
CANADA / JUDGMENT

R. v. Nelson

2010 BCSC 125

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Supreme Court of British Columbia

DECIDED

5 January 2010

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2010 BCSC 125 R. v. Nelson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Nelson,

2010 BCSC 125

Date: 20100105

Docket: 55836-2

Registry: Chilliwack

Regina

v.

Sarah Nelson and Richard John Stephen White

Before: The Honourable Mr. Justice Joyce

Oral Reasons for Sentence

Counsel for the Crown:

S. Domaradzki and A.M.Tosso

Counsel for Defence:

D.G. Schultz

Place and Date of Trial/Hearing:

Chilliwack, B.C.

December 10, 2009; and January 5, 2010

Place and Date of Judgment:

Chilliwack, B.C.

January 5, 2010

- [1] Ms. Sarah Nelson and Mr. Richard White are before the court to be sentenced for two offences to which they have pleaded guilty, namely one count of kidnapping, contrary to s. 279(1.1)(b) of the Criminal Code, and one count of assault causing bodily harm contrary to s. 267(b) of the Criminal Code. The offences were committed between December 18 and 19, 2008, against the complainant, Ms. Violet Wiebe.
- [2] The circumstances of the offences are set out in the transcript of Ms. Wiebe's evidence at the preliminary inquiry, which testimony was admitted at the sentencing hearing.
- [3] In December 2008, Ms. Wiebe was addicted to crack cocaine. Both Mr. White and Ms. Nelson were known to Ms. Wiebe prior to the date of the offences. Approximately one week before the offences Ms. Wiebe gave Ms. Nelson a ride in her car. When a police officer pulled Ms. Wiebe over for not signalling for a turn, Ms. Nelson got out of the car, leaving her cell phone in the car.
- [4] On the evening of December 18, 2008, Ms. Wiebe made arrangements through a dial-a-dope telephone number to purchase some crack cocaine. She drove to the pre-arranged location where she was to make the purchase and arrived at about 10:30 p.m. As Ms. Wiebe was stopping her car, she saw two people coming towards the car in what she described as a "swarming". She recognized one of the persons as Mr. White and the other as Ms. Nelson. Mr. White got into the back of the car behind the driver's seat and pulled Ms. Wiebe backwards by her hair so that she was wedged between the two front bucket seats. Mr. White swore at Ms. Wiebe and asked her about some money. Both Mr. White and Ms. Nelson then proceeded to punch Ms. Wiebe in the head. Ms. Wiebe attempted to put the car in reverse but Mr. White grabbed her hand and removed it from the gearshift lever. In the process, he broke Ms. Wiebe's right ring finger. Ms. Nelson then reached over and turned off the engine of the car.
- [5] Mr. White pulled Ms. Wiebe by her hair and one arm into the back seat of the car and out the rear door. When Ms. Wiebe was outside the car, Mr. White smashed her face into the side of the car. Ms. Nelson also punched her in the face and Mr. White kicked her in the head a number of times. Mr. White was yelling at Ms. Wiebe about money, but Ms. Wiebe said she did not know anything about money. She said she did have Ms. Nelson's cell phone.
- [6] Mr. White and Ms. Nelson then forced Ms. Wiebe back into her car, kicking and hitting her in the process. Mr. White drove them to the house where he and Ms. Nelson lived. Ms. Wiebe was dragged out of the car by her hair and into the residence. Ms. Wiebe was then told to remove her bloody clothes and put on some other clothes that were provided to her.

