
CANADA / JUDGMENT

R. v. Stark

2018 BCSC 2149

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 2149 R. v. Stark

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Stark,

2018 BCSC 2149

Date: 20181102

Docket: 105041

Registry: Kamloops

Regina

v.

John Andrew Carlton Stark

Before: The Honourable Mr. Justice Milman

Oral Reasons for Sentence

Counsel for the Crown:

S. Firestone

Counsel for the Accused:

D.G. Campbell

Place and Date of Trial/Hearing:

Kamloops, B.C.

October 12, 2018

Place and Date of Judgment:

Kamloops, B.C.

November 2, 2018

[1] THE COURT: The following are my reasons on sentence.

Part 1 - Introduction

[2] John Andrew Carlton Stark has pleaded guilty to six counts arising from two home invasions that occurred on November 20, 2017, in Kamloops, British Columbia. The sentencing hearing proceeded immediately after the plea on October 12, 2018, and I reserved judgment until today.

[3] The admitted offences are serious. They are as follows:

- a) one count of aggravated assault contrary to s. 268(2) of the Criminal Code;
- b) two counts of breaking and entering a dwelling house to commit an indictable offence, contrary to s. 348(1)(b) of the Criminal Code;
- c) one count of using a firearm while committing the offence of breaking and entering, contrary to s. 85(1) of the Criminal Code;
- d) one count of possessing a loaded restricted handgun without a licence and registration certificate, contrary to s. 95(1) of the Criminal Code; and
- e) one count of possessing a semiautomatic pistol knowing it to have been obtained by the commission of an offence, contrary to s. 96(1) of the Criminal Code.

Part 2 - Circumstances of the offences

[4] The sentencing hearing proceeded on the basis of admitted facts. The admissions are divided into three sections according to the three addresses at which the relevant events occurred. Those addresses are three dwelling houses close to one another on Coyote Drive, a quiet cul-de-sac in the Campbell Creek neighbourhood of Kamloops.

[5] The events began shortly after 4:00 p.m. on November 20, 2017. At that time, Dean Coles returned to his home at 584 Coyote Drive to find an intruder in the house. Mr. Stark had broken into the house through a window leading into a suite occupied by the Coles' tenant, Angela Gibson, who was not at home at the time. Mr. Stark had taken several items belonging to Ms. Gibson, including a wallet and identification, her passport, and her laptop computer. Mr. Stark then went upstairs into the part of the residence occupied by the Coles family and took their passports, their wedding rings, and a laptop computer.

