
CANADA / JUDGMENT

R. v. West

2020 BCSC 352

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Supreme Court of British Columbia

DECIDED

31 January 2020

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2020 BCSC 352 R. v. West

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. West,

2020 BCSC 352

Date: 20200131

Docket: 107675-2

Registry: Kamloops

Regina

v.

Wesley Enock West

Before: The Honourable Mr. Justice Marchand

Corrected Judgment: The judgment was corrected

at paras. 2, 24, 40, 44, 51 and 55 on March 13, 2020

Oral Reasons for Sentence

Counsel for the Crown:

T.A. Livingston

Counsel for the Accused:

J.P. Gustafson

Place and Date of Trial/Hearing:

Kamloops, B.C.

January 28, 2020

Place and Date of Judgment:

Kamloops, B.C.

January 31, 2020

Introduction

- [1] In these reasons, I will not be referring to the complainants by name. In doing so, I intend no disrespect to them nor to depersonalize their experiences. Rather, I intend only to preserve their dignity and privacy to the greatest extent possible.
- [2] Wesley Enock West has entered guilty pleas to sexually assaulting Complainant Number 1 and sexually touching her nine-year-old daughter, Complainant Number 2, on March 28, 2019, in Kamloops. Mr. West has already served 309 days in custody pending this sentencing decision.
- [3] Crown and defence jointly submit that Mr. West be sentenced to an additional 18 months in custody, plus 18 months' probation, with a focus on rehabilitation. Given the importance of joint submissions to the proper functioning of the criminal justice system, I may not depart from a joint submission on sentence, unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest: *R. v. Anthony-Cook*, 2016 SCC 43.

The Circumstances

- [4] On March 27, 2019, Complainant Number 1 had a number of guests over to her home, including Mr. West. Complainant Number 1 and her guests consumed alcohol. Complainant Number 2 went to bed with her younger siblings in Complainant Number 1's bedroom. Complainant Number 1 fell asleep on a recliner in the living room.
- [5] At some point late on March 27 or early on March 28, 2019, Complainant Number 2 was woken by her younger brother crying. Mr. West entered Complainant Number 1's bedroom and touched Complainant Number 2 on her vagina, on top of and underneath her underwear. Mr. West sat next to Complainant Number 2 and tried to kiss her. Complainant Number 2 told Mr. West "no" and pushed him away.
- [6] Complainant Number 2 saw Mr. West exit the bedroom and go to the recliner where Complainant Number 1 was sleeping. Complainant Number 2 saw Mr. West pull Complainant Number 1's pants down and start sucking. Complainant Number 1 woke up to Mr. West on his knees spreading her legs apart and trying to perform oral sex and digitally penetrate her. He rubbed on her vagina "really hard".

- [7] Complainant Number 1 says that Mr. West was highly intoxicated. She was able to get Mr. West off of her, but he refused to leave. Ultimately Complainant Number 1 called her uncle, who was able to get Mr. West out of Complainant Number 1's home.
- [8] Mr. West says that he was so intoxicated that he essentially has no recollection of the events described by Complainant Number 1 and Complainant 2. He does not dispute their descriptions.
- [9] Mr. West adds one detail that he does recall. He says that he was assaulted with a bat and forcibly ejected from Complainant Number 1's residence. When he was arrested the next day, the police observed lacerations and abrasions on his face.

Impact on the Victims

- [10] Complainant Number 1 and Complainant Number 2 are Indigenous. They did not file victim impact statements, but I would not be surprised if they have suffered a number of the common harms associated with sexual violence, such as fear, anxiety, anger, difficulties trusting others, intrusive thoughts, nightmares, depression, and feelings of worthlessness and/or low self-esteem.

