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CANADA / JUDGMENT

## R. v. Bailey

2021 BCSC 381

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COURT

Supreme Court of British Columbia

DECIDED

15 January 2021

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2021 BCSC 381 R. v. Bailey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bailey,

2021 BCSC 381

Date: 20210115

Docket: 68911-2

Registry: Chilliwack

Regina

v.

Darcy Peter Bailey

Before: The Honourable Mr. Justice Crabtree

Oral Reasons for Sentence

Counsel for the Crown, appearing by teleconference:

S. Authier

Counsel for the Accused, appearing by teleconference:

A.H. Zipp

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

January 4, 2021

Place and Date of Judgment:

Chilliwack, B.C.

**January 15, 2021**

- [1] THE COURT: Following the trial, Mr. Bailey was convicted of Count 3 of Indictment 68911-2, that on July 22, 2017, near Abbotsford, in the Province of British Columbia, he possessed a restricted firearm, to wit: a modified Heckler and Koch flare gun, without being the holder of a licence or registration certificate, which is an offence contrary to s. 91(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The circumstances that resulted in Mr. Bailey being convicted are as follows. I will pause here, to say that they are more fully set out in my oral reasons provided on December 4, 2020. I will simply highlight some of the circumstances, as they are relevant to the sentencing to which the court is called upon to pronounce today.
- [3] At the outset, I will add that in the event that the reasons are transcribed, I reserve the right to edit them, not as to content but only as to form.
- [4] Mr. Bailey travelled to Sumas (in the United States) from Abbotsford, on the date in question, to pick up a part for his Sea-Doo. On his return to Canada, an hour or so later, he was stopped for an unrelated matter. This ultimately resulted in the search of his vehicle, and border officials finding a pelican case containing the modified flare gun.
- [5] The flare gun was found to be a firearm, by virtue of a metal insert located in the barrel. With the insert in place, the item was able to discharge ammunition. Ammunition was located in the case where the flare gun was found. The pelican case was locked, at the time it was discovered.
- [6] I pause to say for the record, that in the summary at the end of my reasons for conviction, I state the flare gun was located or found in the trailer. However, in the body of the decision, I stated the flare gun was discovered in the back of the pickup truck Mr. Bailey was operating. In the event that those reasons are transcribed, I will amend the summary to reflect the finding set out in the body of the reasons.
- [7] As I have said, the flare gun was located in a locked case with the metal cylinder in the barrel, and a number of pieces of ammunition included in that case.
- [8] I found that while Mr. Bailey was in possession of that item, I also found that there was no intention on his part to use it as a firearm; and he had not previously used it as a firearm.
- [9] The Crown and defence differ on whether the circumstances, ought to be characterised as aggravating or not. Counsel's position with respect to sentencing is to a large degree driven by their respective views of the circumstances.

- [10] In total, the Crown submits a period of incarceration is warranted in the range of 8½ months. It is noted that Mr. Bailey had previously spent 170 days on pre-trial detention in connection with this matter, which equates to, at least on the last date we appeared, 255 days (when credit is given at 1.5 days for each day spent in such status of pre-trial detention).
- [11] The defence submits the court should view the circumstances as falling on the regulatory end of the range; and on that basis, it is open for the court to consider various different sentencing options, including a discharge, a suspended sentence, a fine, or a conditional sentence order.
- [12] Each counsel helpfully set out the relevant principles of sentencing which include, but are not specifically limited to, denunciation and deterrence.
- [13] Mr. Bailey has a criminal record, which I would describe as minor and extremely dated. He was convicted of mischief in 1991 and failing to comply with a probation order in 1992. For the purposes of these proceedings, given that approximately 30 years has passed since these convictions, while it is not 100% accurate to say that Mr. Bailey comes before the court with no criminal record, it is minor and extremely dated, which is a significant factor in his sentencing on this matter. There was a Pre-Sentence Report (PSR) prepared in connection with an unrelated matter. I will make brief reference to it, because it sets out in considerable detail Mr. Bailey's background.
- [14] Just to highlight, Mr. Bailey is a graduate of the University of British Columbia. He was engaged, early on, in a relationship of which there was one child. That relationship ended, when the child was approximately five years of age. What I note from the author of the PSR is that Mr. Bailey has remained a significant and important feature in that young person's life; and that obviously is of great benefit to his daughter, but also speaks to Mr. Bailey's character.
- [15] Mr. Bailey worked first in the lumber industry, and then in the oil and gas field. The PSR indicates he was diligent and hard-working in the various employment opportunities he pursued. He suffered injuries in a motor vehicle accident, which unfortunately resulted in his becoming addicted to prescription medication.
- [16] This appears to have caused, in part, a downward spiral in Mr. Bailey's life, for a period of time. After the breakdown of his first relationship, he went on to form a new relationship. In 2008, he moved to Fort St. John where he worked in the oil and gas industry, for a period of time. It appears, in about 2014, the addiction to prescription medication manifested itself and brought about the deterioration of the relationship and the ultimate breakdown of the marriage. Mr. Bailey then entered into a five-year period of instability due to these issues.
- [17] Mr. Bailey has the support of family. While it is indicated that his parents are suffering from some health issues, they remain supportive of him and are obviously prepared to assist in Mr. Bailey's reintegration into the community, and return to a more regularised lifestyle.

