
CANADA / JUDGMENT

R. v. Montemurro

2015 BCSC 162

COURT

Supreme Court of British Columbia

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2015 BCSC 162 R. v. Montemurro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Montemurro,

2015 BCSC 162

Date: 20150113

Docket: 21242

Registry: Salmon Arm

Regina

v.

Cory Joseph Montemurro and Joseph Bruce Skreptak

Before: The Honourable Mr. Justice Betton

Oral Reasons for Sentence

Counsel for the Crown:

S.L. Dworkin

Counsel for the Accused,

C.J. Montemurro:

D.W. Skogstad

Counsel for the Accused,

J.B. Skreptak:

K. Christiansen

Place and Date of Trial/Hearing:

Kelowna, B.C.

September 17-19, 2014

Place and Date of Oral Submissions on Sentencing:

Kelowna, B.C.

December 8-9, 2014

Place and Date of Judgment:

Kelowna, B.C.

January 13, 2015

- [1] THE COURT: This matter is here today for purposes of sentencing. The accused were convicted of numerous counts after a trial before Mr. Justice Barrow. I was assigned to conclude the matter pursuant to s. 669.2(2) of the Criminal Code. This decision follows a resolution of applications made by the defendants that followed that conviction and were the subject of separate oral reasons. I then heard two days of submissions on sentence and reserved my decision to this date.
- [2] By way of background, the reasons for conviction of Mr. Justice Barrow have been transcribed. In a summary way, the accused were stopped by the police on November 25, 2010, near Salmon Arm. They were in a rented vehicle. The vehicle had been rented that morning by Mr. Montemurro in Kelowna and it was to be returned the next morning. There were, in addition to these accused, two other male individuals in the vehicle. The stop led to a search of the vehicle and of the accused. I will reference some of the paragraphs of Mr. Justice Barrow's decision for a synopsis of the results of the searches to which I have just alluded.
- [3] In his Reasons for Judgment, beginning at paragraph 17, Mr. Justice Barrow said this:
- [17] After all four men had been searched and booked into cells, Constable Thompson returned his attention to the Jeep. He first seized the shotgun. Both the barrel and butt stock of the gun had been cut off, such that the butt stock was left with a pistol grip. The green shopping bag in which it was found had the bottom cut out of it, such that the grip of the gun could be held and manipulated, while the gun itself remained in the bag. The shotgun was a 12-gauge pump-action weapon. It was unloaded.

- [18] Next, Constable Thompson examined a duffel bag he found in the hatchback area of the vehicle. In it he found a knife, bear spray, a firearms licence in the name of Mr. Montemurro, 12-gauge shotgun shells, six magazines of 9mm ammunition, two SG shotgun shells, and a bear banger. The bear banger was made from a 12-gauge shotgun shell, but when detonated the shell did not project projectiles but rather simply made a loud noise intended to scare bears or other animals.
- [19] The officer then searched a blue duffel bag also found in the hatchback beside the blue shopping bag. In it he found a black balaclava and a set of body armour. A third duffel bag with the brand name 'Tracker' was searched and in it the police found a Gerber model knife. Behind this bag, located at the base of the wall of the hatchback formed by the back seat, Constable Thompson found a baseball bat and a length of hickory wood. The latter was about two inches in diameter and three feet long. There was no identification in the Tracker duffel bag.
- [20] Constable Thompson and Constable McLellan then turned their attention to the driver's seat area of the vehicle. Constable McLellan saw a handgun under the driver's seat. Constable Thompson then searched that area and found and seized a black balaclava on the floor in the wheel well of the driver's side. He seized the handgun, a 9mm CZ pistol. It was registered to Mr. Montemurro. There was a magazine in the pistol which contained 10 rounds of live ammunition. There was no ammunition in the chamber. The 10 magazines of 9mm ammunition found in the black duffel bag were of the same calibre and brand as the magazine in the pistol. All of those magazines were full of live ammunition.
- [21] The next area searched by Constable Thompson was the centre console between the driver's and passenger seat. There he found a pair of ripped boxer shorts. The shorts had been ripped from the bottom to the elastic waistband, such that the material draped from the waistband. The shorts were useless as shorts, but could be used as a face mask in the manner demonstrated in the photograph in Exhibit 13.
- [22] Next, Constable Thompson found a pair of walkie-talkies, each tuned to the same channel, and a roll of duct tape in the glove box of the vehicle. On searching the back seat of the vehicle, Constable Thompson found a cellphone jammer under the rear seat. When the device was turned on, nearby cellphones were rendered inoperable.
- [4] In reference to Mr. Skreptak, Mr. Justice Barrow said this:
- [13] During that search [of Mr. Skreptak, that is], he noted Mr. Skreptak's cellphone had a sticker on it that read, "Support your local Hells Angels, Kelowna". Constable Thompson also noted that Mr. Skreptak was wearing a black T-shirt with the Hells Angels name and logo on it. Mr. Skreptak was handcuffed and placed in [a police vehicle].
- [15] Once at the detachment, Constable Thompson searched Mr. Skreptak in the booking area. In the course of doing so, he found the bag of marihuana mentioned above. He testified that Mr. Skreptak was wearing two pairs of pants in addition to long underwear. When Mr.