- [7] Ms. Wiebe was then taken upstairs into Mr. White and Ms. Nelson's bedroom, where she was pushed to the floor and hit and kicked a number of times. Mr. White then threw a pair of scissors to Ms. Nelson and told her to cut off Ms. Wiebe's hair. At this time, Ms. Nelson made a comment that she had thought of Ms. Wiebe when she purchased a can of fire-starting material that Ms. Wiebe could see sitting on a counter. Ms. Wiebe was afraid they intended to light her hair on fire. Ms. Nelson gave the scissors to Ms. Wiebe and told her to start cutting her own hair. At first Ms. Wiebe did not comply, but when she was kicked again, she began to cut her own hair. At that time, Ms. Wiebe had very long hair that grew to the middle of her back. At some point Ms. Nelson cut off a portion of Ms. Wiebe's hair. Mr. White and Ms. Nelson also enlisted the help of another woman who cut some of Ms. Wiebe's hair. By this time Ms. Wiebe was feeling woozy and started dozing off, and Ms. Nelson kicked her some more and told her to stay awake. Eventually, Ms. Wiebe fell asleep.
- [8] In the morning, Mr. White took Ms. Wiebe's car and left for a period of time. While he was gone Ms. Wiebe attempted to escape, but Ms. Nelson saw her moving towards the door and kicked her in the ribs. Ms. Wiebe asked to be able to call her common-law husband to come get her, but was not permitted to do so. Eventually, when Ms. Nelson left the residence, Ms. Wiebe was able to get to the door and escape. She went to the door of the house a couple of houses away, and the woman who answered the door let Ms. Wiebe use her cell phone to call her common-law husband. The neighbour also called 9-1-1 and the police attended.
- [9] As a result of the assault, Ms. Wiebe suffered a number of injuries, including a broken nose, cuts to her lower lip, cuts and bruises to her eyes, fractured teeth, which required dental work, fractured ribs and a broken right ring finger. The broken finger was the most severe injury and has required three surgeries to date. Ms. Wiebe still lacks full function in her right hand because of the injury to the ring finger and some collateral damage to the pinkie finger. Ms. Wiebe is right-handed.
- [10] Ms. Wiebe provided a victim impact statement in which she described the effects that the offences have had on her. She says that her sense of safety and security has been seriously affected and she has difficulty sleeping. Her right hand remains dysfunctional. She has residual numbness in her lower lip and chin. She feels that her self-esteem has been taken from her. She said that because of the effects of these offences she had to quit her job. The incident has also affected her children. While they do not live with her, their father is uncomfortable permitting access except in public places for fear that they may come in contact with undesirable people.
- [11] The following circumstances relating to Ms. Nelson and Mr. White are drawn primarily from the Pre-Sentence Reports that were filed at the sentencing hearing. Ms. Nelson is 27 years old. She was raised by her mother and had almost no contact with her father. Her home environment was said to be acceptable, but Ms. Nelson first left home at age 12. She returned and left on several occasions because of her rebellious behaviour and conflict with her mother. She was placed in a number of foster homes. Between the ages of 13 and 18, Ms. Nelson was in a common-law relationship, which produced a child who is now 11 years of

age and is in the custody of Ms. Nelson's mother.

- [12] Ms. Nelson and Mr. White have been in a relationship for the past two years and plan to reunite when they are released from jail.
- [13] Ms. Nelson has a grade 10 level of education but no work history except some employment when she was a teenager. She has primarily lived off the proceeds of crime or social assistance.
- [14] Ms. Nelson's life since her early teens has involved serious substance abuse, including cocaine and heroin addiction. The only times she has been clean since her teens is when she was incarcerated.
- [15] Ms. Nelson has a criminal history that dates back to 1997, when she was 15 years old. She has an extensive criminal record of some 26 offences, including: four convictions for failure to comply with dispositions under the Young Offenders Act; ten convictions for failure to comply with a recognizance or breach of probation; one conviction for possession of stolen property over \$5,000; six convictions for theft under \$5,000; two convictions for mischief under \$5,000; one conviction for break and enter; and two convictions for possession of a controlled substance. The longest custodial sentence that she has received is one year for the break and enter conviction.
- [16] In the past, Ms. Nelson has requested help while in custody in dealing with her drug addiction, but failed to participate in substance abuse and prevention programs when she was released into the community.
- [17] Ms. Nelson has accepted responsibility for her actions by pleading guilty to the offences, but she has also sought to minimize her culpability by stating the offences were committed while she was under the influence of drugs and by stating that they were committed because Ms. Wiebe had taken her cell phone and stolen money. The author of the Pre-Sentence Report felt that Ms. Nelson did not display significant remorse and continues to be entrenched in the criminal lifestyle by maintaining contact with her drug associates and with Mr. White.
- [18] Mr. White is 30 years old. He is the youngest of three siblings. His parents divorced when he was 11 years old and he was placed in a foster home when he was 14. Mr. White has had no contact with his parents or siblings for some years. Mr. White became involved in a relationship when he was 18 and he has two children from that relationship who are in the custody of their mother because of his drug addiction. His former common-law spouse described him as a good father when he is not on drugs.
- [19] Mr. White plans to reunite with Ms. Nelson when they are released. He recognizes that the relationship is somewhat unhealthy because they are both addicts and have committed crimes together, but he has expressed a hope that they can overcome their drug addiction. Given their histories, I fear that may be an overly optimistic belief.

