

CANADA / JUDGMENT

R. v. Lopez

2025 BCSC 1303

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lopez,

2025 BCSC 1303

Date: 20250314

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Rex

v.

Jose Rafael Lopez

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Before: The Honourable Madam Justice Hardwick

Oral Reasons for Sentence

Counsel for the Crown:

D. Grabavac

Counsel for the Accused:

A. Willox

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 14, 2025

Place and Date of Judgment:

Kelowna, B.C.

March 14, 2025

- [1] THE COURT: These are my oral reasons for sentence in respect of Jose Rafael Lopez. This morning Mr. Lopez pled guilty to seven counts of a nine-count indictment sworn October 12, 2021 (the "Indictment").
- [2] Given the number of counts, I am going to summarize them:
- a) Count 1, possession of a loaded restricted firearm, contrary to s. 95(1) of the Criminal Code;
 - b) Count 2, uttering threats, contrary to s. 264.1(1) of the Criminal Code;
 - c) Count 3, pointing a firearm without lawful excuse, contrary to s. 87(1) of the Criminal Code;
 - d) Count 4, possession of a firearm while prohibited from doing so, contrary to s. 117.01(1) of the Criminal Code;
 - e) Count 6, possession of bear spray for a purpose dangerous to the public or for the purpose of committing an offence, contrary to s. 88(1) of the Criminal Code;
 - f) Count 7, occupying a vehicle knowing there was a restricted firearm in the vehicle, contrary to s. 94(1) of the Criminal Code; and
 - g) Count 8, possession of a firearm without a licence, contrary to s. 92 of the Criminal Code.
- [3] All seven of these counts arise out of a series of events which took place in downtown Kelowna between approximately 1:30 a.m. and 3:30 a.m. on July 17, 2021. I will briefly describe the circumstances in a moment.

Circumstances of the Offences

- [4] Specifically, on the early morning of July 17, 2021, at approximately 1:30 a.m., a group of three youths were in and about the area behind the Earls Restaurant in downtown Kelowna. They encountered a group of men, one of whom pulled out a firearm. The situation escalated and one of the youths tried to de-escalate the situation. During the course thereof, a young male in a red shirt pulled out a weapon and pointed this at the head of the youth for approximately 45 seconds. The other youths saw the firearm pointed at the head of their acquaintance. The situation was de-escalated and the individual in the red shirt left. The youths did not initially report the incident to the police.
- [5] At approximately 3:00 a.m., there were two individuals walking in downtown Kelowna in the area of Lawrence Avenue and Abbott Street. An argument broke out for unknown reasons. There was some discussion about gang involvement and an individual in a red shirt

identified himself in some way as "BIBO". That was apparently a term that was familiar to the two individuals who were engaged in the argument. There was also a reference to the individual in the red shirt saying he was looking for a body. These individuals also tried to de-escalate the situation. However, the male in the red shirt pulled out a can of pepper spray or bear spray or mace. Ultimately, the situation did de-escalate. Before doing so, the individual in the red shirt said he had a gun. After the situation de-escalated, the individual in the red shirt expressed some remorse to the individuals and said, "Sorry, bro." He then left and was observed walking away into the downtown core.

