
CANADA / JUDGMENT

R. v. White-Bynoe

2017 BCSC 1829

COURT

Supreme Court of British Columbia

DECIDED

11 September 2017

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2017 BCSC 1829 R. v. White-Bynoe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. White-Bynoe,

2017 BCSC 1829

Date: 20170911

Docket: X079266

Registry: New Westminster

Regina

v.

Shawn Ricardo White-Bynoe

Before: The Honourable Mr. Justice Walker

Oral Reasons for Sentence

Counsel for the Crown:

C.L. Yardley

Counsel for the Accused:

D.M. Melville

Place and Dates of Trial:

New Westminster, B.C.

February 6-9, 2017

March 6-8, 2017

Place and Date of Judgment:

Vancouver, B.C.

September 11, 2017

Overview

- [1] THE COURT: On March 29, 2017, following a trial that took approximately eight days, I convicted Mr. White-Bynoe of one count of assault causing bodily harm to the manager of the apartment building where he was residing, Mr. Michael Rowe, per s. 267(b) of the Criminal Code; and of one count of assault of Mr. Rowe's 23-year-old son, Mr. Blaine Dunn, who also resided at the apartment building in a separate unit, per s. 266. Count 1, concerning assault with a weapon, was stayed by the Crown during trial. My reasons for judgment are indexed at 2017 BCSC 558.
- [2] Sentencing was adjourned at the request of Mr. White-Bynoe so that he could obtain a pre-sentence report ("PSR"). These reasons contain my determination of an appropriate and fit sentence.

Facts

Circumstances of the Offence

- [3] I will turn now to the facts and the circumstances of the offence. The incident that has resulted in those convictions took place between approximately 4:53 p.m. and shortly after 5:00 p.m. on December 18, 2015. The assaults committed by Mr. White-Bynoe occurred outside and near the front of the apartment building that Mr. White-Bynoe was residing at the time which is located at 411 8th Street, New Westminster, British Columbia.
- [4] The circumstances leading up to the assaults are these. Mr. White-Bynoe exited the front door and walked in between Messrs. Rowe and Dunn who were standing outside in close proximity to the front door talking to each other. They were discussing where to go for dinner that evening. Mr. White-Bynoe had been engaged in a dispute over rent with his landlord for which eviction was possible and was not happy with Mr. Rowe's apparent involvement in the dispute.
- [5] As Mr. White-Bynoe walked in between them, intentionally so, causing father and son to part and step back, he muttered to Mr. Rowe under his breath, "Your time is coming," and either as he did that or a brief moment thereafter, brushed against Mr. Rowe. Mr. Rowe pushed him from behind. It was not a hard push. Mr. Rowe contacted Mr. White-Bynoe's back, but did not cause Mr. White-Bynoe to lose his balance. Mr. White-Bynoe immediately spun around and, as he did, he raised his arm high above his head holding a long cylindrical extendible metal baton of the type used by police officers and lowered his hand, all in one

singular motion, towards and on top of or close to Mr. Rowe's forehead, striking him with considerable force.

- [6] Mr. Rowe was not expecting to be hit and as he was, he instinctively crouched down and covered his head and face. He suffered significant injuries as a result including a fractured skull, deep lacerations, and bone fragments, all of which required medical attention (including many stitches) at the hospital. He suffered nausea as well from his injuries. Mr. Rowe has been left with ongoing physical discomfort, scars, and anxiety and emotional upset for which he receives treatment from a psychologist.
- [7] After Mr. Rowe was struck, Mr. White-Bynoe turned towards Mr. Dunn who by then had his hands out of his pockets, up in the air as if in fright, and not in any manner suggesting a combative stance. As Mr. White-Bynoe turned to face Mr. Dunn, he took a swing at him and, as he did, Mr. Dunn turned and ran away to his left. Mr. White-Bynoe immediately chased after him.

When Mr. Rowe was able to look up after being hit, he pointed to a police car parked across the street and also yelled at Mr. White-Bynoe. He saw Mr. White-Bynoe holding a machete (which he described to look like a butcher knife) and hitting his son in the back with it, hitting him three to four times on the back of his son's jacket as his son was bent forward. It was not clear whether Mr. White-Bynoe was striking Mr. Dunn's back with the blade or the handle of the machete. In spite of his injuries, Mr. Rowe was able to run to where Mr. White-Bynoe was assaulting Mr. Dunn and essentially pulled him off of his son. During the course of stopping this assault, Mr. Rowe fell to the ground with Mr. White-Bynoe. As they grappled, Mr. Rowe was struck with the machete and further injured, suffering multiple cuts to his body.

