
CANADA / JUDGMENT

R. v. Feeney

2015 BCSC 1522

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Feeney,

2015 BCSC 1522

Date: 20150708

Docket: 81816

Registry: Kelowna

Regina

v.

Rory Richard Francis Feeney

(also known as Rory Richard Feeney)

Before: The Honourable Mr. Justice Betton

Oral Reasons for Sentence

Counsel for the Crown:

K.A. Froehlich

Counsel for the Accused:

A.P. Watt

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 8, 2015

Place and Date of Judgment:

Kelowna, B.C.

July 8, 2015

- [1] THE COURT: This matter comes before me for sentencing. Mr. Rory Richard Feeney has entered a guilty plea on a single-count indictment to an offence of robbery. That count is that he, on December 16, 2014, at Kelowna, did rob the TD Canada Trust contrary to s. 344 of the Criminal Code.
- [2] In the circumstances of Mr. Feeney, the Crown argues that a sentence of four to six years' incarceration less credit for time served is appropriate. Mr. Watt, on behalf of Mr. Feeney, argues that a 30-month sentence, less credit for time served, and a period of probation for two years and strict conditions would be the appropriate sentence.
- [3] I will first outline some background information. I do not know how I have managed to do it, but I think I left the agreed statement of facts in my chambers.
- [4] MR. FROEHLICH: I've got a clean one signed.
- [5] THE COURT: Thank you. The parties executed an agreed statement of facts which outlines the circumstances of the offence before me. On December 16th, Mr. Feeney was in the Kelowna House on parole, having been granted statutory release. He had in fact been there since late August 2014, but shortly after his initial release, he tested positive for methamphetamine and his parole was suspended. He was again released on September 29, 2014, and had continued to reside there until December 18th, when he was taken into custody in relation to these matters.
- [6] On December 16th, the date of the offence, he left the Kelowna House, indicating that he was going to the grocery store and would return in a short time. When he did not return, the staff at the house attempted to contact Mr. Feeney, and then contacted the authorities.
- [7] At about 5:20 on that day, Mr. Feeney went into the TD Canada Trust, stood in the line, was called to a wicket by the manager of the branch who offered to help Mr. Feeney, indicated, "This is a robbery. I'm not joking. Go and get me a thousand dollars."
- [8] Mr. Hallman, the manager, in fact went and retrieved some cash, some \$200, which contained a global positioning device, and some other cash totalling approximately \$165. Other staff were alerted to what was transpiring. The 9-1-1 call was made. Before the police attended, Mr. Feeney had departed with the funds. He had discarded the portion of the funds that contained the tracking device, believing that it might contain a dye pack. The police were not able to locate Mr. Feeney. They were, however, subsequently able to identify him by a review of video footage.

- [9] Before any arrest took place in respect of that, the police were contacted. Mr. Feeney had returned to the Kelowna House on December 18th with his grandmother, and he awaited the arrival of the police. He thereafter provided a statement acknowledging that he had committed the offence, indicating that at the time he was high on crack, "coke" as it is referred to in the agreed statement of facts, and speed. He says that when he came to his senses hours later, he contacted his grandmother and returned, as I have indicated, on the 18th to the Kelowna House.
- [10] I have the benefit of a presentence report, as well as the submissions of Mr. Watt, that set out Mr. Feeney's background. He unfortunately did not have a happy upbringing. He did not know his father. His mother raised him. She had her own issues, including, as I understand it, addiction issues. There are indications of some violence and/or neglect in his mother's care. He ultimately found his way into his grandmother's care, where there was very little supervision or control over his behaviour. Indeed, he apparently asked that neither of them attend today, Mr. Watt, on Mr. Feeney's behalf, indicating that they have served as enablers for Mr. Feeney's dysfunction in the past.
- [11] Mr. Feeney was largely left to his own devices, which was not a healthy situation for him. He, at an early age, became involved with the use of drugs and was addicted to drugs.
- [12] As Mr. Watt put it, he essentially was on the streets through his younger years, age 14 to 21. He did not have a particular drug of choice, but rather was willing and content to use any hard drug.
- [13] He was born September 1983 in Ottawa. He has not had any regular employment. The presentence report indicates that he has had some academic success, in the sense of schooling coming relatively easily. He completed Grade 11 in the regular school system. There is some inconsistency in the records, at least, in that regard. He got his GED in 2005. The presentence report indicates that at that time he achieved superior marks, and Mr. Watt has echoed the inference from that, that Mr. Feeney possesses some real intelligence and academic skills, if he were to apply himself.
- [14] He has a significant prior criminal history. It is set out in the presentence report, as well as Exhibits 1 and 2 on the sentencing, which are a JUSTIN criminal history report and a CPIC printout. All of that information is consistent. The record begins as a youth in 1999 with convictions carrying on through relatively consistently until 2002, when he became an adult, and thereafter consistently as an adult. There are multiple offences, drug-related offences. The first offence of violence was as a youth in 2002 for assault where he got secure custody for seven days. There are multiple convictions for either breach of judicial interim release or bail orders and/or probation orders; nine by Crown's count, which seems basically to be accurate. As I have indicated, multiple offences for drug-related matters.