Skreptak was removing his second pair of pants, Constable Thompson saw a sock roll out of them. In the sock was a latex glove and nine rounds of .38-calibre ammunition. Constable Thompson then allowed Mr. Skreptak to telephone counsel and allowed him to use his cellphone to do that. When Mr. Skreptak finished speaking to his lawyer, he smashed his cellphone on the corner of a desk and said to Constable Thompson, "Try to get something out of that."

[16] The officer also found two pairs of latex gloves on Mr. Skreptak, both of which smelled of vegetative marihuana.

[5] In respect of Mr. Montemurro, Mr. Justice Barrow said:

[12] Constable Thompson followed the Montemurro vehicle to Salmon Arm,

In summarizing the search that followed the arrest of Mr. Montemurro, "he found a knife tucked into the sock inside of Mr. Montemurro's boot."

[6] A photograph of all of the ammunition and weapons seized was entered as an exhibit on the sentencing.

[7] In respect of the seizures, Mr. Justice Barrow said this at paragraphs 59 and 60:

[59] [I]t is admitted that the shotgun, the CZ 9mm pistol, the Glock 9mm pistol, and the .38-calibre revolver are all "firearms" within the meaning of that word in the Criminal Code. Second, it is admitted that both the shotgun and the .38-calibre revolver are prohibited weapons, Third, it is admitted that the various cartridges seized by the police are "ammunition" within the meaning of the Criminal Code. Further, the shotgun shells are 12-gauge shells and could be fired from the shotgun that was seized from the rear of the motor vehicle.

[60] The ammunition found in the .38-calibre pistol and the ammunition found in the sock that Mr. Skreptak had is .38-calibre ammunition capable of being fired in the .38-calibre revolver that was found in the snow. The cartridges found in the CZ pistol are 9mm ammunition capable of being fired in that weapon, and the cartridges found in the Glock 9mm pistol are also 9mm ammunition capable of being fired by that weapon. Fifth, the clip or magazine found in the Glock 9mm pistol has a capacity for 17 cartridges and, as such, it is a prohibited device within the meaning of s. 84(1) of the Criminal Code. Sixth, the serial number of the Glock 9mm had been removed and was later restored by [a] firearms analyst

[8] All of that led to the charges in the indictment.

[9] The accused are jointly charged with Counts 1 to 10. Mr. Skreptak is separately charged in Count 12, and Mr. Montemurro is separately charged in Count 11. The accused were convicted on all counts.

- [10] Counts 1 to 4 are offences under s. 95(1) of the Criminal Code, each deal with the possession of one of the four firearms without being the holder of an authorization or licence for that possession.
- [11] Count 5 is an offence pursuant to s. 94(1)(a)(ii) of the Criminal Code of being occupants in a motor vehicle in which they knew there were firearms without reasonable grounds to believe that any occupant of the vehicle was the holder of an authorization or licence under which the occupant might possess the firearms.
- [12] Count 6 is an offence of possessing a prohibited device, a cartridge magazine with a capacity for 17 cartridges in 9mm Luger calibre, without being the holder of a licence.
- [13] Count 7 is possessing that prohibited device without reasonable grounds to believe that any occupant of the motor vehicle was the holder of authorizations or licence under which the occupant may transport the prohibited weapons.
- [14] Count 8 is possessing a firearm knowing that the serial number on it had been altered, defaced, or removed, that being the Glock 9mm pistol.
- [15] Count 9 was transportation and storage of firearms in a manner contrary to the Storage, Display, Transportation and Handling of Firearms by Individuals Regulations under s. 117(h) of the Firearms Act, contrary to s. 86(2) of the Criminal Code.
- [16] Count 10 is the offence that each was convicted of, of having in their possession weapons for a purpose dangerous to the public peace, specifically, firearms, ammunition, bear spray, knives, hickory stick, and a baseball bat, contrary to s. 88(1) of the Criminal Code.
- [17] Count 11 is Mr. Montemurro's offence of carrying a concealed weapon, a knife.
- [18] Count 12 is Mr. Skreptak's offence of unlawful possession of cannabis marihuana.
- [19] In terms of criminal histories - and I will comment further on this later in my decision - Mr. Skreptak was convicted on June 18, 2013, of aggravated assault. The decision in that regard is indexed at 2013 BCSC 1288. The offence date was November 1, 2010.
- [20] Mr. Montemurro has a prior conviction for which he had been pardoned but disclosure of it in these proceedings was approved by the Minister of Justice. That conviction or convictions date back to September 30, 1993, in Edmonton when Mr. Montemurro was convicted of possession of a narcotic for the purpose of trafficking and possession of a weapon. He received sentences of three years and six months respectively.
- [21] In these sentence proceedings, a number of issues were raised. First is the application of the principle in *R. v. Kienapple*. That deals with when conditional stays might be appropriate when multiple charges and convictions arise out of a single event or series of events. Second is the need to address the convictions that each of Mr. Montemurro and Mr. Skreptak have had in the past and how they are relevant in these proceedings. Third is the issue of a constitutional question dealing with the mandatory minimum punishment for the offences