- [8] Fortunately, a police officer was able to come to the assistance of Messrs. Rowe and Dunn and put an end to the incident.
- [9] Mr. Dunn received some cuts to his thumb from the machete that required stitches plus suffered from bruising, soreness, and superficial cuts to his hands, legs, and shoulder. For about two months following the assault, he suffered from anxiety out of fear of retribution from Mr. White-Bynoe.
- [10] Mr. Rowe is 5' 8" tall and weighs 170 pounds. Mr. Dunn, who was close to 27 years old at the time, was slight of build, 5' 9" tall and weighed 145 pounds. At 5' 10" tall, Mr. White-Bynoe stands taller than them, at the time weighed significantly more, between 190 to 210 pounds. His physical stature is also commanding over Messrs. Rowe and Dunn in part due to his work outdoors for a concrete forming company.
- [11] It is also the case, however, that Mr. Rowe lost his composure when Mr. White-Bynoe brushed by him and uttered his threat and police presence across the street did not prevent Mr. Rowe from pushing Mr. White-Bynoe, something that I am satisfied was reactive as opposed to being pre-planned.

Circumstances of the Offender

- [12] Mr. White-Bynoe is 43 years old. He was born and raised in Barbados. Mr. White-Bynoe was raised by his maternal grandmother and extended members of his family, in what he described to the author of the PSR as a positive environment. Although his parents separated before his birth, they remained involved in his upbringing. He maintains regular contact with his mother and his two half-siblings who live in Barbados.
- [13] Mr. White-Bynoe's previous effort to obtain a green card to live and work in the United States where his father lives was unsuccessful because he became homesick and decided to return to Barbados. In 2001, he married Linda Madison, A Canadian citizen, who was visiting Barbados and then emigrated to Canada in 2002. They separated amicably in 2010 and have a 13-year-old daughter from their marriage.
- [14] Mr. White-Bynoe currently lives in Burnaby, British Columbia, with his girlfriend who is actively involved in non-profit businesses that assist low income seniors in need and the Ministry of Children and Family Development in its efforts to supervise children in need. He resides with his girlfriend and her 14-year-old daughter in a basement suite and, according to his counsel, Mr. White-Bynoe assists with the costs of their accommodation. He described his relatively new relationship with his girlfriend as a primary support.
- [15] Mr. White-Bynoe dropped out of school at age 16 due to lack of interest. He is employed in the construction field, but has no stable employer. He worked primarily as a painter since moving to the Lower Mainland. He picks up work on an as-needed basis. The principal of one of his employers, a painting company, describes him as a reliable hard-working employee.
- [16] Mr. White-Bynoe has no criminal record. He uses marihuana and has done so on a regular basis since the age of 16. He currently spends approximately \$200 per month to support his marihuana use. He advised the author of the PSR that he is considering stopping his use of marihuana since he is no longer enjoying its effects. He realizes that his past justification for its use, his religious affiliation to Rastafarianism, is a rationale without merit. That, he says, coupled with financial issues may lead to him stopping using it altogether.

Impact on the Victims

- [17] I have previously described the nature and severity of the injuries suffered by Messrs. Rowe and Dunn from the assault. Suffice it to say at this point that the injuries suffered by Mr. Rowe were significant and serious. At trial, I heard his evidence about the ongoing discomfort from the jaw fracture and emotional distress caused by the assault to be matters that Mr. Rowe continues to deal with on a daily basis. Mr. Dunn's emotional distress and physical injuries appear to have resolved within two months of the assault.

Legal Parameters

- [18] The range of sentencing is established in the Criminal Code as follows. For assault causing bodily harm, it is not to exceed a term of imprisonment of 10 years. For common assault, it is not to exceed five years.

Positions of the Crown and Defence

- [19] In respect of the assault on Mr. Rowe, the Crown seeks a custodial sentence ranging between four to six months plus a two-year period of probation following release from custody together with ancillary orders including a firearms ban and the taking of sample DNA. These latter terms are not opposed by the defence. The Crown seeks a one-month custodial sentence for the assault of Mr. Dunn to run concurrently.
- [20] The defence does not agree that a custodial sentence is appropriate, but submits that a 90-day custodial sentence served on an intermittent basis on weekends is a fit sentence.
- [21] The Crown and defence also raised the prospect that Mr. White-Bynoe may face difficulties with the Canadian Immigration authorities if a custodial sentence of six months or more is imposed. At the same time, I have been given case authority establishing that an otherwise unfit sentence should not be changed in order to accommodate the collateral consequences of a personal immigration issue. It is one of numerous factors to be taken into account: *R. v. De Aquino*, 2017 BCCA 266 and *R. v. Pham*, 2013 SCC 15. In this case, in terms of the appropriate range for a fit sentence, the Crown asks that the custodial sentence imposed not exceed six months less one day.