- [6] As Mr. Stark was emerging with these items from a spare bedroom, Mr. Coles was entering the house through the front door. Mr. Stark confronted Mr. Coles. He pointed a handgun at him and said, "I have a gun and I am going to shoot you." Mr. Coles sought to defend himself by deflecting the gun away and disarming Mr. Stark. A struggle ensued. The two men fell on a bed and Mr. Stark was able to get the upper hand by striking Mr. Coles several times in the back of the head with the gun. Mr. Stark then struck Mr. Coles with various objects, including the gun, a screwdriver or a socket wrench, and a knife.
- [7] Mr. Coles was badly hurt. He suffered approximately 20 lacerations on his face and head requiring staples and stitches when he later got to the hospital. He also suffered a broken nose, a fractured orbital, a fractured cheekbone, and a fractured left hand from which a bone protruded. Despite these injuries, Mr. Coles managed to grab an instrument and strike Mr. Stark in the back, causing Mr. Stark to break off the attack. Mr. Stark then asked Mr. Coles where his keys were. When Mr. Coles did not respond, Mr. Stark fled into the garage leaving a backpack containing the items he had intended to steal in the spare bedroom, along with the handgun he had used to assault Mr. Coles. When he got to the garage, Mr. Stark went into Mr. Coles' truck and tried to force his way out of the garage by prying the garage door open with a metal bar. Mr. Coles followed Mr. Stark into the garage and opened the garage door, allowing Mr. Stark to run out to the street. Mr. Coles then called 9-1-1.
- [8] Mr. Stark ran to the neighbouring house at 592 Coyote Drive. That was the home of the Koldewijn family. Mr. Koldewijn had just returned from work and was taking a shower upstairs. His two children, aged three and six, were watching a movie in the family room near the front door. Mr. Stark broke into the home through a rear door that opened into the kitchen, across the hall from the family room. Mr. Koldewijn heard a noise and came downstairs to find Mr. Stark in the kitchen. Mr. Koldewijn grabbed Mr. Stark by the jacket and pushed him toward the door. Mr. Stark ran out the door, but before doing so, he stabbed Mr. Koldewijn twice in the chest with a sharp instrument. One of the wounds was eight centimetres deep. The two children witnessed the stabbing.
- [9] As Mr. Stark ran out of the Koldewijn residence carrying a knife, he was spotted by an off-duty RCMP officer, Constable Terry Harink. Constable Harink chased Mr. Stark, yelling, "Stop, police." Mr. Stark momentarily stopped to tell Constable Harink that he was trying to leave the area and continued running along Coyote Drive.
- [10] Mr. Stark ended up at 537 Coyote Drive, where he got into a Ford Flex that was parked in the driveway. He tried to start the vehicle but was unable to do so. Constable Harink caught up to Mr. Stark a few moments later. He ordered Mr. Stark to drop the knife and get out of the Flex. At that point, more police officers arrived at the scene and blocked the Flex in the driveway. They surrounded the Flex with firearms drawn, but Mr. Stark refused to comply with their demand to surrender. One of the police officers then broke the rear window of the Flex and deployed pepper spray in the cabin, which finally induced Mr. Stark to surrender. He was arrested without further incident.

- [11] Subsequent investigation revealed that the gun that was found in the Coles' spare bedroom was a .22 LR Ruger standard semiautomatic pistol, an operational restricted firearm. It was registered to Ms. Shirley Saunders of 1093 Agate Bay Road in Louis Creek. Mr. Stark had formerly resided at that address. Ms. Saunders had not given Mr. Stark permission to have the pistol. Mr. Coles' blood was found on the magazine cartridges and the inner loop of the trigger guard of the pistol, as well as on Mr. Stark's jacket and jeans. The gun was loaded.
- [12] Mr. Stark was at the time bound by a probation order prohibiting him from consuming drugs or alcohol or from being in a motor vehicle, other than public transit, without the registered owner present.

Part 3 - Victim impact statements

- [13] I heard from five of the victims, each of whom poignantly described the pain, anguish, and ongoing harm that these crimes have caused them.
- [14] Mr. Coles described his painful memories of the altercation with Mr. Stark, his subsequent hospitalization and ongoing treatment, and the ongoing effects of his physical and psychological injuries. They continue to affect his life in profound ways and will continue to do so for the foreseeable future. Ms. Coles described the changes in her life and her feelings of having their home violated and their lives poisoned, as she put it. Both of them continue to feel insecure and fearful in their home. I heard not only about the physical and emotional, but also the financial toll these crimes have taken on them and their family.
- [15] Ms. Gibson was not present for the home invasion, but described her sense of violation and the reminders of Mr. Stark's intrusion that were left in her home. She, too, continues to feel the impact of what occurred.
- [16] Mr. Koldewijn described how his life and that of his family has been changed forever as a result of these events. He had to leave work for seven months in order to recover. He needed physiotherapy to deal with the pain in his chest and restore his mobility. In addition to the long period to heal his physical injuries, he continues to experience anxiety and insomnia. He and his family are still struggling with the emotional fallout from the experience. He has difficulty controlling his temper. He says he is not the person he was before. Ms. Koldewijn described her own struggles with anxiety, insomnia, and feelings of insecurity. She says she is half the woman she was before.
- [17] The Koldewijns spoke eloquently of the profound and continuing impact of these events on them and their family, and particularly their young sons who had their innocence taken from them at a young age. The boys continue to be terrorized by what they experienced on that day. They wonder whether their father's assailant will return. Their family wounds, as Ms. Koldewijn put it, run deep. They are raw and open and continue to cause them pain. They are uncertain about whether they will ever be able to heal completely.