in Counts 1 through 4 in the indictment. Fourth is the issue of what credit should be given for time served by each of the accused prior to their release on various terms of judicial interim release, or bail, as it is commonly referred to. Fifth is the question of what credit, if any, should be given for the time that each of these accused was on bail and subject to restrictions of varying degree.

- [22] Last, of course, taking all of that into account, and taking into account the various aggravating and mitigating factors and the law that has been dealt with in various decisions to which I have been referred, is the issue of, What is the appropriate sentence? Within this broad category there are several issues to be dealt with. As it was raised by counsel in submissions, then, What is the relevance and import, if any, of Mr. Skreptak's involvement with Hells Angels? The question was raised during the course of submissions about the purpose that these weapons and items that have been referenced resulting in the convictions were possessed, and what the accused were doing that day. There are a variety of other issues that were raised during the course of submissions that have been referenced as either aggravating or mitigating factors.
- [23] I will deal with the various issues now.
- [24] First, I am going to touch on the question of whether there should be conditional stays for any of the counts and, if so, what those might be.
- [25] The principle is often referred to as having arisen in *R. v. Kienapple* and therefore as the so-called Kienapple principle. It has been the subject of recent comment by the Supreme Court of Canada in the decision of *R. v. Prince*. That decision is reported at [1986] S.C.J. No. 63. In referencing its earlier decision in *Kienapple*, the Supreme Court of Canada noted that Mr. Justice Laskin in *Kienapple* had referred to the principle that there ought not to be multiple convictions for the same "delict" or "matter" or "cause." In noting that there had been controversy about the application of that principle over the years since its pronouncement, the Supreme Court of Canada in *Prince* determined that a further detailing of how the principle ought to be applied should be undertaken. I will quote briefly from portions of paragraphs 17 to 38 of the *Prince* decision.
- [26] The court noted that:
17. It is elementary that *Kienapple* does not prohibit a multiplicity of convictions, each in respect of a different factual incident. Offenders have always been exposed to criminal liability for each occasion on which they have transgressed the law, and *Kienapple* does not purport to alter this perfectly sound principle. It is therefore a *sine qua non* for the operation of the rule against multiple convictions that the offences arise from the same transaction.

The court went on, noting:

20. In most cases, I believe, the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges? [Referencing a decision in *Côté*, the court said] As *Côté* demonstrates, however, it will not always be easy to define when one act ends and another begins.
- [27] In dealing with the subject of the nexus between the offences and asking the question, Need there be one? the court noted:
22. In my opinion, the application of *Kienapple* is not so easily triggered. Once it has been established that there is a sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves. The requirement of an adequate legal nexus is apparent from the use by the majority in *Kienapple* of the words "cause", "matter" or "delict" in lieu of "act" or "transaction" in defining the principle articulated in that case.
23. In my opinion, the weight of authority since *Kienapple* also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions.
24. Numerous other cases can be cited to illustrate that a single act of an accused can involve two or more delicts against society which bear little or no connection the one to the other.

And further:

There must be a relationship of sufficient proximity firstly as between the facts, and secondly as between the offences, which form the basis of two or more charges for which it is sought to invoke the rule against multiple convictions.

[28] In paragraph 31, the court said:

31. It has been a consistent theme in the jurisprudence from *Quon*, through *Kienapple* and *Krug* [referencing earlier decisions] that the rule against multiple convictions in respect of the same cause, matter or delict is subject to an expression of Parliamentary intent that more than one conviction be entered when offences overlap:
32. I conclude, therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.
- [29] At paragraph 34, under a heading titled, with a question, "When is an element of an offence not additional or distinct?" the court says:
34. I now turn briefly to the question of when an element of an offence sufficiently corresponds to another element so that it cannot be regarded as additional or distinct. When can it be said that elements are "substantially the same" or "alternative" the one to the other? This is a question which defies precise answers. Differences of degree are often important and, as *La*

Forest J. has pointed out, abstract logic must be supplemented by an awareness of practical considerations in ascertaining Parliament's intention in creating different offences: Krug, *supra*, p. 269. Without purporting to be exhaustive, I believe that there are at least three ways in which sufficient correspondence between elements can be found, each of which is subject always to the manifestation of a legislative intent to increase punishment in the event that two or more offences overlap.

35. First, an element may be a particularization of another element.

...

