

CANADA / JUDGMENT

R. v. Cappello

2014 BCSC 840

COURT

Supreme Court of British Columbia

DECIDED

17 April 2014

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2014 BCSC 840 R. v. Cappello

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cappello,

2014 BCSC 840

Date: 20140417

Docket: 157928-5

Registry: Victoria

Regina

v.

Jacob Anthony Cappello

Cody Fred Smith

Justin James William Upton

Before: The Honourable Mr. Justice Macaulay

Oral Reasons for Sentence

Re Justin James William Upton

Counsel for Crown:

M. Murray

Counsel for Justin Upton:

M. Allen

Place and Date of Hearing:

Victoria, B.C.

April 17, 2014

Place and Date of Judgment:

Victoria, B.C.

April 17, 2014

- [1] THE COURT: Most of the charges in this case arose out of the police finding two loaded handguns inside a vehicle in which Justin James William Upton was a passenger. At the conclusion of the trial I convicted Upton on Counts 5 and 6: each charging unlawful occupation of a vehicle knowing there was a restricted firearm in the vehicle, contrary to s. 94(1) of the Criminal Code; Count 7 and 8: each charging possession of a loaded restricted firearm, contrary to s. 95(1) of the Code; Count 11: possession of the restricted firearms while prohibited from doing so, contrary to s. 117.01(1) of the Code; and finally, Count 10: with intent to commit an indictable offence, having his face masked, contrary to s. 351(2) of the Code.
- [2] Although I also found the offender guilty on the remaining counts respecting the weapons in the indictment, namely Counts 1 to 4, on application of the principles set out in *R. v. Kienapple*, no convictions will be registered on those counts. These are my reasons for sentence on Counts 5, 6, 7, 8, 10 and 11.
- [3] The Crown seeks concurrent sentences of six to eight years on Counts 7 and 8. Each of those offences is subject to a statutory minimum sentence of three years. The Crown further seeks concurrent sentences of two to four years on each of Counts 5, 6 and 10, also to be served concurrently with the sentences on Counts 7 and 8. Finally, the Crown seeks a one year sentence on Count 11, to be served consecutive to the other sentences. Viewed globally, the Crown's submissions call for a total sentence of seven to nine years. The Crown and defence agree that Upton should be credited 12 months and nine days for pre-trial custody.
- [4] In addition, the Crown seeks a DNA order, a lifetime weapons prohibition and forfeiture of several items that the police seized, including the handguns and ammunition.
- [5] The defence contends that the global range for all sentences is three to four years.
- [6] The offences occurred on April 24, 2012, and the circumstances are set out in my oral reasons for convicting the offender. A brief summary will suffice at this point.
- [7] The offender, along with two associates, Smith and Cappello, planned to carry out a home invasion and robbery at the residence of a rival drug dealer. At the time, the offender and Cappello had been dealing drugs for an individual, who likely instructed them to carry out the offences. With Smith driving, the three men went to a local building store and bought a

sledge hammer and duct tape to use in the planned offence. Inside the vehicle, they had other paraphernalia to use in carrying out the offence, including zap-straps, two balaclavas and two pairs of gloves.

