
CANADA / JUDGMENT

R. v. Tremblay

2014 BCSC 901

COURT

Supreme Court of British Columbia

DECIDED

17 April 2014

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tremblay,

2014 BCSC 901

Date: 20140417

Docket: 149932-2

Registry: Victoria

Regina

v.

Daniel Joseph Adrien Tremblay

Before: The Honourable Mr. Justice Butler

Oral Reasons for Sentence

Counsel for the Crown:

Rome Carot

Counsel for the Accused:

Jordan Watt

Place and Date of Trial/Hearing:

Victoria, B.C.

April 17, 2014

Place and Date of Judgment:

Victoria, B.C.

April 17, 2014

- [1] THE COURT: Following a trial by judge and jury, Daniel Tremblay was convicted of three offences relating to his dealings with Sandra Gardner. The three convictions are: Count 2 - defrauding Ms. Gardner of money with a value in excess of \$5,000, contrary to s. 380(1)(a) of the Criminal Code; Count 3 - forgery of a false document, a settlement receipt, with the intent that it be acted upon to the prejudice of Ms. Gardner, contrary to s. 367 of the Criminal Code; and Count 4 - theft of money and jewellery, the property of Ms. Gardner, of a value of less than \$5,000, contrary to s. 334(b) of the Criminal Code.
- [2] I have now heard the very helpful submissions from counsel regarding sentencing. I have also received a victim impact statement from Ms. Gardner and Mr. Tremblay has addressed the court. These are my reasons for sentence.

Circumstances of the Offences

- [3] The convictions arose from a series of transactions between Mr. Tremblay and Ms. Gardner over several months from late 2008 to September 2009. Each transaction was for an amount less than \$5,000. As the trial was conducted with a jury, it was unclear as to which of the transactions the jury relied upon for the convictions with respect to Counts 2 and 4. Accordingly, following the trial, I received submissions from the parties and issued a ruling regarding the facts relevant to the sentence. That application and my ruling were made pursuant to the provisions of ss. 723 and 724 of the Criminal Code.
- [4] I will now briefly summarize the circumstances of the offences, taking into account, of course, that ruling.
- [5] Mr. Tremblay befriended Ms. Gardner in 2008. They were of similar ages; approximately their mid-fifties. She worked in the office of a mini storage facility and provided security for that facility by living on the property in her own trailer. She can be described as simple, trusting, and naïve. Undoubtedly, she was also lonely, given her circumstances. She is unsophisticated in financial and legal matters. When she met Mr. Tremblay, she had a few thousand dollars in savings, but was in a somewhat precarious financial situation. Mr. Tremblay befriended her, knowing that she was having difficulty with her employer and that she wanted to make some money with her limited savings, which had been invested in GICs.
- [6] Mr. Tremblay first approached her with an investment scheme in late 2008. It was a complete fabrication. He promised he would invest her money with a banking acquaintance of his who allegedly worked for the Bank of Montreal. He said the scheme would give her a return of more than 10% a month for six months, at the end of which the principal would be repaid in full. She gave him \$4,500 to invest in the scheme. He gave her the first monthly

interest payment of \$500, but nothing further. Accordingly, he defrauded her of \$4,000 with respect to that incident.