- [15] In 2005, he received a sentence of five years with credit for the equivalent of one year presentence custody for break, enter, and commit offences, as well as 90 days concurrent for narcotics offences. Then in 2009, two years plus one day for possession of stolen property over \$5,000, and then in 2012, 18 months' jail and probation for one year. Then finally in April of 2013, a robbery conviction, jail of two years plus one day, and it was that offence that had seen him on statutory release at the time of these matters.
- [16] The presentence report describes in some detail Mr. Feeney's history with the corrections system and it does not paint a positive picture.
- [17] Under the heading, "Attitude and receptiveness to previous and proposed interventions", the presentence report includes this:

Corrections Branch records and Correctional Services of Canada records consistently describe the Subject as having a lack of respect for authority, the criminal justice system, correctional staff and the police. Although he has at times stated that he was open to attending programs he has also described them as being useless to him. While last out on parole prior to the commission of the present offence he told the psychologist / facilitator of the course that he was only attending to satisfy the requirements of his release. He further suggested that he could "teach" the program and that he did not require "psychological counselling".

- [18] At another point in the report, after referencing some of the institutional charges that he had dealt with while in custody, of which there were apparently numerous, the presentence report says this:

A number of correctional authorities have opined that in the past the Subject has shown no regret or remorse for his aggressive and other problematic institutional behaviour which one described as having been ". . . nothing short of abysmal . . ." His behaviour has necessitated a high degree of supervision and structure resulting in his classification to a high security facility and / or enhanced security protocols.

- [19] As I alluded to briefly at the outset, the Crown's position is four to six years, less credit for time served. The Crown points to that prior criminal record, the presentence report, a sampling of which I have just referred to, as well as a series of cases, five in total, that Crown argues support the range of sentence articulated. Among those are three recent Court of Appeal decisions: *R. v. J.J.Q.G.*, 2013 BCCA 51; *R. v. Zakis*, 2012 BCCA 450; and *R. v. Turnbull*, 2014 BCCA 186.
- [20] Mr. Watt, on behalf of Mr. Feeney, says that this case is a shining example of the product of serious drug addiction, and that the sentence he proposes takes into account the principles of sentencing, but also the realities of that drug addiction. He says that I, unlike other courts, am being specifically asked to look at the accused's response to this event, his assurance that he is now serious about dealing with his drug issues, and that I impose a sentence of 30 months, less the credit for time served, to be followed by a period of probation with strict conditions regarding abstinence and intensive counselling through AA,

NA, or other such programming.

- [21] In this particular case, the accused's record is a significant factor in respect of the imposition of the appropriate sentence and of particular note there are the recent convictions which I alluded to. In his most recent convictions, beginning in March 2005, he has received sentences equivalent to five years in 2005, two years plus a day in 2009, 18 months in March of 2012, and two years plus a day in April of 2013. His record generally shows a longstanding pattern of behaviour in conflict with the law, with brief interruptions, often only, it would appear, because of his period of incarceration. There are multiple convictions for breaches of court orders and, as alluded to also in this case, he was on statutory release at the time of this offence, having already had his release suspended only months prior to this offence.
- [22] The presentence report in some detail goes through his history and suggests a lack of real desire or intent upon Mr. Feeney to engage in or take seriously any rehabilitation.
- [23] Mr. Watt forcefully and ably argues that it is really for Mr. Feeney to decide at what point in time he is going to take his rehabilitation seriously and become engaged in a meaningful manner in the process, and asks me to accept that that time is now and that I should focus on the rehabilitative aspect of sentencing.
- [24] I note in the presentence report that there are some references to recent aspects of Mr. Feeney's attitude towards rehabilitation. In the presentence report, one portion reads:

An assessment was prepared by the Forensic Services for one of the Subject's previous Court matters in March 2012. The psychologist who prepared the report suggested that he probably met the criteria for a diagnosis of bipolar disorder at that time. He did assess him with a personality disorder with narcissistic, anti-social and passive-aggressive traits. He noted that personality disorders do not easily lend themselves to treatment, remarking that there are few experienced therapists in this field and that it requires costly long-term individual psychotherapy.

Correctional Services of Canada records from January 2015 indicate that one of their contracted psychologists opined at that time that his personality characteristics would continue to pose a challenge for correctional staff and program facilitators. Federal corrections records as well as Corrections Branch records indicate a history of anger and agitation in response to interviews, questions and other discussions. The Forensic Services psychologist who prepared the earlier noted assessment opined that he seemed quick to feel unfairly treated or misunderstood, further remarking that on a couple of occasions he was concerned that the Subject would walk out of their session.

