

CANADA / JUDGMENT

R. v. Ertmoed

2016 BCSC 344

COURT

Supreme Court of British Columbia

DECIDED

16 February 2016

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2016 BCSC 344 R. v. Ertmoed

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ertmoed,

2016 BCSC 344

Date: 20160216

Docket: 36587-3

Registry: Prince George

Regina

v.

Dillon Benjamin Ertmoed

Restriction on Publication: Pursuant to s. 486.5(1) CCC

Before: The Honourable Mr. Justice Tindale

Oral Reasons for Sentence

Counsel for Crown:

A. Schroff

L. Phipps

J. Ball, Articled Student

Counsel for Accused:

K. Jones

Place and Date of Hearing:

Prince George, B.C.

February 11, 2016

Place and Date of Judgment:

Prince George, B.C.

February 16, 2016

[1] THE COURT: The accused, Dillon Benjamin Ertmoed, was convicted of several offences on Indictment Number 36587-3, after a trial.

[2] Pursuant to the principles on R. v. Kienapple, convictions were entered on counts 2, 4, 5 and 9. Those counts read as follows.

Count 2: On or about the 24th day of August, 2012, at or near Prince George in the province of British Columbia, did break and enter a dwelling house, situate at 125 South Ogilvie Street and commit an indictable offence therein, unlawful confinement contrary to s. 348(1)(b) of the Criminal Code.

Count 4: On or about the 24th day of August, 2012, at or near Prince George in the province of British Columbia, did break and enter a place, having stolen or with the intent to steal a firearm located in the place, contrary to s. 98(1)(b) of the Criminal Code.

Count 5: On or about the 24th day of August, 2012, at or near Prince George in the province of British Columbia, did rob Kwan-Mei Lee, contrary to s. 344(1)(b) of the Criminal Code.

Count 9: On or about the 24th of August, at or near Prince George in the province of British Columbia, did possess a firearm knowing that he was not the holder of a licence under which he may possess a firearm and a registration certificate for the firearm, contrary to s. 92(1) of the Criminal Code.

BACKGROUND

[3] By way of brief background, on or about August 24, 2012, two or more individuals broke into the residence of Kwan-Mei Lee, located at 125 South Ogilvie Street in the City of Prince George, in the early morning hours. Mrs. Lee is a retired person. She has lived at her residence on South Ogilvie for approximately 30 years. Her youngest son, Chedat Lee, also lived at that residence. However, he was away at work on August 24, 2012.

[4] Mrs. Lee woke up in the middle of the night with a cushion on her face and someone in her bedroom. One or two individuals put tape on her mouth and around her hands and feet. At one point during this ordeal a male came into her bedroom and asked her where her son's stuff was. Within approximately five minutes a man came back and asked her for the code to the gun safe.

- [5] About an hour later Mrs. Lee was asked where the keys to her Honda Civic automobile were. Mrs. Lee ultimately was able to free herself and go to a neighbour's home to call 9-1-1.
- [6] A Glock 9 mm model 17 pistol, a Springfield 35 model 1911 A-1 pistol and a Springfield 9 mm model XPM pistol were stolen from the residence. These firearms belonged to Chedat Lee.
- [7] In addition, a 60-inch television set, a home theatre system, as well as some clothes belonging to Mr. Lee were taken.
- [8] Finally, a wedding ring of Mrs. Lee was stolen.
- [9] Chedat Lee had met the accused approximately five years prior to the robbery, as they both worked at a local bar. The accused was identified by his DNA, which was found on two Pepsi bottles, which were located in the basement of the residence, as well as on a cigarette butt, which was located outside of the residence, on the driveway. The two Pepsi bottles were not opened and the cigarette butt was not in the driveway prior to the robbery on August 24, 2012.
- [10] Mrs. Lee's automobile was located approximately one block west and one block south of the residence of Don Schmidt, who was also charged in relationship to these offences. A firearm was located at Don Schmidt's residence, which belonged to Chedat Lee.
- [11] Mr. XX knows both the accused and Mr. Lee. He heard conversations between the accused, Mr. Schmidt, and others, in regard to robbing Mr. Lee. Mr. XX also saw a gun safe in his residence, which belonged to Mr. Lee, sometime after the robbery occurred.