Mr. West's Circumstances

- [11] In considering Mr. West's circumstances, I have had the benefit of three detailed and thoughtfully-prepared reports, namely a pre-sentence report ("PSR"), a psychological pre-sentence assessment completed by Dr. Joneja, and a so-called Gladue report.
- [12] Mr. West is 32 years old. He is a member of the Takla First Nation, a community that is part of the Carrier Sekani Tribal Council located in North Central B.C.
- [13] Mr. West had a chaotic and traumatic childhood.
- [14] Three of Mr. West's grandparents, his mother, and he himself attended the Lejac Indian Residential School which closed in the mid-1990s. He and his mother also attended a federal Indian day school in Takla Landing. Mr. West understands that his family members experienced physical and sexual abuse at Lejac. He recalls experiencing physical abuse there.
- [15] Until age five or six, Mr. West was raised by his mother and maternal grandmother. At times, he lived with his mother in Vernon. At other times he lived with his grandmother in Prince George or Takla Landing. Child protection services were involved, but for the most part Mr. West's father was not.
- [16] As a young child, Mr. West witnessed his mother's struggles with alcohol and her experiences with domestic violence. Sadly, Mr. West's mother committed suicide when he was five or six years old. Mr. West witnessed the aftermath of her suicide, which must have been horrifying.

- [17] Growing up, Mr. West recalls witnessing a lot of parties, fights, and sexual violence. A few people in the community sexually abused him.
- [18] Mr. West has some type of cognitive impairment. He found school difficult. According to the PSR, Mr. West attended high school in Williams Lake, but did not graduate due to a conflict with a brother he was staying with.
- [19] Mr. West has two children. His oldest son is 16 years old and lives with his biological mother. Mr. West would like to have more of a relationship with his oldest son, but his son's mother will apparently not permit that. Mr. West's younger son is nine years old and lives with Mr. West's grandmother.
- [20] As an adult, Mr. West has used illicit drugs, and has seriously struggled with alcohol. As a result, he has accumulated a serious record which includes five convictions for property offences, 14 convictions for breaching court orders, two convictions related to possession of weapons, two convictions for driving offences, one conviction for harassment, one conviction for uttering threats, one conviction for assault, and one conviction for sexual assault. Mr. West's sexual assault conviction related to an incident of forced anal intercourse on an intimate partner. Mr. West received an effective 18-month custodial sentence plus 18 months of probation for the sexual assault conviction.
- [21] According to Dr. Joneja's psychological assessment, Mr. West's traumatic childhood, significant history of substance abuse, significant history of offending, cognitive issues, problems with self-awareness and insight, difficulties with stress and coping, exposure to negative peer influences, and possible problems with following through with treatment combine to make Mr. West an above average risk of committing future acts of sexual violence.
- [22] Despite his obstacles, challenges, and difficulties, Mr. West has a number of very positive personal qualities. Mr. West has had employment in road construction, contracting, maintenance, and firefighting. He has worked on his family's trapline.
- [23] Mr. West's uncle, Herbert West, has been an important support for Mr. West. Herbert West says that when Mr. West is not drinking, he is a good person and a good worker. At times, Mr. West has helped looked after his younger son and his grandmother in a way that makes Herbert West proud.
- [24] Further, despite being the victim of targeted bullying behaviour while in custody, Mr. West has made very good use of his time pending his sentencing hearing. His segregation plan notes indicate that he has generally been polite and respectful, and that he has participated in a variety of programs. He has completed all available modules of the Essential Skills to Success program, including with respect to employability skills, living skills, healthy relationships, and substance abuse. He appears to be highly motivated to bring about lasting changes in his lifestyle so that he can be a better parent, person, and family and community member.

Sentencing Principles

[25] Sections 718 to 718.2 of the Criminal Code set out the purpose and principles of sentencing. At the time of Mr. West's offences, these sections provided in part as follows:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives

[26] Do you need a break, Mr. West?

[27] THE ACCUSED: No.

[28] THE COURT: I am sorry that my decision is taking so long and I appreciate it is hard to get through this. If you do need a break, will you please let me know?

[29] THE ACCUSED: I'm okay.

[30] THE COURT: Madam Clerk, will you pass this box of Kleenex along to Mr. West.

[31] Here are the objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[32] On September 19, 2019, a new provision, s. 718.04, came into force. It provides as follows:

718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances -- including because the person is Aboriginal and female -- the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

Special Considerations Arising Out of the Indigenous Status of the Complainants and Mr. West

[33] 718.04 and 718.2(e) may seem to be somewhat at cross purposes in the circumstances of this case. Where vulnerable victims like Complainant Number 1 and Complainant Number 2 are Indigenous and female, s. 718.04 directs the court to give primary consideration to the objectives of denunciation and deterrence. At the same time, where an offender is Indigenous, like Mr. West, s. 718.2(e) and related authorities direct the court to, where appropriate, take a more rehabilitative and restorative approach to sentencing. These two sections deserve some attention. I will start with s. 718.04.