- [25] I earlier alluded to a portion of the report that talked about Mr. Feeney indicating he was attending the sessions on his last parole only to satisfy the requirements of the release. Those observations, particularly the latter, are contradictory to the submissions made by Mr. Watt regarding Mr. Feeney's desire or intent or seriousness regarding these matters.

- [26] The prior cases to which I have been referred to are helpful and, as always, there are features of every case that is referred to in sentencing and other matters that have similarities and differences from the facts of the case before me. I do note that generally those cases involve individuals with significant prior records, in some cases robberies, in other cases not. That they all involve cases where there are substance abuse and addiction issues. It is fair to say that none of them, as I recall, specifically address the issue in the manner in which it has been presented here by Mr. Watt on behalf of Mr. Feeney. None of them involve actual violence or weapons, although there are stronger comments made in at least two of the cases regarding the potential for violence, the presence of a gun, other individuals, that sort of matter. But those cases, as I say, have some level of similarity and do support the Crown's position as to range of sentence.
- [27] In the Turnbull case, the most recent case, the offence involved an indication that there was another accomplice and that the teller should comply to ensure that no one got hurt. No weapon was produced or discovered. There was no prior conviction for robbery in that case, but there was a significant record.
- [28] Reference is made to the McPherson case from the Court of Appeal and the Dionne case from the Court of Appeal, each of which, in my view, have distinguishing features. Specifically in respect of the Dionne case, the Court of Appeal in Turnbull commented that it was at the very low end and that the case offers little guidance on the appropriate range of sentences for this kind. In Turnbull, a sentence of five years' imprisonment was upheld.
- [29] As I have indicated, the issue of addictions can be a real challenge. There are numerous cases, not specifically the ones before me necessarily, but numerous cases where, in the context of sentencing, addictions have been looked at as a disease and something over which an individual does not have complete control. At the same time, addictions cannot serve as an excuse and a person has to be accountable for not necessarily the fact that they have the disease, but how they have managed that disease or dealt with it in the past.
- [30] The principles of sentencing that apply are set out in the Criminal Code. I will not deal with them in detail, but obviously it involves a balancing of considerations, those considerations set out in s. 718, which include denunciation, deterrence, separation of offenders from society where necessary, assistance in rehabilitation, and providing for reparations for harm done and promoting a sense of responsibility in offenders.
- [31] Under s. 718.2, one of the considerations that I am required to take into account is that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. To that extent, reference to previous authorities and decisions is a necessary exercise, not just a helpful exercise.

- [32] I am troubled by the presentence report's recording of Mr. Feeney's stated attitude towards counselling and that, according to the report, is not just historical but existed up to and including a short period of time prior to the commission of these offences, and indeed January of 2015 post-dates these matters.
- [33] Accordingly, I give some diminished weight to the sincerity of the proposition and the optimism expressed or that Mr. Watt asked me to have regarding these matters. There are mitigating factors and some of it supports Mr. Watt's proposition, and that is the fact that Mr. Feeney turned himself in, that he entered an early guilty plea, all of which indicates an intention and desire to fully accept responsibility for these matters. The question in the circumstances is how I should balance these principles of sentencing, taking into account all of that information.
- [34] In my view, the Crown's suggested range of sentence is certainly in keeping with the authorities and in keeping with the facts and circumstances. The appropriate sentence, before I deal with questions of credit for time served, and taking into account the mitigating factors and giving some credence to Mr. Feeney's stated desire or indication that this time it is different (although I have a healthy skepticism for that, I will give some credit for it), is 45 months.
- [35] Now, I want to explain my math for the credit for time served. I will give that enhanced credit at the rate of one and a half days for each day served, which would be the equivalent of 303 days. I prefer to state the sentence in the context of months rather than days. If I take a year at 365 days, and divide that by 12, that averages each month to 30.4 days, rounded slightly. Accordingly, I give Mr. Feeney credit for 10 months' time served, so the actual sentence is 35 months' new time.
- [36] In addition, I agree with both Crown and defence that the ancillary orders suggested are appropriate and accordingly there will be a lifetime ban from the possession of any firearms, ammunition, explosive substances, or any items as set out in s. 109 of the Criminal Code. This being a primary designated offence, there will be an order that he provide a sample suitable for registration with the DNA data bank at a time and date through the facility.
- [37] There will be a no-contact order that prohibits him from having any contact, directly or indirectly, with Ted Hallman, the teller dealt with directly, and sorry, the other name was ...?
- [38] MR. FROEHLICH: Brynn Moore, My Lord.
- [39] THE COURT: Brynn Moore, both employees of the branch which was robbed.
- [40] Anything else, gentlemen, that I need to deal with?
- [41] MR. WATT: Nothing, My Lord.
- [42] MR. FROEHLICH: No, My Lord.

[43] THE COURT: All right, thank you both.

"D.A. Betton"

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