

CANADA / JUDGMENT

R. v. Smith

2021 BCSC 1705

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1705 R. v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Smith,

2021 BCSC 1705

Date: 20210621

Docket: 54389-3

Registry: Vernon

Regina

v.

Jevon Daniel Smith

Before: The Honourable Mr. Justice Wilson

Oral Reasons for Sentence

Counsel for the Crown:

B. Bellrichard

Counsel for the Accused as Amicus Curiae:

C. Johnson

Appearing on his own behalf:

J. Smith

Place and Date of Trial/Hearing:

Vernon, B.C.

June 10, 2021

Place and Date of Judgment:

Vernon, B.C.

June 10, 2021

- [1] THE COURT: This is the sentencing hearing for Daniel Smith. Mr. Smith was convicted of two counts under Indictment 54389-3. Count 1 was that he used an imitation firearm while committing or attempt to commit during flight or after committing or attempting to commit the indicatable offence of assault with a weapon, contrary to s. 85(2) of the Criminal Code; and Count 2 arising out of the same set of circumstances that Mr. Smith did commit assault of David Prebushewski while carrying an imitation weapon, contrary to s. 267(a) of the Criminal Code.

The offence

- [2] The circumstances of the offence were summarized when I gave my decision in which I found Mr. Smith guilty. Those circumstances were essentially as follows: Mr. Smith and Mr. Prebushewski were known to each other. Mr. Prebushewski was the owner and operator of the Armstrong Hotel where Mr. Smith was a tenant and had been a tenant since approximately September of 2019 along with his spouse, Ms. Melissa Little.
- [3] The events that gave rise to the charge occurred on February 19, 2020. A few days earlier Mr. Prebushewski endeavoured to terminate Mr. Smith's tenancy by way of a handwritten 10-day eviction notice. Shortly before noon on February 19, 2020, Mr. Smith parked his car in front of Mr. Prebushewski's truck while Mr. Prebushewski was reversing, got out of his car holding what appeared to be handgun, whereupon he yelled at Mr. Prebushewski. He accused Mr. Prebushewski of having sexual relations with his wife and threatened to kill him. Mr. Smith then drove away.
- [4] Mr. Smith was arrested approximately two hours later and what appeared to be a handgun, but was subsequently determined on closer inspection to be an imitation handgun, was found in Mr. Smith's car.

The victim

- [5] The victim of this offence is Mr. David Prebushewski. There was no victim impact statement before the court, but the impact of these events on him was obvious at the trial. During the trial and part way through his cross-examination Mr. Prebushewski was visibly unwell and confirmed that he felt ill. He was taken to the Kelowna General Hospital and was released several hours later. When he resumed cross-examination, he testified behind a screen.

The offender

- [6] The offender, Mr. Smith, is 46 years of age and was born in Edmonton. He lived there until he was approximately 12 years old and moved to Salmon Arm. He has four children and has a relationship with most of them. He reports a history of abuse when he was a child.
- [7] He has a relevant criminal record that includes over 50 convictions. The convictions include weapons charges, assaults, and uttering threats. Mr. Smith has documented mental health issues that include bipolar disorder, post-traumatic stress disorder, and antisocial disorder.
- [8] There was no presentence report available in this case as Mr. Smith wished to have the sentencing proceed prior to obtaining such a report. That said, however, as a result of an order made following the trial, I do have the benefit of records from Interior Health, from the Kamloops Regional Correctional Centre, and a psychosocial report prepared by Dr. Nickie Mathew. I also have letters of support from the Okanagan Indian Band and some certificates with regard to the courses he completed while in custody. The medical records set out some of the mental health issues and background which I have found to be helpful.

Positions of the parties

- [9] The Crown's position is that the appropriate sentence here is a term of imprisonment of some 24 to 30 months plus terms of probation that includes staying away from the victim. The Crown says that the 12-months under Count 1 which is a mandatory minimum consecutive sentence should be on top of the 12 to 18 months sentence for the assault under Count 2.
- [10] The defence argues that 90 days for the assault and 12 months under Count 1 for a total of 15 months would be appropriate. They also agree to some of the proposed terms of probation.

