

CANADA / JUDGMENT

R. v. Bingley

2020 BCSC 2218

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bingley,

2020 BCSC 2218

Date: 20200724

Docket: 175006-2

Registry: Victoria

Regina

v.

Bryden Jim Bingley

Shane George Wilson

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Corrected Judgment: The cover page of the judgment was corrected on December 15, 2021

Before: The Honourable Mr. Justice A. Saunders

(Appearance via videoconference)

Oral Reasons for Sentence re Shane George Wilson

Counsel for the Crown

(Appearing by teleconference):

P. Donnachie

Counsel for the Accused:

M. Swartz

Place and Date of Trial/Hearing:

Victoria, B.C.

July 24, 2020

Place and Date of Judgment:

Victoria, B.C.

July 24, 2020

- [1] THE COURT: Shane George Wilson is before me for sentencing having pleaded guilty on January 30, 2020, to Counts 2, 3, and 6 on the indictment, being, respectively charges of unlawfully being in a dwelling house, contrary to s. 349(10) of the Criminal Code; robbery, contrary to s. 343; and having his face masked, contrary to s. 351(2).
- [2] The circumstances of the offences are set out in the Agreed Statement of Facts, as follows, with the victim identified as "A.B." pursuant to a publication ban, and with the specifics of the location being deleted:
1. On July 13, 2018 at about 4:30 in the morning, A.B. phoned 911 saying that he was being robbed by 3 males, that they were still in his apartment, and asking the police to hurry.
 2. Police arrived in short order and cleared the apartment but only A.B. and Andreanna Cook ("Cook") remained. A.B. appeared to be in shock and nervous. A.B. and Cook spoke to the police that evening and A.B. provided the police with video from his NEST security system.
 3. A.B. told the police that he had been celebrating his birthday with friends when a masked man, dressed in camouflage and carrying a bowie knife entered the apartment. The mask was described as red, with two gaping eyeholes, and the word "Support" in writing between the eyes. A.B. recognized this as a Hell's Angel's Support garment.
 4. The masked man was subsequently identified by A.B., though not definitively, and by Cst. Kale Howe as Shane Wilson ("Wilson").

5. When first approached by A.B., Wilson pointed to a male that A.B. did not know [subsequently identified as Julio Alvarez, ("Alvarez")] who had entered the apartment before Wilson and was already in the living room. Wilson told A.B. to deal with Alvarez. Wilson stood at the door with his bowie knife.
6. Alvarez told A.B. that his sister had died of an overdose and that he had discovered that A.B. had sold her the drugs that killed her. Further, that they were there to collect money for her funeral. Alvarez appeared to be under the influence of drugs and was carrying an imitation gun in his waistband.
7. A.B. tried to convince Alvarez that he did not sell drugs and that he had not sold drugs to his friend who had overdosed. Alvarez insisted otherwise and went into A.B.'s bedroom in an effort to find valuables. Some of A.B.'s female friends were in his bedroom. A.B. continued to try and persuade Alvarez that he did not sell drugs and that he had no money or valuables. At one point, a male friend of A.B.'s who had been in the living room entered the bedroom room with an imitation gun that A.B. had in the living room. Alvarez pulled his imitation gun out of his waistband, pointed it at the head of the male friend of A.B., threatened the other people in the room with it and then told them to get down. Some of them did get to the ground. Others tried to calm the situation down, console Alvarez, and stop him from going through A.B.'s things. Alvarez continued to hold the imitation gun in his hand.
8. A.B. continued to try and convince both Alvarez and Wilson, who had now come to the door of the bedroom, that he had not sold drugs to their friend. This went on for about 10 more minutes with Alvarez continuing to look for valuables and demanding money for the funeral. Then Wilson told Alvarez it was time to leave and they left.
9. Throughout most of this attendance, Wilson remained in the front doorway. At some points he can be heard to tell the other party goers to go sit down in the front room and they comply.
10. About 2 hours later an unmasked Wilson returned to the apartment and followed others in through the secure front door and A.B.'s apartment door behind one of A.B.'s birthday party guests. A.B. previously knew Wilson through a mutual friend and had spent one evening with Wilson and this friend in the month or so leading up to this date. A.B. was aware Wilson had a reputation in the community, which led him to be afraid of him; A.B. was aware that Wilson was a MMA fighter. A.B. believed that Wilson was the masked man from earlier because of his voice, his stance, the tattoos on his hands, and the tattoos he was able to see around his eyes where the mask was gaping.
11. Wilson asked to speak with A.B. in private. A.B. reluctantly obliged out of fear. Wilson explained to A.B.:
 - (a) That he was aware that two people had been there earlier about a friend who had overdosed;