Case Law

- [22] One of the two cases cited by the Crown suggests that the range is usually between nine months to two years: *R. v. MacDonald*, 2015 BCSC 2032, at para. 11. Yet, neither in that case, nor in the other case cited by the Crown, was a sentence for assault causing bodily harm imposed for longer than nine months.
- [23] I found that decision and, of the cases cited by the defence, *R. v. M.F.T.*, 2013 BCCA 20, to be instructive because they both involved individuals who set out to resolve problems with other individuals through violence. The other cases cited by the defence are, in my respectful opinion, of limited assistance because they involve random attacks, barroom fights, or persons suffering from mental illness resorting to violence.
- [24] In *MacDonald*, the accused, who was 34 years old at the time of the assault, accompanied his father to the victim's home because of their dissatisfaction with changes to stone paving work done on property owned by his father. Without warning, the accused struck the victim on the left side of the face with enough force to break his nose and the bony ridges above and below his left eye. Surgery was required. The victim suffered ongoing headaches from the injury and repair surgery which continues to affect his work. He was convicted of assault

causing bodily harm.

- [25] The accused had a prior problem with drug and alcohol abuse, 42 prior convictions (mainly for property offences to pay for his drug habit, but four were on account of assault) and had a 13-year-old daughter and an eight-year-old son who had been in the care of the Ministry of Children and Family Development for some time.
- [26] Unlike the case at bar, the accused put before the sentencing judge, Madam Justice Fenlon, as she then was, "moving" letters from his family attesting to his skill as a father and his love for his children. Submissions from defence focused on rehabilitation. Even though Justice Fenlon found that the accused had made significant efforts to rehabilitate himself in the prior year, she said that she must also consider denunciation and deterrence. She described the assault at para. 17 of the reasons as a "senseless and brutal act, a sucker punch of a defenceless person which caused serious injury". She imposed a custodial sentence of nine months.
- [27] In M.F.T., the accused attended upon a secondary school with his son and two others to seek revenge on a boy that had punched his other younger son. One of the youths was armed with a baton. The accused induced the two others to attack the victim. When the victim began to get the upper hand against the son, the accused intervened. A male bystander tried to prevent the accused from intervening and the accused head-butted the bystander causing injury to his face. The original targeted victim was badly injured with the baton. A custodial sentence for both counts to run concurrently for six months was imposed.

Mitigating and Aggravating Factors

- [28] I will start by describing the aggravating factors in this case.
- [29] The assault took place outside the building where Messrs. Rowe and Dunn reside. They were not expecting to be assaulted. He used force as a means to deal with issues concerning his dispute with his landlord. When Mr. White-Bynoe used the metal baton and machete, both capable of causing serious physical harm, while carrying the assaults, he attacked Mr. Rowe without warning and with force all out of proportion to the push that he had received following his verbal threat to Mr. Rowe. After striking Mr. Rowe with significant force, he then chased after the much younger Mr. Dunn who had done nothing to provoke him or cause him to be fearful of his safety. Mr. White-Bynoe caused serious, significant, and permanent injury to Mr. Rowe and, albeit to a much lesser degree, physical injury and emotional upset and anxiety to Mr. Dunn. Mr. White-Bynoe was not impaired by alcohol or drugs at the time.
- [30] There are mitigating factors that serve to reduce what I would have imposed as a much lengthier sentence. They are:
- (a) he has resided in Canada for some 15 years and has no criminal record;
 - (b) he is providing some support for his girlfriend and her 14-year-old daughter;

- (c) he has dutifully reported in person to his bail supervisor and his bail without -- bail has been without incident;
- (d) he is considering stopping his use of marihuana and does not use any other illegal substances; and
- (e) Mr. White-Bynoe is willing to attend counselling programs ordered by the court and his probation officer (although he does not accept that he an anger management problem).

[31] I attribute limited weight to Mr. White-Bynoe's expression of remorse that he provided to the author of the PSR. Although he regrets striking Mr. Rowe, his remorse is essentially limited to the victim's injuries and, even with it, he does not recognize the manner and the means of his assault.