CIRCUMSTANCES OF THE ACCUSED

- [12] The accused is 24 years of age and was raised in Prince George. He is currently residing with his mother. His father passed away on March 15, 2014, and he has one younger brother, Nathan.
- [13] By all accounts the accused grew up in a good home and did not have any problems until he was approximately 13 years of age. It was at that time that he began to develop a serious drug problem. The accused completed grade 9 in school. He later tried to complete his education through distance learning. However, substance abuse issues prevented him from doing that. While in custody, the accused has completed two grade 12 equivalency courses.
- [14] The accused began using "crystal meth" a number of months before this offence occurred. At the time of these offences the accused did not have a criminal record.
- [15] On September 19, 2012, the accused committed a robbery at a local mall. He was convicted of that offence on February 12, 2013. He received 729 days in custody for that offence, as well as two years' probation. The accused was also convicted on December 24, 2014, with theft under \$5,000. This occurred when the accused was on parole for the above-mentioned robbery conviction.

[16] I have had the benefit of a pre-sentence report prepared by probation officer, Jeffrey Grainger, which was filed with the court on November 5, 2015. Mr. Grainger, under the heading, "Attitude and Understanding Regarding Offence", states the following:

Mr. Ertmoed reports very little recollection of planning or committing the offence, due to the effects of his illegal drug dependency. Additionally, Mr. Ertmoed states he believes his struggles with substance misuse and associations with negative associates are the main underlying issues that may have contributed to the offence. Mr. Ertmoed also suggests he has made changes in regards to these contributing factors, since the committing, [of] his most serious offences.

Similarly, to his response in the previous report, Mr. Ertmoed purports to regret his actions and any trauma he has caused his victims. Furthermore, Mr. Ertmoed claims he does not have any intention to cause harm to people.

[17] Exhibit 2 on the sentencing hearing is a letter dated January 25, 2016, from Benjamin Scarff. Mr. Scarff is a parole officer who supervised the accused while he was on parole from the robbery conviction. In that letter Mr. Scarff writes the following:

I have been asked to provide my assessment on whether or not I feel that Mr. Ertmoed has been meaningfully rehabilitated, such that a further long period of custody is not warranted, and whether or not Mr. Ertmoed would take opportunities to participate in programming.

It is somewhat difficult to answer these questions given the time that has elapsed since I last worked with Mr. Ertmoed. My concerns are that Mr. Ertmoed breached his condition to abstain from drugs twice at the outset of his release and committed a new offence near the end of his release, which indicates to me that he has not meaningfully rehabilitated at this time. However, I do feel that Mr. Ertmoed would be willing to participate in programming in the future.

He did not strike me as an individual who wished to be involved in criminal activity over the long term, but needed training to provide him with life skills that would assist him in the community. Indeed, I got the impression that Mr. Ertmoed was simply more interested in taking the easy road, and his associates, likewise, had a great deal of impact on his behaviour.

[18] During the sentencing hearing Mr. Ertmoed expressed to the court that he was remorseful and I accept that to be a genuine expression of remorse.

VICTIM INFORMATION

[19] I do not have a victim impact statement from Ms. Lee. However, in the presentence report she told Mr. Grainger that she has been okay since the offence and denies any ongoing emotional or psychological issues. She told Mr. Grainger that she has installed an alarm system in her home and continues to feel safe in her home.