- [20] Mr. White has a grade 10 level of education. He has worked mainly in the forest industry and also in construction. His employment was negatively affected by his drug use, beginning in about 2002, and since then he has had only sporadic employment.
- [21] Mr. White's serious problems with drugs began when he was about 23 years old and progressed to heroin and crack cocaine addiction. He completed a six-week substance abuse program in 2004 but soon returned to drug use.
- [22] Mr. White has a criminal record that begins in 1995. There was a period of some nine years, starting in 1997, during which Mr. White had no convictions but his offending recommenced in 2006. Mr. White has a record of some 13 convictions in total, including two convictions for assault and one conviction, in April 2007, for assault causing bodily harm. His other convictions are: two convictions for theft; one conviction for attempted theft; three convictions for breach of recognizance; three convictions for breach of probation; one conviction for mischief; and one conviction for possession of a controlled substance.
- [23] In his interview with the author of the Pre-Sentence Report, Mr. White expressed remorse for the current offences and stated that no person should go through what Ms. Wiebe did. He states that these offences represent the ultimate low point in his life. The author of the report felt that his expressed remorse was genuine.
- [24] Crown seeks an effective sentence for each offender of between five and six years on each count to be served concurrently, and also seeks a DNA order and a lifetime firearms prohibition. Crown counsel submits that Ms. Nelson and Mr. White should receive credit on a two-for-one basis for the time spent in custody on these matters since December 19, 2008. That period of time to January 5, 2009, is 383 days, which, when doubled, would provide a reduction of 766 days, or approximately 25 months from whatever effective sentence is imposed.
- [25] Mr. Schultz submits that an appropriate effective sentence for Ms. Nelson would be two-and-one-half to three years on each count to be served concurrently. For Mr. White he submits that an effective sentence of between three-and-one-half and four years on each count to be served concurrently would be appropriate. Mr. Schultz submits the difference in sentence is warranted because of the difference in the nature of the two offenders' records and the degree of involvement of each of them in these offences.
- [26] Ms. Nelson and Mr. White have pleaded guilty to serious offences. Kidnapping carries a potential maximum penalty of life imprisonment, and assault causing bodily harm carries a potential maximum penalty of imprisonment of ten years.
- [27] I agree with Crown counsel that the principles of denunciation and deterrence, both specific and general, are important considerations when sentencing for these offences. In *R. v. Lowman*, 2006 BCSC 1565 ("Lowman"), Mr. Justice Cullen remarked at paragraph 34:

34 In my view, having reviewed the authorities put before me by both counsel, it is clear that the dominant consideration for offences of this sort are the principles of deterrence and denunciation. Offences such as this are rightfully regarded as striking at the heart of the community's sense of safety and security. The prospect of a carefully planned scheme to snatch a person from his or her daily tasks and pleasures, to confine them in circumstances sure to provoke extreme fear or even terror, to threaten their loved ones with their death or torture all in pursuit of commercial gain is something which demands a powerful message of denunciation and deterrence.

[28] Lowman involved more egregious circumstances in that there was a carefully planned kidnapping of a victim who was held over a period of eight days in an effort to extort money from his family. During much of his confinement the victim was blindfolded and bound by his hands and ankles. On a number of occasions, he was confined in the trunk of a car. The passage I have just quoted is, in my view, nonetheless apt. In the present case, Ms. Nelson and Mr. White kidnapped Ms. Wiebe in an effort to obtain the return of money that they believed Ms. Wiebe had taken from Ms. Nelson. They assaulted Ms. Wiebe numerous times, including breaking her finger by snapping it backwards. The events that Ms. Wiebe had to endure during her 12-hour ordeal were no doubt very painful and terrifying.

[29] Crown counsel also referred me to the decision in *R. v. Deo*, 2007 BCCA 626. In that case, the accused kidnapped the victim and kept him in several locations for three days. The motive for the kidnapping was the belief that the victim was responsible for a shipment of marihuana that went missing. The victim was bound, blindfolded, beaten, held at gunpoint and threatened. Ransom demands and a money exchange took place. Deo, who was 21 years old, was sentenced to seven years for kidnapping and seven years concurrent for extortion. His associate, Mangat, who was 26 years old and who played a somewhat more significant role in the crimes, was sentenced to two eight-year terms of imprisonment. At trial, it was argued that *R. v. Mills* (1998), 112 B.C.A.C. 129 C.C.C. (3d) 313, [1998] B.C.J. No. 2105 (2L) (C.A.) ("*Mills*") established two distinct categories of kidnapping, one category is the classic kidnapping, where a person is kidnapped and held for ransom, where penalties in the ten years to life range are appropriate. The other class of cases is where a kidnapping technically occurs but the offence bears greater resemblance to extortion or robbery accompanied by a relatively short period of confinement, in which the range of sentence is four to six years. The trial judge rejected that submission.