37. A second way in which elements may correspond relates to there being more than one method, embodied in more than one offence, to prove a single delict.
38. The third situation in which there is sufficient correspondence between elements to sustain the Kienapple principle is somewhat similar. It arises when Parliament in effect deems a particular element to be satisfied by proof of a different nature, not necessarily because logic compels that conclusion, but because of social policy or inherent difficulties

- [30] Mr. Skreptak bases his submission on an interpretation of the principles, but when applied here, I confess that I did not fully understand his interpretation. He says that if you, for example, take the Glock 9mm pistol, there can only be one offence arising out of its possession with its clip and therefore Counts 6 and 7 should be stayed in accordance with this principle. He further stated that if you can eliminate one element and eliminate more than one offence, "you have a problem". He says that Count 11 is caught by the principle because, although not charged as such, other items in Count 10 were, in fact, concealed.
- [31] In my view, his submissions were based on an analytical approach that was flawed. Counts 1 to 4 deal with possession in close proximity to ammunition without any authorization. Count 5 deals with possession in a motor vehicle or being in a motor vehicle with firearms. Counts 6 and 7 are the equivalent to Count 5 dealing with the excess capacity clip, and Count 8 is focused on the serial number. Count 9 deals with the manner of storage and transportation of firearms and ammunition. In my view, Count 9 is caught by the principle articulated in Kienapple and later in Prince and is and should be the subject of a conditional stay of proceedings.
- [32] Count 10 deals with the purpose of the possession of the various weapons, and Count 11 deals with the manner of possession of the knife.
- [33] As indicated, in my view, the proper application of R. v. Prince dictates that there be a conditional stay of Count 9. The storage and transportation of the ammunition is specifically addressed in Counts 1 to 4, 5 and 7. It is therefore the same delict, matter, or cause, to use the language from Kienapple. I do not agree that any other counts should be the subject of a conditional stay.

- [34] I will now touch on the question of the prior offences for both Mr. Montemurro and Mr. Skreptak.
- [35] In Mr. Montemurro's case, his prior convictions were the subject of a pardon. The Crown took steps pursuant to s. 7.2 of the Criminal Records Act and obtained an authorization through the Minister of Justice to reference them. Mr. Montemurro, through counsel, concedes that in light of those circumstances they can be treated as prior convictions. As such, the fact of the pardon is not relevant in these proceedings.
- [36] In this case, that record is dated and, in my view, although it is relevant, its impact on my decision here is limited. There have been no intervening criminal convictions.
- [37] In respect of Mr. Skreptak, the timing of his conviction in 2013 and the offence dates is relevant. I was referred to the decision in *R. v. Paquin*, a 1989 decision of the Quebec Court of Appeal. There, the Quebec court said this:

That is not to say that a sentencing judge cannot take into account offenses committed after an accused has been convicted but prior to sentencing. These subsequent convictions may be taken into account in order to assess the character of the accused and the degree to which he may or may not be on the road to rehabilitation following his conviction.

But the sentencing judge, in considering offenses committed by an accused subsequent to those for which he is to be sentenced, must not treat those subsequent offenses as he would a criminal record and ascribe to the accused the same degree of culpability or criminalization as if the accused had been previously convicted and punished for these offenses and, notwithstanding the previous conviction and punishment, had committed criminal offenses anew.

In quoting an author, Ruby, on Sentencing, the court read this quote:

"Since a first offence is dealt with as lightly as possible, and a subsequent offence may be viewed more seriously, it becomes a matter of some importance to determine whether a particular conviction was prior to the offence under consideration. Any misapplication of the rules in this regard may result in an offender being treated more harshly than his record warrants. A repetition of an offence after one has been, so to speak, "warned" and "put on notice" by the imposition of a prior sentence, absent explanation, may be viewed more seriously than a first offence. Determining what is a prior conviction for purposes of sentence is therefore crucial.

It is not the order of a commission of offences that is significant, nor the order of convictions, but the order of sentences. It is only offences for which one has already been sentenced which may be taken into account as a prior criminal record. One should ask whether at the time of committing the offence in question, a conviction and sentence had then been imposed."

- [38] In Mr. Skreptak's case, there had not been a sentence imposed at the time of the offending in this particular situation, and as such, the conviction in 2013 is not a prior conviction.

- [39] I will next address the constitutional question raised in the notice of application and constitution issue filed by Mr. Skogstad on behalf of Mr. Montemurro. That deals with the mandatory minimum punishments now in place in respect of s. 95 offences. The issue is presently before the Supreme Court of Canada in a decision, *R. v. Nur*, which is on appeal from the Ontario Court of Appeal. That appellate decision is reported at 2013 ONCA 677. That appeal in the Supreme Court of Canada I am told was heard in November of 2014, and as far as I am aware, the decision has yet to be rendered.
- [40] There are other authorities touching on the issue, including the decision in *R. v. Lloyd*. Here, Mr. Skogstad acknowledges that based on the convictions entered, the appropriate sentence would not be less than the mandatory minimum contained in s. 95 in any event, so as was referenced in *R. v. Lloyd*, 2014 BCCA 224, the specific question does not arise.
- [41] I will make reference as well to our Court of Appeal's decision in *R. v. Ball*, 2014 BCCA 120. There, at paragraph 13, the court said:

In the case at bar, the sentencing judge considered a constitutional challenge to the mandatory minimum sentence but concluded the challenge was academic because a fit sentence for Mr. Ball, when assessed without reference to the statutory minimum, met or exceeded the mandatory minimum. No appeal is taken from that conclusion.