Aggravating and mitigating factors

- [11] In terms of aggravating and mitigating factors, the most obvious aggravating circumstance here is Mr. Smith's extensive criminal record for similar offences that also involved threats, weapons, and assaults. In this case, not only was a firearm used, but it was pointed directly at the victim, Mr. Prebushewski. Mr. Smith was also on probation at the time of the offence.
- [12] In terms of mitigating circumstances, the Crown agrees that the time spent by Mr. Smith in pretrial custody is a mitigating factor because during the COVID pandemic the institutions have been run somewhat differently than would normally be the case. In Mr. Smith's case this has involved significant periods of time in what is called induction, which is long periods of isolation, some 23 hours per day, and also a lack of available programming that would normally be made available to people in Mr. Smith's circumstances.

Sentencing principles

- [13] In terms of the principles of sentencing, denunciation and deterrence are at the fore with regard to assault charges. Rehabilitation is also a factor in some cases. In this case, however, denunciation and deterrence must be paramount. Members of the community should feel free to go about their business without fear of being accosted and threatened with a weapon, something that would be undoubtedly terrifying for any person.
- [14] With regard to the specific offences, the assault with a weapon carries a maximum of 10 years and there is no minimum sentence. Now, with regard to the use of the firearm that involves a minimum one year and a maximum of 14 years with the sentence for the use of the firearm, statutorily to be consecutive to any other terms of imprisonment.
- [15] Sentencing is an individualized process. As the Supreme Court of Canada said in *Regina v. Nasogaluak*, 2010 SCC 6, at para. 44:
- [44] . . . A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.
- [16] A sentence imposed must be proportional. That is, it must be proportional to sentences given to similar offenders and in similar offences.

Discussion

- [17] The Crown, in support of its sentencing position, provided the court with authorities that involved robbery and argued that the cases are analogous. In *R. v. Al-Isawi*, 2017 BCCA 163, there was a mandatory consecutive one-year sentence for offences involving a firearm.
- [18] However, the cases involving robberies are not, in my view, particularly helpful to my analysis involving Mr. Smith's facts. Robbery involves an additional crime which in itself involves taking the property of another person. I accept that the impact on the victim of a robbery may be similar, fear for one's life. However, robbery is generally an offence that involves some planning, even if as was the case in another of the Crown's authorities, *R. v. Louie*, 2019 BCSC 368, the planning was poor planning. Robbery involves choosing a product to steal and then going to a store and in the cases were cited, threatening an employee in order to be able to steal those goods.
- [19] It was clear from his submissions that Mr. Smith still harbours anger towards Mr. Prebushewski. In some respects, this does not help his position today because it would suggest a lack of actual remorse for what he did notwithstanding his protestations of remorse. I suspect his regret relates more to the consequences that have befallen him since as opposed to any appreciation for what Mr. Prebushewski endured as his victim.