[34] In its powerful final report, the National Inquiry into Missing and Murdered Indigenous Women and Girls documented a crisis of violence, including sexual violence, against Indigenous women, girls, and 2SLGBTQQIA people. The Inquiry identified four "pathways" that have resulted in disproportionate rates of oppression and violence towards Indigenous women, girls, and gender-diverse people. The four pathways identified by the Inquiry are:

- Historical multigenerational and intergenerational trauma;
- Social and economic marginalization;
- Maintaining the status quo and institutional lack of will; and
- Ignoring the agency and expertise of Indigenous women and girls and 2SLGBTQQIA people.

[35] The Inquiry concluded that:

the more these pathways intersect in an Indigenous person's life, the more likely they are to experience violence

- [36] One of my takeaways from the Inquiry's work is that Canada's colonial history and destructive assimilationist policies, as well as racism and sexism, have embedded and normalized violence into the everyday lives of Indigenous women, girls, and gender-diverse people.
- [37] The Inquiry's final report makes 231 calls for justice. Call for Justice Number 5.18 calls on the federal government to amend the Criminal Code to make violence against Indigenous women, girls, and gender-diverse people an aggravating factor at sentencing. While s. 718.04 does not do so, it highlights the need to denounce and deter violence against Indigenous women and girls as but one way to reduce that violence.
- [38] Turning to s. 718.2(e), it was introduced in 1996. Cases such as *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13 make clear that it is a remedial provision that was and is intended to deal with the crisis of over-representation of Indigenous offenders in the Canadian criminal justice system. Sadly, the statistics are worse today than they were in 1996.
- [39] The crisis described by the Supreme Court of Canada has been driven by the alienation, poverty, substance abuse, lower educational attainment, lower rates of employment, and bias experienced by Indigenous Canadians as a result of Canada's colonial history and destructive assimilationist policies such as the operation of Indian residential schools. While these are broader societal issues, the Court in *Gladue* and *Ipeelee* has recognized that sentencing Indigenous offenders has a role to play in addressing their over-representation in the criminal justice system. Indigenous offenders are different from other offenders because, in the words of the Supreme Court of Canada, they "are victims of systemic and direct discrimination".
- [40] To help address the crisis, *Gladue* and *Ipeelee* changed the way Indigenous offenders are sentenced, though not necessarily the result. In sentencing an Indigenous offender, a sentencing judge must consider two factors:
1. The unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and
 2. The types of sentencing procedures and sanctions which may be appropriate in the circumstances.
- [41] According to *Gladue* and *Ipeelee*, a sentencing court must take a holistic approach to imposing a fit sentence. A fit sentence is one that is proportional and appropriately balances the seriousness of the offence with the moral blameworthiness of the offender.

- [42] In striking the appropriate balance, the unique systemic or background factors that may have played a part in bringing the particular offender before the court speaks to the moral blameworthiness of the offender. While a causal connection between the systemic and background factors need not be established, a link may be important or helpful in finding a fit sentence.
- [43] Finally, restorative sentences may be more appropriate for Indigenous offenders, but taking a restorative approach will not necessarily lead to a reduced sentence. Generally, the more serious or violent the crime, the more likely it will be, as a practical matter, that the terms of imprisonment will be the same for an Indigenous and a non-Indigenous offender.

Range of Sentence

- [44] Sentencing is a highly individualized process. The type of available sentence may be constrained by statutory provisions and the range of appropriate sentences is generally established through a consideration of sentences imposed for similarly-situated offenders who have committed similar offences in similar circumstances.
- [45] In this case, s. 271 of the Code provides for a maximum punishment of ten years' imprisonment for Mr. West having sexually assaulted Complainant Number 1. Section 151 of the Code provides for a maximum punishment of 14 years' imprisonment for Mr. West having sexually touched Complainant Number 2.
- [46] While the parties did not refer me to any sentencing authorities, I accept that the joint submission falls within the range of sentences imposed on similar offenders who have committed similar offences in somewhat similar circumstances. I note, in particular, that the overall effective sentence will be significantly higher than the sentence Mr. West received in relation to his prior conviction for sexual assault.