Part 4 - The circumstances of the offender

- [18] Mr. Stark is 32 years old. Although he has a criminal record, which I will describe in more detail below shortly, it is a relatively recent one and did not involve violence until the events that bring him to court today.
- [19] Mr. Stark had what was described by his counsel as a great childhood. He is the youngest of three children. He had a good relationship with his siblings and his parents as he grew up. I was shown letters from friends and relatives speaking to his good character. A long-time family friend described him as "a trusted and reliable person who has demonstrated a strong work ethic and respectful demeanour". An aunt says that Mr. Stark was a role model for her teenage children.
- [20] A close childhood friend describes Mr. Stark as caring, thoughtful, and loving. The support that Mr. Stark gave that friend in difficult times meant a great deal to him and changed his life.
- [21] Another friend and support worker, who has known Mr. Stark since childhood, described him as "the most well-mannered, respectful, and kind young man you would encounter." She adds that "he was always there to lend a helping hand."
- [22] After he graduated high school, Mr. Stark followed in his father's footsteps and became a miner. That work took him all over Canada. Later, he drove trucks for a living, but lost his licence due to a driving incident. He then began doing odd jobs for friends.
- [23] Mr. Stark's life began to unravel following the death of his grandparents and his older brother David. David Stark died tragically in an accident involving carbon monoxide poisoning in a remote area. Mr. Stark never recovered from that blow. He became depressed and tried to self-medicate. His substance abuse escalated to the point that he became addicted to crystal meth and crack cocaine.
- [24] Mr. Stark's criminal record dates back to April 2016, or about 18 months before the subject offences. In that short time, Mr. Stark accumulated a lengthy record, consisting primarily of property crimes, resisting arrest, and breaches of the terms of his probation orders and recognizances. He was in and out of jail frequently.
- [25] By November 20, 2017, Mr. Stark was homeless. He says he had not slept in days. He procured a firearm for his own protection because he was given to understand that he had been accused of being an informant and feared for his safety. He says that his behaviour on November 20, 2017 was the product of his addiction and lack of sleep.
- [26] While in custody awaiting disposition for these offences, Mr. Stark has been trying to come to grips with what happened. He has availed himself of counselling and other services that have been made available to him, although his prison record also displays one or two incidents of violence with other inmates. Nevertheless, while in custody, Mr. Stark composed letters of apology to his victims and read them to them at the sentencing hearing.

I am satisfied, having observed him and listened to him, that he is genuinely remorseful for what he did. To his credit, Mr. Stark has assumed full responsibility for his conduct and does not seek to deflect responsibility onto anyone else.

Part 5 - Relevant sentencing principles

[27] In imposing sentence, I must be guided by the principles set out in ss. 718, 718.1, and 718.2 of the Criminal Code. These provisions state that the purpose of sentencing is to contribute to respect for the law and to maintain a just, peaceful, and safe society by imposing just sanctions. A just sentence is one that is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[28] The objectives of sentencing are stated to include the following:

- a) to denounce unlawful conduct;
- b) to deter the offender and others from committing offences;
- c) to separate offenders from society, where necessary;
- d) to promote the rehabilitation of offenders;
- e) to provide reparations for harm done to victims; and
- f) to promote a sense of responsibility and acknowledgment of the harm done to the victims and the community.

[29] It was held in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, that the relative weight and importance of the various factors enumerated in those provisions will vary with the circumstances of the offence and the individual offender.

[30] In a case such as this involving violence causing serious injury while carrying out a home invasion, the elements of deterrence, denunciation, and protection of the public must be the primary considerations. I must have particular regard to s. 348.1 of the Criminal Code which states as follows:

348.1 If a person is convicted of an offence under . . . 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,

- (a) knew that or was reckless as to whether the dwelling-house was occupied; and
- (b) used violence or threats of violence to a person or property.