- [20] However, it is also clear from Mr. Smith's comments that he lost his temper due to both the manner of his eviction from the hotel owned by Mr. Prebushewski coupled with his hearing rumours of an affair between Mr. Prebushewski and Ms. Little who is Mr. Smith's wife. Mr. Smith then reacted and since he was not taking his medications at the time, his behaviour and his anger resulted in the altercation and the offence for which he has been convicted.
- [21] As such, this was not an obviously premeditated offence, as is invariably the case in robberies as set out in the Crown's authorities.
- [22] I also note that if it were not for Mr. Smith's use of the weapon there would be no assault at all as defined under the Criminal Code. That is, there was no application of physical force, nothing other than perhaps uttering threats which did not form a part of the charges regarding the confrontation with Mr. Prebushewski and as such there was no other concurrent or accompanying criminal act. This, of course, does not make the event any less terrifying for Mr. Prebushewski, but the circumstances here are nonetheless not particularly analogous, in my view, to a robbery.
- [23] The accused argues that his mental health should be seen as a mitigating factor. There is authority from our Court of Appeal to support this general proposition. In *R. v. Badhesa*, 2019 BCCA 70, our Court of Appeal held that mental illness can be a mitigating factor because the offender's moral culpability is reduced. At paragraph 42 the Court said the following:
- [42] When mental illness causes or contributes to the commission of an offence, it is a mitigating factor and a sentence may be reduced because the offender's moral culpability is attenuated. In these circumstances, general deterrence is a less weighty consideration because a mentally ill offender is not an appropriate medium for making an example to others: . . . Nor does specific deterrence or severe punishment play a significant role in the determination of a fit sentence. The former is meaningless when an offender is out of touch with reality and the latter may be disproportionate to the offender's degree of responsibility: . . .
- [24] Mental health is clearly a significant concern for Mr. Smith and undoubtedly plays a role in his behaviours. As a most recent example, he was hospitalized in March of 2021 following a psychotic episode in which he believed he was the Governor General. However, in this case there is insufficient evidence here to establish that there was a reduced culpability on the part of Mr. Smith on account of a mental illness. Firstly, his mental illness is episodic. Second, it appears that it can be modified with prescriptions which he has declined at least as recently as when he was in the Vernon hospital more recently.
- [25] I concluded in my reasons for judgment when I found Mr. Smith not guilty of the charge of uttering threats that he was so obviously delusional that his threats towards the arresting officer were not capable of being taken seriously. However, it does not necessarily follow that a lesser sentence should be the result just because the offender has mental health issues.

- [26] The focus in the cases is whether moral culpability is attenuated as a result of the mental illness. The evidence in this case confirms the mental illness, but does not establish that it attenuates moral culpability. It appears in the case of Mr. Smith that it is treatable on medication. Sometimes Mr. Smith takes the medication and at other times he does not. It appears to me that Mr. Smith is an intelligent man capable of knowing right from wrong and one who by his own admission has gaps in his periods of offending when he is under a doctor's care and following their advice. As such, I do not consider Mr. Smith's mental health challenges to be a significant mitigating factor in this case.
- [27] I turn now to the issue of pretrial incarceration. Firstly, Mr. Smith is clearly entitled to credit spent awaiting trial and sentence. The amount of pretrial credit is an area of disagreement.
- [28] The Crown concedes that in addition to certain matters that were fully agreed, Mr. Smith is entitled to 415 days credit that he served prior to a consent appeal following the Supreme Court of Canada's decision in Zora. The accused has another appeal pending for a period of incarceration from December 20, 2020 to March 14, 2021. He says that the complainant in that has recanted and that his appeal will surely succeed and he wants credit for that pretrial time too.
- [29] I am not prepared to assume the outcome of an appeal. I conclude that Mr. Smith is entitled to credit for 307 actual days or 415 days based upon the enhanced credit of 1.5 to one.
- [30] Mr. Smith has spent a significant amount of time in what was referred to in submissions as induction and is generally a waiting period upon admission into an institution, largely due in more recent times to the COVID protocols resulting from the current global pandemic. When in induction, Mr. Smith spends 23 hours out of every 24 in isolation. He submits, and I agree, that this is inevitably very bad for his mental health.
- [31] I accept that the punishment that results from having been held in isolation is detrimental to mental health and while I cannot accept that he ought to receive credit at anything more than 1.5 to one, it is a mitigating factor that would tend to lower the sentence that might ordinarily be imposed. By any calculation Mr. Smith has spent at least 65 days in this induction process that results in his 23 hours out of 24 in isolation.
- [32] THE ACCUSED: Thank you.
- [33] THE COURT: In all of the circumstances I have determined that Mr. Smith's sentence will be as follows: Mr. Smith, under Count 1, using a firearm while committing an offence, the sentence I impose is one of 12 months which is the minimum. With regard to Count 2, assault with a weapon, I conclude that the appropriate sentence is one of five months. This will be served consecutively as is required under s. 85(2) of the Criminal Code. By my calculations -- and counsel you can correct me if I am wrong -- the 17 months would equate to 515 days less credit of 417 days leaving 98 days remaining to serve. If I am wrong in those calculations, you can let me know.

