

CANADA / JUDGMENT

R. v. West

2022 BCSC 2348

COURT

Supreme Court of British Columbia

DECIDED

15 December 2022

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2022 BCSC 2348 R. v. West

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. West,

2022 BCSC 2348

Date: 20221215

Docket: 74659-2; 74915-2

Registry: Prince George

Rex

v.

Eric Vern West

Before: The Honourable Mr. Justice Tindale

Oral Reasons for Sentence

Counsel for the Crown:

R.D. Withall

Counsel for the Accused appearing by videoconference:

R. Larmer

Place and Date of Hearing:

Prince George, B.C.

November 1, 2022

Place and Date of Judgment:

Prince George, B.C.

December 15, 2022

[1] THE COURT: The offender, Eric West, entered pleas of guilty to the following counts on Prince George Registry Court File Number 74659-2:

Count 3

... on or about the 8th day of October, 2020, at or near Prince George, in the Province of British Columbia, did intentionally discharge a prohibited or restricted firearm into or at a place, knowing or being reckless as to whether another person was present, or being reckless as to the life or safety of another person, contrary to Section 244.2(3)(a) of the Criminal Code.

...

Count 7

... on or about the 8th day of October, 2020, at or near Prince George, in the Province of British Columbia, did possess a loaded prohibited or restricted firearm, a sawed-off shotgun, without being the holder of an authorization or a licence under which he may possess the firearm in that place and a registration certificate for the firearm, contrary to Section 95(1) of the Criminal Code.

...

Count 11

.... on or about the 8th day of October, 2020, at or near Prince George, in the Province of British Columbia, did operate a conveyance in a manner that, having regard to all of the circumstances, was dangerous to the public, contrary to Section 320.13(1) of the Criminal Code.

Count 14

.... on or about the 8th day of October, 2020, at or near Prince George, in the Province of British Columbia, did possess a firearm, prohibited weapon or restricted weapon, a sawed-off shotgun, while he was prohibited from doing so by any order under this Act or any other Act of Parliament, contrary to Section 117.01(1) of the Criminal Code.

[2] The offender, after a trial, was convicted of the following two counts on Prince George Registry Court File Number 74915-2:

Count 8

. . . on or about the 17th day of June, 2019, at or near Prince George, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: cocaine . . . contrary to Section 4(1) of the Controlled Drugs and Substances Act.

Count 9

. . . on or about the 17th day of June, 2019, at or near Prince George, in the Province of British Columbia, did unlawfully possess a controlled substance, to wit: . . . (heroin) mixed with fentanyl and caffeine, contrary to Section 4(1) of the Controlled Drugs and Substances Act.

Circumstances of the Offences

File PG 74659-2

- [3] The circumstances of the offences for Court File Number 74659-2 are set out in an agreed statement of facts which has been marked as Exhibit 2 on this sentencing hearing.
- [4] Briefly, the circumstances are that on October 8, 2020, the offender, along with a Bradley Ouelette and Kenneth Munroe, participated in a planned drive-by shooting at a residence located at 281 Bellos Street in Prince George, British Columbia. The target of the drive-by shooting was a Thomas Toman.
- [5] The offender drove a four-door Chevy Malibu vehicle, while Mr. Munroe and Mr. Ouelette were passengers in that vehicle. Mr. Ouelette was armed with a non-restricted Weatherby shotgun and Mr. Munroe was armed with a prohibited firearm.
- [6] Mr. Ouelette fired two shots at 281 Bellos and Mr. Munroe fired a single shot at the residence. No one was injured during the shooting.
- [7] At 11:40 am, Constable Hawco of the RCMP located the Malibu vehicle and a police pursuit occurred. The Malibu vehicle accelerated to a high rate of speed, weaving in and out of traffic on 5th Avenue in the City of Prince George. At one point, the Malibu vehicle turned right on Highway 97, nearly sideswiping several vehicles. There was a high level of foot and vehicle traffic in the area at that time.
- [8] The Malibu vehicle ran a red light at 10th Avenue and Highway 97. The pursuit continued down 10th Avenue until the Malibu crashed into the front yard of 2356 McBride Crescent. The playground at Duchess Park high school was about a block away from that location and there were youth there at the time of the crash.
- [9] After the crash, Mr. Ouelette fired his shotgun at Constable Groundwater's police cruiser, which resulted in shotgun pellets being embedded in the windshield of that vehicle.
- [10] A foot chase ensued and the offender was found under a deck at 2365 McBride Crescent.