[32] It was also apparent from his comments to the author of the PSR that Mr. White-Bynoe has not fully accepted his role in the assaults. In the section of the report headed, "Attitude and Understanding Regarding Offence", Mr. White-Bynoe is reported to have accepted only partial responsibility and that section that I referred to states:

Mr. White-Bynoe accepts partial responsibility for his offending behaviour against Michael Rowe. He believes the situation was avoidable had Michael Rowe not pushed him when he walked by him and his son, Blaine Dunn. Mr. White-Bynoe states that he punched Michael Rowe because he interpreted the victim's gesture as a violation of his personal space. Mr. White-Bynoe contends that Michael Rowe's injuries were accidental. He claims his jacket was pulled over his eyes and therefore he could not see to intentionally stab Michael Rowe.

[33] Thus, Mr. White-Bynoe appears not to recognize his primary role in instigating the incident and, further, that:

- (a) he was pushed following his threat to Mr. Rowe as he intentionally walked between him and his son;
- (b) by walking directly into their path forcing them to part by stepping back, Mr. White-Bynoe made the decision to infringe on their personal space, not his;
- (c) Mr. Rowe's injuries were not accidental, but instead were the result of Mr. White-Bynoe's intentional use of force that was wholly disproportional in the circumstances; and
- (d) indeed his jacket was pulled over his head by Mr. Rowe at a different point in time when he was trying to pull Mr. White-Bynoe off Mr. Dunn and has nothing to do with the initial assault on Mr. Rowe with the baton.

[34] Insofar as Mr. Dunn is concerned, Mr. White-Bynoe continues to deny assaulting him, claiming that his contact with him was to retrieve a weapon (the machete) from Mr. Dunn. The video surveillance footage shows that Mr. Dunn did not possess the machete when Mr. White-Bynoe walked past him. At trial, Mr. White-Bynoe's position was that the machete had been hidden in the nearby hedge by Mr. Dunn who was waiting for him to come outside the

apartment building. Thus, if true, there was no way that Mr. White-Bynoe would have known that when he decided to chase Mr. Dunn who was in full flight.

[35] For these reasons, I would attribute only marginal weight to Mr. White-Bynoe's expression of remorse as a mitigating factor.

Principles of Sentencing

[36] The principles are set out in s. 718 of the Criminal Code as follows:

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.

[37] During submissions, defence counsel advised that Mr. White Bynoe did not wish to address the court and had said all he wanted to say through counsel, and I am asking Mr. White Bynoe now if he wishes to revisit his decision and does he have anything to say.

[38] Do you wish -- do you have anything to say, Mr. White-Bynoe, that you wish to say before the court before I pass sentence?

[39] MR. MELVILLE: No, My Lord, thank you.

[40] THE COURT: All right.

Reasons

[41] I find the approach taken by the remarks of Justice Fenlon in the MacDonald case to be apposite to this case. However, I note the force used by Mr. White-Bynoe on Mr. Rowe was far more extreme than the sucker punch used by Mr. MacDonald. It also went well beyond the sucker punch with his fist.

[42] The case is also different from M.F.T. inasmuch as Mr. White-Bynoe was the actual perpetrator who instigated the incident and assaulted both victims.

- [43] This case is akin to MacDonald and M.F.T. because Mr. White-Bynoe sought to take action in respect of his perceived conflict with his landlord by instigating trouble with and attacking an unarmed Mr. Rowe, the building manager, and then attacking his defenceless son who was in flight.
- [44] I am also not persuaded that Mr. White-Bynoe has accepted his responsibility for his conduct towards Mr. Rowe and Mr. Dunn. His expression of remorse suggests that it is begrudging, that he still holds animosity towards Messrs. Rowe and Dunn, and only now regrets that they were injured. He has not acknowledged the impropriety of using the baton and a machete in these assaults, let alone possessing those weapons. He has not acknowledged that he has an anger management problem. The principles of denunciation and deterrence are at the forefront of this case. Personal disputes are not to be settled by acts of violence.
- [45] I accept the identical submissions in Crown and the defence that the adverse immigration consequences are relevant to Mr. White-Bynoe's circumstances and to an appropriate and fit sentence. Without them, I would have imposed a custodial sentence to [sic] that imposed by Justice Fenlon in MacDonald. However, Mr. White-Bynoe has resided in Canada for 15 years without incident and has no criminal record. A custodial sentence of six months or more coupled with a subsequent detention order would, in these circumstances, have resulted in an unfit sentence. Without these circumstances, I would have imposed a custodial sentence close to that imposed by Justice Fenlon in MacDonald.
- [46] In the circumstances, I am of the opinion that a fit sentence for the assault on Mr. Rowe is a custodial sentence of six months less one day plus two years' probation and the ancillary orders sought by the Crown. I am also of the opinion that a fit sentence for the assault of Mr. Dunn is a one-month custodial sentence to run concurrently.
- [47] So, Mr. White-Bynoe, will you please stand while I read out the sentence?
- [48] I sentence you to a custodial custody of six months less one day to be served together with a probation order of two years to take effect immediately upon your release from custody.
- [49] I also impose the following ancillary orders.
- (a) within 24 hours from your release from custody, you must report in person to a probation officer at Unit 103 at 88A 6th Street, New Westminster, B.C., and thereafter, as and when directed by your probation officer, and you must report your residential address and phone number and all other information requested of you;
 - (b) during your term of probation, you must keep the peace and be on good behavior;
 - (c) at all times, you must appear in court when requested by the court or your probation officer;