POSITION OF THE PARTIES

The Crown

- [20] The Crown submits that the appropriate range of sentence is six to thirteen years in jail. Crown says that given the circumstances of this case and of the accused, a fit sentence would be in the middle of that range. The Crown notes that the maximum penalty for counts 2 and 4 on the indictment is life imprisonment. They also note that the accused is a youthful, first-time offender, for which there is a possibility of rehabilitation.
- [21] The Crown, in establishing the range for a fit sentence, relies on the following cases: *R. v. Moore* 2008 BCCA 129, *R. v. Vickers* 2007 BCCA 554, and *R. v. Kory* 2009 BCCA 146. In addition the Crown has provided a sentencing table with a number of decisions summarizing the sentences for the offence of break and enter.
- [22] In *Moore* the court commented that the various home invasion cases seemed to establish a range of six to thirteen years: see para. 14. In that case the accused was 24 years of age and had a prior criminal record for offences involving violence or threatened violence. The female victim in that case sustained physical injuries that lasted for several weeks. The court upheld a sentence of eight years in custody.
- [23] In *Vickers* the court, in discussing the principles of sentencing that must be considered in home invasion cases stated the following, at paragraphs 12 and 13.
- [12] This Court has repeatedly stated that deterrence and denunciation are the primary factors in sentencing for violent crimes, particularly when these crimes violate the safety and security of a person's home. As Madam Justice Saunders recently stated in *R. v. Meigs*, 2007 BCCA 394 at para. 25, "it is a grave offence to enter another person's home without permission, and graver to enter the home and violate the occupant. The courts must and do impose stern sanctions for such crimes."
- [13] While rehabilitation cannot be overlooked, it is of secondary importance in dealing with a case of this kind. This is particularly so when there is no indication that the offender is a good candidate for rehabilitation. Indeed, the indicators with respect to Mr. Vickers point in the opposite direction, given his criminal record and the fact that he engaged in serious criminal activity within hours of being released from jail.
- [24] The Crown also argues that I can take into account the particular situation in a specific region with regard to violent offences of this nature. In that regard they rely on *R. v. Lacasse* 2015 SCJ No. 64, at paras. 87 - 89. Crown has also tendered an article titled "Canada's Most Dangerous City, Prince George", dated December 15, 2011", which was apparently published in *Maclean's Magazine*.
- [25] The Crown argues that the mitigating factors in this case are the accused's young age, the fact that he did not have a record at the time of this offence, the fact that he does not appear to be committed, in the long term, to a criminal lifestyle, and the fact that there is a prospect for rehabilitation.

- [26] Crown also argues that the aggravating factors, as set out in s. 348.1 of the Criminal Code, are clearly met in this case. The accused broke into a dwelling house which was occupied by an elderly woman. The duration of the assault on Mrs. Lee lasted for more than 30 minutes, which included putting a pillow over her face and binding her.
- [27] Crown also argues that given the evidence of Mr. XX, this was clearly a planned crime for the sole purpose of stealing firearms. The Crown argues that a fit sentence for the accused would be eight years in jail.

The Accused

- [28] Mr. Jones, on behalf of the accused, notes that the accused has been in custody on these charges from January 12, 2015, until he perfected his bail on December 15, 2015, which is a total of 331 days. Applying the principles in *R. v. Summers*, the accused is entitled to enhanced credit at a rate of 1.5 to 1 day for his pretrial detention, which would result in credit for his pretrial detention of 497 days. The Crown is in agreement with this calculation.
- [29] Mr. Jones concedes that deterrence and denunciation are the primary factors to be considered in this case and that the offence was committed for the purpose of stealing firearms. Mr. Jones, however, does not agree with the range of sentences suggested by the Crown. In that regard he notes that Mr. Schmidt was sentenced in the provincial court of British Columbia on May 23, 2013, to four years in jail in relationship to this home invasion.
- [30] I have had an opportunity to consider the reasons for sentence of the Honourable Judge M.A. Gray (on Provincial Court File Number 36587-2-C), and I have also heard today, submissions from both Crown and Mr. Jones with regard to that decision of Judge Gray.
- [31] It is clear that this was a joint sentencing position that was put before Judge Gray for four years in jail for Mr. Schmidt. It is also clear on the record that one of the primary factors in coming to the decision was the fact that the evidence linking Mr. Schmidt to this offence was the product of a warrantless search. There were significant Charter issues that had to be considered with regard to Mr. Schmidt. These Charter issues do not apply to Mr. Ertmoed, as he had no privacy interest in the Schmidt residence where the firearm and other belongings of Chedat Lee were found, and which Mr. Schmidt was in possession of.
- [32] It was because of those factors that Mr. Schmidt received four years in custody. In my view, his case is distinguishable from the case at bar for those reasons.
- [33] Mr. Jones argues that the accused is young and had no record at the time of his offence. He is motivated to turn his life around and continue his education. Mr. Jones argues that a fit sentence for the accused would be four years, less his credit for pretrial detention.