- (b) That he knew these people and that they asked him to arrange a meeting between A.B. and themselves so they could "clear the air"; and
 - (c) That they just wanted to talk and that there would be no weapons involved.
12. A.B. reluctantly agreed to talk to Wilson's friends although he believed that Wilson had been the masked individual who had been at his apartment earlier. Wilson made a phone call. Within minutes Alvarez returned. This time he was with a third male. A.B. did not know this male, but he was subsequently identified as Bryden Jim Bingley ("Bingley"). Alvarez still had the imitation gun in his waistband. Bingley was armed with a knife.
13. Almost immediately Bingley became aggressive. He wanted to know who owned the apartment. When A.B. stepped forward, he introduced himself to A.B. and asked him if he knows about the wolf pack from Vancouver and then said that he is from the wolf pack, that he was woken up in the night, that he wants matters settled, and that if it isn't settled he will bring over other "bros" to deal with it.
14. Bingley then told the other party goers to stay in the living room. He locked the door. He brandished the knife, paced back and forth, raised his voice and said things like:
- (a) That they were there to "tax" somebody;
 - (b) That he represents his people;
 - (c) That they know A.B. sold the drugs;
 - (d) That he is there to supervise;
 - (e) That he wants the money now; and
 - (f) That he wants \$4000 for the funeral.
15. Initially Bingley remained at the front door pacing and threatening the party goers and A.B. Alvarez and Wilson continued to speak with A.B. to get his cooperation and money. At one point while this was taking place a male named Todd Crowther ("Crowther") got too close to Bingley and Bingley sucker punched him right back into the living room. Bingley then told Crowther that his brothers are outside and that they will not win against him. Bingley demanded that A.B. give them \$4000. A.B. took the money he had out of his wallet and gave it to Bingley.
16. Bingley then moved into A.B.'s bedroom where Alvarez and Wilson were trying to get A.B. to open his safes. Bingley demanded that A.B. open his safes. When A.B. was struggling with one of the safes, Bingley threatened to "shank" A.B. if A.B. didn't open his safe.
17. A.B. opened his safe. In the meantime, Alvarez was going through A.B.'s other safe, his cupboards, and his drawers. Alvarez collected some electronics, two air soft guns A.B. had in boxes in his closet, and about \$4000 American that A.B. had in an envelope in his safe.

