
CANADA / JUDGMENT

R. v. Brien

2014 BCSC 1260

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Brien,

2014 BCSC 1260

Date: 20140613

Docket: 57823-B

Registry: Chilliwack

Regina

v.

Shawn Charles Brien

Before: The Honourable Mr. Justice Joyce

Oral Reasons for Sentence

Counsel for the Crown:

S.K. Domaradzki

Counsel for the Accused:

K.S. Westlake, Q.C.

Place and Date of Hearing:

Chilliwack, B.C.

May 30, 2014

Place and Date of Sentence:

Chilliwack, B.C.

June 13, 2014

- [1] THE COURT: On January 21, 2014, Mr. Shawn Brien pleaded guilty to one count of break and enter a dwelling house and commit an indictable offence therein, namely, robbery, contrary to s. 348(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46. Mr. Brien is before the Court today to be sentenced for that offence.
- [2] The offence is one that is often referred to by way of shorthand as a home invasion; that is, breaking into a person's home and committing a robbery. The home invasion occurred on January 14, 2009, when two of Mr. Brien's cohorts, Mr. Dahlgren and Mr. Bishop, broke into the home of Mr. Richard Dyck; assaulted him; and stole property from the residence including money and marihuana plants from Mr. Dyck's marihuana grow operation.
- [3] Mr. Brien was charged and pleaded guilty, not on the basis that he actually entered the home and committed the robbery, but as a party to the offence under s. 21 of the Criminal Code. He was instrumental in formulating the decision to commit the offence and recruiting the two men who actually committed it; and in driving the vehicle that they used in the commission of the offence.
- [4] Mr. Dahlgren and Mr. Bishop were convicted and sentenced in other proceedings; the case against Mr. Brien having been severed.
- [5] For the most part, Crown and defence have put forward a joint submission with respect to the appropriate sentence. They submit that an effective sentence of three and one-half years would be appropriate in all the circumstances. They also jointly submit that Mr. Brien should receive credit on a two-for-one basis for the time that Mr. Brien spent in custody on the matter prior to sentencing which was 170 days from June 15, 2009 up until December 2, 2009; a total of 170 days which doubled would be a credit of 340 days.
- [6] Counsel do not agree, however, on whether or the extent to which, the fact that Mr. Brien was subject to alleged stringent bail conditions from December 2, 2009 until April 2013 should be taken into account in further reducing what they say would otherwise be an appropriate sentence.
- [7] For the reasons that follow, I accept the joint submission insofar as the length of the effective sentence is concerned and conclude that such a sentence would not be unfit. I also accept the submission that the effective sentence should be reduced by 340 days. However, I do not accept the defence submission that Mr. Brien is entitled to any additional credit on account of his time on bail, or that the length of the effective sentence should be reduced from three and one-half years on account of the bail conditions as a mitigating factor.

- [8] With regard to the circumstances of the offence, the following facts come from the Statement of Agreed Facts admitted in this hearing and from submissions of the prosecutor that Mr. Brien accepts as fact.
- [9] On June 14, 2009 at approximately 6:00 p.m., Mr. Brien telephoned Mr. Dahlgren and offered him an opportunity to make some money by participating in a grow rip. Mr. Brien told Mr. Dahlgren that Mr. Bishop was also in on the intended grow rip. Mr. Dahlgren accepted the offer. Mr. Brien picked up Mr. Dahlgren in his vehicle, then picked up Mr. Bishop, and proceeded to Mr. Dyck's home in Mr. Brien's vehicle, arriving there at between 11:00 and 11:30 p.m.
- [10] Mr. Brien drove by the residence and noticed that a pickup truck was parked outside the residence. Comments were made that Zap straps may have to be used and that the truck would be taken.
- [11] Mr. Brien parked his vehicle around the corner from the residence and Mr. Dahlgren got out, took some items from the trunk, and went to the door of the residence. When they got to the residence, Mr. Dahlgren saw that Mr. Bishop had a sawed-off shotgun. That was the first time that he had noticed the gun.
- [12] It is accepted by the Crown that there had been no discussion about the use of guns. Mr. Brien was unaware that Mr. Bishop had taken a gun to the residence and he was not in a position to see Mr. Bishop at the front door when Mr. Bishop produced a shotgun.
- [13] Mr. Bishop and Mr. Dahlgren entered the residence. Mr. Dyck, who had been dozing on the couch in the living room, awoke to see the two men; one being Mr. Bishop carrying a sawed-off shotgun and the other, Mr. Dahlgren, a can of bear spray. Mr. Dyck was pushed to the floor and his t-shirt was pulled over his head. The gun was briefly put to the back of his head and his hands were tied with Zap straps.
- [14] Mr. Dahlgren went into a bedroom where Mr. Dyck's 12-year-old son was sleeping, woke the boy, led him into the living room and placed him on the floor. The boy's hands were tied behind his back with Zap straps.
- [15] The two men took Mr. Dyck's keys and opened a locked door leading to a small marihuana grow operation. The two intruders spent about 20 to 45 minutes cutting the marihuana plants which they removed and loaded into Mr. Dyck's truck. They also stole Mr. Dyck's cell phone, wallet, and a bundle of cash amounting to somewhere between \$1,200 and \$1,800. They also took Mr. Dyck's keys to his truck and stole the vehicle with the freshly cut marihuana plants.
- [16] While the two men were in the residence, there was texting between Mr. Bishop and Mr. Brien about what to take.