[31] In *R. v. Chudley*, 2016 BCCA 90, after citing that provision, Stromberg-Stein J.A. writing for the Court noted as follows at paras. 24-27:

[24] Further, this Court has recognized several sentencing principles that are normally engaged in home invasion type cases. First, in *R. v. Vickers*, 2007 BCCA 554, the Court held that deterrence and denunciation are the primary factors in sentencing for violent crimes, especially when these crimes violate the safety and security of a person's home: para. 12. As Madam Justice Saunders observed in *R. v. Meigs*, 2007 BCCA 394 at para. 25:

"it is a grave offence to enter another person's home without permission, and graver to enter the home and violate the occupant. The courts must and do impose stern sanctions for such crimes"

[25] Second, with respect to rehabilitation, this Court in *Vickers* stated that while it cannot be overlooked, it is of secondary importance. This is particularly true when there is no indication that the offender is a good candidate for rehabilitation or when he or she has demonstrated a history of violence: *Vickers* at paras. 13, 15.

[26] Third, the "step principle" - the idea that sentences should only be increased in moderate steps to avoid an adverse impact on the offender's chances of rehabilitation - is generally not helpful when the dominant sentencing factor is protection of the public: *Vickers* at para.16. Also, the "step principle" generally only applies when rehabilitation is a significant sentencing consideration: *R. v. McCallum*, 2004 BCCA 341 at para. 10.

[27] Fourth, higher sentences are appropriate when serious injuries are inflicted: *Vickers* at para. 19. In *A.J.C.* at para. 42, then Chief Justice Finch stated that a 14 or 15 year sentence may be appropriate in "the most aggravated circumstances where a 'home invasion' involves not only a break and enter to commit robbery, the terrorizing and confinement of victims, and the use of weapons to achieve these objectives, but also the infliction of serious injuries, sexual assault or death."

[32] In *R. v. Berry*, 2014 BCCA 7, the Court had occasion to consider the sentence of an offender who, like Mr. Stark, had committed two home invasions in one day. At paragraph 53, Willcock J.A. writing for the Court held that consecutive sentences can be appropriate, not only in relation to wholly unconnected incidents but also where, as here, the offender injures multiple victims in close proximity.

[33] Despite the pre-eminence of the principles of deterrence, denunciation, and protection of the public in home invasion cases, rehabilitation must not be overlooked in the appropriate case: *R. v. Deadder*, 2011 BCSC 306, at paragraph 78.

[34] In *R. v. Steinhauer*, 2016 BCSC 1322, Devlin J. noted the wide, 6 to 13-year range in the sentences that had been imposed in home invasion cases. She suggested that the breadth of the range is due to a number of factors, including:

- a) the nature and extent of the offender's involvement;
- b) the use of a firearm;
- c) the degree of violence; and

- d) the criminal record of the offender.

Part 6 - The positions of the parties

(a) The Crown

[35] The Crown urges me to impose a sentence of 10 to 12 years' imprisonment less time served. Crown counsel submits that this case lies at the more severe end of the spectrum of home invasion cases, owing principally to the number of victims affected, the degree of violence used, and the extent of the injuries and other profound impacts suffered by the victims, who include two children of tender years.

[36] In addition, the Crown points to the following circumstances as aggravating factors in this case:

- a) Mr. Stark targeted a dwelling house, intending to steal money and property;
- b) he prepared for the invasion by arming himself with a firearm and other weapons;
- c) he broke into two dwellings knowing they would be occupied or reckless as to whether they would be;
- d) the occupants of the dwellings were confined, if only briefly;
- e) using a firearm and other weapons, Mr. Stark threatened the occupants with death or serious injury;
- f) while in the Coles' home, he attempted to steal property;
- g) he refused to desist when he encountered the occupants in both homes and then violently resisted their efforts to protect themselves and their families;
- h) he used multiple weapons, including a firearm that he had obtained illegally;
- i) he was on probation at the time on terms prohibiting him from consuming drugs or alcohol or being in a vehicle without the owner present; and
- j) he has a record for property offences, resisting arrest, and breaching probation orders and recognizances.