DECISION

- [34] The purpose of sentencing can be found in s. 718 of the Criminal Code, which reads as follows:

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 one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[35] Section 718.2 of the Criminal Code reads as follows:

A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
- shall be deemed to be aggravating circumstances.
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
 - (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
 - (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
 - (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[36] In this case section 384.1 of the Criminal Code is also applicable and it reads as follows:

If a person is convicted of an offence under section 98 or 98.1, subsection 279(2) or section 343, 346 or 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,

- (a) knew that or was reckless as to whether the dwelling-house was occupied; and
 - (b) used violence or threats of violence to a person or property.
- [37] This was a home invasion that was planned and executed for the primary purpose of stealing handguns. The elderly complainant, Ms. Lee, was terrorized in her own home, waking up to people in her bedroom that bound and gagged her. Fortunately, she was not physically injured and reports suffering no long lasting effects from this offence.
- [38] The Crown has established the aggravating factors in s. 348.1 of the Criminal Code. The Crown also argued that the accused was part of a gang. I am not satisfied that the evidence disclosed that the accused was, however, part of a criminal organization, as defined in s. 467.1, because it is not clear how many people were actually involved in this offence, other than the accused and Mr. Schmidt.
- [39] The mitigating factors in this case are that the accused is relatively young, had no criminal record at the time of the offence, and has expressed, as I said, genuine remorse. There is also a prospect for rehabilitation.
- [40] While I am not satisfied that the article that the Crown urged upon me to review is of any assistance to the court, I am of the opinion that violent crimes are a problem in this community and that the public has legitimate concerns over their safety.
- [41] There is a wide range of sentencing options available for these types of offences. However, considering the cases put forward by the Crown and considering the circumstances of the offence and of Mr. Ertmoed, in my view the appropriate range of sentence is six to eight years in jail.
- [42] The sentencing decision in regard to Mr. Schmidt is distinguishable, as I have said, from the present case because there was a joint submission based on the considerable weaknesses in the Crown's case due to the warrantless search that the police conducted on Mr. Schmidt's residence.
- [43] Deterrence and denunciation are the primary considerations in sentencing in this case. Having said that, I must also take into account that this is a youthful offender who has prospects of rehabilitation. However, the seriousness of this crime, including the obvious terror that was inflicted upon an elderly woman in her own home, coupled with the fact that accused was there to steal firearms, leads me to no other conclusion than that a lengthy period of jail is required.
- [44] Considering all the circumstances, in my view an appropriate sentence for the accused, as a global sentence, would be seven years in jail, less pretrial detention credit for 497 days.
- [45] Mr. Ertmoed, with regard to count number 2, you will be sentenced to seven years in jail, less your pretrial detention of 497 days. That leaves a total of 2,058 days to be served.

- [46] On count 4, I sentence you to five years in jail, to be served concurrently with any other count on this indictment.
- [47] On count 5, I sentence you to three years in jail, to be served concurrently with any other count on this indictment.
- [48] Count 9, I sentence you to one year in jail, to be served concurrently with any other count on this indictment.
- [49] In addition, as count number 5 on this indictment is a primary designated DNA offence, I will make an order pursuant to s. 487.051.
- [50] Also, pursuant to s. 109 of the Criminal Code, I am making an order prohibiting you from possessing any firearm other than a prohibited firearm or restricted firearm, any crossbow, restricted weapon, ammunition, explosive substance for a period of ten years, and any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

"R.S. Tindale, J."

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