- [6] Upon the individual in the red shirt leaving the eyesight, one of the individuals involved in the altercation called the police. In the circumstances, there was a large police response to the downtown core. There was also a report of a white BMW being driving erratically, and it was identified that a male in a red shirt was driving the white BMW. Ultimately, that white BMW stopped in or about the vicinity of the Bank of Montreal on Bernard Avenue in downtown Kelowna. A male in the red tank top was seen exiting the vehicle and then quickly started to run from the police. A police chase ensued. There were multiple officers involved.
- [7] Eventually the male in the red shirt was tackled by one officer and arrested. He was later identified as Mr. Lopez, although Mr. Lopez originally denied doing anything wrong and at one point indicated he was going for a midnight jog. He was placed in the car, and at that point in time he was noticed by the police to have a strong smell of alcohol coming from his breath.
- [8] There was a search incidental to arrest which located some items including a key fob to a BMW and a cellphone, as well as identification for Mr. Lopez. Subsequently, there was a search of the BMW vehicle using the fob that was located on Mr. Lopez's person. The vehicle was also registered to Mr. Lopez. During the course of the search of the vehicle, they found a loaded weapon, a Smith and Wesson revolver, in the back of the vehicle with some personal items such as shoes and lifejackets.
- [9] It was during this police response and during, I understand, the search of the BMW vehicle that the three youths who were involved in the earlier altercation behind the Earls Restaurant noticed or observed the police presence and then reported what had occurred with the individual with the red shirt and identified the individual in the red shirt as the person who had pointed the weapon at the head of one of the youths.
- [10] Mr. Lopez was chartered and given a right to counsel. He gave a brief statement to police which indicated that the BMW was his car and that no one else had access. The firearm was sent for analysis by the RCMP and the expert concluded that it was a restricted weapon. There were six ammunition that were also located, and those were also sent for analysis and they met the definition of ammunition under the Criminal Code. Mr. Lopez had no licence to possess a firearm, and indeed was subject to a 10-year ban contrary to s. 110 of the Criminal Code which had been made back on September 10, 2019.

- [11] Mr. Lopez, as indicated, was arrested on the date of the offences and then was in pretrial custody for a period of time before receiving judicial interim release. That bail was not perfected for some period of time. Fortunately, though, counsel has factored in pretrial custody into the proposed sentence, which I will address in a moment, and so there is no need to deal with the calculation for enhanced credit specifically.
- [12] There are no victim impact statements that were tendered by the Crown. The individuals involved in the two altercations, the first altercation involving the weapon and the second altercation involving the pepper spray, did not want to make victim impact statements based on safety and security concerns, particularly having regard to the circumstances giving rise to the recent second degree murder conviction of the accused, Mr. Lopez, which I will turn to.
- [13] Specifically, Before turning to the principles of sentencing and my consideration of what counsel say is a "true Anthony-Cook" joint submission, there is a very significant intervening event which is relevant to understanding the concurrent and consecutive elements of the joint submission. Specifically, very recently on March 7, 2025, Mr. Lopez was sentenced to life imprisonment for second degree murder, contrary to s. 231(7) of the Criminal Code. In light of that conviction, no sentence for any of the offences included in the Indictment can be served consecutively as to do so would be contrary to the Criminal Code.
- [14] On this basis, the Crown and the defence pose that a fit and appropriate sentence in the circumstances is a total sentence of four years and nine months broken down as follows:
- a) Count 1, four years custody concurrent to the second degree murder conviction entered March 7, 2025;
 - b) Count 2, one month concurrent with Count 1 on this Indictment;
 - c) Count 3, 10 months concurrent to Count 1 on this Indictment;
 - d) Count 4, nine months consecutive to Count 1 on this Indictment, which as noted is concurrent to the life sentence contrary to s. 231(7);
 - e) Count 6, three months concurrent to Count 1 on this Indictment;
 - f) Count 7, 15 months concurrent to Count 1 on this Indictment; and
 - g) Count 8, six months concurrent to Count 1 on this Indictment.
- [15] As this is a joint submission, I will briefly turn to the general principles in this regard. In *R. v. Anthony-Cook*, 2016 SCC 43, Justice Moldaver of the Supreme Court of Canada clarified the legal test for the scenario in which Crown and defence presented joint submissions on sentence in a criminal proceeding. While joint submissions on a sentence are both accepted and acceptable means of a plea resolution in a criminal proceeding, they are not sacrosanct. In certain circumstances, judges may depart from the joint submission on sentence and impose a sentence that is different from one that the Crown and defence jointly propose.

The test for whether a trial judge should accept a joint submission on sentence is whether the proposed sentence would bring the administration of justice into disrepute or would be contrary to the public interest. This is a stringent test, which means a high threshold must be cleared before a trial judge departs from a joint submission on sentence.

Principles of Sentencing

[16] Turning then to the principles of sentencing. As a starting point, s. 718 of the Criminal Code provide as follows regarding the purposes of sentencing:

718 The fundamental purpose of sentencing is to protect society and 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.