[37] The Crown referred me to a number of authorities in support of its position on sentence. I will canvass them briefly.

R. v. Chudley, 2016 BCCA 90

[38] This was an appeal from a ten year sentence for a home invasion described as a "grow rip." The Court of Appeal upheld the sentence as fit and within the appropriate range. The home invasion in that case was carried out by five men. After a struggle, the victim was shot three times in the legs, struck with a baseball bat, and bound with duct tape. Mr. Chudley was one of those present. His fingerprints were on the duct tape. He had a long criminal record with

38 convictions, including many acts of violence. He denied having been present, but was found guilty after trial. The Court of Appeal at paragraph 53 also justified the lengthy sentence by distinguishing that case from others where the offence was "committed due to an addiction", and noted the fact that the offender had a substantial criminal record, including offences involving violence.

R. v. Riches, 2000 BCSC 317

[39] Mr. Riches pleaded guilty to aggravated assault following a trial. After forcing entry into an apartment with his female co-accused, Mr. Riches struck the male occupant approximately 25 times in the head with a claw hammer and then stole various items. Although the sentencing judge accepted that Mr. Riches was remorseful, he also found that the offence was planned and deliberate, in part because the couple had brought a change of clothes, expecting to have bloodstains on their clothes when they emerged. The offender had a lengthy criminal record, including numerous acts of violence. Indeed, at the time of the instant offences, he had been on parole for another home invasion. Owen-Flood J. imposed a term of ten years' imprisonment.

R. v. Moore, 2008 BCCA 129

[40] This was an appeal from an eight-year sentence for a home invasion involving robbery, breaking and entering, uttering threats, suffocating, and possessing a prohibited weapon. The Court of Appeal dismissed the appeal. The offences (which included some violence, but not at the level in issue here), were witnessed by two teenaged children. The offender had a criminal record involving violence. He had expressed remorse and was found to have rehabilitative prospects.

R. v. Berry, 2014 BCCA 7

[41] This was an appeal from a 14-year sentence imposed following guilty pleas to various offences arising from two home invasions, including aggravating assaults on two victims in one day. The sentence was reduced on appeal to ten years less time served, having regard to the offender's young age, 29 when sentenced, the relatively shorter sentences he had received for prior offences, and the offender's prospects for rehabilitation. The offender had a criminal record including violence. It was apparent that the offender's drug addiction and mental illness had played a role in the offences.

[42] Willcock J.A. writing for the Court added, at paragraph 63, that it was "important to note that some of the cases at the high end of the range . . . are cases where the offender has assaulted more than one person". The cases he referred to in that regard involved global sentences of eight and five and a half years.

R. v. Ertmoed, 2016 BCSC 344

[43] Mr. Ertmoed was convicted following a trial of several offences arising from a home invasion through which he intended to steal firearms. He was one of at least two perpetrators who entered a home and placed a cushion over the face of the victim while she was sleeping in her bed, and then bound her mouth, hands, and feet with duct tape. She was not otherwise injured. Mr. Ertmoed had no criminal record and was 24 years old at the time of sentencing. He had begun using crystal meth a few months before the offence occurred. He was found to be genuinely remorseful. Tindale J. imposed a sentence of seven years' imprisonment.

R. v. Steinhauer, 2016 BCSC 1322

[44] Mr. Steinhauer pleaded guilty to a planned home invasion that was committed using a replica firearm. He had broken into a home with another unknown accomplice who was armed with a crowbar and bear spray. Once inside, he pointed the replica firearm at the victims and threatened to kill them, demanding money and drugs. He punched one of the victims twice in the jaw. His accomplice sprayed one of the victims with mace. Mr. Steinhauer was 29 years old at the time of the sentencing and had a lengthy criminal record involving violence and 14 prior break and enter convictions. He had previously received a seven-year sentence for two robberies. He was on parole for those offences at the time of the home invasion. He had a history of substance abuse, but asserted that the crime was financially motivated. He expressed remorse and had availed himself of rehabilitation opportunities while in custody.