- [8] In addition, they had two loaded handguns in a duffle bag. One of the handguns was a Luger pistol with 10 live rounds in the magazine. The other was a revolver with five live rounds in it. I accepted that the offender handled one of the firearms and put it in the pouch of his hoodie while he was in the vehicle. Counts 5 and 7 relate to the Luger pistol; Counts 6 and 8 relate to the revolver. Count 11 relates to both firearms.
- [9] After driving a circuitous route, the three men arrived near the destination point for the proposed home invasion and robbery. After Smith parked the vehicle, the offender and Cappello got out. Around that time, both disguised their faces. Cappello wore one of the balaclavas. Although the offender also had a balaclava, he disguised himself by tying a light coloured slitted tank top around his face and pulling up his hoodie. Count 10 relates to the face mask. At that time, Cappello also carried the sledge hammer.
- [10] As they approached the residence, Upton observed a vehicle parked out front and decided they would not proceed at that time. The two men returned to the vehicle and Smith drove them away.
- [11] The men did not know that the police had been conducting covert surveillance on their boss's house and also following them for several hours. Uniformed police stopped the vehicle shortly after it left the area of the proposed home invasion and robbery and arrested all three men. The loaded weapons were found on the floor of the rear passenger area. The revolver was located directly behind the driver and immediately in front of where Cappello had been sitting. The Luger was also in plain view and located near the centre of the floor area behind the front seats.
- [12] There were a pair of dark gloves on the floor of the front passenger side where the offender had been sitting. The offender was wearing a bulletproof vest under his hoodie. The day after the arrests, the police also found the second balaclava inside some of the offender's clothing.
- [13] The driver, Smith, was convicted of two counts under s. 94 as well as one count of obstruction. He is awaiting sentence.
- [14] Cappello pleaded guilty to some offences but not the most serious ones under s. 95(1), and received a conditional sentence. He also testified for the Crown at the offender's trial. I do not consider Cappello's sentence a helpful guide in determining parity in the circumstances.
- [15] According to the pre-sentence report, Upton now admits that, at the time, he was associated with a "dial-a-dope" operation and had been tasked with overseeing a drug rip of a marihuana grow operation. He was acting in a supervisory capacity over the two new recruits to the business. In exchange, Upton was to receive half of whatever they managed to steal. He told the probation officer that he committed the offences because he was

unemployed and wanted to maintain a lavish lifestyle, but also stated that he does not understand why he offends.

- [16] Upton maintained at the sentencing hearing that his role was somewhat less than described above. He was there to ensure that the other two did what they were expected to do, namely commit the home invasion, and to ensure that they turned over anything they stole. Upton asserts that Cappello was solely responsible for the guns and any manual handling of the weapon himself.
- [17] Upton's present explanation is not consistent with my findings of fact nor, with respect, does it make sense. Why would he be the one to wear a bulletproof vest, don a face mask, and leave the vehicle with Cappello if he was not to be actively involved in carrying out the proposed home invasion?
- [18] Upton has roots in an Aboriginal community on Quadra Island in Campbell River, where his maternal grandfather still lives. The pre-sentence report clearly sets out the historical discrimination suffered by the community and the ongoing social problems, such as family violence, substance abuse and sexual assault.
- [19] Upton grew up in a home in which alcohol and drugs were misused. His mother was murdered by her boyfriend when Upton was a seven year old child. Upton also had a traumatic childhood as a result of being physically and verbally abused by his father. He also lost his grandmother when he was still young. By age 13, Upton had lived in 17 different foster homes. After that, Upton became homeless but then lived with his grandfather from age 15 to 22. That home is on a reserve near Campbell River and is drug and alcohol free. Upton's grandfather continues to be supportive of him. Upton has completed a grade 11 education. Upton admitted to the probation officer that he uses alcohol and marihuana daily, and, as well, cocaine on the weekends.
- [20] Upton's criminal record is a significant aggravating factor. He has accumulated 27-odd convictions over the period April 2005 to January 2011, including thefts, fraud, property offences, drug offences, extortion, multiple breaches of court orders, wilful obstruction, assault with intent to resist arrest and, in January 2011, aggravated assault for which he received a jail sentence, a weapons prohibition and one year of probation. Upton was on probation at the time of the present offences.
- [21] Upton failed to appear for trial on this matter as originally scheduled and the court issued a warrant for his arrest. Eventually he was found and arrested in Campbell River. As a result, he was charged with and convicted of obstructing a police officer, apparently by offering a false name, and breach of undertaking.
- [22] One of the concerns about Upton's criminal record is that he has graduated towards more serious offences over time. In reaching that conclusion, I have taken into account Upton's explanation of the provocation that led to the aggravated assault.

