

CANADA / JUDGMENT

R. v. Patterson

2023 BCCA 386

COURT

British Columbia Court of Appeal

DECIDED

10 October 2023

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2023 BCCA 386 R. v. Patterson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Patterson,

2023 BCCA 386

Date: 20231010

Docket: CA48892

Between:

Rex

Respondent

And

Edmond John Henry Patterson

Appellant

File Sealed in Part

Corrected Judgment: The text of the judgment was corrected on page 2 on
October 18, 2023.

Before:

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Marchand

On appeal from: An order of the Provincial Court of British Columbia, dated November 1, 2022 (sentence) (R. v. Patterson, Courtenay Docket 42489).

Oral Reasons for Judgment

Counsel for the Appellant:

P.T. Gardiner

Counsel for the Respondent:

M. Shah

Place and Date of Hearing:

Vancouver, British Columbia

October 10, 2023

Place and Date of Judgment:

Vancouver, British Columbia

October 10, 2023

Summary:

The appellant seeks a reduction of his 23-month sentence for robbery and one-year consecutive sentence for use of an imitation firearm while committing robbery. Held: Appeal allowed in part. While the judge mistakenly referred to the appellant as pointing the imitation firearm at the complainant, this had no impact on the sentence for the robbery as the circumstances of the offence involved pulling out and racking the pistol and thereby causing the store clerk to fear for her safety. The judge did not err in his understanding of the appellant's criminal record. The repeal of the mandatory minimum one-year consecutive sentence for use of the imitation firearm before appeal requires a reconsideration of that sentence. Considering principles of proportionality, the circumstances of the offence were less aggravating than in other cases where a one-year sentence was imposed. An appropriate sentence is 8 months consecutive to the sentence for robbery.

GRIFFIN J.A.:

Introduction

[1] Mr. Patterson appeals from his sentence imposed on November 1, 2022 after he pleaded guilty to offences related to his August 16, 2020 robbery of a fast food restaurant using an imitation firearm.

[2] The offences are:

a) Count 1, robbery contrary to s. 344(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code];

- b) Count 3, use of an imitation firearm (a "pellet pistol") while committing the indictable offence of robbery contrary to s. 85(2) of the Code; and
- c) Count 4, failure to comply with a release order by possessing the pellet pistol, contrary to s. 145(5)(a) of the Code.

[3] I find it useful to set out in table form the positions of the parties on sentencing, the sentence imposed, and the position of Mr. Patterson on appeal:

Count 1

Count 3

Count 4

Position of Crown at sentencing

24 to 30 months

1-year consecutive to Count 1

90 days concurrent to Count 1

Position of defence at sentencing

In the range of 14 months

1-year consecutive conceded due to mandatory minimum

90 days concurrent to Count 1

Sentence imposed

23 months minus credit for time served of 281 days (leaving 418 days remaining)

1-year consecutive to Count 1

90 days concurrent to Count 1

Appellant's position on appeal

21 months (minus credit for time served)

6-8 months consecutive to Count 1

No reduction sought: 90 days concurrent to Count 1

[4] Mr. Patterson submits that the sentence for Counts 1 and 3 should be reduced for three reasons:

- a) The judge made an error in relying on an aggravating factor in relation to Count 1 and the circumstances of the offence, finding that Mr. Patterson pointed the imitation firearm at the store clerk when there was no submission to that effect.

- b) The judge made an error in relying on an aggravating factor in relation to the circumstances of Mr. Patterson, in finding that he had a lengthy criminal record without any significant gap, when there was a lengthy gap in the criminal record.
- c) At the time of sentencing, there was a mandatory minimum sentence of 1-year consecutive for Count 3, use of an imitation firearm, contrary to s. 85(2). However, the mandatory minimum sentence was repealed and Mr. Patterson is entitled to the benefit of the new legislation.
- [5] The Crown says that the sentencing judge made no material errors in assessing the circumstances of the offence or the offender in respect of Count 1.
- [6] The Crown's position is that while the repeal of the mandatory minimum sentence for Count 3 does permit Mr. Patterson to seek reconsideration of his sentence for that offence, the sentence imposed was fit and should be confirmed.
- [7] I will address the alleged errors regarding Count 1 first, as that will be a convenient point to turn to the circumstances of the offence and the offender.