18. As all this was taking place, Wilson was lying on the bed with his hands behind his head watching while Bingley and Alvarez demanded money from A.B., demanded that he open his safe, rifled through his belongings, or threatened to stab him.
19. At some point just before their departure A.B. was able to call 911 and advise police that he was being robbed by three males. Alvarez and Bingley left shortly after this. Alvarez's arms were full of the items he had taken.
20. Wilson left shortly after Bingley and Alvarez through the same side door from which they had fled.
21. A.B. had a NEST security system in his apartment which captured both episodes. This footage was provided to the police. There were also surveillance cameras at the doors and in the hallways of the apartment building that captured people entering and exiting the building.
22. Bingley, Alvarez and Wilson were identified in these videos by police officers who were very familiar with them. Bingley and Alvarez were also identified in photo lineups by A.B.
23. A camouflage jacket like that worn by the masked man was discovered nearby on the galloping goose trail. DNA on the neck and sleeve of this jacket was matched to the DNA of Wilson. This camouflage jacket was also compared to the camouflage jacket worn by the masked man captured on video at A.B.'s house. These jackets shared many similar characteristics.
24. Alvarez was arrested at 74 Norquay Road just before midnight on July 13, 2018, that same day. The police executed a search warrant and discovered, amongst other items, the following:
 - (a) Mail addressed to Wilson and Alvarez at the Norquay address;
 - (b) Camouflage pants;
 - (c) A red Nanaimo Hell's Angel's "support" shirt with one sleeve missing;
 - (d) Knives; and
 - (e) Rifles and imitation firearms.
- [3] To briefly supplement those agreed facts, the folding-style knife brandished by Mr. Wilson on his first attendance at A.B.'s apartment that evening when he was in disguise is seen in the videos in evidence as having had a blade about six to eight inches in length. With respect to paragraph 10 of the Agreed Statement of Facts, I would note that A.B.'s evidence at Bingley's trial was that his conclusion that the masked individual was, in fact, Mr. Wilson was only formed later in the evening when Mr. Wilson's tattoos were pointed out by a police officer on viewing the video. I would also note in respect of paragraph 12 that initially Bingley had the knife in his pocket. Bingley only brandished the knife after his assault of A.B. Those are simply details and do not weigh in any respect on my determination of

sentence.

- [4] Alvarez and Bingley have already been sentenced. Alvarez re-elected on January 6, 2020, to trial before a Provincial Court judge, and he subsequently pleaded guilty. He was sentenced to four years concurrently on each of the robbery and dwelling house counts and an additional consecutive year on a separate charge of using an imitation firearm. Bingley and Wilson were to have stood trial before me, a trial by judge and jury. The trial commenced on January 27th of this year with a number of applications. Mr. Wilson entered a guilty plea on January 30th, just before the jury was to be put in charge. Bingley stood trial and was convicted on February 12th.
- [5] On July 2nd of this year, I sentenced Bingley. He received an effective sentence, before credit for time served, of five years in respect of the robbery and dwelling house charges.
- [6] In respect of Mr. Wilson, the Crown's position is that a fit sentence before credit for time served would be four years on the robbery offence, a slightly lower concurrent sentence on the dwelling house count, and a sentence in the range of eight to 12 months on the masking offence. The defence contends for a sentence of three years on the robbery, two years on the dwelling house, and 12 months on the wearing of the mask.
- [7] I will turn now to discuss the factors that go into sentencing Mr. Wilson in particular. Before I do, just so that I do not forget this administrative matter, in respect of the ancillary orders, I am making an order that Mr. Wilson provide DNA samples under s. 487.051(1). I am also ordering a lifetime weapons prohibition under s. 109.
- [8] Now, the Criminal Code provides that a just sentence is one which meets one or more of several specific objectives laid out in the Criminal Code. These objectives can include things such as rehabilitation, making reparations to victims and to society, and also promotion of a sense of responsibility, and acknowledgment of harm caused to the victim and to the community. However, in the case of violent crimes including, in particular, crimes perpetrated through violating the safety and security of the victim's residence, the principal objectives are denunciation and deterrence; this is reflected in the sentences given in what are styled commonly as home-invasion-type cases. These generally lead to a range of sentencing of six to 13 years depending on the degree of violence, the nature of the offences, and the extent of the offender's own involvement: see *R. v. Moore*, 2008 BCCA 129, at paragraph 14; *R. v. Vickers*, 2007 BCCA 554, at paragraph 12.
- [9] Sentences, of course, must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as set out in s. 718.1. Section 718.2 of the Code further provides that sentences must recognize other principles, the most salient in the present case being the recognition of aggravation and mitigating factors, and of what is call the parity principle, that is, imposing sentences similar to those imposed on similar offenders for similar offences in similar circumstances.