Aggravating Factors

- [47] In this case, there are a number of aggravating factors including:
1. There are two victims, including one who is a child;
 2. Mr. West's conduct was invasive, intrusive, and can be expected to have significant long-term and harmful consequences to the complainants;
 3. Mr. West has a lengthy criminal record including a previous conviction for sexual assault;
 4. Mr. West was a guest in the home of Complainant Number 1. By sexually assaulting Complainant Number 1 and sexually touching Complainant Number 2, Mr. West breached the trust of the complainants; and
 5. Mr. West committed his offences in a place where Complainant Number 1 and Complainant Number 2 expected that they would be safe and secure.

Mitigating Factors

- [48] In terms of mitigating factors, to his credit, Mr. West has taken responsibility for his actions. His guilty pleas have spared the complainants from reliving their traumatic experiences through giving testimony at a preliminary inquiry and/or trial. Further, Mr. West is sincerely remorseful for his actions. He has sufficient insight to know that he must address his addiction issues. He has already taken meaningful steps in this direction, and through his joint submission on sentence has expressed his sincere desire to continue to do so.

Principles of Sentencing Deserving of Greatest Emphasis

- [49] It is not clear to me whether s. 718.04, which came into effect after Mr. West's offences, has retrospective effect. Either way, the circumstances, the authorities, and with respect to Complainant Number 2, s. 718.01, all dictate that denunciation and deterrence are the primary sentencing principles. A fit sentence must send a clear message that sexual abuse of vulnerable women and girls will not be tolerated.
- [50] At the same time, Mr. West's personal circumstances and s. 718.2(e) cry out for a sentence that emphasizes restoration and rehabilitation. Sadly, Mr. West had a childhood that no person should experience and he needs significant help to overcome the difficulties he is experiencing as a result. As noted by Dr. Joneja in her psychological assessment of Mr. West, the risk to the public safety posed by Mr. West will be reduced by Mr. West controlling his addiction and working.
- [51] In Dr. Joneja's opinion, Mr. West would benefit from living in a structured environment free of destabilizers. Dr. Joneja recommends that Mr. West have individual counselling to address his sexual offending, as well as his own experiences of victimization, trauma, grief, and loss. Dr. Joneja also recommends that Mr. West attend a culturally appropriate treatment facility to address his addiction, which is a key underlying factor contributing to his risk of re-offending. Finally, Dr. Joneja has recommended that Mr. West attend a long-term supportive recovery facility to reduce the risk of relapse.
- [52] Dr. Joneja sees this type of recovery and relapse prevention plan as being critical to Mr. West's ability to maintain employment, intimate relationships, and community support, while reducing his risk of future conflict with the law.
- [53] While it may be challenging to strike the correct balance between denunciation, deterrence, restoration, and rehabilitation in cases involving Indigenous victims and Indigenous offenders, it is critical to victims, offenders, and the community to do so. As part of the exercise, I note that community-based sentences that focus on rehabilitation can also address denunciation and deterrence: *R. v. Schneider*, 2019 BCCA 310 at para. 24.

Sentence

- [54] In this case, I have no hesitation in endorsing the joint submission on sentence. Mr. West has committed serious offences with a number of aggravating features. On the other hand, Mr. West has a reduced level of moral blameworthiness. He had a highly chaotic childhood in which substance abuse and sexual violence were normalized. To complicate matters, he has cognitive impairments. Despite these challenges, Mr. West has made significant progress towards reducing his risk of re-offending and the proposed sentence will support his ongoing efforts to rehabilitate himself.
- [55] Mr. West has already been in custody for 309 days, not including today. Given his good behaviour while in custody, that is the equivalent of a 15.5-month sentence. A further 18 months in custody will create an effective sentence of 33 and a half months which reflects the seriousness of Mr. West's offences and fulfills the primary sentencing objectives of denunciation and deterrence.
- [56] In terms of rehabilitation, while serving his sentence, it is anticipated that he will attend the forensic sex offender program at the Ford Mountain Correctional Centre. The program is facilitated by a registered psychologist and a qualified mental health professional. It follows a cognitive behavioural therapy model that teaches, amongst other things, self-management strategies, empathy and victim awareness, relationships and social functioning, and emotional well-being. The program is 12 weeks in length.
- [57] Once that program has been completed, I recommend that Mr. West be transferred to the Prince George Regional Correctional Centre so that he can see his family and receive their support. Throughout his time in custody, I recommend that he receive culturally appropriate support and that all programs offered to Mr. West incorporate First Nations' culture and traditions to the greatest extent possible.
- [58] In a moment, I will outline conditions for an 18-month probation order that will follow Mr. West's release from custody. The aim of the probation order is to support Mr. West's recovery.
- [59] I recommend that Mr. West's probation officer support Mr. West's desire to attend the long-term supportive recovery treatment facility known as Baldy Hughes Therapeutic Community and Farm near Prince George. Both Dr. Joneja and the author of Mr. West's Gladue report have identified the Baldy Hughes facility as being appropriate for Mr. West. It is an intensive one-year abstinence-based and voluntary program with multiple phases. It aims to assist participants deal with trauma, maintain motivation to address addictions and lead a balanced lifestyle.
- [60] At your request, Mr. West, and with a view to protecting public safety, you will not be able to possess or consume alcohol or illicit drugs while on probation.

