

CANADA / JUDGMENT

R. v. Kirby

2023 BCSC 1658

COURT

Supreme Court of British Columbia

DECIDED

1 March 2023

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2023 BCSC 1658 R. v. Kirby IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Kirby, 2023 BCSC 1658 Date: 20230301 Docket: 48394-2 Registry: Penticton Rex v. Seamus Ronald Alexander Kirby Before: The Honourable Mr. Justice Wilson Oral Reasons for Sentence Counsel for Crown: A.W. Lerchs Counsel for Defence: M.A. Patterson Place and Date of Trial/Hearing: Penticton, B.C. March 1 2023 Place and Date of Judgment: Penticton, B.C. March 1, 2023

- [1] THE COURT: This is my decision with regard to sentence for Mr. Kirby who pleaded guilty to Count 1 of a five-count indictment. He pleaded guilty to possessing a firearm contrary to s. 95(1) of the Criminal Code.
- [2] The circumstances of the offence are that on or about May 26th of 2021, Mr. Kirby was recognized by a police officer as someone with an outstanding warrant. Mr. Kirby fled from the police and was seen by a civilian neighbour throwing a black bag into a small stream. At the time, Mr. Kirby was attempting to escape from the police officer by running up the stream that ran behind some residential properties. The black bag in the stream contained a loaded handgun and Mr. Kirby, while resistant, was arrested some short time later and a short distance away.
- [3] The circumstances of Mr. Kirby are that he is presently 31 years of age. Counsel says he has a background of substance abuse. Mr. Kirby has a substantial criminal record which was marked as an exhibit in these proceedings. His criminal record can be accurately described as an unbroken string of offences. There are 42 Criminal Code convictions, 20 for breach of probation, six for breach of bail. There is a robbery amongst other offences in a criminal record which I say is extensive for one so young.
- [4] The joint submission for sentence is for 33 months of jail, a s. 109 lifetime firearms prohibition, a DNA order under s. 487.051 of the Criminal Code and for a forfeiture order with regard to the gun, ammunition, and magazine seized pursuant to s. 490(1) of the Criminal Code.
- [5] I will now turn to the aggravating and mitigating circumstances. The only mitigating circumstance that was brought to my attention and the only one frankly that would make sense in these circumstances is the guilty plea from Mr. Kirby. I am advised that there have

been lengthy discussions and although the offence was now almost two years ago, the matter was set for trial in December but on account of the status of the negotiations the trial was cancelled well in advance such that witnesses could be denotified and court time and expense could be avoided.

- [6] In terms of aggravating circumstances, the first and most obvious one is the extensive criminal record that I have just mentioned. Additionally, Mr. Kirby was already subject to a 10-year firearms prohibition and he was also bound by a probation order that itself prohibited possession of a firearm.
- [7] Ms. Lerchs also points to the fact that this occurred in a quiet residential neighbourhood and Mr. Kirby was running through back yards in a quiet neighbourhood with a loaded gun. Of particular concern in circumstances such as this is that having discarded the gun into the stream, who knows what might have become of the gun had someone other than the police officers found it.
- [8] The principles of sentencing that apply in this case are denunciation and deterrence both general with regard to people in the community and specific as it relates to Mr. Kirby. The proposed jail sentence here is 33 months. Crown referred me to a British Columbia Court of Appeal case, *R. v. Holt*, 2015 BCCA 302, in which, our Court of Appeal discussed the Supreme Court of Canada decision in *R. v. Nur*, 2015 SCC 15. In *Nur*, the Ontario Court of Appeal had discussed the differences between the types of circumstances that might constitute offences under s. 95 - the full range from an innocent otherwise law-abiding responsible gun owner who ostensibly made a mistake all the way to people involved in criminal enterprises who possess guns as a tool of the trade.
- [9] There is no suggestion here that Mr. Kirby is in the former and he is clearly, given his criminal record, in the latter category.
- [10] The sentence range as discussed in *Holt*: In *Holt*, Mr. Holt had been originally given a sentence of 18 months by the trial judge. That was increased on appeal to 30 months and the circumstances of Mr. Holt was a less significant criminal record than Mr. Kirby. Nonetheless the court confirmed that possession of loaded firearms posed an increasing threat across Canada and concluded that British Columbia should follow the example set in other provinces.
- [11] Because this is a joint submission I must consider the Supreme Court of Canada's decision in *Regina v. Anthony-Cook*, 2016 SCC 43, and in that case Justice Moldaver said that the court should accept the joint submission unless the proposed sentence would bring the administration of justice into disrepute or alternatively it would be contrary to the public interest. I am satisfied that in this case the proposed sentence is within an acceptable range and therefore I am prepared to accede to the request for the sentence as proposed.

- [12] THE COURT: Mr. Kirby, I therefore sentence you to 33 months in jail. There will be a s. 109 lifetime firearms prohibition. There will be a DNA order under s. 487.051 of the Criminal Code and there will be a s. 490(1) forfeiture order with regard to the items that were seized.
- [13] In terms of the calculation of the time remaining, Mr. Kirby has been in custody since May 26, 2021, which is 645 days to today's date. During that period of time he received and served a 15-day sentence which should therefore be deducted as it related to an unrelated matter. As such he is entitled to 645 less 15 days, which equals 630 days of credit. In terms of enhanced credit at a day-and-a-half per day, the enhanced credit total is 945 days. A 33-month sentence equates to 990 days and as such there are 45 days remaining to serve for Mr. Kirby, so that is the sentence that I pronounce.
- [14] Mr. Kirby has indicated that he wishes to return to obtain a trade. Mr. Kirby, I wish you all the best with that. Time will tell, of course, but you are still young enough to be able to do something productive and have a life that fits with the expectations of society. I say it is not too late and I hope that you succeed and I wish you all the best with that.
- [15] THE ACCUSED: Thank you very much, sir.
- [16] THE COURT: Is there anything else?
- [17] CNSL A. LERCHS: Justice, just to confirm that the s. 109 order was for lifetime.
- [18] THE COURT: Yes.
- [19] CNSL A. LERCHS: Thank you. And otherwise I direct a stay of proceedings on all outstanding counts on the indictment.
- [20] THE COURT: So that would be Counts 2, 3, 4, and 5 are therefore stayed.
- [21] CNSL A. LERCHS: Thank you.
- [22] THE COURT: Thank you.
- [23] CNSL M. PATTERSON: Thank you, Justice.
- [24] THE ACCUSED: Thank you very much, sir. Thank you. "Wilson J."

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