- [10] I must also give due weight to Mr. Wilson's Aboriginal background. Given the nature of the offences we are dealing with, there is no alternative to incarceration, but I am still required to carefully consider the length of the prison term given the factors discussed in the Supreme Court of Canada's decision in *R. v. Gladue*, [1999] 1 S.C.R. 688 and the cases that have followed from that, including *R. v. Ipeelee*, 2012 SCC 13, and *R. v. J.L.M.*, 2017 BCCA 258.
- [11] The fact that Mr. Wilson's co-accused, Alvarez and Bingley, have already been sentenced places the parity principle that I have described at the forefront of determining Mr. Wilson's sentence. It may be presumed that the sentences given Alvarez and Bingley appropriately met the principal objectives of denunciation and deterrence through appropriate weighing of aggravating and mitigating factors and other relevant considerations. The parity principle requires me to determine the assessment of Mr. Wilson's sentence through a comparison with the sentences for Alvarez and Bingley, relating their circumstances and degree of responsibility with Mr. Wilson's.
- [12] Alvarez's circumstances in respect of commission of the offences of robbery and being in a dwelling house are the more comparable as he and Mr. Wilson were involved from the beginning of the events that evening, and also taking into account the factor that both pleaded guilty. I will say a little bit more about that guilty plea momentarily. There is, in my view, only one respect in which Mr. Wilson's culpability can fairly be said to be greater than Alvarez's, that being his wearing of a mask which, although it is the subject of a separate count, may be considered as an aggravating factor on the robbery and dwelling house offences. However, even that differentiating factor has only slight significance; Alvarez knew that Mr. Wilson was masked and so, as co-principal, he shares in the culpability attached to that particular circumstance, to a great degree. In other respects, Alvarez's circumstances are more aggravating, if anything. Both Mr. Wilson and Alvarez had a weapon, Mr. Wilson a knife, Alvarez what was at least an imitation firearm, but only Alvarez did more than brandish the weapon, actually pointing his at someone's head at one point in time. Alvarez appears throughout to have been the instigator or leader of the events that evening. In contrast, I cannot make any assumptions, certainly no finding beyond a reasonable doubt, as to what degree of planning or deliberation there was on Mr. Wilson's part.
- [13] Further, I commented in sentencing Bingley how relatively little weight should be accorded the factor of Alvarez's guilty plea; that was in the context of comparing Alvarez's circumstances to Bingley's, when Bingley had gone through trial. However, whatever weight might be given to the fact that guilty pleas were entered by Alvarez and Mr. Wilson, I must recognize that there was something of a legitimate issue as to Mr. Wilson's identity in having been masked and so, if anything, Mr. Wilson's guilty plea was more meaningful as a mitigating factor.