- [34] THE ACCUSED: Thank you.
- [35] CNSL B. BELLRICHARD: Sorry, the number again you -- for the total sentence in days?
- [36] THE COURT: Five fifteen less 417 equals 98 in my math.
- [37] CNSL B. BELLRICHARD: Okay. I -- I have -- and for my -- I see the sentence as -- so 17 months -- yeah, 510 days minus the 415, that's correct.
- [38] THE COURT: In addition, there will be a term of probation for a period of two years. Mr. Smith, you will -- the compulsory conditions are set out in pick list item 2001, you must keep the peace and be of good behaviour. You must appear before the court when required to do so by the court and you must notify the court or the probation officer in advance of any change of name or address and promptly notify the court or the officer of any change of employment or occupation.
- [39] Next, pick list 2002, you must have no contact or communication directly or indirectly with David Prebushewski.
- [40] 2005-1, you must not go or be within 250 metres of any place where David Prebushewski lives, works, attends school, worships or happens to be. If you see him, you must leave his presence immediately without any words or gestures.
- [41] 2104, you must report in person to a probation officer at Vernon Community Corrections at 3101 29th Avenue, Vernon, B.C., within two business days after your release from custody unless you have obtained before your release from custody written permission from the probation officer to report elsewhere or within a different timeframe. After that, you must report as directed by your probation officer.
- [42] 2106, your reporting ends when you have satisfied your probation officer that you have completed all of your required counselling and the officer has told you that you no longer need to report.
- [43] 2202, when first reporting to your probation officer, you must provide them with the address where you live and your phone number. You must not change your address or phone number without notifying your officer in writing, at least, I will say five days in advance of any change.
- [44] 2610, you must not possess directly or indirectly any weapon as defined by the Criminal Code, including; firearms and ammunition, crossbows, prohibited or restricted weapons or devices or explosive substances, anything used, designed to be used or intended for use in causing death or injury to any person or to threaten or intimidate any person, any imitation of all of the above, including compressed airguns or BB and pellet guns or any related authorizations, licences or registration certificates and you must not apply for any of these.

- [45] Finally, with regard to counselling. Although Mr. Smith did not originally agree he subsequently agreed to participate in intake with regard to mental health. So there will be a term of his probation order, 2501. You must attend, participate in, and complete any intake, assessment, counselling or education program as directed by your probation officer. This may include counselling or programming for mental health. So that is 2501(d).
- [46] Next, there will be a mandatory DNA order under s. 487.051 of the Criminal Code.
- [47] There will be a mandatory lifetime firearms ban pursuant to s. 109 of the Criminal Code.
- [48] And pursuant to s. 491(1)(a) a forfeiture of the imitation firearm.
- [49] So, Mr. Smith, I hope you recognize that it is important that you take advantage of whatever services are available to you and that you address --
- [50] THE ACCUSED: Okay.
- [51] THE COURT: -- what appears to be, and what you have agree -- admitted are your mental health issues. Your his --
- [52] THE ACCUSED: Thank you, Your Honour.
- [53] THE COURT: Your history --
- [54] THE ACCUSED: There's one -- if there's a possibility that you could send me to a specific institution and that institution would be Ford Mountain. It's a medium institution where I could get a job and work and I can take advantage of extra programming right now they -- that they're offering. I can go outside and --
- [55] THE COURT: Okay.
- [56] THE ACCUSED: -- it will have a screened window on my -- on my cell that I can open at night. I just spent -- I just spent --
- [57] CNSL T. ANDERSON: -- [indiscernible/overlapping speakers] --
- [58] THE COURT: -- I know you would like that. Unfortunately, I do not have the ability to do that. I cannot dictate where you go.
- [59] THE ACCUSED: I think you could order my -- my detention at a specific detention centre. I -- I have seen it in the past.
- [60] CNSL B. BELLRICHARD: But Ford Mountain Institution is a federal institution for inmates who are serving sentences of more than two years so he wouldn't be able to serve that time --
- [61] THE COURT: Oh.
- [62] CNSL B. BELLRICHARD: -- it is Corrections Canada's jurisdiction.
- [63] THE COURT: Mr. Smith, you probably would not want to go there because I would have to sentence you for another two years.