Background and Sentencing Judgment

- [8] As sentencing was based on guilty pleas, the judge relied on the submissions of the parties, and certain documents for the background facts: a pre-sentence report and pre-sentence report update, plus Mr. Patterson's criminal record.
- [9] At just before 8:00 a.m. on August 16, 2020, Mr. Patterson entered a Subway franchise in Courtenay, BC. His face was partially covered with a handkerchief. He asked to use the washroom and was permitted to do so. When he came out of the washroom he ordered a sandwich from the employee. As the Crown described it:

After that point he had ordered a sandwich, and when the time came to pay he produced a firearm, racked it and said, give me all the money. [The complainant] then gave him \$350 in cash and he ran out the door.

- [10] The Crown also described video evidence of the robber wearing sunglasses and pulling a black pistol out of his waist band area.
- [11] The Crown submissions emphasized that Mr. Patterson's actions were intended to put the store clerk in fear for her life, by actioning or racking the gun while carrying out the offence.
- [12] Mr. Patterson was arrested soon after. After his arrest, he confessed to the robbery. The Crown submitted that Mr. Patterson claimed the gun was plastic and not real and he said he felt sorry for the store clerk, and "saw the fear in her eyes". The weapon was not recovered by police.

- [13] When the Crown referred to sentences in cases involving similar offences, in at least one of those cases, *R. v. Bell*, 2005 BCCA 403, the facts involved an offender who pointed the weapon at the complainant, a fact referred to in the sentencing judgment in that case. Other comparable cases relied upon by the Crown referred to the accused "brandishing" a weapon or imitation weapon.
- [14] Near the end of the Crown's submissions, the judge asked Crown counsel to clarify whether the Crown was taking the position that pointing the firearm and racking the gun were acts of violence. The Crown stated that racking the gun was particularly aggravating. The judge repeated the question, and the Crown stated that "I would call them violent actions", intended to be a threat, and "over and above what I would describe as an ordinary robbery". The Crown clarified that there were no additional verbal threats. The Crown appeared not to discern the judge's assumption that Mr. Patterson pointed the gun at the store employee, and did not clarify that there was no evidence of pointing, just evidence that he had racked the gun.
- [15] The submissions of defence counsel did not address whether or not the offender had actually pointed the imitation weapon at the employee. Defence counsel did not discuss the circumstances of the offence other than to note that Mr. Patterson did not utter a threat, made no physical contact and did not cause physical injury. However, defence counsel conceded that "obviously [it] was a frightening thing to the store clerk, and Mr. Patterson himself does not minimize that", reflecting on the fact that it frightened Mr. Patterson to think of somebody doing that to his own daughter.
- [16] Mr. Patterson used his opportunity to speak to the sentencing judge, expressing remorse. He said that he had tears in his eyes when the store employee was passing him money and he ran out the door crying.
- [17] When the judge described the circumstances of the offence in reasons for sentence, the judge said:
- [4] Mr. Patterson went into the Subway premises. He asked to use the washroom. He was allowed by [the complainant] to use the washroom. Once he exited the washroom, he asked [the complainant] to make him a sandwich, which she did. At the point Mr. Patterson was to pay, he pulled out and pointed what appeared to be a pistol at [the complainant]. He then racked the gun and demanded cash. [The complainant] then emptied the till and gave him some \$350, Mr. Patterson then ran out of the Subway restaurant.

[Emphasis added.]

- [18] The judge later referred to aggravating circumstances in sentencing, stating:

[26] It is an aggravating factor that Mr. Patterson used violence when he pointed the pellet pistol at [the complainant] and then racked the pistol. He clearly did this to intimidate and to scare [the complainant] to make her think that her life was in jeopardy, thereby ensuring she complied with his demand to turn over the money. It is also aggravating that [the complainant] was a vulnerable person for the reasons that I have already noted. This experience was no doubt very terrifying for her.

[Emphasis added.]

[19] The judge's reference to Mr. Patterson pointing the pistol at the store employee was in error: this was not part of the factual background highlighted in the Crown submissions.

[20] As for the circumstances of Mr. Patterson, he was age 50 at the time of sentencing. He had a long history of substance use disorder.

[21] At the time of the offence, Mr. Patterson was bound by a release order that prohibited him from possessing a firearm or anything resembling a firearm.

[22] The Crown emphasized Mr. Patterson's "lengthy and serious" criminal record, somewhere between 61 and 64 criminal convictions. His record includes multiple convictions for property offences: break and enter, possession of stolen property, theft, and mischief; as well as convictions for violent offences such as assault, and assaulting a police officer, approximately six convictions for assault and threats; as well as for offences involving illicit substances. In contrasting Mr. Patterson's record to the facts of another case, the Crown referred to Mr. Patterson's "virtually unbroken string of offending".