[45] Devlin J. found that:

The circumstances giving rise to these offences are disturbing and the prospect of future violent offences is not encouraging . . .

[46] She imposed a sentence of ten years. She said at paragraph 88 that the "cumulative impact of the extensive criminal history and the fact he was on parole at the time of this offence can be viewed as an exceptional factor that would justify a sentence outside the normal range."

(b) The Defence

[47] The Defence argues that the appropriate sentence would be a term of seven to nine years' imprisonment. Defence counsel submits that there are mitigating factors present in this case that were not present in many of the cases cited by the Crown. In particular, Mr. Stark had no record for violence and only a brief record of property crimes in the year or two preceding the instant offences. That record was, moreover, attributable to his having succumbed to substance abuse following the accidental death of his brother. Prior to that, Mr. Stark showed decades of stable and constructive behaviour. He has shown himself capable of being productive in his work. He has a support network of friends and family, some of whom wrote letters on his behalf in which they described a very different person

than the one who committed these offences.

- [48] He recognizes his debt to society and has not sought to blame others for his situation. He is genuinely and sincerely remorseful. He pleaded guilty without having to put the victims through a preliminary inquiry or trial. He intends to rehabilitate himself.
- [49] Defence counsel referred me to the following authorities as indicative of the appropriate range.

R. v. Deadder, 2011 BCSC 306

- [50] Mr. Deadder and an accomplice broke into a home wearing masks and committed robbery with a firearm. It was a planned attack. The offenders knew in advance there would be a small child in the home. One of the victims was hit in the head once with a gun or a fist. Mr. Deadder was 30 years old at the time of sentencing and had an extensive criminal record, including crimes of violence. He made good use of his time in custody, taking the rehabilitation programs and participating in Narcotics Anonymous and Alcoholics Anonymous meetings. He was remorseful. Following a guilty plea on the day of trial and joint submission from Mr. Deadder, but not his accomplice, Mr. Deadder was sentenced to six years.

R. v. Baetz, 2010 BCPC 20

- [51] Mr. Baetz pleaded guilty to aggravated assault, using a firearm while committing robbery, and using a firearm while committing aggravated assault. Mr. Baetz was engaged in a feud with the former partner of his girlfriend. That individual was living with his mother. Mr. Baetz showed up at the house at 4:00 a.m. seeking to gain entry. When the mother refused to let him in, Mr. Baetz fired a bullet through the door, hitting the mother in the abdomen. He then fired four more shots through the window. Later that same day, he invaded another home in which he and his accomplices stole three puppies at gunpoint. He was 27 years old at the time of sentencing. He struggled with substance abuse. He had a criminal record involving violence. He was under a mandatory firearms prohibition at the time of the offence. He received a global sentence of nine years.

R. v. Navas-Rivas, 2013 BCSC 2176

- [52] Mr. Navas-Rivas was found guilty of various offences arising from a home invasion, including using an imitation firearm to commit an indictable offence, robbery, and breaking and entering. He and his accomplice had entered the home at 4:00 a.m. wearing masks. He pointed a gun at the victim and her two children, but notably, unlike in this case, there were no injuries. He was 23 years old at the time of the sentencing and had a criminal record involving violence. He was on parole and probation at the time of the offence. Smith J. found the case to lie at the bottom of the range and imposed a six-year sentence.

R. v. Foster, 2015 BCSC 1198

[53] Mr. Foster pleaded guilty to various offences arising from two incidents six months apart. The first incident involved one count of assault causing bodily harm, unlawful confinement, two counts of breaking and entering with intent to commit an indictable offence, and one count of using an imitation firearm during the break and enter. Mr. Foster had a criminal record extending over two decades, but also suffered from a learning disability. There was a joint submission on sentence. He was remorseful and received a global sentence of seven years.