- [23] I also observe, however, that Upton has received a jail sentence on almost every occasion that he has been convicted. Upton has occasionally been placed on probation but has now accumulated about five convictions for various breaches, although I note Mr. Allen's explanation that Upton has tended to follow work when available, rather than his obligation to the court. It is very apparent that no sentence to this point has successfully deterred Upton from further criminal activity.
- [24] Some of Upton's difficulties with the law, including his failure to comply with court orders, may arise from the constellation of diagnoses that he received as a child. These include attention Deficit Hyperactive Disorder (ADHD), Bipolar Disorder, and Fetal Alcohol Syndrome (FAS). He does not currently take any medication and has not since about the age of 15.
- [25] In spite of those factors, Upton remains connected to the band and participates in their culture, traditions and services. Upton has a seven year old daughter who lives with her mother in the Courtenay area. Upton occasionally visits his daughter. According to counsel, Upton maintains regular phone contact with his daughter and he says that he wants to serve his time and establish a relationship with her.
- [26] For the most part, however, based on the pre-sentence report, it appears that Upton's present friends and associates are all involved in a criminal lifestyle. Although Upton claims to like working, he has made little effort to take advantage of the seasonal family or band run resource industry opportunities, like fishing, that are available to him in the Campbell River area.
- [27] As to the present offences, Upton has little or no insight. According to the probation officer: Mr. Upton seems to lack the ability to see the severity of the offence and while he confirms the details found in the Report to Crown Counsel, he does not appear to understand the seriousness of his actions. He does not see a problem with his lifestyle and/or the people he associates with.
- [28] It is fortunate that the police were able to intercept Upton and his associates before they could carry out their plan. There is every likelihood that he would be facing even more serious charges if they had succeeded.
- [29] The convictions under s. 95(1) set out in Counts 7 and 8, are each subject to a mandatory minimum sentence of three years in jail as first offences. There is no constitutional challenge to the section in this case. There is no statutory minimum sentence for the remaining offences. All the offences are subject to a maximum sentence of 10 years.
- [30] The principles of sentencing that deserve the greatest emphasis in this case are denunciation and deterrence. The safety of the public must be the paramount concern. While I have considered Upton's prospects of rehabilitation, I find little reason to hope, at this point, that he will change. So long as he does not change, the public is at an intolerable risk. I can only hope that, with the aid of programs available to Aboriginal offenders in the federal penitentiary system, that he will take responsibility for change. Otherwise, he will

not have the family relationship that he says he seeks.

- [31] The sentence I impose must be proportionate to the gravity of the offence and Upton's personal degree of responsibility. This is sometimes referred to as the fundamental principle of sentencing in Canada. The degree of censure required to express condemnation of the offence is limited by the requirement that the punishment must be proportional to the moral culpability of the offender, and no greater. Upton's degree of moral culpability is very high. He was a leader in a criminal enterprise that required planning for, and had embarked on carrying it out. There was no other purpose underlying the possession of the loaded handguns inside and outside the vehicle.
- [32] I must increase or reduce the sentence for any relevant aggravating or mitigating circumstances. The significant aggravating factors are the serious criminal purpose of the enterprise that Upton and his associates were involved in, the degree of planning, his role as a leader of recruits, the obvious risk to the public, that he was motivated by greed and, finally, his extensive criminal record.
- [33] The only mitigating factor is Upton's terribly disadvantaged Aboriginal and personal background as a child and youth. While it must have had very serious long-term effects upon him, the aggravating factors far outweigh the mitigating ones.
- [34] I must also impose a sentence similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

The Crown relies on the following authorities: *R. v. Ball*, 2014 BCCA 120; *R. v. Nur*, 2013 ONCA 677; *R. v. Guha*, 2012 BCCA 423; *R. v. B.C.M.*, 2008 BCCA 365; *R. v. Ross*, 2010 BCCA 314; *R. v. Jarsch*, 2007 BCCA 189; *R. v. Borecky*, 2013 BCCA 163; and *R. v. Bradbury*, 2013 BCCA 280.