[23] The defence emphasized Mr. Patterson's early guilty pleas, and his efforts to help with homelessness and substance use disorder in the community.

[24] A pre-sentence report ("PSR") was prepared which outlined some of Mr. Patterson's family history, history of substance use disorder, possible brain injury, and the fact that he had a daughter who was then aged 15. The report outlined Mr. Patterson's previous attempts at recovery from his substance use disorder. The author of the PSR noted that Mr. Patterson described his personal circumstances at the time of the offence. He was homeless and "deep into his addiction", the offence was to support his substance use disorder, and the offence was the lowest point of his life. He expressed shame for his actions and acknowledged that the offence was extremely traumatizing for the victim and could have a long-lasting impact on her.

[25] The judge in sentencing reasons reviewed Mr. Patterson's personal history and circumstances, and said this about his criminal record:

[15] Mr. Patterson has an extensive criminal record. He has somewhere between 61 and 64 convictions. Those convictions started in 1990 and continue up to and including a couple of convictions in 2020. There appear to be no gaps of any significance in his record. His record includes convictions for property offences including break and enter, possession of break-

and-entering tools, possession of stolen property, theft, mischief, and possession of stolen credit cards. He has violence-related convictions on his record including assaults, assault-peace-officer, and uttering threats. He has drug-related convictions including a conviction for trafficking. He has some impaired driving convictions including at least one impaired driving causing bodily harm, and last, he has many breaches of various sorts including for failures to report and failures to appear.

[Emphasis added.]

- [26] The judge later stated that aggravating factors to be taken into account in sentencing "include Mr. Patterson's lengthy criminal record without any gaps": para. 24.
- [27] On appeal, Mr. Patterson submits that the judge was in error in commenting that there were no gaps in his criminal record. He says that his criminal record shows a gap between 1997 and 2003, and that the judge overlooked this.
- [28] The judge also commented on Mr. Patterson's failed attempts at recovery from his substance use disorder:
- [16] The record reflects that Mr. Patterson has never had much regard for the law and has never thought much about the persons he was victimizing along the way. His record also reflects his ongoing drug and alcohol use. Mr. Patterson apparently shows some insight into his offending on this occasion, but does not seem to be able to act on that insight. Mr. Patterson has been in two different treatment facilities since these offences took place and he was kicked out of both of them. He initially was put into a program in Nanaimo. He was expelled from that program in May of 2021 due to behavioural issues. A few days later, he got a bed at the Grove Recovery House in Victoria, but was expelled from this program a few weeks later due to substance use.
- [29] The judge further observed there were indications that since pleading guilty, Mr. Patterson appeared to return to substance use, but Mr. Patterson denies committing crimes. The judge observed he had been charged with three breaches of his release order: paras. 17-18. The judge also noted that Mr. Patterson completed some courses in jail before he was released in February 2021, and he appeared to do well in custody: para. 19.
- [30] The judge found as mitigating circumstances that Mr. Patterson pleaded guilty early on and showed some remorse; had some insight and expressed the goal of turning his life around; and when in custody had completed various courses to try to better himself: at para. 27.
- [31] Nevertheless, the judge also found that Mr. Patterson acted with some planning, was sober when he committed the offences, and had high moral blameworthiness given his plan to intimidate and threaten the victim: para. 28.
- [32] Before pronouncing the sentence, the judge referred to a number of authorities cited by the parties, including Bell cited by the Crown. The judge stated in respect of Bell:

[31] The Crown also referred to *R. v. Bell*, 2005 BCCA 403, where the Court of Appeal upheld a sentence of two years for a robbery similar to the case at bar. The facts are set out at paragraph 3 as follows:

The robbery for which the appellant stands convicted occurred at approximately 1:00 a.m., after the appellant arrived at the service station in a car accompanied by another person. She entered the store wearing sunglasses and a puffy blue jacket with the hood up. She confronted the lone employee, a 19-year-old man, and pointed a pellet gun, which had been sawed off to make it look real, at his stomach. She demanded cigarettes and cash. She took 34 packages of cigarettes and the till, which contained \$166.