R. v. Ali, 2012 BCSC 340

[54] Mr. Ali was found guilty of being a party, along with three other accomplices, to a home invasion using a loaded firearm. The home invasion was planned. It was found to have been motivated by greed. The occupant was beaten and confined, although his injuries were not as serious as those inflicted in this case. Mr. Ali had a previous record involving violence. At the time of the offence, he was subject to a probation order prohibiting him from possessing firearms. On the other hand, he was 21 years old at the time of the sentencing and 18 at the time he committed the offence. He was remorseful. He had completed rehabilitative programs while in custody. Ehrcke J. imposed a global sentence of six and a half years.

R. v. Brossault, 2009 BCSC 464

[55] The case involved guilty pleas in respect of two home invasions. In the first, several accomplices committed a preplanned home invasion wearing masks and bulletproof vests. One of them put a machete to the victim's throat and two others pointed guns at his temple. They tied his hands with electrical cable. They kicked and hit the victim in the head with a machete or guns whenever he looked at them. One of them stomped on his ear and ripped an earring from his earlobe. In the second home invasion that occurred two months later, the offenders used a machete and an imitation gun. There were two occupants in that home, both were tied up, kicked and beaten, and robbed. Mr. Tait was involved in both incidents. He had a youth criminal record including acts of violence. On the other hand, he was an aboriginal offender who was only 20 years old at the time of sentencing. He was remorseful and showed strong rehabilitative prospects. Joyce J. imposed a global sentence of five and a half years.

Part 7 - Discussion

[56] I agree with Crown counsel that there are many aggravating factors in this case. The authorities cited by the Crown make it clear that deterrence, denunciation, and protection of the public are the paramount considerations in cases like these and that rehabilitation must be treated as a secondary factor. The cases cited by the defence generally predate the more recent appellate authorities cited by the Crown such as Chudley and Berry, and therefore rely on older appellate authorities describing a lower range: see Steinhauer at

paragraph 65.

- [57] Mr. Stark deliberately targeted two dwelling houses hoping to steal property from the occupants. He armed himself in advance. He committed not just one, but two consecutive home invasions. In each, he assaulted his victims with considerable violence causing serious injuries. He brought weapons with him, presumably so he could have them available to use for that purpose if the need arose. When confronted by Mr. Coles, Mr. Stark indicated his intention to shoot him. I agree with Crown counsel that Mr. Coles was confined by Mr. Stark's threat to use the gun and the subsequent violence, if only briefly. Having said that, it was not the kind of confinement seen in some of the cases where the victims' limbs were bound with duct tape or an electrical cord, for example.
- [58] Rather than leave the homes when confronted by their occupants, as he could have done, Mr. Stark chose instead to attack them violently. A particularly disturbing feature in this case is that the Koldewijn children, who were only three and six years old at the time, had to witness their father being stabbed as he tried to protect his family by forcing Mr. Stark out the door.
- [59] The severe and lasting impact these crimes have had and will continue to have on the victims is a heavily aggravating factor in this case: see s. 718.2(a)(iii.1) of the Criminal Code.
- [60] Finally, I must consider the fact that Mr. Stark committed these offences while on probation and in breach of the terms of his probation order. Although he had no record for violence, he did have a busy record showing approximately 24 convictions over the previous 18 months for property crimes, resisting arrest, and breaching the terms of his many probation orders and recognizances. For those offences, he had served a number of relatively shorter jail terms measured in weeks and was placed on probation for periods lasting one year to 18 months. With that history, he knew that his drug use tended to lead to crime, violent or not.
- [61] In the absence of compelling mitigating factors, these aggravating factors would tend to push this case to the higher end of the range as suggested by Crown counsel. On the other hand, contrary to the situation described in Chudley at paragraph 25, I find that there is some indication that Mr. Stark has the potential for rehabilitation. He is 32 years old. He has support from friends and family. He has demonstrated the capacity to be productive and to contribute positively to society. Unlike many of the offenders in the cases cited by the parties, Mr. Stark has no prior record for violence. His brief record appears to involve primarily property crime which I am prepared to infer is related to his recent struggle with addiction.
- [62] While I agree with Crown counsel that the offence was preplanned, in the sense that Mr. Stark brought weapons with him, it does not appear that he sought out the persons in the homes in order to attack them, unlike in some of the cases cited by counsel where multiple perpetrators planned to confine and injure the occupants as part of their plan. In other words, I am not persuaded that this was a "planned and deliberate home invasion designed to terrorize the victims" as Devlin J. described the situation before her in Riches, at

paragraph 13.