- [11] On February 4, 2022, Mr. Ouelette was sentenced to a global sentence of eight years in jail on a joint submission. Mr. Ouelette's sentence included counts of discharging a firearm at both 281 Bellos and at the police.
- [12] On February 11, 2022, Mr. Munroe was sentenced to a global sentence of five and a half years on a joint submission. Mr. Munroe's sentence did not include counts relating to shooting at the police.

File PG 74915-2

- [13] The circumstances of Prince George Court File Number 74915-2 are, briefly, that the RCMP were investigating a residence in Prince George for narcotics trafficking. On June 17, 2019, the police observed a vehicle leaving that residence and they pursued it.
- [14] The police pulled over the vehicle and the offender was found in the rear passenger seat of the vehicle. Underneath the seat were a number of baggies of narcotics which have forensic evidence linking him to those baggies.
- [15] The offender, after a trial, was convicted of possession of 3.1 grams of cocaine and 17.83 grams of heroin mixed with fentanyl and caffeine.

Circumstances of the Offender

- [16] The offender is 42 years of age, having been born on July 7, 1980. He is a First Nations man and a registered member of the Takla Lake Indian Band.
- [17] I have had the benefit of a pre-sentence report prepared by Probation Officer Jessica Bereck, which has been marked as Exhibit 1 on this sentencing hearing.
- [18] I have also had the benefit of a Gladue report prepared by Amery Schultz, which has been marked as Exhibit 3 on this sentencing hearing.
- [19] The offender has a previous criminal record. His JUSTIN conviction list has been marked as Exhibit 4 on this sentencing hearing. The offender has previous convictions for assault, assault with a weapon, assault causing bodily harm, extortion, drug trafficking, break and enter, obstruction, attempted fraud, theft, mischief, impaired driving, as well as a number of convictions for breaching court orders.
- [20] The offender has been incarcerated since the date of these offences and, while incarcerated, has taken a number of courses relating to his addiction and anger management issues, as well as gaining his Adult Dogwood diploma. These certificates have been marked collectively as Exhibit 6 on this sentencing hearing.
- [21] The offender has five children. The offender has been previously employed in operating heavy equipment and has worked in the logging industry.
- [22] In Exhibit 3, the Gladue report writer states the following at p. 2:

Eric was born into an environment of extreme substance misuse and violence. As a child and youth, Eric moved several times with his parents, and then with his mother after his parents divorced. There were many periods of housing instability and stress throughout Eric's childhood. Eric said that due to his parents' trauma resulting from their experiences at Indian Residential School "neither of them ever said they loved me".

Over his lifespan Eric has been exposed to a lifestyle that normalized violence, trauma, instability, alcohol abuse, criminal activity, addiction, victimization, and unstable relationships, and he described having "no supervision when we were kids." Corroborated by Eric's mother, many of Eric's experiences within this environment have had a lasting impact in shaping his values, norms, and beliefs, well into adulthood. He has had many interactions with the Criminal Justice system.

Eric is disconnected from the history, traditions, and culture of the Takla Lake First Nation, instead experiencing his Indigenous heritage in the form of the impacts of colonization. Eric's experience of "being native" as described by himself, and his mother, has primarily been through "abuse poverty addiction" and outright racism in school, and society in general. These experiences have had a lasting impact in shaping his values, norms, and beliefs, and thus his perspective of, and interaction with, family, community, and the wider world.