- [18] I do not propose to say much more from the PSR. The report was prepared in connection with another matter, which occurred after this event and resulted in Mr. Bailey being sentenced to a period of incarceration. While I have not been advised of the length of sentence, I am told it is a lengthy sentence at a federal institution. That is a relevant factor in my mind, when considering the appropriate disposition of this matter.
- [19] In terms of the sentencing framework, I will say briefly that the principles of sentencing have evolved in the common law and as codified in Part XXIII of the Criminal Code. Very briefly, s. 718 of the Criminal Code provides that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. As set out in s. 718, the objectives of sentencing include the denunciation of unlawful conduct, deterrence of the offender and others from committing further offences, separation of the offender from society where necessary, rehabilitation of the offender, reparation for harm done, and promotion of a sense of responsibility in the offender, including acknowledgment of the harm.
- [20] Section 718.1 articulates the most basic principle of sentencing, namely that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [21] Section 718.2 sets out a number of specific sentencing principles, which include that a sentence should be similar to sentences imposed on similar offenders for similar offences in similar circumstances. An offender should not be deprived of liberty if a less restrictive sanction is appropriate. All reasonable sanctions, other than imprisonment, should be considered if they are reasonable and consistent with the harm done. Where consecutive sentences are imposed, the total sentence should not be unduly long or harsh. A sentence should be increased or reduced to take into account any aggravating or mitigating circumstances.
- [22] In the course of counsel's submissions, counsel relied on a number of authorities which were very helpful in setting out the general context of the offence to which Mr. Bailey has been convicted, under s. 91(1) of the Criminal Code. Some cases discuss the sentences that have been imposed with respect to this particular section.
- [23] Counsel acknowledged that they were not able to locate a case which is on all fours with, or directly relevant to, the one before the court. But the cases provided give helpful guidance in terms of considering the matter. I was told that s. 91(1) has a maximum sentence of five years and that there is no minimum penalty. Five years reflects the fact that this is a serious matter. The available range of sentence that can be imposed could be found on a spectrum starting with a discharge, a suspended sentence, a fine, or a period of incarceration.
- [24] Parliament and the courts have emphasised that sentences for firearm offences must reflect their very serious nature. In *R. v. Guha*, 2012 BCCA 423, a decision of our Court of Appeal at paras. 29-30, the Court states:

- [29] This Court has also proffered the view that sentences for firearm-related offences must reflect their very serious and dangerous nature .
- [30] In short, firearms, and in particular handguns, are extremely dangerous when possessed for an illicit purpose. That purpose can only be to threaten or inflict serious bodily harm or death. Sentences for these types of offences must reflect society's absolute rejection of such unacceptable conduct. [Internal citations omitted.]
- [25] R. v. Nur, 2015 SCC 15 [Nur], a decision of the Supreme Court of Canada, is a case dealing with s. 95(1) of the Criminal Code. The decision is helpful in that the Court sets out the wide range of potential conduct that is covered by these particular offences. In brief, the range is from a type of regulatory transgression or circumstance, all the way to a much more serious criminal circumstance.
- [26] In fact, the Supreme Court of Canada in Nur (at para. 82) set out the range of sentence for an offence pursuant to s. 95(1). I will read a short passage to reflect that spectrum or the range:
- [82] Section 95(1) casts its net over a wide range of potential conduct. Most cases within the range may well merit a sentence of three years or more, but conduct at the far end of the range may not. At one end of the range, as Doherty J.A. observed, "stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade . [T]his person is engaged in truly criminal conduct and poses a real and immediate danger to the public" . At this end of the range -- indeed for the vast majority of offences -- a three-year sentence may be appropriate. A little further along the spectrum stands the person whose conduct is less serious and poses less danger; for these offenders three years' imprisonment may be disproportionate, but not grossly so. At the far end of the range, stands the licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored. For this offender, a three-year sentence is grossly disproportionate to the sentence the conduct would otherwise merit under the sentencing provisions of the Criminal Code.
- [27] The Court goes on to talk about the specifics of that case in para. 83, which I will not read, but was referred to during the course of the sentencing proceeding.
- [28] Having reviewed Nur, and the discussion as set out in the decision of our Court of Appeal in R. v. Holt, 2015 BCCA 302, the bottom end of the range for true crime, absent extraordinary circumstances, is approximately 30 to 36 months. Where does this case fall within the spectrum? In my view, it falls within the regulatory range as counsel have suggested. That range, to go back to the comments of the Supreme Court of Canada in Nur, is more akin to the law-abiding gun owner who fails to obtain a proper registration or licence, in part because of a view that this particular item did not need to be registered.
- [29] In my view, this shifts the sentencing paradigm to one which would open up the possibility of a sentence of a discharge, a suspended sentence, a fine, or a period of incarceration at the low end. Here, when I reference the low end of the range, I do not mean the low end of the

30 to 36 months, but I mean a short period of incarceration. How I have identified these options and what guides my ultimate determination are the cases referred to during submissions. I am mindful that counsel reviewed a large number of cases. I will review some now, but have considered them all.

- [30] *R. v. Devink*, 2016 BCSC 1658, a decision of our court, was a circumstance in which a person, a paraplegic, kept a gun for his own protection. He was found with a loaded restricted handgun contrary to s. 95(2) of the Criminal Code. The individual had no previous record. He was sentenced to a 12-month conditional sentence order.
- [31] In *R. v. Eagan*, 2014 ONCJ 260, a decision of the Ontario Court of Justice, Mr. Eagan had no record and entered a guilty plea. During the course of a search warrant, he was found to be in possession of a rifle, a shotgun. He was 59 years of age and he was unaware a permit was required. He was granted an absolute discharge and a victim surcharge of \$1,500.
- [32] In *R. v. Haus*, 2016 BCPC 11, Mr. Haus had no record, and was operating a bakery. As a result of a police attendance, he was found in possession of a number of weapons and ammunition. This was a hobby to him. There was no criminal purpose associated with his possession. The Court focused on the more technical aspect, or regulatory aspect, of Mr. Haus's transgression. He was sentenced to a period of six months on a conditional sentence order.
- [33] In *R. v. Kurkcuoglu*, 2010 BCSC 633, a jewellery store owner was in possession of a loaded prohibited firearm. He used that weapon to resist three individuals who were robbing his store. He was fined initially but, on appeal, granted a conditional discharge.
- [34] *R. v. Sears*, 2016 BCSC 965, involved possession of an unloaded firearm, in which the individual threatened to kill himself; so, to use the weapon on himself. He was sentenced to a 25-month conditional sentence order.
- [35] These cases demonstrate the range that Crown concedes, and that Mr. Zipp referred to.
- [36] In my view, the mitigating factors I take into account in this context are that Mr. Bailey has a dated and unrelated record; and I am to treat him in more or less the same position as a person who appears before the court with no record. He cooperated with the investigation, in that he provided a statement.
- [37] Mr. Bailey's previous work history and his support in the community are factors which I also take into account. I further take into account that this event occurred within the context of a period of time in Mr. Bailey's life when he was experiencing a downward spiral, as a result of an addiction issue initially brought about by injuries suffered in a motor vehicle accident.
- [38] As the Crown notes, this involves an item that falls within the definition in the Criminal Code as a firearm. The fact that the item, albeit described as a flare gun, was modified, inherently dangerous, and located with ammunition in close proximity.