That is the situation that is essentially conceded by Mr. Skogstad here, and is a process that I endorse, and accordingly will not deal further with the constitutional question.

- [42] I turn next to the question of credit for time served by each of the accused here.
- [43] In respect of Mr. Montemurro, Mr. Skogstad presented a calculation as an aide-mémoire for purposes of his submission. There is no issue taken between Mr. Skogstad and the Crown that Mr. Montemurro has spent 208 days in custody in respect of these matters, and when credit of 1.5 to 1 is given in accordance with the Supreme Court of Canada decision in *R. v. Summers*, that would indicate a credit entitlement of 312 days. The issue that arises is whether there should be any additional credit for three periods of time Mr. Montemurro spent nine days in City cells, and in that case, Mr. Skogstad says that credit for 2 for 1 should be given, adding an additional 5.5 days for a period of time when there were three people in a cell much like a drunk tank, and for a third period of time when he was in segregation through no fault of his own, arguing that there should be credit for, in total, approximately an additional 20 days.
- [44] The law on the subject of enhanced credit has evolved in recent years. Prior to the Truth in Sentencing legislation, the norm, based on appellate decisions, was that individuals would get credit at a 2-for-1 ratio for time served prior to sentencing. Then that legislation reduced the credit to 1 for 1 with some discretion incorporated in s. 719(3.1) of the Criminal Code. That legislation presently, if there is to be any enhanced credit, limits it to a ratio of 1.5 to 1. I have not been referenced to any authority that allows for credit on the basis of 2 for 1, and in any event, in accordance with the Supreme Court of Canada in *R. v. Summers*, I am not

inclined to do so. Accordingly, it is my conclusion that the credit to which Mr. Montemurro is entitled to be applied against the sentence that I will impose today is 312 days.

- [45] In respect of Mr. Skreptak, he was previously sentenced, as I indicated, in the decision indexed at 2013 BCSC 1288. At the time, the issue of his time spent in custody was dealt with, and it was recognized that he was in custody both in respect of the matter that he was then sentenced for and in respect of this matter. Of his bank, if you will, of time served, 112 days was utilized on a basis of 1-to-1 credit. The Crown agrees that in light of the subsequent decision of the Supreme Court of Canada in *R. v. Summers*, that credit would have been 1.5 to 1 and, accordingly, that there is an entitlement to an additional 56 days of credit to be applied against the sentence to be imposed today.
- [46] In respect of any credit for stringent bail conditions, the basis for such credit would arise out of s. 719(2) of the Criminal Code. Various cases have taken into account stringent bail considerations as a factor, notably, the decision of the Ontario Court of Appeal in *R. v. Downes*. The appropriate approach, in my view, is articulated in the B.C. Court of Appeal decision in *R. v. Nghiem*. That is a decision of the B.C. Court of Appeal at 2009 BCCA 170. At paragraph 16, the court there said:
- In my view, time spent under strict bail conditions is not to be considered by way of application of some mathematical formula to reduce the length of sentence. Instead, a court should concern itself with the degree to which objectives of sentencing may have already been accomplished through the imposition of strict bail conditions. While such conditions are not intended to be penal, they can nonetheless incidentally serve to further the goals of rehabilitation, deterrence and denunciation.
- [47] That case was referred to by the Saskatchewan Court of Appeal in *R. v. Lever*, [2014] S.J. No. 266. After referencing some other cases in addition to the B.C. decision to which I have referred, the court said:
- [9] That said, the cases also reveal a number of principles which guide the exercise of a trial judge's discretion in relation to this issue.
- [10] First, pre-sentence release should not be seen as the necessary equivalent of pre-sentence custody and it obviously does not automatically reduce what would otherwise be a fit sentence.
- [11] Second, pre-sentence release does not generate sentencing "credits" in the same way as pre-sentence custody. Rather, it is one of many potentially mitigating factors to consider when formulating an appropriate sentence.

- [12] Third, the harsher and more burdensome the pre-sentence release conditions, the more likely they are to have a valid mitigating effect. The factors to be taken into account in this regard include (but are not limited to) the length of time spent on release, the stringency of the release conditions, and the impact of those conditions on the offender's ability to carry on normal personal relationships, employment and the like.
- [13] Fourth, and speaking generally, time spent on pre-sentence release can reduce an otherwise appropriate sentence only if it involves meaningful hardship or important limitations on the offender's liberty.

That is an approach that I would endorse as being appropriate.