- [63] These crimes do not appear to have been driven by greed, but rather the need to feed an addiction.
- [64] I appreciate that the mere fact of an addiction is not necessarily a mitigating factor when the offender knows the risk of using illicit drugs, but I also accept Mr. Campbell's submission that Mr. Stark had no record for violence and is therefore not in quite the same position as an offender who knew in advance where his drug use would lead.
- [65] To his credit, Mr. Stark pleaded guilty relatively early in the process, thereby sparing the Crown and the victims the need for a trial or even a preliminary inquiry. I am not prepared to attach too much weight to this factor, however, given that this is not a case like Deadder in which the offender gave up one or more viable defences by pleading guilty. The Crown's case against Mr. Stark appears to have been a very solid one.
- [66] Finally, I do accept that Mr. Stark is genuinely remorseful and intends to rehabilitate himself. He has a long way to go, but he has at least taken the first step.

Part 8 - Disposition

[67] Mr. Stark, please rise. I am sentencing you as follows:

Count 1, the aggravated assault on Mr. Coles, I sentence you to a term of four years' imprisonment.

Count 3, breaking and entering the Coles residence and committing theft, I sentence you to a term of four years' imprisonment to be served concurrently.

Count 4, breaking and entering the Koldewijn residence and committing the aggravated assault on Mr. Koldewijn, I sentence you to a term of four years' imprisonment to be served consecutively.

Count 6, use of a firearm in the commission of the offence, I sentence you to a term of one year imprisonment to be served consecutively, as required by s. 85(4) of the Criminal Code.

Count 7, possessing a loaded restricted handgun without authorization, I sentence you to a term of one-year imprisonment to be served concurrently.

Count 8, possessing a weapon obtained by the commission of an offence, that is the firearm taken from Ms. Saunders, I sentence you to a term of imprisonment of one year to be served concurrently.

The total of these terms is nine years. You are entitled to a credit of 1.5:1 for the time you have spent in custody since your initial arrest on November 20, 2017. That calculation yields a credit of 347 days times 1.5, which is 521 days or one year and 156 days. The remaining term you must serve is therefore seven years and 209 days.

[68] In addition, I am making the following ancillary orders:

1. You are prohibited, pursuant to s. 109 of the Criminal Code, from possessing a firearm, crossbow, restricted weapon, ammunition, explosive substance, prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.
2. Because Counts 1, 3, and 4 are primary designated offences under s. 487.04 of the Criminal Code, I am also making a DNA order under s. 487.051 authorizing the taking of samples of bodily substances as reasonably required for the purpose of forensic DNA analysis at a time and place to be determined by the custodial authorities.
3. Finally, I am making a restitution order in favour of Mr. Coles in the amount of \$20,000, which was not opposed, but I will waive the victim fine surcharge under s. 737 of the Criminal Code. I recognize, Mr. Stark, that you will not be in a position to begin paying that amount until after your release from prison, and so I am recommending that a condition of your parole be that you make significant progress towards payment within a reasonable time after your release.

[69] You may be seated.

[70] Counsel, has a stay been entered on the remaining counts?

[71] MS. FIRESTONE: No, and I do that now. I direct a stay on all remaining outstanding counts, so I think that is 2 and 5, 9 and 10.

[72] THE COURT: All right, is there anything else, counsel?

[73] MR. CAMPBELL: No, My Lord.

[74] THE CLERK: My Lord, may I just confirm, the firearms prohibition, was that going on all of the counts?

[75] THE COURT: Ms. Firestone?

[76] MS. FIRESTONE: Yes, it would be.

[77] THE COURT: All right, all counts then.

"Milman J."

The Honourable Mr. Justice Milman

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