- [7] In spite of his failure to repay the money as promised, he managed to maintain the friendship and Ms. Gardner continued to trust him. Mr. Tremblay took an additional \$1,500 from her by getting her to advance money to him on a credit card through his landlord's business. He used the money to pay his rent and for other purposes.
- [8] On May 30, 2009, Mr. Tremblay persuaded Ms. Gardner to give him \$2,500 by making false statements about the use that the money would be put to. He said he needed the money to hire an investigator to help her with claims she wanted to make against her employer for dismissing her and making her move her trailer from the parking lot at the storage facility.
- [9] On July 9, 2009, he obtained an additional \$2,400 from her by means of further false statements about how those funds would be used for her benefit to pursue those claims. One of the ways he managed to maintain her trust was to provide assistance to her when she was kicked out of her trailer home. He allowed her to move in with him for a period of time. He also frequently drove her to medical appointments.
- [10] The last transaction which was proved as part of the factual underpinning for the fraud charge was the money Mr. Tremblay persuaded Ms. Gardner to give him in September 2009. I concluded the amount taken from her at that time totalled \$1,500. He said he needed \$1,000 for a deposit on a house for her to rent in Metchosin, and that he needed another \$500 to help him pay for a trip to Toronto. He never intended to use the money for a deposit on a house and never did so. The story he told about the trip to Toronto was a lie, as he never took or intended to take such a trip. He kept the funds for himself.
- [11] The total amount of the money which Mr. Tremblay defrauded Ms. Gardner of in relation to Count 2 is \$11,900. The funds were all obtained by means of fairly detailed lies he told about the investment, the payments he was going to make to help with the Employment Standards and Residential Tenancy claims, the deposits he was going to supposedly make for rental properties, and the non-existent trip to Toronto. He took advantage of her naïvety and of the trust she placed in him. By the time these transactions were done, she had no savings left, was without work and had lost her home.
- [12] It should be obvious from the descriptions of these circumstances that the fraud was not detailed or sophisticated. Rather, Mr. Tremblay took advantage of a woman who was naïve and unsophisticated. He did so by means of a feigned friendship and false promises, which would likely not have fooled most people.

- [13] The document which formed the basis for the forgery count was a settlement receipt that Mr. Tremblay prepared in order to prove to the police or other people that he had repaid Ms. Gardner all of the money he took from her. The document was created so that it appeared to be signed by her, and falsely stated that repayment had been made, with interest, of all the funds taken from her in the transactions I have described. The document was, of course, a fabrication.
- [14] The money and jewellery stolen by Mr. Tremblay, which formed the basis for Count 4, were discovered by him at the time Ms. Gardner was being evicted from her trailer home at the parking lot. He found some jewellery in the trailer and persuaded her to give it to him for safekeeping. He then sold it and kept the money. He also persuaded her to give him some cash she had for safekeeping. He never returned that money. I concluded that there was \$500 in cash, and there was no way to value the gold jewellery, as there were no photographs or appraisal evidence. The jewellery had belonged to Ms. Gardner's mother and was obviously of sentimental value. The jury concluded that the value of the two items was less than \$5,000.
- [15] I turn now to the impact of the offence on Ms. Gardner. The impact of the offences was obviously significant. She was struggling with her personal life and finances when she met Mr. Tremblay. She thought he was a friend and she placed great trust in him. Through the deception and theft, he took from her most of her worldly possessions. She described the impact of his actions in her victim impact statement. The impact is both emotional and physical. She feels shame and is now reluctant to trust other people. She says she feels like a complete failure. Physically she says she is suffering from lack of sleep and tension, which she blames on the trauma of the situation. She has had to give up her dog as a result of the pet care costs she can no longer afford, and this has also impacted her emotionally. She also says that she is now living in poverty. While I accept that this is the case, I note that part of the reason for that is the loss of her job, and Mr. Tremblay had nothing to do with that. She would likely have been in financial difficulty in any event.

Circumstances of the Offender

- [16] Mr. Tremblay is now 58 years old. He was born and raised in Quebec, but has been in B.C. for the last ten years. He has a very long criminal record with convictions for a wide variety of offences. Unfortunately, much of his adult life has been spent in prison. The record includes approximately 30 convictions. The adult convictions started in 1977, when Mr. Tremblay would have been about 20 years old. They have continued up to the present time and include convictions for two offences which postdate the incident in question. His convictions include six for theft and six for breaking and entering, and one for extortion. He also has convictions for crimes of violence, including assault, kidnapping, robbery, forcible confinement, attempted murder, and uttering threats.

- [17] The most serious conviction was for attempted murder and he was incarcerated for that offence in 1992. He received day parole in about 2003 and full parole from that in 2006. As the defence notes, he has been on parole since 2003, except for a period of about three-and-a-half years' incarceration from January 2010 until August 2013. That custodial sentence was for the break and enter and assault charges arising out of the January 2010 incident.
- [18] At the time of these offences involving Ms. Gardner, Mr. Tremblay was still on parole.