- [64] CNSL C. JOHNSON: No.
- [65] THE ACCUSED: No, I believe that --
- [66] CNSL C. JOHNSON: My Lord --
- [67] THE ACCUSED: -- I believe it's a provincial institution. I am not sure what --
- [68] CNSL C. JOHNSON: -- [indiscernible/overlapping speakers] institution.
- [69] THE COURT: I think it is federal, isn't it? It --
- [70] CNSL C. JOHNSON: I believe it is part of B.C. Corrections system. It is the principal treatment centre for addiction and mental health and sex offences for the Province of British Columbia.
- [71] THE COURT: All right. In any event, I do not believe I have the ability to do that and I am not intending to do that today in terms of selecting the institution.
- [72] CNSL C. JOHNSON: I believe, My Lord, the limits of your power would be to make a recommendation on the warrant of committal.
- [73] THE ACCUSED: I'd appreciate that if you could. That would be very helpful to me. I'd like to take advantage of -- of the -- all these -- I missed the entire summer of 2020 and in segregation at KRCC. I have been in a cell literally going stir crazy. I could benefit greatly from -- from working and considering I have a job to go to when I get released. I could benefit from getting back in the -- the groove of working if I was able to get a job in the institution. Right now, I'm -- I'm in a remand sentence position and these remand sentence jails have waiting lists for jobs. There's a good chance that I won't be able to benefit from a job. This is why I am asking you to do this because --
- [74] THE COURT: Yes. No, I understand why, but I just do not have enough information that would enable me to conclude that they have space or whether it would be appropriate to make that recommendation or not so I am just not in a position to do that even though it would be good for you if you were able to get into a place that was able to offer you some programming.
- [75] THE ACCUSED: What about -- what about -- and this is one more suggestion? Sentencing me to a treatment facility. There's a bed open for me at -- at a residential treatment facility. There's a bed open at the VisionQuest treatment -- drug and addiction treatment facility that they have held for me for the last three months or four months since my bail hearing since it was denied. I wonder if the 90 days that I have left to serve would be better benefitted to myself and the community if you sentence me to serve that in the -- the 90 days at the treatment centre which is a 90-day program with -- that's basically -- that's the basic guideline. That 90 days I'll get a certificate for completing a drug and alcohol treatment program. That in itself would -- would probably be just as beneficial to myself at this point.

- [76] THE COURT: -- I am not going to say that your -- the term of imprisonment can be served at VisionQuest, but what I will say is this: something like VisionQuest is the sort of residential programming that is one of the things that you said you were not prepared to consent to when we were talking about the probation orders. All right. If between now and when you are released, if you would like the probation term to include a residential treatment component, all right --
- [77] THE ACCUSED: No.
- [78] THE COURT: -- then I --
- [79] THE ACCUSED: No. Here -- here -- here's my -- my thinking on this one is that the reason that I have asked to have this sentence um -- obviously within the 90 days I am not sure what - I think I will have to serve 45 more days and I am not sure what that will put my release date at, but I know it would be 40 -- around 45 days from -- from today. If you could do the math, maybe let me know what 45 days from today looks like that would be helpful. I have to -- I have run out of -- I have run out of funds and run out of family that can help me pay for my storage and my -- and at this point I have to get -- I have a lot of keepsakes, I have a lot of things that I have kept over the years. They're very sentimental to me and very important in value far more than any expensive items. They -- they mean a lot to me. Hence, the reason that I simply wanted to make do with the time that I'm -- that I'm sentenced.
- [80] THE COURT: No, I understand that.
- [81] THE ACCUSED: I mean, VisionQuest --
- [82] THE COURT: I am not going to include going to VisionQuest as the term of incarceration, but what I say --
- [83] THE ACCUSED: Okay.
- [84] THE COURT: -- what I will say is if -- and you are under no obligation to do so, but if you wanted the probation order to include a residential program then you could apply for that before your release and I would be prepared to consider it and that way you would likely get ahead of the queue. But that is entirely up to you. I --
- [85] THE ACCUSED: Okay.
- [86] THE COURT: So that is something you can discuss with Mr. Johnson, but --
- [87] THE ACCUSED: Sure.
- [88] THE COURT: -- if you wish. But I say if you wanted a term of the probation order to include attendance -- it is not in there now because it was not consented to.
- [89] THE ACCUSED: Okay.