- [48] With both of these accused, the conditions were relaxed over time and on application to accommodate some elements of the accused's normal life, and I say some elements because it is apparent that they were not living normally, but they were able to be in contact with family, live in circumstances where that occurred, and relaxations of conditions were accommodated in order that each could pursue employment.
- [49] Their performance on bail generally was good, and they were compliant. As such, in my view, the imposition of the bail conditions in their varying levels of stringency over time are a mitigating factor to be taken into account in a general way but not in accordance with any specific calculation.
- [50] I now turn to the particular circumstances of each of the accused.
- [51] Dealing first with Mr. Skreptak, he filed a group of reference letters in support of a characterization of him as a person of generally good character, and indeed, they are positive letters. I am told that in respect of each, the authors were aware of Mr. Skreptak's conviction and his membership with the Hells Angels. Some of the letters, at least one specifically, appeared to be in reference to Mr. Skreptak's earlier conviction in 2013, the circumstances there being specifically discussed rather than the circumstances of these offences, but I do accept that, generally, Mr. Skreptak is a person who is capable and has in the past been a hard worker, successful in a number of positive recreational activities, close to his family, and viewed as a positive support to family and those close to him.
- [52] Both Crown and defence made submissions as to how Mr. Skreptak's involvement with the Hells Angels should be taken into account. In this particular case, that membership is not connected in any way with the particular circumstances of the offence, save the observations by Mr. Justice Barrow of his displaying, if you will, his connection with the Hells Angels. It is not, though, specifically part of the factual matrix of the offences per se.
- [53] In her submissions, Ms. Christiansen, on behalf of Mr. Skreptak, made a number of references to his background. He was born April 23, 1967, in Ontario. He grew up in a positive home environment. He has a grade 11 education. He completed his GED while incarcerated after the sentencing in 2013. He has certificates that allow him to pursue employment in the oil and gas industry. He would appear to have a very solid work ethic and

be capable in that regard. He has been in British Columbia since 1991. In 2001, he was involved in a serious motorcycle crash that impacted his ability to pursue employment.

- [54] He is acknowledged to be a full-patch member of the Hells Angels since 2004. Ms. Christiansen described his focus in that membership as being his bike, riding motorcycles, and the freedom associated with that. His role in the Hells Angels, I am told, is as a businessman and to run the business, if you will, of the Hells Angels. That was not specifically articulated. He denies any criminal activity associated with or on behalf of the Hells Angels and noted that the Hells Angels are involved in helping children, with examples such as Toy Runs, Food Bank donations, and the like, and indicated that Mr. Skreptak is a proud member of the Hells Angels.
- [55] That is an interesting characterization. However, I am unwilling to accept that membership in Hells Angels should be treated anything like -- and this is not a comparison used by counsel, but if one takes the submissions generally, for example, being like a Rotarian or any other community-minded organization.
- [56] I dealt with the issue of membership in Hells Angels previously in sentencing Mr. Skreptak in 2013, and I will simply make the observation that it is impossible, in my view, to view or for anyone who is a member of Hells Angels to honestly say that that should be viewed as a positive reflection on their character or on who they are as an individual, and in my view, it is indeed a negative reflection on Mr. Skreptak's character.
- [57] To put that in perspective, one need go no further than the pre-sentence report of Mr. Montemurro. In his pre-sentence report under the heading, "attitude and understanding regarding offence," Mr. Montemurro is described as follows:
- Mr. Montemurro has chosen not to discuss his level of involvement in the offences as he is considering an appeal at the conclusion of his sentencing and does not want to incriminate himself. He is also fearful that telling the truth about what happened on the day the offences took place will place him at risk while incarcerated, given that his co-accused is a Hells Angel.
- [58] This is an individual whom Mr. Skreptak knows. They have had some sort of association on a friendly basis and, despite that, he is fearful simply because of Mr. Skreptak's membership as a Hells Angel. That is a reflection, in my view, of the impact that membership in such an organization has on an individual in terms of their character generally. All of that is to be balanced against the very positive features of Mr. Skreptak's background which have been alluded to, and all form part of the basis for considerations in the principles of sentencing outlined in s. 718.1 and .2 of the Criminal Code.
- [59] I note that in the course of her submissions, Ms. Christiansen, on behalf of Mr. Skreptak, offered his apology for his actions. There has not, however, been any explanation, specifically, for those actions at any time during the proceedings.

