background factors that may have played a part in bringing him before the courts. The presentence report indicates his mother raised him in a Caucasian environment. She did not have any appreciation that she was Métis, and there is no indication that her background was affected by those unique systemic or background factors.

[25] Similarly, I have nothing specifically before me to indicate that Mr. Babi would have a fundamentally different world view that might impact the effectiveness of sentencing itself. He is an Aboriginal individual with Métis heritage. I accept that. He has embraced that heritage and has found meaning, it would appear, in doing that going forward, and that I see as a positive factor, and to that extent that new connection to the community and his desire to learn of it and participate in it is something that is relevant ultimately to the overall sentence.

[26] These are circumstances that, in keeping with the comments of Nur and Holt and other cases, are of a criminal nature with respect to the possession of the gun. The circumstances were very serious. The police were on high alert. Weapons were drawn. The manipulation by Mr. Babi of the handgun within his coat put not only the police officers but anyone who might have been in the area and himself and the driver of the vehicle at great risk. There is

always the prospect of inadvertent discharges of weapons, police responding to actual threats or perceived threats, and it has got tragic consequences written all over it, but for good fortune and restraint on the part of it would appear everyone involved.

- [27] Mr. Babiy's record is a troubling one. It is long and he was on probation at the time and subject to a firearms prohibition. For him to put himself in possession of a handgun in those circumstances alone, let alone the additional circumstances of the specific offence, are very serious matters indeed.
- [28] Crown here has argued that a four-year sentence is appropriate before credit for his time served. The defence position is three years. Each agree that a period of probation to follow is appropriate. In my view, a sentence closer to that which the Crown has advocated is appropriate in all of the circumstances. But for Mr. Babiy's good conduct in custody, for his now professed acceptance of responsibility, his embracing of his Aboriginal heritage, his completion of programs, I would impose the sentence that the Crown has advocated for. I will, however, impose a sentence of the equivalent of three years and eight months.
- [29] I have not done the arithmetic, counsel. I know that Corrections does not like to mix credit and sentences with different units, that is months and days. So let me transparently do my calculation and counsel can tell me if they have any concerns about the accuracy of it. If we use 365 days for a year, divide that by 12, on average we have what I will call 30.4 days per month. Three years and eight months is 44 months, which by my arithmetic translates to 1,337.6 days, which I will round to 1,337. If I subtract 759 days, I think the correct number is 578 days. I invite counsel to check my arithmetic to make sure that I have not inadvertently articulated a number that is inconsistent with my conclusion.
- [30] While counsel do that, I will impose a period of probation of 24 months to follow. The terms of probation, Madam Clerk, just so you have them, are as outlined in the presentence report. For each of those, the author helpfully included reference to the standard picklist numbers. I will, however, articulate those as I view it necessary and appropriate to do so for Mr. Babiy's benefit and for the record. They are as follows:
- Item 2104: You must report in person to a probation officer at 3101 29 Avenue, Vernon - I will modify it slightly, I am going to say with 72 hours of your release from custody - that allows for if he happens to be released on a Friday - unless you have obtained before your release from custody written permission from the probation officer to report elsewhere or within a different timeframe. After that you must report as directed by your officer.
 - Item 2203: You must live at an address approved in advance by your probation officer and provide them with your phone number. You must not change your address or phone number without written permission of your officer.
 - Item 2209-1 and 1A: You must obey a curfew of being inside your approved residence, and -- counsel, I propose to impose one timeframe for the first 12 months and a second timeframe for the second 12 months of the probation order. For the first 12 months it will be between 9:00 p.m.

and 6:00 a.m. daily. For the second 12 months, it will be between midnight and 6:00 a.m. daily. During your curfew, you must present yourself immediately at the door of your residence or answer the phone when any peace officer or probation officer attends or calls to check on you during your curfew.

You may be away from your residence during the curfew with the written permission of your probation officer. Such permission is to be given only for employment or other compelling reasons. You must carry the permission with you when you are outside of your residence during your curfew. While at or going to or returning directly from a healthcare facility because of a medical emergency. If asked you must provide your probation officer with proof of your attendance at the facility.

- Item 2501: You must attend, participate in and complete any intake, assessment, counselling, or education program as directed by your probation officer.

- Item 2610: You must not possess directly or indirectly any weapon as defined by the Criminal Code, including firearms and ammunition; crossbows, prohibited or restricted weapons or devices, or explosive substances; anything used, designed to be used, or intended for use in causing death or injury to any person, or to threaten or intimidate any person; any imitation of all of the above including any compressed air guns or BB/pellet guns; or any related authorizations, licences and registration certificates and you must not apply for any of these.

[31] I will add one further term, and I am sorry I do not have the number from within the picklist, but it is a requirement that you not have any contact, direct or indirect, with Lorne Ryan.

[32] I will make an order that you provide a sample suitable for registration with the DNA databank to be provided as directed by the Corrections staff.

[33] I will also make an order pursuant to s. 109 for a lifetime firearms prohibition.

[34] Now, have I failed or neglected to address any issues, counsel?

[35] CNSL T. ZANATTA: Just with regard to the curfew, did Your Honour include "or on its lot"? I am just thinking if Mr. Babiy is a smoker, and I did not canvass that with him ahead of time.

[36] THE COURT: I am only hesitating because there are a number of different residential scenarios that might arise --

[37] CNSL T. ZANATTA: Of course.

[38] THE COURT: -- such as a condominium or an apartment complex or something of that sort. No, I am content that it be within the boundaries of the property in which he is resident.

[39] CNSL T. ZANATTA: Thank you.

[40] THE COURT: Anything else?

- [41] CNSL L. MCPHEETERS: It is not something that Your Lordship has neglected, but I have turned my mind to a forfeiture order. I have not drafted one but I do seek forfeiture of the gun, and if Your Lordship agrees that that would be reasonable I will draft it and send it to Ms. Benson for your signature.
- [42] CNSL T. ZANATTA: I take no issue with that.
- [43] THE COURT: I would make that order.
- [44] CNSL L. MCPHEETERS: Thank you.
- [45] THE COURT: All right. Mr. Babiy, I hope --
- [46] THE ACCUSED: Yes, sir.
- [47] THE COURT: -- that this can be the last time you have to be in that environment appearing before a judge. If all of what you have said and what you have done is sincere, and it will not be without its challenges, and hopefully the probation order that follows your release will help you with that, you will be able to find a way to a much more productive lifestyle and not be spending all of your time in a jail cell.
- [48] THE ACCUSED: Yes, sir, I understand.
- [49] THE COURT: So I wish you luck, sir.
- [50] THE ACCUSED: Thank you so much.
- [51] THE COURT: Anything else, counsel?
- [52] CNSL L. MCPHEETERS: Your Lordship said a number, which I instantly forgot as I was doing my math. What was the number you came up with?
- [53] THE COURT: I hope I wrote it down, 578.
- [54] CNSL L. MCPHEETERS: Excellent, that is the number I have, as well.
- [55] THE COURT: All right.
- [56] CNSL T. ZANATTA: As do I.
- [57] THE COURT: All right. Thank you.
- [58] CNSL L. MCPHEETERS: Thank you, My Lord.
- [59] CNSL T. ZANATTA: Thank you, My Lord.
- [60] THE ACCUSED: Thank you.
- [61] CNSL L. MCPHEETERS: Oh. My Lord, I failed to direct a stay of proceedings on the other counts, and I do that.
- [62] THE COURT: All right. Thank you.

"Betton J."

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