[17] The fundamental principle is that set out in s. 718.1, which provides that:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[18] In terms of the other sentencing principles, the relevant provisions of s. 718.2 mandate that a sentence should be increased or decreased to account for any relevant aggravating or mitigating factors. I will turn to those in relation to Mr. Lopez in a moment. I will go back and point out that in this particular case as it pertains to s. 718, the objectives which are relevant here are to denounce the unlawful conduct and harm done to the victims of the community that is caused by the unlawful conduct, and to deter other persons from committing the offences, as well as to separate offenders from society where necessary, to a lesser extent, in this case, given the intervening sentence which Mr. Lopez will be serving.

[19] Before turning beyond the case law and to the circumstances of Mr. Lopez, I will just quote from the majority of the Supreme Court in *R. v. Nur*, 2015 SCC 15, the fundamental principle in sentencing is reaching a proportionate sentence that balances the gravity of the offence and the degree of the responsibility of the offender. In particular, at para. 42 of *Nur*, the Court says that:

- [42] In reconciling these different goals, the fundamental principle of sentencing under s. 718.1 of the Criminal Code is that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

Aggravating and mitigating factors

- [20] In respect of the s. 718.2 factors, the following were brought to my attention. The first aggravating factor is, of course, the circumstances of these offences involving youths, involving firearms, and involving threats of violence. In addition, there was the pointing of a firearm. There was running from police. There is also the location of the events which took place in the downtown core of Kelowna during the busy summer months.
- [21] In respect of the specific circumstances of the first incident involving the youths when the weapon was pointed at one of the youth's head, it is noted that Mr. Lopez was in the presence of a large group of males, at least one of whom was identified as having a firearm, as well, and there was some reports of other individuals having firearms but those were not confirmed.
- [22] Mr. Lopez does have a relevant prior criminal record. As it relates to his prior criminal record, the conviction for second degree murder is not relevant as it incurred after these offences. He does have two relevant offences, convictions for assault, one of which resulted in the weapons prohibition for which he is being sentenced for contravening as one of the counts today.
- [23] In terms of mitigating factors, the most significant is Mr. Lopez's guilty plea. By pleading guilty he has saved not only the court resources, he has not required the individuals involved in the two altercations to come forward and provide their testimony. It also saves significant police resources given the number of police officers who likely would have been called having regard to the large police response that was involved in this particular incident(s).
- [24] Mr. Lopez still is a relatively young man. He had at the time of these offences good prospects for rehabilitation. I will come back to some other personal circumstances of Mr. Lopez in a moment that were brought to my attention by his counsel. Those prospects of rehabilitation are limited given his life sentence but they are still relevant, in my view, to these particular offences.
- [25] Mr. Lopez expressed remorse through his counsel today and is taking acknowledgement and responsibility for his offences through his guilty plea and indicated that again through his counsel. There is also some actual in the moment expression of remorse in his saying "Sorry, bro" after the pepper spray incident was de-escalated.
- [26] Turning to the personal circumstances of Mr. Lopez. He, as indicated, is a relatively young man. He was 22 years of age at the time of these offences. He is now 26 years of age. He did come from a conventional family unit. He has three sisters. He is the second youngest child. I understand it was nuclear family until his father unfortunately passed away when he was

17. The family did move frequently even after moving to British Columbia when Mr. Lopez was approximately three years of age. He found that this was disruptive and did not result in him succeeding in school or being able to form significant friendships. As a result of this, he left school in grade nine and entered the workforce when he was 15. He also left the family home for a period of time at around age 15, but did return prior to his dad's passing when he was 17 as his dad was ill, I gather for at least some period of time prior to his passing.