- [39] When I consider what the appropriate disposition is, Mr. Bailey, I first turn to all of those sentencing options that were raised by your counsel. I am not convinced in this case that a conditional discharge is appropriate. In saying that, I do not disagree that a conditional discharge may be in your best interests in the general sense, but in terms of considering the applicability of the test as to whether or not to grant a discharge, I do not see that once I go beyond the general sense of it being in your best interests, the specific interest or benefit that occurs. Here, there is insufficient evidence to find that it is in your best interests and not contrary to the public interest.
- [40] That said, the circumstances are unique. You had that item in your possession for the purpose of using that device if you encountered difficulty, to signal distress or an emergency when you were on your Sea-Doo. I have already commented that you had never fired the device using ammunition and it was in a locked case. While it was located in a part of your vehicle that was accessible by the public, it was not in plain view. I am also mindful that it was found at the border, but this is not a case similar to other cases that have been referred to where an individual was importing firearms into Canada. The circumstances were that item was in your vehicle, you went to Sumas to pick up a part for your Sea-Doo, and you returned an hour later.
- [41] In all of these circumstances, had you the ability to pay a fine, I would have considered this option more seriously. While your counsel suggested that a suspended sentence is an option, I am not clear that it is in these circumstances. Further, your counsel submitted that I could consider a conditional sentence order, but given your current situation and having read the provisions of the Criminal Code I was referred to, I am not satisfied, at least on that material, that it is open to the court.
- [42] I have concluded that the appropriate penalty is a period of incarceration, recognising the principles of sentence including denunciation (to the public) given the serious nature of the offence; and deterrence, particularly general deterrence, not specific deterrence to you. It is also recognised that consideration should be given to rehabilitation. Taking the foregoing into account, the appropriate sentence in these circumstances, Mr. Bailey, is to impose a brief period of incarceration. The appropriate period is two months.
- [43] Because you have spent time in custody, I am essentially taking 40 of those days that you spent in custody, applying the 1.5 credit that you are entitled to, which then equates to a 60-day sentence, and the sentence, because you have served that time already, will simply reflect on your record a sentence of one day and 40 days' time served.
- [44] In addition, I am required to impose a 10-year weapons prohibition pursuant to the provisions of s. 110 of the Criminal Code. That order will be prepared and provided to you in writing. I will return to the wording of that in a moment.