- [23] The offender told the court that he is not the same person now that committed these offences. He indicated that he had previously lived sober from 2014 through to 2019, until he relapsed and got into trouble, and he wishes to do better for himself and his children.
- [24] The offender has significant support in the community. His mother, Peggy West, spoke on his behalf. She said that she was drinking while she was pregnant with the offender. Mrs. West described her son as a kind, loving, and intelligent person.
- [25] Doug West, who is a cousin of the offender, said that the offender is the best logger he knows and is a real leader in the community. Doug West also said that the offender is the leader of their family.
- [26] Chief John French of the Takla Nation said that they are a very progressive band, that there are support systems in their community, such as drug and alcohol counsellors and other therapists. The community values the offender and Chief French said that the offender worked for him in his logging business previously.
- [27] Chief French asked the court to consider a lesser sentence, and he believes that the offender can be a leader in their community.
- [28] Chief French says that the offender is not considered to be a threat to their community.
- [29] Michael Teegee is the offender's uncle and has known the offender his entire life.
- [30] Mr. Teegee describes the offender as a loving man and a hard worker.

Position of the Parties

Crown

- [31] The Crown submits that the offender should receive a global sentence of six years' incarceration, less credit for his pretrial detention. With regard to Court File Number 74659-2, the Crown submits that the sentence should be broken down as follows:
- a) Count 3, five years in jail;
 - b) Count 7, four years in jail served concurrently;
 - c) Count 11, two years in jail served concurrently; and
 - d) Count 14, one year in jail served consecutively.
- [32] The Crown further submits that the offender should receive 15 days in jail on both Count 8 and 9 of Court File 74915-2. These offences are to be served concurrently with one another.
- [33] In addition, the Crown seeks a mandatory DNA order, as well as a s. 109 weapons prohibition for life. Finally, the Crown seeks, pursuant to s. 491 of the Criminal Code, a forfeiture order with respect to the firearm, ammunition, all the drugs, and drug paraphernalia seized during these investigations.
- [34] The Crown submits that it is a mitigating factor that the offender has entered a guilty plea.
- [35] The Crown argues that there are a number of aggravating factors, however, which include that this was a planned drive-by shooting of an occupied dwelling house in a residential neighbourhood. This shooting occurred in close proximity to an elementary school and a prohibited sawed-off shotgun was used in this crime.
- [36] The Crown argues the fact of the offender's role as the getaway driver is a relevant consideration, but it is likely to be a minor mitigating factor in this case: *R. v. Dingwall*, 2018 BCSC 1041.
- [37] The Crown argues that the principles of denunciation and deterrence are the key considerations of sentencing involving firearms.
- [38] The Crown acknowledges that the offender has applicable Gladue factors. However, given the seriousness of these offences, Crown says that six years is a fit sentence.

The Offender

- [39] The offender argues that on Court File Number 74915-2, he should receive an absolute discharge or, in the alternative, one day in jail for the narcotics offences.
- [40] The offender argues that on Court File Number 74659-2, he should receive a global sentence of four years' incarceration less credit for the time he has spent in custody since October 8, 2020.

- [41] The offender also argues that if the four-year mandatory minimum sentence was found to be unconstitutional in a pending Supreme Court of Canada case or as it has been changed by the legislation now, then the offender should in fact receive three and a half years in custody.
- [42] The offender says that there are many Gladue factors that need to be considered, such as the fact that both of his parents and grandparents were impacted by residential schools, his exposure to substance abuse at an early age, as well as extreme violence in his family.
- [43] The offender has experienced racism and neglect throughout his life.
- [44] The offender notes that he has been able to maintain sobriety in the past for over five years.
- [45] The offender argues that his moral culpability is much less than his co-accused Mr. Munroe and Mr. Ouelette, both because of his personal circumstances and his role in this offence.
- [46] The offender argues that he has the following mitigating factors:
- 1) he entered a guilty plea;
 - 2) he has served particularly hard time over the last two years because much of it has been in segregated custody;
 - 3) he has completed a significant amount of work towards his rehabilitation;
 - 4) his moral culpability is reduced on account of his addictions and FASD;
 - 5) he has extensive intergenerational trauma through the impact of residential schools on his parents and grandparents; and
 - 6) he has significant support in the community.
- [47] The offender also notes that he did not use a firearm in these offences.
- [48] The offender relies on the following cases to determine a fit sentence:
- 1) R. v. Lyta, 2013 NUCA 10;
 - 2) R. v. Johnson, 2013 YKSC 126;
 - 3) R. v. McMillan, 2016 MBCA 12;
 - 4) R. v. Hall, 2018 BCSC 1229;
 - 5) R. v. Baptiste, 2019 BCSC 2339;
 - 6) R. v. Nungusuituq, 2019 NUCJ 06;
 - 7) R v. Itturiligaq, 2020 NUCA 6;
 - 8) R. v. Neeposh, 2020 QCCQ 1235; and
 - 9) R. v. Alphonse, 2020 BCSC 1882.