- [14] In having listed these differentiating factors between Alvarez and Mr. Wilson, I do not mean to assign these factors any particular weight. I am not marking off a scorecard or a checklist. I am simply noting points of similarity and points of distinction as the parity principle requires.
- [15] Lastly, we have in evidence the Gladue report concerning Mr. Wilson's background. I will not go into details. I will simply say that the circumstances of his upbringing through his childhood and his youth were terribly, terribly sad with there having been significant neglect, abuse, and physical violence. It is small wonder that Mr. Wilson has struggled for years with substance abuse. If the process of Gladue analysis is to have any meaning here, it cannot result in Mr. Wilson receiving precisely the same sentence of four years that was imposed on Alvarez.
- [16] Taking these circumstances into account, recognizing fully what the case law says regarding the appropriate range of sentence in cases involving home-invasion-type offences, but also having regard to the particular circumstances of this offence as I have described it and the particular circumstances of Mr. Wilson and, as I say, giving significant weight here to the parity principle, I have determined that the fit sentence here would be a term of three years. I would apply that three-year term to both of the robbery and dwelling house charges. On the charge of wearing a mask, the appropriate sentence will be 12 months, concurrent.
- [17] This brings us to the question of credit for time served. As I have discussed with counsel at the beginning of the proceeding this morning, we are now just two or three days shy of the two-year anniversary of Mr. Wilson being detained on these charges. One of those years was a leap year so there was an additional day of pretrial detention which is to be factored-in. If we were looking at this sentencing hearing only proceeding a day or two later than it is, we would be looking at conventional credit for time served of one and a days for each day of detention, and the roughly two years of pretrial detention would result in three years of credit at a sentence of time served. We are very, very slightly short of that mark. The sentence, then, net of credit for time served, will be a sentence of one day with a two-year period of probation.
- [18] Mr. Wilson, sir, if you would stand, please. Mr. Wilson?
- [19] Shane George Wilson, I am sentencing you to a term of imprisonment of one day followed by a period of probation of two years. During that two-year period, you are to obey the following conditions. First, you must report within two business days following your release to a probation officer at 836 Courtney Street in Victoria and, after that, you must report as directed by the probation officer. Your first contact with a probation officer may be by telephone and, thereafter, you are to report either in person or by telephone as directed by your probation officer.

- [20] Second, when first reporting to the probation officer, you must inform him or her of your residential address and phone number. You must not change your address or phone number without written permission from your probation officer.
- [21] Thirdly, you must attend, participate in, and successfully complete any intake, assessment, counselling, or program as directed by the probation officer, including programs directed at drug and alcohol dependency.
- [22] Fourth, you must not consume or possess alcohol, drugs, or any other intoxicating substance except in accordance with a medical prescription.
- [23] Number 5, during your probation, you will have no contact with A.B., Bryden Jim Bingley, or Julio Francesco Alvarez.
- [24] Sixth, you will not be within a two-block radius of anywhere where A.B. is known by you to be and, if you come across A.B., you will remove yourself from his proximity and maintain a distance of two blocks from that position where you saw A.B. for at least two hours.
- [25] Seventh, you will also stay outside of a two-block radius of A.B.'s residence in Victoria.
- [26] Eighth, during the term of your probation, you will not be in possession of any knives except for the purpose of food consumption or purposes immediately related to your employment.
- [27] Ninth, for the first six months of your probation, you will maintain a curfew between the hours of 10:00 p.m. and 6:00 a.m. in your residence as that residence is provided to your probation officer. During the hours of your curfew, you will answer your telephone or you will respond to any peace officer who is at your door for the purpose of carrying out a check.
- [28] You understand, sir, and you will abide by these terms?
- [29] THE ACCUSED: Yes, Your Honour.
- [30] THE COURT: All right, thank you. You may be seated. Counsel, is there anything further?

[DISCUSSIONS WITH COUNSEL]

- [31] CNSL M. SWARTZ: -- there may be one last issue. I do not think it is applicable, but the victim fine surcharge. I think, given the date of the offence, it is not necessarily applicable and, if I am wrong in that regard, I would ask the court to consider waiving it in these circumstances. Mr. Wilson has been incarcerated for two years, he does not have a current form of employment, and I suspect that it may be some time before he is able to obtain gainful employment in light of the ongoing pandemic.
- [32] THE COURT: Yes. Ms. Donnachie, any submission on that point?
- [33] CNSL P. DONNACHIE: No, My Lord.

[34] THE COURT: Okay. I am not certain that the victim surcharge was applicable in this case. If it is, it is waived. These are extraordinary times we are in, and I am aware that there is some case law questioning whether those fines can be waived, but we are living in extraordinary times which can require extraordinary measures.

[DISCUSSIONS WITH COUNSEL]

[35] Mr. Wilson, sir, I am impressed by your determination to undertake rehabilitation. I thank you for your expression of responsibility today and I wish you luck in completing your term of probation and in finding your way in our society.

"A. Saunders, J."

The Honourable Mr. Justice A. Saunders

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