- [45] Given your circumstance, and subject to any comment by counsel with respect to the victim surcharge, I propose that it be waived. I will give the Crown an opportunity, if they wish to say anything about that, and I will pause here to do that.
- [46] MR. AUTHIER: Thank you, My Lord. No, I don't have any comment, I think in - the current situation is that we are going to waive the victim surcharge.
- [47] MR. ZIPP: And I agree, of course.
- [48] THE COURT: Thank you. In terms of the wording of the s. 110, which is the discretionary prohibition order, it is set out in 110(1). Actually, can I just - is it the discretionary or the mandatory?
- [49] MR. AUTHIER: I believe 91 is discretionary. Actually, if I could have one moment?
- [50] THE COURT: Yes. I ask because s. 109 is the mandatory provision and it makes specific reference to s. 95(1), whereas s. 110 is the discretionary one.
- [51] MR. AUTHIER: Yes, it is under s. 110, it's for 91 - it's under s. 91, I think, because it's a maximum of five years, I think it's under the discretionary one.
- [52] THE COURT: Sorry, I may have - yes, all right. So it is s. 110. Mr. Zipp, anything you wish to say?
- [53] MR. ZIPP: Well, My Lord, it's anticipated that Mr. Bailey, upon his release, will probably want to go back to a northern community. The PSR outlined his - I believe it outlined his history hunting. Not only did he hunt, but he was also a guide, so the use of firearms is absolutely something that is mandatory in a hunting situation. I would argue that he does not need a firearms prohibition. As Your Lordship has noted, this was more at the regulatory end, and so I would argue against that.
- [54] THE COURT: Am I correct in thinking that the maximum period is 10 years and so that that leaves open the possibility of imposing any period of time up to 10 years?
- [55] MR. AUTHIER: You're correct, My Lord, I think on the first offence it is a maximum of 10 years but it could be less, and on a subsequent 110 it's a - it's a mandatory prohibition.
- [56] THE COURT: All right, so -
- [57] MR. AUTHIER: Just [indiscernible]
- [58] THE COURT: I appreciate there were not submissions on the last date on this, other than Crown had raised this as one aspect of sentencing. I have heard from Mr. Zipp, so before we get too far down this road then, I will ask Mr. Authier if there is anything he wishes to say.
- [59] MR. AUTHIER: Yes, thank you, My Lord. I think, while I appreciate that Mr. Bailey might want to hunt instead of a hobby, it is not something that is necessary for his survival. Because he has been convicted of an offence related to a firearm, which again, a handgun, I think part of the denunciation and deterrence is met by having those orders put on the

individual. And I would submit that perhaps he might not need 10 years, but I think five years at least for a weapons prohibition will be appropriate. And my-I appreciate also the time when he will be incarcerated, so the impact on whether he could hunt or not would be minimal, but I think in order to address denunciation and deterrence, I think a weapons prohibition ought to be ordered in this situation.

[60] THE COURT: All right. And finally, Mr. Zipp, and I appreciate we have done this a little bit backwards, but I will give you the last word.

[61] MR. ZIPP: Thank you, My Lord. So I am aware of Mr. Bailey's current status. However, life in the North is materially different from Southern British Columbia, and I can say that having resided in both places. I reside in Quesnel, which is not even halfway up the province. However, on the property where I have my horses, every spring there are five or six bears, and from time to time, they just apparently pop out of the bush and I don't know what's going to happen to me. If I've got my dog with me, that makes it even more problematic. Now, I am aware that's not Mr. Bailey's current situation, but I anticipate that with his perspective, he will probably go back to Northern British Columbia, and life in the northern part of the province, so that's even further north than Quesnel, like Fort St. John-I deal with black bears. There are grizzlies up there and they're not nearly as accommodating or negotiable as black bears are. In addition to that, there's cougar, any number of other critters that their idea of an encounter with a human is dinner. So it takes on a different perspective.

[62] Now, I can appreciate my friend's remarks that while he is in custody, a firearms prohibition is not going to have any effect upon him, but it will have an effect if he applies for a possession and acquisition licence, because the Chief Firearms Officer will take that into account. In addition to that, if there are ever any other further firearms matters, even if it is only on the basis of a conservation officer coming upon Mr. Bailey, that will also have an impact upon him.

[63] So I appreciate my friend's remarks and for someone living in the Lower Mainland, they are undoubtedly appropriate, but the rest of the province has a completely different situation. I apologise for making biographical remarks about this, but that's the best way that I can draw a picture for Your Lordship of the conditions north of Hope. Thank you, My Lord.

[64] THE COURT: Thank you. So dealing with the issue of the Crown's application for a discretionary prohibition order pursuant to the provisions of s. 110, I am guided by the very helpful submissions of both counsel in this regard, as it is not a cut-and-dry matter.

[65] When I reflect upon Mr. Bailey's background, including the material set out in the PSR, the circumstances giving rise to this particular offence, and the various findings that I have made in connection with those circumstances, I am persuaded, at the end of the day, not to make a prohibition order in this circumstance. I do so having carefully considered all of the events and circumstances that took place on the date in question and Mr. Bailey's background, to the circumstances as to how he acquired this device in the first place.