[30] On appeal, Chief Justice Finch held that the trial judge had been correct in rejecting the notion that *Mills* established two distinct and exclusive categories of kidnapping. At paragraphs 13 and 14 he said this:

13 Given the infinite range of personal circumstances of those convicted of kidnapping, and the infinite variety of circumstances that can occur in the commission of the offence itself, it seems evident to me that the full spectrum of penal consequences should be open to a trial judge when sentencing for this offence. Although this Court sometimes expresses views as to an appropriate range of sentence for certain classes of offences, it has no mandate to exclude from consideration any sentence that is permitted by law under the Criminal Code.

14 While it may be useful to identify factors in the offence that demonstrate a lesser or a greater degree of culpability, at the end of the day the sentencing process requires the judge to consider carefully all factors relevant to both the offender and the offence, in fixing a sentence, within any limits set by the [C]ode that is fit in all the circumstances.

[31] Finally, Crown counsel referred to R. v. Berthelet, 2008 BCSC 999 ("Berthelet"). There the offender was a 32-year-old addict with no criminal record. She and her co-accused took the victim from the street at knifepoint, forced her to go to crack houses, beat her, locked her up and robbed her of her personal belongings. Eight hours later they returned the victim to her home at knifepoint with threats to prevent her from going to the police. The victim was targeted as a form of revenge for some wrong done within the crack cocaine using community. Berthelet was convicted of robbery, kidnapping, unlawful confinement and assault causing bodily harm, and received an effective global sentence of four-and-one-half years in prison, comprised of the following: four-and-one-half years for kidnapping, two years for each of the robbery and unlawful confinement charges, and 12 months for assault causing bodily harm with all of the sentences to run concurrently.

[32] At paragraphs 65 and 66 the sentencing judge noted the need for denunciation and deterrence saying:

65 In this particular case it is clear that there is a very strong need to denounce this kind of unlawful conduct. It is very destructive to communities and the safety of individuals to have people enforcing disputes arising from drug debts or the non-delivery of drugs, or associated with other aspects of the drug culture, which result in the commission of serious criminal offences where real physical harm is caused, and in which there is always a risk of greater physical harm or death.

66 In relation to subparagraph (b) of s. 718, another sentencing objective, the court is required to consider the following:

(b) to deter the offender and other persons from committing offences...

In this case I find there is a real and pressing need to deter Ms. Berthelet from ever letting herself become so out of control again such that she engages in this kind of conduct. To my mind, it is self-evident why others must be deterred from committing these types of offences.

[33] While a number of circumstances in Berthelet are similar to those in the case at bar, I do note that Ms. Berthelet had no prior criminal record and the injuries inflicted on the victim in that case during the course of the kidnapping and confinement were less serious than those inflicted on Ms. Wiebe. I also note, however, that in Berthelet a knife was used in the kidnapping.

[34] Mr. Schultz referred to a number of decisions from other jurisdictions, namely: *R. v. Perlin* (1977), 23 N.S.R. (2d) 66 (N.S.C.A.); *R. v. Young* (1989), 77 Nfld. & P.E.I.R. 355 (P.E.I.C.A.); *R. v. Auclair* (2001), 148 O.A.C. 71 (Ont. C.A.) and *R. v. Hazout* (2005), O.A.C. 3550 (Ont. C.A.), where sentences for unlawful confinement, kidnapping, range from 90 days to six years. I have read all these cases, but considering the ages of the cases, the different circumstances in which the offences in the various cases were committed, and the fact they are from different jurisdictions in Canada, I do not find them particularly helpful to me in determining fit sentences in this case.

[35] Mr. Schultz also referred to *R. v. Spagnolo* (1996), 80 B.C.A.C. 10, in which a 19-year-old accused was convicted of 20 separate offences, including unlawful confinement, extortion and assault with a weapon. He received a global sentence of three-and-one-half years. In upholding the sentences on appeal, Madam Justice Huddart said at paragraphs 11 and 12:

11 The maximum sentences fixed by Parliament are five years for uttering threats, ten years for unlawful confinement and assault with a weapon, and life imprisonment for extortion. Clearly the trial judge considered that he had no alternative despite Mr. Spagnolo's youth but to sentence him to a federal institution. Defence counsel submitted that two and half years would be sufficient if the trial judge was of that view, to permit Mr. Spagnolo to benefit from the Intensive Anger Management Program available at the Federal Regional Health Centre. All previous efforts at assisting Mr. Spagnolo had failed. As the trial judge put it Mr. Spagnolo "has been offered the benefit of our criminal rehabilitative safety net in the past. He has shown no interest whatsoever in participating to any degree where a modicum of success could be achieved or even expected."

12 An isolating sentence at 18 may be harsh but in this case all of the evidence points to harshness as being necessary if Mr. Spagnolo is to be helped.