- [60] In terms of Mr. Montemurro, I have the benefit of a pre-sentence report. From that and from submissions, Mr. Montemurro is 44 years of age, born February 19, 1970. He has been in a common-law relationship. There are two children of his partner in that relationship to whom he has been a parental figure. He was born in Edmonton, is the oldest of five children, and appears to have had a positive upbringing.
- [61] In respect of Mr. Montemurro, there is again a substantial collection of positive reference letters from individuals with various personal and other connections with Mr. Montemurro over a period of years. They speak very positively of his character, of his willingness to help those to whom he is close, and of his work ethic.
- [62] The pre-sentence report indicates that since these matters have arisen, Mr. Montemurro has struggled with anxiety and depression, has encountered significant financial problems. He, in the pre-sentence report, is referenced as acknowledging association to known gang members in the past and specifically while socializing at bars and clubs, at the gym, or during business encounters, but he minimizes those associations stating that he would not call these individuals friends and was not involved in any criminal activity that they may have engaged in.
- [63] An observed risk factor in the pre-sentence report is stated as follows:
- Mr. Montemurro's identified risk factors for prior and future offending include his association to pro-criminal individuals and minimization and denial of offending behaviours.
- [64] I will next address some of the authorities that deal with the principles of sentencing applicable to these types of offences. They are primarily, the cases that I will refer to at least, recent Court of Appeal decisions from this province.
- [65] In *R. v. Guha*, 2012 BCCA 423, Madam Justice Smith for the court notes in respect of the s. 95 offences the following observations at paragraph 28:
- [28] The serious and inherently dangerous circumstances associated with firearm-related offences have been forcefully underscored by front-line trial judges: [and she quotes a number of decisions].
- [29] This Court has also proffered the view that sentences for firearm-related offences must reflect their very serious and dangerous nature:

She quotes Madam Justice Southin from an earlier Court of Appeal decision as follows:

- [5] It appears to me from the cases which have been cited to us that the judges of the courts below are taking far too lenient an approach to the possession of restricted weapons which patently have some illicit purpose. This Court where necessary and appropriate should do what we can do in order to help rid this community of people who possess firearms unlawfully for an illicit purpose - they should be treated severely. ...

- [30] In short, firearms, and in particular handguns, are extremely dangerous when possessed for an illicit purpose. That purpose can only be to threaten or inflict serious bodily harm or death. Sentences for these types of offences must reflect society's absolute rejection of such unacceptable conduct.
- [66] That decision, that is, Guha, is quoted at some length by the Court of Appeal in its decision in *R. v. Ball*, 2014 BCCA 120. In that quote from Guha, reference is made to paragraph 32 of that decision, noting that "a mandatory minimum sentence is a type of 'inflationary floor' that still required the application of the overriding principle of proportionality." The Court of Appeal endorses the observation "the least culpable offender in the least serious circumstances, who might have received a more lenient sentence prior to Bill C-2," that being an earlier version of mandatory minimum punishments in respect of this offence, "will now be sentenced to one year in prison. It would be inconsistent with proportionality if worse offenders in more serious circumstances, who might have received a more lenient sentence prior to Bill C-2, continue to be sentenced to one year under the new regime."
- [67] In *Ball*, the court addressed what in its view was an error by the trial judge in identifying the applicable range for such offences and, in doing so, failed to recognize that the mandatory minimum is the starting point of the range and is not available for more serious offences.
- [68] In my view, these accused cannot be characterized as the best offenders, and certainly, the circumstances do not support a conclusion that it is the least serious circumstances.
- [69] The last of the Court of Appeal decisions that I will refer to for its statement of principles is *R. v. Borecky*, 2013 BCCA 163. In that case, the court refers to a number of authorities and, at paragraph 55, says:

The range of sentences that emerges from these cases for weapons offences similar to those for which Mr. Borecky was convicted is eighteen months to seven and a half years. However, in light of the mandatory minimum sentence for s. 95 offences, this range now begins at three years. As would be expected, they are very much dependant on the mitigating and aggravating circumstances in each case. As found by Madam Justice D. Smith in *R. v. Guha*, 2012 BCCA 423, the range in the case law "demonstrate[s] the individualized nature of the sentencing analysis for s. 95 offences as well as the application of general sentencing principles, which continue to govern the range for mandatory minimum sentences."

- [70] Defence counsel here have put some emphasis on the Crown's inability to prove what the accused's intentions were on the evening of November 25, 2010, and cautioned the court about drawing inappropriate inferences. Those are fair observations but, of course, proving the specific purpose is not an element of Count 10, and the purpose is not at all connected with the remaining counts for which the accused have been convicted.
- [71] Mr. Justice Barrow, in his decision at paragraphs 140 to 146 outlines his various findings and sets out the basis for his conclusion that in this case the weapons were possessed for a purpose dangerous to the public peace. The offences for which these accused have been

convicted are directed at controlling the handling and movement of weapons. As with all criminal offences, the peculiar facts of each case place it within a spectrum of seriousness. Here, the accused were travelling in a rental vehicle in the evening hours with an arsenal of weaponry and ammunition. A sawed-off shotgun wrapped to allow it to be used while remaining partially concealed, handguns, large capacity magazines for ammunition, ammunition, a bat, a hickory stick, body armour, jamming devices, duct tape, balaclavas, these constitute, on the whole, in my view, particularly aggravated facts.