Decision

[49] The offender, as of today's date, has spent, by my calculation, 799 days in pre-trial custody. Giving him credit of one and a half days for every one day spent in pretrial custody, the offender is entitled to credit of 1,199 days.

[50] Further, since the sentencing submissions were made, Bill C-5 has been given Royal assent and, as such, there is no longer a minimum mandatory sentence of four years for offences that are captured in this case by s. 244.2(3)(b). A global sentence of three and a half years is available to the offender.

[51] Section 718 of the Criminal Code outlines the purpose of sentencing and reads:

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:

- (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.

[52] Section 718.1 of the Criminal Code reads:

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

[53] And s. 718.2 also provides the court with guidance as to other sentencing principles and reads:

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, and, without limiting the generality of the foregoing,

...

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

...

shall be deemed to be aggravating circumstances;

- (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 should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[54] The offender is a First Nations man and, as such, I must consider the unique factors which affect Aboriginal offenders, as set out in the case of *R. v. Gladue* and *R. v. Ipeelee*.

[55] The court in *Ipeelee* in discussing the factors in *Gladue* said the following at para. 59:

[59] The Court held, therefore, that s. 718.2(e) of the Code is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[56] The court in *Ipeelee* went on to say the following at para. 75:

[75] Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors

and circumstances, including the status and life experiences, of the person standing before them. Gladue affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement . . .

- [57] The offender was raised in a household where violence was the norm. He has substance abuse issues and has experienced racism throughout his life. The offender likely suffers from fetal alcohol effects or syndrome.
- [58] The offender has significant support and respect in his community, and has the potential to go for extended periods of time without abusing alcohol or other drugs, and he also has skills which make him employable in such industries as logging.
- [59] The offender, however, participated in an extremely violent and dangerous incident with Mr. Munroe and Mr. Oulette. The shooting took place in a residential area of Prince George near an elementary and high school.
- [60] A police pursuit occurred where the offender was driving in an erratic manner throughout the streets of Prince George, where the foot traffic and vehicle traffic was heavy. The pursuit ended near another high school, as well as a daycare.
- [61] This was a planned shooting, and even though the offender was not one of the shooters, he was a willing participant and agreed to drive his co-accused and drove the getaway vehicle through the streets of Prince George.
- [62] This type of gun violence and mayhem on busy residential streets cannot be tolerated in any community and certainly not in Prince George.
- [63] The fact that the offender was the getaway driver and not one of the shooters is a mitigating factor. However, it is a minor one, given the extreme violence and seriousness of these offences.
- [64] The mitigating factors in the case at bar are:
- 1) the offender entered guilty pleas to the offences on Court File Number 74659-2;
 - 2) the offender was not one of the shooters;
 - 3) the offender does have a number of Gladue factors which have had a pejorative effect on his life; and
 - 4) the offender has significant support from his community.
- [65] In addition, as noted in both the pre-sentence report and the Gladue report, the offender and his mother believe that he suffers from fetal alcohol spectrum disorder.