- [17] The three men went to an apartment occupied by Mr. Bishop, his brother, and mother. Mr. Dahlgren drove the stolen truck with Mr. Bishop as his passenger, while Mr. Brien drove his own vehicle to the apartment.
- [18] As a result of information from a neighbour, who as I understand it witnessed the two men taking marihuana plants into the apartment, the police attended at the residence in the early morning hours of June 15, 2009, and arrested the three perpetrators. They were charged with a number of offences.
- [19] Following a preliminary inquiry, Mr. Dahlgren pleaded guilty to break and enter and commit robbery, possession of marihuana, and possession of stolen property. He was sentenced in the Provincial Court to a term of two years after credit of six months for the three months that he spent in custody prior to sentencing.
- [20] Following a voir dire, Mr. Bishop pleaded guilty to break and enter and commit robbery, use of an imitation firearm (this relates to the shotgun which the Crown was unable to prove was a real gun), and possession of an unloaded, prohibited firearm which relates to another weapon found at the apartment. Mr. Bishop received a total sentence of four years - the mandatory minimum sentence of three years for possession of a prohibited firearm, one year concurrent for break and enter, and one year consecutive for use of an imitation firearm while committing an indictable offence. As I indicated, Mr. Brien spent 170 days in custody from the time of his arrest on June 15, 2009 until December 2, 2009, when he perfected bail. From December 2009 until April 2013, Mr. Brien was subject to a curfew that required him to be in his residence between 10:00 p.m. and 6:00 a.m., except for work purposes. That condition of his bail was removed in April 2013. While on bail and subject to the curfew, Mr. Brien was employed by his father's business and was able to travel frequently, including trips out of the Province.
- [21] With regard to the impact of this offence on the victims, I was provided with victim impact statements from Mr. Dyck and from his stepson's father given in December 2009. They are brief, but record that both Mr. Dyck and the boy suffered emotionally as a result of this crime.
- [22] Turning to the circumstances of the offender, much of the following information is taken from a psychological report prepared by Dr. Michael Elterman at the request of defence counsel.
- [23] Mr. Brien is 32 years old and was 27 at the time of these offences. His parents separated when he was three or four years old. He lived with his mother until he was about 10, then went into foster care because his mother rejected him and his father had remarried and did not want to take him in. Mr. Brien became a permanent ward when he was 12 years old. He did not have a happy time growing up in foster care and was at times abused by other foster children with whom he lived. He ran away from the foster homes quite often. Mr. Brien experimented with drugs as a teenager, but did not use alcohol.

- [24] Mr. Brien began working at age 15, as a landscaper. Between the ages of 18 and 22, he worked for his father, but his father fired him, as I understand it, because he got involved in using and dealing drugs. They became estranged.
- [25] Mr. Brien told Dr. Elterman that he was unemployed and broke, and emotionally a wreck when he committed these offences. Interestingly, Mr. Brien's relationship with his father and his half-brothers appears to have changed significantly after he was arrested on these charges. Mr. Brien has been working for his father driving a delivery truck for the past three years and also oversees a warehouse belonging to his father's business. He has two half-brothers who also work in his father's business.
- [26] Mr. Brien has never married, but was in a relationship for about five years from which he has a son. However, Mr. Brien does not have a relationship with that child at the mother's request. Mr. Brien is currently in what he describes as a committed relationship with a 31-year-old woman who has two children, ages 13 and eight. Mr. Brien says he no longer associates with any of the people from his past who had been involved in criminal activity.
- [27] With regard to Mr. Brien's current psychological status, Dr. Elterman made the following comments:

The self-concept of this individual has both positive and negative aspects. His attitudes about himself vary from states of pessimism and self-doubt to periods of self-confidence and self-satisfaction. Fluctuations in his self-esteem are likely to be a function of his circumstances.