Legal Parameters

- [19] Pursuant to s. 380(1)(a) of the Criminal Code, the maximum penalty for Count 2, the fraud charge, is 14 years in prison. The maximum penalty for Count 3, the forgery charge, pursuant to s. 367(a), is 10 years in prison. As Mr. Tremblay was convicted of theft under \$5,000, the maximum penalty for Count 4 is two years.

Positions of the Parties

Position of the Crown

- [20] The Crown's position is that Mr. Tremblay should serve a custodial sentence of three years, which should be consecutive to any sentence he is currently serving. Specifically, the Crown seeks a sentence of three years on Count 2, one year on Count 3, and one year on Count 4, with the latter two to be served concurrently to the sentence on Count 2.

Position of the Defence

- [21] The defence says that a fit sentence in the circumstances of this case is nine months in prison, which is to be served consecutively to any current sentence. The defence says I must take into account the loss of parole Mr. Tremblay will suffer, which will increase the total sentences he faces. The defence also argues that Mr. Tremblay does have rehabilitation potential, and says he is doing much better in the past ten years than he did at any time earlier in his life. He has taken numerous courses for personal betterment and employment. He has held numerous jobs over the past ten years and he is now doing well at the community residential facility he is currently staying at. I have reviewed the last four monthly reports from that facility which confirm that submission.
- [22] The defence also notes that Mr. Tremblay has serious medical issues, mainly related to the throat cancer that he was diagnosed with about four years ago. He is taking multiple medications and needs continuing treatment.

Sentencing Authorities

- [23] I have considered all of the sentencing authorities the parties have referred to. I will deal with a few of them later in these reasons. At this point, I will make the observation that there is a broad range of sentences for fraud offences and, of course, a huge difference in the circumstances surrounding such offences. These differences make the sentencing task difficult.
- [24] The Crown referred to: *R. v. Gooderham*, 2004 BCCA 315; *R. v. Goertzen*, 2004 BCCA 639; *R. v. Williams* (1995), 55 B.C.A.C. 101; and *R. v. Wasan*, 2006 BCCA 47.
- [25] The defence referred to: *R. v. Marceau*, [1988] B.C.J. No. 2704 (C.A.); *R. v. Lamberton*, [1990] B.C.J. No. 1145 (C.A.); *R. v. Bueger*, [1994] B.C.J. No. 2198 (C.A.); *R. v. Saran*, [1996] M.J. No. 534 (C.A.); *R. v. Dimillo*, [1998] O.J. No. 3349 (C.J.); *R. v. Tiwana*, 2007 ABPC 59; *R. v. Cook*, 2013 ABPC 6; *R. v. Friesen* (1994), 40 B.C.A.C. 223; *R. v. Dhaliwahi*, [2011] O.J. No. 5015 (C.J.); *R. v. Bullock*, 2013 ABCA 44; *R. v. Douglas*, 2014 ABCA 113; *R. v. Brennan*, 2008 NLTD 61; and *R. v. Evans*, 2003 NBQB 54.

Sentencing Principles

- [26] The statutory framework for sentencing is found in ss. 718 to 718.2. The fundamental purpose of sentencing is set out in s. 718. The objectives enumerated include denunciation, deterrence, the separation of offenders from society where necessary, and rehabilitation.
- [27] Section 718.1 provides that "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." I have also taken into account the other sentencing principles set out in s. 718.2. These include the principle that a sentence should be increased or reduced to take into account relevant aggravating and mitigating circumstances relating to the offence and the offender, and the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
- [28] I must also consider the provisions of s. 380.1(1) which require the court to take into account specified factors as aggravating circumstances where they exist. Here subsection (c.1) is of some relevance. It makes it an aggravating circumstance where "the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation". The Crown also suggested that subsection (a) is relevant here. I do not agree. I do not find that the magnitude, complexity, duration, or degree of planning of the fraud was significant. It is a factor in the case, of course, but I would not describe it as significant.