- [66] In *R. v. Ramsay* 2012 ABCA 257, a decision of the Alberta Court of Appeal, in discussing the sentence of offenders who suffer from fetal alcohol spectrum disorder, stated the following at para. 25:
- [25] The degree of moral blameworthiness must therefore be commensurate with the magnitude of the cognitive deficits attributable to FASD. The more acute these are shown to be, the greater their importance as mitigating factors and the less weight is to be accorded to deterrence and denunciation, all of which will serve to "push the sentence ... down the scale of appropriate sentences for similar offences" . . .
- [67] I have no doubt, given the offender's background and the fact that his mother drank during her pregnancy with him, that he suffers from FASD. However, there is very limited information to determine the magnitude of the cognitive deficits attributable to FASD as they affect the offender.
- [68] In addition, the offender and his mother both indicate that he may suffer from ADHD. However, I do not have evidence as to the effects of that disorder on the offender either.
- [69] There are many aggravating factors in this case. There were multiple shots fired at a dwelling house in a residential area which is in close proximity to an elementary and high school.
- [70] This was a planned shooting with a prohibited sawed-off shotgun, which was motivated by a dispute between rival gangs.
- [71] The offender has a relatively lengthy criminal record which includes numerous convictions for assault, and he was bound by a firearms prohibition at the time of these offences.
- [72] Mr. Ouelette received eight and a half years in jail, though he also shot at the police. Mr. Munroe received five and a half years in jail, though he was not bound by a firearms prohibition at the time of this incident.
- [73] I have been provided with a number of authorities to assist in the determination of a fit sentence. None of the authorities specifically match the circumstances of the offender and the offences in the case at bar.
- [74] In my view, given the extreme violence of these offences, deterrence and denunciation are the primary considerations for sentence, though I do recognize that the offender has prospects for rehabilitation, significant community support, and has been negatively impacted by the residential school system and colonialism.
- [75] Count 14 on Court File Number 74659-2 generally attracts a consecutive sentence to other offences: *R. v. Melnick* 2019 BCCA 390 at para. 23.
- [76] After considering all of the factors, a custodial sentence is required on the circumstances of this case. Mr. West, if you could stand up, please.

[77] On Court File Number 74659-2, the term of imprisonment I would have imposed before granting any credit for your pre-trial custody is:

- a) Count 3, five years in jail;
- b) Count 7, four years in jail to be served concurrently;
- c) Count 11, two years in jail to be served concurrently; and
- d) Count 14, six months in jail to be served consecutively.

[78] That is a total of five and a half years or 2,007 days. I am granting you credit of 1,199 days for your pre-trial custody. The global sentence imposed on you on Court File Number 74659-2 is therefore 808 days.

[79] For clarity, on Court File Number 74659-2, the sentence of 808 days after time served is distributed among the counts as follows:

- a) Count 3, 628 days;
- b) Count 7, 628 days to be served concurrently;
- c) Count 11, 628 days to be served concurrently; and
- d) Count 14, 180 days to be served consecutively.

[80] With regard to Court File Number 74915-2, after taking into account the global sentence on Court File Number 74659-2, a fit sentence is as follows:

- a) Count 8, 15 days in custody to be served concurrently with any sentence; and
- b) Count 9, 15 days in custody to be served concurrently with any sentence.

[81] So sir, the total sentence was five and a half years, but the effective sentence after your time served is 808 days, time that you will have to still serve.

[82] In addition, I will make the following ancillary orders:

- Pursuant to s. 109(3) of the Criminal Code, you are prohibited from possessing any firearm, cross-bow, restricted or prohibited weapon, prohibited device, ammunition, and explosive substance for life.

- Count 3 on Information 74659-2 is a primary designated offence. Pursuant to s. 487.051(1) of the Criminal Code, I authorize the taking of samples of bodily substances from you. The samples will be taken from you while you are in custody and you must submit to the taking of those samples.

- Also, pursuant to s. 491 of the Criminal Code, I will make a forfeiture order with respect to the firearms, ammunition, and all drugs and drug paraphernalia seized during the investigations.

[83] Is the Crown seeking a driving prohibition on Count 11? I do not believe it is mandatory, but it is certainly there.

[84] CNSL R. WITHALL: I didn't make submissions with respect to that. I do not believe it's mandatory. I think the new legislation makes it discretionary. I will leave it up to the court as to whether the court feels that is appropriate. It was not a joint submission, so the court can impose one.

[85] THE COURT: I am not going to make a driving prohibition.

[86] CNSL R. LARMER: Yes, he's going to be prohibited pursuant to s. 98, in any event, Justice, so --

[87] THE COURT: All right. All right, thank you.

"The Honourable Mr. Justice Tindale"

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