- [28] Dr. Elterman went on to say:

He appears to have a large number of people to whom he can turn for support as a buffer against stress. The combination of a highly-developed system of social support with a reasonably low stress environment is a favourable prognostic sign for future adjustment.

- [29] Dr. Elterman concluded by giving this opinion:

From a psychological perspective, Mr. Brien has spent a considerable part of his adult life dealing with the over-compensation from being an abused, frightened child and a child who has felt dejected and abandoned by close family. Should Mr. Brien continue his present employment in the family company and find meaning in raising his children, I am optimistic that he will maintain a pro-social life.

- [30] I was provided with a number of letters of support from Mr. Brien, including letters from his father, mother, current partner, brothers, sister, and a friend. I have read and considered all of them. They speak to Mr. Brien's positive character traits and the fact that he is a very different kind of person now than he was five years ago.

- [31] Finally, based upon the submissions of counsel, the letters from Mr. Brien's family and friend, and his address to the Court at the conclusion of submissions, I am satisfied that Mr. Brien is truly remorseful for his actions in committing this crime and the pain it caused to his victims.
- [32] As I indicated earlier, Crown and defence have presented a joint submission with regard to an appropriate sentence. They disagree only on the issue of whether the effective sentence that they suggest of three and one-half years should be reduced because of the nature of the bail conditions on which Mr. Brien was placed, in addition to the reduction for time that he actually spent in custody on the charges.
- [33] The general purpose and principles of sentencing in Canada have been codified in ss. 718 to 718.2 of the Criminal Code. Section 718 provides that the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have a number of objectives including denunciation of unlawful conduct, specific and general deterrence, rehabilitation of the offender, and promoting a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community.
- [34] Section 718.1 provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [35] Other principles of sentencing are set out in s. 718.2 of the Criminal Code, including the principle that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender and that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
- [36] With regard to the law concerning joint submissions, the Court is not bound to accept a joint submission if a proposed sentence would be unfit, but careful consideration must be given to a joint submission on sentencing. As our Court of Appeal said in *R. v. Bezdan*, 2001 BCCA 215 at para. 15:
- [15] It is apparent that the administration of criminal justice requires cooperation between counsel and that the court should not be too quick to look behind a plea-bargain struck between competent counsel unless there is good reason to do so. I would not go so far as to say that a sentencing judge can only depart from the sentence suggested in the joint submission if he or she is satisfied that the proposal is contrary to the public interest, or that the sentence proposed would bring the administration of justice into disrepute. It is not clear to me that these two circumstances cover all situations in which a sentencing judge might conclude that the sentence proposed was "unfit".

- [37] In support of the joint submission Crown referred to a number of cases. I will list them, but I am not doing to discuss them: *R. v. Bernier*, 2003 BCCA 134 [Bernier]; *R. v. Dukeshire*, [1999] B.C.J. No. 1984; *R. v. Potgieter*, [2007] B.C.J. No. 2785; *R. v. Drydgen*, 2013 BCSC 1876; and *R. v. Parinas*, [1993] B.C.J. No. 2465.
- [38] *Bernier* is perhaps the leading authority on the matter of sentencing for this kind of offence, often referred to as a home invasion, although in that case three separate sets of reasons were issued.
- [39] In another case, *R. v. Brossault*, 2009 BCSC 464, at para. 86, I set out what I draw from *Bernier*. I said this:
- [86] What I take from all of this is that the Court of Appeal has suggested that the majority of cases of "home invasion" will fit somewhere in the range of five to eight years, depending upon the circumstances of the particular offences said to constitute home invasion and the circumstances of the particular offender but that there will be cases that fall on either side of that general range. A case may warrant a sentence in excess of that range because of particularly egregious circumstances concerning the offence or a particularly high moral blameworthiness on the part of the offender, and the lack of any mitigating circumstances. Other cases may warrant a sentence under the usual range because the circumstances of the offence are not egregious, and/or the circumstances of the offender are exceptional, such as the lack of any significant record, the youth of the offender, aboriginal status, evidence of remorse, and a clear potential for the rehabilitation of the offender.
- [40] Turning to the aggravating and mitigating circumstances in this case. I am satisfied in this case there are both aggravating and mitigating circumstances.
- [41] The aggravating circumstances include the fact that the residence was occupied; a fact that Mr. Brien either knew having observed the vehicle parked outside, or was reckless about. Section 348.1 deems that to be an aggravating circumstance. Further, the fact that one of the victims was a 12-year-old child is an aggravating circumstance.
- [42] In addition, this offence involved some degree of planning by Mr. Brien. Even though he did not actually break into the residence with his cohorts, it was his idea and he recruited the others to do the job. While it may not have involved the detailed planning over a long period of time, it was not in my view a rash spur-of-the-moment decision.
- [43] By way of mitigation, Mr. Brien is relatively youthful. He had no criminal record prior to committing these offences. He entered a guilty plea after a voir dire and before the victims were called upon to testify at trial. His guilty plea saves the administration of justice time and expense, and more importantly saves the victims the added trauma of having to testify about this frightening event.