- [66] There will be no prohibition imposed in this circumstance.
- [67] Now, does that address matters, Mr. Authier?
- [68] MR. AUTHIER: I think [indiscernible] be the fact that this offence is a secondary designated DNA offence?
- [69] THE COURT: Yes.
- [70] MR. AUTHIER: And so [indiscernible] Your Lordship to order that, a DNA order?
- [71] THE COURT: Thank you. Well, it is a secondary designated offence. I am mindful of the test that the court must take into account. I am satisfied, bearing in mind the circumstances, that it is appropriate that order be made in this circumstance and that is pursuant to the section which I have, subject to confirmation by Crown. Is it s. 491? Just give me a moment.
- [72] MR. AUTHIER: [Indiscernible] and s. 487.
- [73] THE COURT: Thank you. So Mr. Bailey, what will transpire is, is that a sample, a mouth swab, will be taken of your DNA for registration in the DNA Data Bank in Ottawa, Ontario. That will be done at some point, at your convenience, in the location where you are, so I do not believe I need to specify a date or time in which Mr. Bailey needs to show up.
- [74] THE ACCUSED (BY VIDEOCONFERENCE): I'm sorry to interrupt, I believe we've lost Mr. Zipp.
- [75] THE COURT: All right. I am sorry, Mr. Bailey, we will get Mr. Zipp back or we will wait for him to return.
- [76] Do we have a means of-
- [77] THE CLERK: No, he has to-
- [78] THE COURT: -phoning Mr. Zipp?
- [79] MR. AUTHIER: I can provide his phone number, I believe I have it.
- [80] THE CLERK: Then he wouldn't be on MS Teams.
- [81] THE COURT: No, but he may not know what's happened. Mr. Authier, can you phone Mr. Zipp? Can I impose upon you?
- [82] MR. AUTHIER: Yes, I could, certainly.
- [83] THE COURT: Just to let him know he needs to reconnect.
- [84] MR. AUTHIER: If I could have one moment and I'll-
- [85] THE COURT: Thank you.
- [86] THE ACCUSED: If it may assist the court, I know Mr. Zipp's phone number off the top of my head.

- [87] MR. AUTHIER: If you could provide that [indiscernible]-
- [88] THE COURT: Go ahead, sir.
- [89] THE ACCUSED: [Phone number redacted.]
- [90] THE COURT: Thank you, Mr. Bailey.
- [91] THE CLERK: Do you want me just to try phoning him?
- [92] THE COURT: I think Mr. Authier is speaking to him.
- [93] MR. AUTHIER: I just got his voice mail. I left a voice mail to see if he is able to connect. I could send him an email, as well, if he's-
- [94] THE COURT: All right.
- [95] MR. AUTHIER: -- able [indiscernible] that.
- [96] THE COURT: There we are.
- [97] MR. ZIPP: Hello. Yes, I'm sorry, My Lord. There was a brief power outage and my Internet had to reset. My apologies.
- [98] THE COURT: No, no apologies necessary. I am not sure at what point you left us, but I believe it was when we were addressing the issue of the DNA order pursuant to the secondary or discretionary aspect and-
- [99] MR. ZIPP: Yes.
- [100] THE COURT: After considering the factors that are set out in s. 487.051(3), I am satisfied that it is in the best interests in the administration of justice to make an order in the appropriate form authorising the taking of a bodily sample from Mr. Bailey for the purpose of registration in the National DNA Data Bank. I will leave it to the authorities to address that and do not impose setting out a time. As he is in custody, the sample will be taken from him while he is there.
- [101] Now, Mr. Authier, I believe that concludes the sentencing hearing, but just in case there is anything else that needs to be addressed, anything from you?
- [102] MR. AUTHIER: No, My Lord, thank you.
- [103] THE COURT: All right. Mr. Zipp?
- [104] MR. ZIPP: No, thank you, My Lord.
- [105] THE COURT: All right, thank you. Mr. Bailey, sir, thank you for your attendance here in this forum today and good luck to you, sir.
- [106] THE ACCUSED: Thank you, My Lord. Thank you again for letting me appear by video.
- [107] THE COURT: Thank you. All right, we are adjourned then.

"T.J. Crabtree J."

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