- (d) during your term of probation, you must forthwith notify the court or your probation officer in advance, and in writing, if you intend to change your name, residential address, or phone number;
- (e) during your term of probation, you must forthwith notify the court or your probation officer of any change of your employment or occupation;
- (f) at all material times, you must not have any contact -- sorry, not material -- at all times, you must not have any contact or communication directly or indirectly with Michael Rowe or Blaine Dunn;
- (g) at all times, you must not attend any place of work, residence, or education of Messrs. Rowe and Dunn as they may be known to you;
- (h) at all times, you are not to attend within a two-block radius of 411 8th Street, New Westminster, British Columbia;
- (i) pursuant to s. 109(1) of the Criminal Code, you must not possess any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for the remainder of your life;
- (j) pursuant to s. 109(2) of the Criminal Code, you must not possess any firearm, other than a prohibited or restricted firearm, crossbow, restricted weapon, ammunition, and explosive substance for a period of 10 years from the date of your release from custody;
- (k) during your term of probation, you must not possess any weapon as defined in s. 2 of the Criminal Code, except a knife for the purpose of eating or working and only then at the specific location of intended use;
- (l) pursuant to s. 487.051 of the Criminal Code, you are to forthwith provide a sample or samples of your bodily substances that are reasonably required for the purpose of forensic DNA analysis;
- (m) during your term of probation, you must not consume any alcohol, drugs, or other intoxicating substance except in accordance with a valid medical prescription; and
- (n) during your term of probation, you must attend, participate in, and successfully complete anger management counselling, alcohol and substance abuse counselling, and any other counselling or programs directed by your probation officer.

[50] Now, are there any questions arising?

[51] MR. MELVILLE: No, thank you.

[52] THE COURT: Ms. Yardley, anything?

[53] MS. YARDLEY: I probably missed it, in the probation order, there is a reporting condition; is that correct?

- [54] THE COURT: I think I have that at the very beginning.
- [55] MS. YARDLEY: Okay.
- [56] THE COURT: "At all times you must appear" -- just a minute. Yes, "within 24 hours of release," actually, that is the very first one.
- [57] MS. YARDLEY: Thank you.
- [58] THE COURT: All right, and lastly, I want to thank counsel for your excellent submissions not only during the case, but -- during the case in the main, but during sentencing, for which I am very grateful. Thank you.
- [59] MR. MELVILLE: Thank you, My Lord. The only thing is, and I may have missed it, the victim fine surcharge?
- [60] THE COURT: Well, no one addressed that in submissions, so --
- [61] MR. MELVILLE: I believe it's mandatory. Your Lordship can, I believe, do one of two things: Your Lordship can either order it payable forthwith and find Mr. White-Bynoe in default and sentence him to one day concurrent, or Your Lordship can give him time to pay. My submission would be that Mr. White-Bynoe is of limited means and he has been supporting Stephanie and her young daughter, so I would ask that the Court find Mr. White-Bynoe in default of the victim fine surcharge and he receive one day concurrent to the sentence that Your Lordship has imposed.
- [62] THE COURT: Ms. Yardley?
- [63] MS. YARDLEY: I have no submission on that.
- [64] THE COURT: All right. I agree with the submission of Mr. Melville. I impose the crime victim surcharge, and I find Mr. White-Bynoe in default and impose a custodial sentence of one day to run concurrently with the other sentences.

"Walker J."

The Honourable Mr. Justice Walker

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