- [44] In the present case, the sentence that is proposed is lower than the general range suggested by Bernier. However, Mr. Brien was, as I noted at the outset, not convicted as a principal but as an aider. He was unaware that Mr. Bishop had a sawed-off shotgun. He did not actually participate in any assault or threats towards the victims.
- [45] With the generous assistance of his father, Mr. Brien appears to have turned away from drug abuse and crime and adopted a positive, productive life where he is now respected by his family and friends.
- [46] In all of the circumstances, I am prepared to accept the joint submission with respect to the length of sentence. In my view, it is a sentence that is within the range of sentence of that which this Court might impose and is not unfit.
- [47] That leaves for consideration Mr. Westlake's submission regarding additional credit for strict bail conditions. I do not accept that submission for two reasons.
- [48] First, while the bail conditions were in place for quite a long period of time, I do not view them as unduly harsh. Furthermore, I do not have evidence that satisfies me that they affected in any serious way Mr. Brien's activities. While the curfew obviously restricted Mr. Brien's freedom, that is the case with almost every bail order. The curfew may have affected Mr. Brien's social life, although I have no actual evidence of how it was affected, and Mr. Brien was able to work freely including taking business trips to Calgary.
- [49] Secondly, it is my view that harsh bail conditions can be taken into account in mitigation of sentence and in the determination of an effective sentence that may be less than would otherwise be the case. I am not persuaded, however, that harsh bail conditions should be dealt with the same way as time spent in custody where credit is given to reduce the effective sentence according to a formula or policy adopted by the courts. In my view, this accords with the decisions of our Court of Appeal in *R. v. Cuthbert*, 2007 BCCA 585 and *R. v. Nghiem*, 2009 BCCA 170.
- [50] In this case, the time that Mr. Brien spent on bail and the conditions to which he was subject while on bail is one of the things that I have taken into consideration in deciding that the effective sentence proposed by Crown and defence is appropriate. I decline to give any further credit.
- [51] I will, therefore, impose a sentence that effectively is one of three and one-half years. Towards that sentence, I will give credit of 340 days for the time spent in custody. That is a two-for-one credit which was the norm at the time the offence was committed. By my calculation, the actual sentence imposed therefore is one of two years and 208 days to be served in a penitentiary.

- [52] With respect to ancillary orders, as this is a primary designated offence, there will be an order that Mr. Brien provide a bodily sample for DNA analysis for the National DNA Databank. There will also be a mandatory ten-year weapons prohibition under s. 109 of the Criminal Code. With respect to the victim impact surcharge of \$200, I will not waive it, but will give Mr. Brien three months from the date of his release from prison to pay that surcharge.
- [53] Is there anything further?
- [54] MS. DOMARADZKI: No, thank you, My Lord.
- [55] MR. WESTLAKE: Nothing from me, My Lord. I'm just checking the mathematics to make sure that they're accurate with respect to the computation of the -
- [56] THE COURT: Yes. I can tell you what I did is I - I think this is how I calculated it and you can check this. I took three times 365 as being three years, I added 182 days to that and that would be three and a-half years. I deducted 340 days and then I deducted two times 365 days which would be two years and ended up with 208 days.
- [57] MR. WESTLAKE: That's correct.
- [58] THE COURT: If the calculation is - the actual calculation is wrong, the formula is correct. It will be three-and-one-half years less 340 days.
- [59] MR. WESTLAKE: It appears to be correct, My Lord. Thank you very much.
- "B.M. Joyce J."

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