[36] Clearly, in my view, the relative youth of the offender was a significant factor in that case. Had the offender been older with an adult criminal record, I strongly suspect that the sentence would have been greater.

[37] Finally, Mr. Schultz referred to *R. v. Debolt*, 2009 BCCA 115, where the offender was sentenced to four years and 150 days for sexual assault causing bodily harm and unlawful confinement. The issue on appeal dealt with the sentencing judge's refusal to give credit for time spent in custody prior to sentencing, so the Court of Appeal does not deal with the quantum of the effective sentence in any way.

- [38] The offences in the case at bar include a kidnapping motivated by an intention to obtain money that the offenders believed Ms. Wiebe had taken from Ms. Nelson. They kidnapped and confined Ms. Wiebe for a period of approximately 12 hours during which they subject her to continual assaults. The injuries sustained by the victim were serious and it appears that at least one of them, the broken finger, may be permanent. In addition to the physical harm done to the victim, she was terrorized and her sense of worth was diminished by cutting off her hair, which she prized. These are, in my view, very serious circumstances that require significant sentences in order to denounce the offenders' conduct and send a message that such actions will be met with serious repercussions.
- [39] I, of course, take into account in mitigation the fact that Ms. Nelson and Mr. White have pleaded guilty to the offences and have thereby saved the victim the further trauma of testifying at trial. I also take into account in mitigation the fact that Mr. White appears to be truly remorseful. However, I cannot draw the same conclusion with respect to Ms. Nelson.
- [40] Both offenders have criminal records that cause me to wonder about the prospects for their rehabilitation. Mr. White's record is more serious in that it includes convictions for other crimes, whereas Ms. Nelson's record appears to be related to and driven by her drug addiction. I can only hope that with the amount of time that they have spent in custody and with the additional time they will have to serve, they may make some progress in dealing with their drug addictions.
- [41] In the end, having considered all the circumstances and the authorities to which I have been referred, I am of the opinion that the appropriate effective sentence for Ms. Nelson is four years for kidnapping and two-and-one-half years for assault causing bodily harm. Taking into account the time spent in custody, the actual sentences will be 23 months in jail for kidnapping and five months in jail for assault causing bodily harm. The sentences are to be served concurrently.
- [42] As for Mr. White, taking into account the fact that he has a more serious record, involving crimes of violence and the fact that it was he who actually broke Ms. Wiebe's finger, I am of the view that his sentence ought to be somewhat greater. I would impose effective sentences of four-and-one-half years for kidnapping and three years for assault causing bodily harm. Taking into account the time that he had spent in custody, I impose on Mr. White actual sentences of 29 months for kidnapping, and 11 months for assault causing bodily harm. The sentences are to be served concurrently.
- [43] In respect of both Ms. Nelson and Mr. White I make orders that they provide bodily samples for DNA analysis pursuant to s. 487.051(1) of the Criminal Code.
- [44] With regard to weapons prohibition, an order under s. 109 was made on a previous occasion in respect of Mr. White, so I will make a mandatory order under s. 109(3) prohibiting him from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for life.

[45] No order has previously been made under s. 109 in relation to Ms. Nelson and no weapon was used in the commission of these offences, or any other offences that she has committed. I will therefore make an order under s. 109(2) prohibiting Ms. Nelson from possessing:

- (a) any firearm other than a prohibited firearm or restricted firearm and any crossbow, restricted weapon, ammunition and explosive device during the period that begins today and ends ten years after Ms. Nelson's release from prison, and
- (b) any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

[46] Given the offenders' circumstances and the sentences of imprisonment I have imposed, I will waive any victim impact surcharges.

[SUBMISSIONS BY COUNSEL]

[47] THE COURT: Upon hearing further submissions, I am going to accept the submissions of the defence that a federal sentence in this case would be preferable for Ms Nelson's potential rehabilitation. Ms. Nelson is still a relatively young person and one should not give up entirely the hope for rehabilitation, although her record is far from stellar to date. But considering the submissions that the prospects for rehabilitation may be better in the federal system, given the nature of the programs involved, both in the institution and the facilities upon parole, I am content to impose an actual sentence of two years on the kidnapping conviction rather than 23 months.

[48] MR. SCHULTZ: Thank you, My Lord.

[49] THE COURT: In all other respects the sentences and orders remain the same.

[50] MR. SCHULTZ: Thank you.

[51] MS. DOMARADZKI: Madam Clerk, were stay of proceedings entered on Counts 3 and 4?

[52] THE CLERK: They were.

[53] MS. DOMARADZKI: They were, thank you.

"B.M. Joyce J."

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Prepared on 29 October 2026 · Esheria