Aggravating and Mitigating Circumstances

- [29] The defence argues that the total amount of money was not large in comparison to many fraudulent schemes. That is true. As the Crown notes, the total monetary value of the theft is only \$12,400. While that is not a substantial amount to many people, it was Ms. Gardner's nest egg at a difficult time in her life. As the Crown argues, the breach of personal trust is a significant aggravating factor in this case. Ms. Gardner was lonely and vulnerable because of her simplicity and naïvety.
- [30] Other aggravating factors include the fraud and forgery offences involved a considerable amount of planning, both for the commission of the offence and the attempt to cover it up, and so that further fraudulent activities could occur between Mr. Tremblay and Ms. Gardner.
- [31] Another aggravating factor is Mr. Tremblay was on parole at the time the offences were committed. He actively attempted to mislead the police investigation through the forged settlement receipt.
- [32] Of course, Mr. Tremblay has a lengthy criminal record, which includes previous convictions for theft and offences which amount to breaches of trust.
- [33] Finally, the fraud had a significant negative impact on Ms. Gardner, who has been emotionally devastated by the incident. She has also been affected financially and physically, as I have described.
- [34] There are no real mitigating factors here. Mr. Tremblay has not shown any remorse, and he denied the commission of the offences throughout the trial of this matter.

Analysis and Decision

- [35] The most important sentencing objectives in this case, given the circumstances of the offences and Mr. Tremblay's personal circumstances, are deterrence and protection of the public. While general deterrence is an important consideration, given Mr. Tremblay's record and the fact of his continued offending over time, specific deterrence is also important. The same consideration, that is Mr. Tremblay's record over time and the difficulty he has in living within the rules of society, also make protection of the public a very important objective here.
- [36] I accept as well, that rehabilitation plays some role in the sentence I must give. I do not accept the Crown's submission that it is not a consideration at all. As the defence argues, Mr. Tremblay has made some steps towards rehabilitation over the past ten years. He has successfully completed a number of useful programs and does well within the halfway house community where he is now living. He has shown some effort to become a productive member of society, even though he has suffered significant setbacks. It would be wrong to completely ignore the positive, including the support he now receives from individuals within the corrections system, like Mr. Sandhu and the chaplain. I accept that monthly

reports from the halfway house have been very positive. Nevertheless, rehabilitation does take a back seat to the primary objectives I have outlined.

- [37] The aggravating circumstances are significant. Mr. Tremblay targeted a vulnerable, trusting, naïve woman for his personal gain. The offences took some planning and preparation. The fraud and forgery were not opportunistic crimes. They involved a good deal of forethought. While the theft offences were somewhat opportunistic, the cover-up for the jewellery theft also involved fabrication, which took planning. The breach of personal trust, the fact that the fraudulent activity continued for nine months and involved several individual incidents increases Mr. Tremblay's moral responsibility.
- [38] I have had some difficulty fitting the case into a real range. As I have indicated, the variety of circumstances that can make up a fraud conviction and the variety of personal circumstances make that difficult. I agree with the Crown that there are some valid similarities between this case and the decision in Goertzen, especially with regard to Ms. James. The offender there had a very long list of fraud convictions and breached the trust of good friends. She received consecutive sentences of two-and-a-half and three years, which were described as being at the high end of the range. There are, however, significant distinguishing features between that case and this case. The fraud in that case was far more sophisticated and elaborate, and the amount taken was much greater. Between the two sets of victims, it totalled \$100,000. In my view, those differences have some significance.
- [39] Williams also has some similarity to the present case. The accused there had 17 prior fraud convictions. The amount involved was less than \$1,000 and the accused was sentenced to 18 months, which was upheld on appeal.
- [40] The decision in Friesen also has some similarity to the present case. The offender in that case had five prior convictions, all involving shoplifting. She fraudulently obtained over \$12,000 in welfare over a five-year period. She was sentenced to nine months in prison.
- [41] I turn now to one of the difficult features in this case, and that is the impact that this conviction and sentence will have on Mr. Tremblay's existing sentence. I accept Mr. Watt's description of the likely impact. The submission he made was based on Mr. Tremblay's personal experience and in particular, what happened when he was convicted of the assault and break and enter in 2010. His parole was revoked and the time remaining on his previous sentence was then recalculated with the sentence he was given. While his sentence for the new break and enter offence was for three years, he was not eligible for mandatory release for more than three years. Mr. Watt submits the same thing will happen here. Mr. Tremblay now has 14 months left on his current sentence, and so he says it is likely there will be a revocation of parole and a recalculation of his parole eligibility by adding the remaining months to the sentence I give. I assume, for sentencing purposes, that this will likely happen.
- [42] I turn now to the law in relation to this situation.