- [61] Mr. West, can you please stand. For the reasons I have expressed, I am sentencing you on Counts 1 and 2 to concurrent 33 and a half-month sentences. You have already spent 309 days in custody. I am giving you credit for that time at a rate of 1.5 to one, which totals 15.5 months. As a result, you have 18 months of new time to serve, with today being day number one.
- [62] Following the completion of the custodial part of your sentence, you must comply with a probation order for a term of 18 months. The conditions are as follows:
1. You must keep the peace and be of good behaviour;
 2. You must appear before the court when required to do so by the court;
 3. 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;
 4. You must have no contact or communication, directly or indirectly, with Complainant Number 1 and Complainant Number 2. Madam Clerk will fill in their actual names;
 5. You must not go to or be within 50 metres of any place where Complainant Number 1 or Complainant Number 2 live, work, attend school, worship, or happen to be. If you see them, you must leave their presence immediately without any words or gestures;
 6. You must report in person to a probation officer in Prince George within three business days after your release from custody unless you have obtained, before your release from custody, prior written permission from the probation officer to report elsewhere or within a different timeframe. After that, you must report as directed by your officer;
 7. You must live at an address approved in advance by your probation officer and provide them with your phone number. You must not change your address or phone number without prior written permission of your probation officer;
 8. You must not possess or consume alcohol, drugs, or any other intoxicating substance, except with a medical prescription;
 9. 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 violence prevention, alcohol or drug addiction, mental health, or sexual offence prevention;
 10. Having consented in court, you must attend, participate in, and complete any intake, assessment, program, treatment, or a full-time live-in treatment program as directed by your probation officer. This may include programming or treatment for alcohol or drug addiction, psychiatric or psychological health, or sexual offending.
- [63] I must also make two ancillary orders.

- [64] Counts 1 and 2 on the indictment are primary designated offences. Pursuant to s. 487.051(1) of the Criminal Code, I authorize the taking of samples of bodily substances from you. The samples, which are for DNA purposes, will be taken from you while you are in custody and you must submit to the taking of the samples.
- [65] You have been found guilty of more than one designated offence and pursuant to s. 490.013(2.1). You are required to comply with the Sex Offender Information Registration Act for life.
- [66] Mr. West, no one in the courtroom knows better than you how devastating sexual abuse can be on victims, and no one in the courtroom knows better than you how a person's life can be ruined by addictions. You are clearly at a crossroads. All of the pieces will be in place to help you transition to a life free of substances. If you can do that, there is no reason to think that you will ever be back in court again in the future. Given all that you have been through, I know that will be hard, but your family and community need you to be at your best. I really believe you can do it.
- [67] Madam Clerk, given all the recommendations that have been made, counsel have suggested that a transcript of my reasons be prepared. I ask that that be done and that my reasons be shared with Corrections so that they will know the recommendations of the court.
- [68] Have I covered everything, counsel?
- [69] MR. LIVINGSTON: Yes, My Lord. The Crown will direct a stay of proceedings to Count 3 on the indictment.
- [70] THE COURT: Thank you.
- [71] MR. GUSTAFSON: Nothing further, My Lord.
- [72] THE COURT: I thank counsel for their helpful and thoughtful submissions. I thank everyone in the courtroom, including Mr. West, for their patience as I got through my reasons for sentence. Good luck, Mr. West.

"L.S. Marchand J."

MARCHAND J.

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