Of the above, the defence contends that Jarsch is the best comparator.

- [35] Jarsch is, in my view, of limited assistance because it predates the establishing of the current minimum three year sentence for offences under s. 95(1). At the time, the minimum sentence was one year. The offender was one of five occupants of a vehicle in which the police found a number of loaded guns. The trial judge imposed a global sentence of 21 months less a day. The offender was relatively young, single and had no criminal record, apart from a minor dated conviction for theft. He was making good progress towards rehabilitation and the Court of Appeal upheld the sentence imposed.
- [36] As pointed out most recently in *Ball*, at paragraph 17, the mandatory minimum is now the starting point of the range and is not available for more serious offences. There, the court overturned a minimum sentence and substituted a sentence of four years for an offender who had possession of a concealed fully-loaded handgun that he had fired several times outside of town. The Court of Appeal also observed in *Ball* that, generally, s. 117 offences should attract consecutive rather than concurrent sentences ranging between six months and one year: paragraph 24.

- [37] Nur is significant in that it points out that "the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade" stands at the most serious end of s. 95 offences: paragraph 51. Our Court of Appeal applied similar reasoning in *Guha* by referring to the need for sentencing judges to impose sentences for firearm related offences that reflect their "very serious and dangerous nature": paragraph 29. The sentences "must reflect society's absolute rejection of such unacceptable conduct": paragraph 30.
- [38] Borecky sets out a useful review of various decisions on firearms offences. In that case, the sentencing judge sentenced the offender to an effective three years on various drug offences, an effective four years on several firearms counts and a one year consecutive sentence for a s. 117 offence. The offender was involved in the drug world and had a lengthy criminal record, including an assault with a weapon and robbery. The Court of Appeal increased the sentence on the drug offences to seven years concurrent to reflect the weapons and ammunition offences as aggravating factors but did not disturb the sentences for the weapons offences.
- [39] There is, in my view, no viable alternative to a very lengthy jail term in the present circumstances. Upton has not been individually deterred by past sentences, including periods of probation. He has steadily increased the seriousness of his offences over a lengthy period and has now committed very serious offences, yet still shows no insights that are likely to assist him to change in future. Apart from a lengthy jail term, I see no means to protect the public. For these reasons, and in spite of Upton's disadvantaged Aboriginal and personal background, there are no other reasonable sanctions available apart from lengthy imprisonment. I would reach the same conclusion even absent the statutory minimum applicable under s. 95(1).
- [40] Mr. Upton, please stand. I sentence you as follows.
1. Count 7: five years in prison, to be served concurrently with the sentence imposed on Count 8;
 2. Count 8: five years in prison, to be served concurrently with the sentence imposed on Count 7;
 3. On each of Counts 5, 6 and 10: three years in prison, to be served concurrently with each other and with sentences on Counts 7 and 8;
 4. On Count 11: one year in prison, to be served consecutively to the sentences on Counts 5, 6, 7, 8 and 10.

Against the overall sentence of six years, you are to be credited 12 months and nine days, leaving four years and 356 days to serve as the actual sentence.

- [41] In addition, I order you to provide a DNA sample pursuant to s. 487.051 and impose a lifetime weapons prohibition pursuant to s. 109(2) of the Code. Finally, I order forfeiture of the two handguns, ammunition and the bulletproof vest that the police seized.

[42] Is there anything arising?

[43] Mr. allen: I'm just -- I want to be sure I heard and noted correctly, My Lord. Count 7 -- 5, 6, 7, 8 and 10 essentially all, a global five years. Count 11, one year consecutive to all others? Or did I mishear? I thought Your Lordship --

[44] THE COURT: That is the effect. They are all concurrent with the exception of Count 11, which is consecutive.

[45] Mr. allen: All right, thank you.

[46] THE COURT: Yes, but it is the five years on each of Counts 7 and 8, and three years on each of Counts 5, 6 and 10, but all except Count 11 are served concurrently.

[47] Mr. allen: Thank you.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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