[32] At paragraph 7, the Court of Appeal also noted:

He also considered her lengthy criminal record. The appellant, who was 38 years of age at the time she was sentenced, has a record of more than 41 convictions, including 31 for theft and fraud-related offences. She also has convictions for threatening and for assault...

[33] Then at paragraph 13, the Court of Appeal said:

In my view, the appellant has demonstrated a steady pattern of criminality linked to her drug addiction and her offending has escalated to serious and violent crime. Specific deterrence, general deterrence and protection of the public are overriding sentencing factors in this case. Although it is said that she is doing well in prison and hope for her rehabilitation should not be abandoned, this type of crime requires a sentence that will provide general deterrence. [And] I am not satisfied that this sentence can be said to be demonstrably unfit in all of the circumstances.

[34] The Court of Appeal upheld the two-year sentence.

[35] I note that in the *Bell* case the accused was younger than Mr. Patterson and had a bit of a lesser record. The *Bell* case is of the most assistance of the cases provided to the court.

[33] Later, after reviewing the various authorities cited by the parties, the judge returned to *Bell*:

[44] As I noted, the *Bell* case is of the most use. The main difference between the *Bell* case and the case at bar is that, unlike the case at bar, Ms. Bell went to trial. Here, Mr. Patterson pled guilty and this is a significant mitigating factor not present in the *Bell* case. On the other hand, Mr. Patterson has a worse record and is older than Ms. Bell. While rehabilitation is a factor in both cases, it is not a factor on the same footing as deterrence or denunciation and is less of a factor in the case at bar.

[34] The judge then imposed the sentence referred to earlier in my judgment, namely 23 months for Count 1 less credit for time served.

[35] The judge also simply stated that for Count 3 he would impose a sentence of one-year consecutive to the time on Count 1: para. 46.

Impact of Error Regarding "Pointing" the Firearm

- [36] I am satisfied from the above review that the judge did make an error in stating as part of the summary of aggravating facts that Mr. Patterson pointed the firearm at the store employee. The question for us to determine is whether that error had an impact on the sentence: R. v. Joe, 2017 YKCA 13 at paras. 36, 40; R. v. Agin, 2018 BCCA 133 at paras. 43-48; R. v. Nystrom, 2023 BCCA 232 at para. 15.
- [37] I am not persuaded that it did have an impact on the sentence. The only relevance of the fact of pointing the gun is that it supports the conclusion that the method of the robbery was intended to and would cause fear and intimidation on the part of the store employee.
- [38] There are many ways a robber can use a weapon to cause fear: pointing it is one method; brandishing it in the air is another method. Here, the robber's conduct was to pull out what looked like a pistol, and rack it, which implied that the robber was ready and willing to shoot and the gun could be fired at any moment.
- [39] While the judge found the Bell case to be instructive, and in that case the robber did point the weapon at the employee, the judge recognized that not all circumstances were the same as in Bell and indeed implicitly found the circumstances here to be less aggravating as he imposed a lesser sentence than Bell, 23 months as opposed to 24 months. This was after noting Mr. Patterson's greater criminal record. The judge did note that a mitigating factor here was Mr. Patterson's guilty plea.
- [40] In Bell, the employee complainant did not believe the gun to be real. This was not a factor in the present case. I also note in Bell there is no suggestion the robber "racked" the weapon.
- [41] Here the important aspect of the judge's findings regarding aggravating circumstances was that Mr. Patterson intended to intimidate and scare the store employee into believing her life was in jeopardy. This finding was supported by the judge's correct findings that Mr. Patterson pulled out the gun and racked it. In my view, it matters not that Mr. Patterson did not also point the gun at the employee. The absence of this fact does not ameliorate these otherwise extremely aggravating circumstances. I therefore do not consider that the judge's error in referring to the gun being pointed had any impact on the sentence.

Impact of Criminal Record

- [42] The next question is whether the judge made an error in referring to Mr. Patterson's criminal record, in describing it as "lengthy without gaps": para. 24. I note the judge earlier referred to the record as beginning in 1990 and having "no gaps of any significance": para. 15. Again, Mr. Patterson on appeal says his criminal record shows a gap between 1997 to 2003.

- [43] I am not convinced that the judge made an error. Rather, I am of the view that from the judge's perspective, in light of the extensive record, the judge did not find any gap to be of significance in sentencing. At para. 15 of the judge's reasons, the judge referred accurately to the number and type of convictions in Mr. Patterson's criminal record.
- [44] The fact is that Mr. Patterson's lengthy criminal record was an aggravating factor, even accepting that there was a gap. He had begun offending in 1990 and was still offending in 2020. As the judge's reasons indicate at para. 15, the judge clearly understood the seriousness of the number of convictions and types of offences.
- [45] In summary, I would not accede to the able arguments that the judge made errors that impacted the sentence for Count 1.