- [72] Mr. Skogstad, for Mr. Montemurro, put some considerable emphasis on the fact that his client did legally own one of the handguns, although that would not authorize the possession in the circumstances. In my view, that is not a mitigating factor.
- [73] The authorities that I have been referred to do assist with their statements of principle. They also, of course, provide examples of sentence imposed in other circumstances and demonstrate the application of those principles to the peculiar facts of those cases. I will briefly reference some of those here but will make the observation that the more recent Court of Appeal decisions have the most compelling influence on my determination of the appropriate sentence, and specifically, the decisions in Ball, Guha, and Borecky, to which I have previously referred. They are recent pronouncements of the Court of Appeal.
- [74] In Ball, the accused was sentenced for one count of possession of a loaded restricted firearm, for possessing a handgun, two counts of possession of a firearm while prohibited for a handgun, rifle, and shotgun. The trial judge characterized the offences as being serious and that the aggravating factors were at the high end of the range. There, a sentence of four years was imposed for the possession of the handgun.
- [75] In Guha, the Court of Appeal reviewed a three-year global sentence for possession of a loaded handgun, possession of a restricted device, and carrying a concealed weapon on his person, and increased a three-year global sentence to four years. There was a prior criminal record but not an extensive one. He was on bail for another drug possession charge at the time of the arrest.
- [76] In Borecky, there were 13 counts relating to possession of firearms, ammunition, and a restricted device. The accused there had a lengthy criminal record. The Court of Appeal upheld the trial judge's imposition of a five-year sentence.
- [77] In my view, here, the facts are more serious than those set out in Ball and Guha and on par with those set out in Borecky. Mr. Borecky, however, had a very significant prior criminal record. In Borecky, the Court of Appeal indicated that the sentence imposed was within the range and chose not to interfere with it. In Ball and Guha, the Court of Appeal specifically imposed its own sentence, as I have alluded to, and for that reason, there are some differences in what one can take from the decisions of the Court of Appeal in those three cases.

- [78] I do note that the Crown, in its submissions, put particular emphasis on the Supreme Court decision in *R. v. Sanghera*. There, there were three accused found guilty of various offences in connection with purchasing or possessing three loaded and concealed firearms found in a vehicle that one of them owned. The serial numbers were fully removed on one gun and partially on another. One of the accused had a relevant criminal record. One accused received a global sentence of six years and one month, the other for seven years, and largely on that basis, on the strength of that case, the Crown here makes a submission for a seven-year sentence.
- [79] In my view, the impact of that particular decision as a precedent is tempered to some extent by the later B.C. Court of Appeal decisions to which I have referred.
- [80] There is no question but that the sentences here must be greater than the mandatory minimum set out in s. 95 of the Criminal Code.
- [81] I am satisfied that all of the sentences should be concurrent.
- [82] I have referenced various of the factors that are mitigating and aggravating circumstances, and when considered as a whole, I see no reason that there should be found to be greater or lesser culpability for either of these accused, and their sentences should be the same differing only by the credit to which they are entitled for time served.
- [83] In my view, when one considers the whole of the circumstances, these individuals, and the seriousness of these offences, the appropriate global sentence is five years for each accused, to be reduced in Mr. Montemurro's case by -- and I know that the Corrections authorities do not wish to mix years, months, and days; I will round up slightly his credit and give him credit for 11 months, and in respect of Mr. Skreptak, for two months.
- [84] Those will be the sentences in respect of Counts 1 through 4 each, all being concurrent. The sentences on Counts 6 through 8 will be three years concurrent. The sentence on Count 9 will be one year concurrent, Count 10 will be five years concurrent, Count 11 will be three years concurrent, and Count 12 is a \$100 fine.
- [85] The Crown has asserted that there should be various ancillary orders to which no specific objection has been taken. There will accordingly, then, be a firearms prohibition pursuant to s. 109 of the Criminal Code in respect of each accused for life. There will be a requirement that each accused surrender any firearms, ammunition, restricted or prohibited devices in their possession, and in respect of Mr. Montemurro, any licence, authorization, or registration certificate.
- [86] There will be DNA orders that each provide samples of their DNA suitable for the DNA databank.
- [87] There will be forfeiture of items seized.
- [88] Now, Counsel, is there anything that I have failed to address in the course of my reasons?

- [89] MS. DWORKIN: No, My Lord. I had drafted the forfeiture order, but there was a couple of items that my friend -- personal items that I think Mr. Montemurro may wish, so I will work that out with my friend and then submit the order --
- [90] THE COURT: All right.
- [91] MS. DWORKIN: -- as drafted.
- [92] MR. SKOGSTAD: Yes, that's acceptable. My Lord, I'm just wondering about Count 9 when you stay it and yet you still pronounce a sentence.
- [93] THE COURT: Oh, I am sorry. That is my error. I was just using the Crown's template and I neglected to address that. It is the subject of a conditional stay. There would, of course, be no sentence on Count 9. Anything else? Ms. Christiansen?
- [94] MS. CHRISTIANSEN: No.
- [95] THE COURT: All right. Thank you.
- "D.A. Betton J."

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