- [90] THE COURT: I would be prepared to change an add that term to the probation order if you wanted me to do so if you were to apply before your --
- [91] THE ACCUSED: I'll let Cameron Johnson --
- [92] THE COURT: -- release. So that is --
- [93] THE ACCUSED: Sure, I'll let Cameron -- what -- so the 45 days from today are -- sorry, 98 would be 47 days -- what -- what -- 47.5, what would that put my release date at?
- [94] THE COURT: I am no math expert. Presumably 98 days, half of that is 49 so that would be what, towards the end of July, but I do not know. I am not a --
- [95] CNSL B. BELLRICHARD: It's -- it's usually [indiscernible/rapid speech] after two-thirds so that would usually put it around 62, 63 days.
- [96] THE COURT: Yes, so I -- but in any event I -- that is my decision so --
- [97] THE ACCUSED: Okay, thank you.
- [98] THE COURT: All right. Is there anything arising out of the decision?
- [99] CNSL B. BELLRICHARD: Just the victim fine surcharge that is applicable. It is \$200 on both counts.
- [100] THE ACCUSED: I'm already a disparaged, disenfranchised and --
- [101] THE COURT: Right.
- [102] THE ACCUSED: -- marginally disproportioned -- disproportionately marginalized person. I don't have the finances to pay these -- these surcharges. And I think that's an absolute insult for the Crown to even --
- [103] THE COURT: Mr. Bellrichard, I --
- [104] THE ACCUSED: -- [indiscernible/overlapping speakers].
- [105] THE COURT: -- I am not sure how he could possibly --
- [106] CNSL B. BELLRICHARD: I raise it to the court. It is a statutory obligation. It is not the Crown asking. It is part of the Criminal Code.
- [107] CNSL C. JOHNSON: My Lord, I would ask that --
- [108] THE ACCUSED: I mean, I -- I lost my damage deposit --
- [109] CNSL C. JOHNSON: -- [indiscernible/overlapping speakers] --
- [110] THE ACCUSED: -- I've also had to pay my wife back \$250 for --
- [111] THE COURT: Sorry.
- [112] THE ACCUSED: -- the damage deposit she's refusing to return.

[113] THE COURT: Mr. Smith, Mr. Johnson just wants to tell me something and I cannot quite hear him.

[114] THE ACCUSED: Okay.

[115] CNSL C. JOHNSON: My Lord, given the fact of Mr. Smith's employment and the fact he's on social assistance as recently as last year, I would suggest that the victim fine surcharges should be waived.

[116] THE COURT: I agree. I am not going to impose them. Frankly, I suspect Mr. Smith does not have any money and, if he does, he has probably got children that need feeding. So --

[117] THE ACCUSED: Thank you, Your Honour.

[118] THE COURT: -- I will waive them.

[119] THE ACCUSED: Thank you.

[120] THE CLERK: My Lord, the firearm prohibition and how long that was for?

[121] THE COURT: That is a lifetime.

[122] THE CLERK: That's a lifetime.

[123] CNSL B. BELLRICHARD: Yes.

[124] THE CLERK: Thank you.

[125] CNSL B. BELLRICHARD: And I think lastly is the conditional stay on Count 3.

[126] THE COURT: Yes.

"Wilson J."

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