Impact of Repeal of Mandatory Minimum Sentence

- [46] I turn to Mr. Patterson's ground of appeal in relation to Count 3.
- [47] The sentencing judge's reasons did not discuss why he imposed a one-year sentence for Count 3. He had no choice of imposing a sentence of less than this period, given the mandatory minimum sentence then in effect. The judge also did not discuss the totality principle.
- [48] After sentencing, and obviously prior to this appeal, the one-year consecutive mandatory minimum sentence for use of an imitation firearm, s. 85(2) of the Code, was repealed. However, s. 85(4) was not amended, and so any sentence for this offence must still be served consecutively to any other punishment for other offences arising out of the same event.
- [49] The Crown concedes that when a law is passed after sentencing, creating more favourable sentencing provisions for an offender, but before the appeal has been decided, the offender is entitled to the benefit of the change in the law: *R. v. Dunn*, [1995] 1 S.C.R. 226 at para. 27, 1995 CanLII 149; *R. v. R.A.R.*, 2000 SCC 8 at paras. 15-16. Mr. Patterson did not file his application for leave to appeal from sentence within the prescribed period. However, he has since been granted an extension of time to file his application. In these circumstances, the Crown accepts that *Dunn* applies.
- [50] We are therefore entitled to consider afresh the fit sentence for Count 3, without deference to the sentencing judge.
- [51] Mr. Patterson submits that consideration of other sentences for this offence, imposed on other offenders, leads to a fit sentence in this case being in the range of 6-8 months. The appellant cites the cases of *R. v. Lesko*, 2022 BCSC 2276 and *R. v. Khudhair*, 2023 BCSC 1175 as useful for guidance. He submits that the circumstances of the offences in those cases were much more aggravating than the circumstances in this case, and yet each of those offenders received sentences of one-year consecutive. Mr. Patterson's argument is that a sentence of one year in this case is disproportionate.

- [52] The Crown submits that a one-year sentence remains fit in the context of the global sentence, also pointing to Lesko and Khudhair, as well as the cases of R. v. Campbell, 2023 BCSC 753 and R. v. Pelly, 2023 BCPC 7.
- [53] On this ground, I am persuaded by Mr. Patterson's submissions.
- [54] The circumstances surrounding the use of the imitation firearm in the cases cited by the parties, where a one-year sentence was imposed, were more violent than the circumstances of Mr. Patterson's offence. For example, in each of Lesko, Khudhair, Campbell and Pelly, the crimes occurred in the complainant's home, normally a place of sanctuary where a person should feel secure. The time period of the interaction during which the victims were threatened and at risk was also more enduring than the relatively brief interaction between Mr. Patterson and the complainant in this case. Also, in each of these cases the victims were touched by the perpetrator, unlike the present case. In Lesko, Khudhair and Campbell, the crimes involved assault and the victims suffered injuries. In Pelly, the victims had their hands tied behind their backs with zip ties.
- [55] In the present case, the entire transaction occurred quickly and, in my view, the use of the imitation firearm involved less violence than the circumstances in the cases just cited. That is not, however, to deny that it was extremely frightening to the store clerk but simply to distinguish the circumstances of other offences as more aggravating.
- [56] I agree with Mr. Patterson that based on proportionality and in the particular circumstances of this case a sentence of less than one year is fit for Count 3. However, I would not reduce the sentence to six months, as in my view that does not sufficiently meet the goals of denunciation and deterrence or reflect the seriousness of the offence. I would impose a sentence of 8 months for Count 3, consecutive to Count 1.

Disposition

- [57] Leave to appeal was previously granted. I would allow the appeal from sentence, and vary the sentence for Count 3 by reducing it to an 8-month sentence, consecutive to the sentence for Count 1. I would not vary the sentence for Count 1.
- [58] DEWITT-VAN OOSTEN J.A.: I agree.
- [59] MARCHAND J.A.: I agree.
- [60] GRIFFIN J.A.: The appeal is allowed and the sentence for Count 3 is varied by reducing it to an 8-month sentence, consecutive to the sentence for Count 1.

"The Honourable Justice Griffin"

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