- [27] Mr. Lopez has been employed in numerous vocations over the course of his youth until his incarceration. They have involved being a labourer, they have involved working in restaurants, they have involved working as a tire technician, and most notably Mr. Lopez did want to pursue a career as an electrician and took some training for that prior to these offences taking place in the summer of 2021. Mr. Lopez, however, did leave grade nine as indicated. He hopes to complete his high equivalency while in custody and pursue his training as an electrician.
- [28] In terms of other case authorities that were identified by counsel, there were various case authorities that were brought to my attention with respect to the range of sentences for, in particular, weapons offences. I will not read them into the record for the purposes of these reasons for judgment, but I am satisfied that they support the joint submission that is being made by counsel in these circumstances.
- [29] Ultimately, having regard to the foregoing, the circumstances of the offences, the circumstances of the offender, Mr. Lopez, and recognizing that this is a true Anthony-Cook submission, I am prepared to sentence Mr. Lopez accordingly.
- [30] Mr. Lopez, if you could please stand.
- [31] As it relates to Count 1, which is the offence contrary to s. 95 of the Criminal Code, I am sentencing you to four years in custody concurrent to your second degree murder conviction.
- [32] As it relates to Count 2, which is the uttering threats, contrary to s. 264.1(1)(a) of the Criminal Code, I sentence you to one month concurrent with Count 1 of this Indictment.
- [33] As it respects Count 3, which is the unlawful possession of a firearm, contrary to s. 87(1) of the Criminal Code, I am sentencing you to 10 months concurrent with Count 1 of this Indictment.
- [34] As it relates to Count 4, which is the possession of the firearm contrary to s. 117.01(1) of the Criminal Code, I am sentencing you to nine months consecutive to Count 1 on this Indictment.
- [35] As it relates to Count 6, which is the possession of pepper spray, contrary to s. 88(1) of the Criminal Code, I am sentencing you to three months concurrent to Count 1 on this Indictment.

- [36] In respect of Count 7, which is occupying a vehicle knowing that there was a restricted firearm, contrary to s. 94(1) of the Criminal Code, I sentence you to 15 months concurrent with Count 1 of this Indictment.
- [37] And as it relates to Count 8, which is resisting arrest, contrary to s. 129(a) of the Criminal Code, I am sentencing you to six months concurrent with Count 1 of this Indictment.
- [38] You may be seated.
- [39] Those are my reasons for judgment.
- [40] CNSL D. GRABAVAC: On the ancillary orders, Justice.
- [41] THE COURT: Oh, yes, the ancillary orders, thank you.
- [42] CNSL D. GRABAVAC: And the forfeiture.
- [43] THE COURT: We dealt with it -- I have made a forfeiture order, which I have signed. I have made a forfeiture and destruction order, which is that pursuant to ss. 490 and 491 of the Criminal Code, the items listed below which will be forfeited to the Crown for destruction, that includes the bear spray; the Smith and Wesson .38 calibre military and police revolver, serial number V161111; three bullets from Exhibit A, which is the Smith and Wesson revolver, three bullets from Exhibit 1A, which is the Smith and Wesson .38 calibre revolver; and the DNA swabs which were identified in the accompanying affidavit.
- [44] And there are two ancillary orders. Mr. Grabavac, could you save me and give me the cite, I am not able to read my scribble.
- [45] CNSL D. GRABAVAC: Section 487.051 of the Criminal Code.
- [46] THE COURT: 051, that is why it is scribbly.
- [47] In terms of ancillary orders, there will be the DNA order under s. 487.051 as this is a primary offence, and there will be under s. 109 of the Criminal Code a lifetime weapons prohibition order.
- [48] Thank you, Mr. Grabavac.
- [49] CNSL D. GRABAVAC: Justice, the Crown will stay Count 5, which is the unsafe storage count; and the Crown will stay Count 9, which is the s. 92 offence the no licence offence for the firearm.
- [50] Additionally during the break, Corporal Dewolf attended and provided with my friend the cellphone.
- [51] THE COURT: All right.
- [52] CNSL D. GRABAVAC: And the last thing I think we need to do is deal with the victim fine surcharge, and I think we are done unless my friend has any comments.

[53] THE COURT: No. I think we -- I am satisfied that the victim surcharge shall be waived.

[54] THE CLERK: Madam Justice, just for clarity then, the ancillary orders all apply to Count 1?

[55] THE COURT: Yes.

[56] THE CLERK: Thank you.

[57] THE COURT: Thank you, Mr. Registrar. Okay. Thank you.

"Hardwick J."

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