[43] In Bueger at paras. 20 and 21, the Court of Appeal commented on the proper approach for a sentencing court when considering how the loss of parole on a previous conviction should impact the sentencing on a new offence:

20 There is much to be said in favour of keeping the loss of parole for an earlier offense separate from the sentencing on a subsequent offense. Indeed it is difficult to understand why an offender should gain any credit for a forfeiture of conditions of parole, an entirely self-inflicted consequence of misconduct. Care must be taken to avoid the inconsistency involved in treating the commission of the offense on parole as an aggravating circumstance on the one hand, and, on the other, mitigating the penalty because of the consequences of parole revocation.

21 Having said that, however, I think that a sentencing court must appreciate the totality of what will result from the commission of the offense. The overall length of custody bears upon at least two sentencing factors, the protection of the public and rehabilitation.

[44] In Saran, the Manitoba Court of Appeal considered these comments and noted at para. 16 that the important consideration is how the current sentence affects the totality of the sentences to be served by an accused:

16 The application of the principle of totality in circumstances such as we have here is not a novel concept. It simply means that the sentencing tribunal should, as always, take into account the totality of the sentences to be served by an accused in determining whether a particular sentence is a fit and proper one. In doing so, the court must bear in mind, if the facts be so, that there is an unexpired portion of a previous sentence still to be served by the accused. This is not inconsistent with the principle, relied on by the Crown, that courts should ignore the actions or potential actions of the administrative process pursuant to the provisions of the Parole Act [now the Corrections and Conditional Release Act, S.C. 1992, c. 20]. The reality, as noted by the British Columbia Court of Appeal in both Bueger and Moore, is that in most instances the fact that the accused will first have to complete the unfinished portion of a previous sentence will be of little or no significance in the sentence that is imposed for the offence before the court.

[45] I accept that I must give consideration to the totality principle. Here that includes considering how the unexpired portion of Mr. Tremblay's previous sentences impact on the sentence I must impose. I have considered that in coming to the decision I am about to render. Of course, my consideration is not mathematical; rather, I have considered the total sentence Mr. Tremblay will receive, including the likelihood that the remaining portion of his previous sentence will be added to recalculate his eligibility for parole. This factor is a relatively minor consideration when compared to the circumstances of the offence and the offender and the relevant sentencing principles which I have already outlined.

[46] When I take all of those factors into account, I conclude that a fit sentence for Mr. Tremblay is 22 months in prison.

[47] Now, Mr. Tremblay, can I ask you to please rise.

- [48] On Count 2, I sentence you to 22 months in prison. That will be served consecutively to any sentence that you are now serving.
- [49] On Count 3, I sentence you to 12 months. That will be served concurrently with the sentence on Count 2, and of course consecutively to other sentences.
- [50] On Count 4, I sentence you to 12 months and that will be served concurrently with the sentences on Counts 2 and 3.
- [51] I am also going to make a stand alone restitution order on Counts 2 and 4. You are required to make restitution to Ms. Gardner in the amount of \$12,400. That is the monetary amount of the fraud and theft.
- [52] I am also going to make a DNA order, as I understand fraud is a secondary designated offence. So there will be a DNA order under s. 487.051(3).
- [53] Now, I think that concludes everything I need deal with.
- [54] MR. WATT: Yes, thank you, My Lord.
- [55] MR. CAROT: Thank you, My Lord.
- [56] THE CLERK: The DNA will be taken at the jail or here?
- [57] THE SHERIFF: Taken at the jail.
- [58] THE CLERK: At the jail, thank you.
- [59] THE COURT: Yes. Mr. Tremblay, I hope that what you indicated to me is correct; that you are moving towards a better role in society, and I wish you some success with that.

"Butler J."

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