

Citation: *R. v. Bailey*, 2023 YKTC 18

Date: 20230502

Docket: 22-00126

Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before Her Honour Judge K.L. McLeod

REX

v.

RODNEY MERVIN BAILEY

Appearances:  
Noel Sinclair and  
Sarah Bailey  
Raymond Dieno

Counsel for the Crown

Counsel for the Defence

**REASONS FOR SENTENCE**

[1] McLEOD T.C.J. (Oral): In terms of the offences to which you pleaded guilty; I am going to repeat them.

[2] Today, you pleaded guilty to the charge of having in your possession, a firearm, under s. 95 of the *Criminal Code* of Canada, which pursuant to the *Criminal Code*, has a mandatory minimum sentence of three years. However, the Supreme Court of Canada has said this is an unconstitutional mandatory minimum, and therefore, it no longer exists. At the same time, the Supreme Court, and courts from across the country have

said that possession of a restricted firearm, such as the one that you had, with bullets in the chamber — or loaded in it, but the magazine was empty — is still to be considered as an incredibly serious offence.

[3] In addition, you have pleaded guilty to an offence under s. 117 of the *Criminal Code*. As you already have numerous weapons lifetime prohibitions on your record, and by having that firearm in your possession, you breached this section of the *Criminal Code*. Usually, in sentencing cases, this requires a consecutive sentence.

[4] Today, you also pleaded guilty to a conspiracy charge, a conspiracy to traffic cocaine into the Whitehorse Correctional Centre.

[5] Back in 2022, I found you guilty after a trial of break, enter and assault, and the uttering of threats to the victims of that matter.

[6] I am faced today with a joint submission. A joint submission is one that I should accept unless I believe it brings the administration of justice into disrepute. The principles of sentencing that guide me when sentencing you are that I am obligated to impose a sentence that is just and proportionate — *just* means fair. Proportionate means it balances the seriousness of the offences and your responsibility, while taking into account other principles and objectives of sentencing. This is to send a message to you and to the public that, if you commit such offences, you will receive a significant sentence.

[7] I must also repeat that what you have done offends the rules of society, and I need to impress that upon you. I also have to ensure that in any sentence that I impose

that rehabilitation is considered. Even for someone like you — and I mean this with no disrespect — who has, probably, the longest record I have ever seen in 30 years of being in the criminal justice system.

[8] I am also meant to provide, in sentencing you, a sense of responsibility in you and to acknowledge the harm that you have done to the community and to the victims. I have to take into account the aggravating and mitigating factors of your crimes. I must do that all under the lens of a reasonable and proportionate sentence and one that deprives you of liberty only to the extent necessary.

[9] What are the aggravating factors of your crimes?

[10] To be part of a conspiracy to traffic drugs into a jail is frankly extraordinary in its seriousness. The trafficking of drugs, to bring dangerous drugs (cocaine), to inmates who will do anything to either get a fix, in certain circumstances to relieve boredom, can be frighteningly dangerous, especially in today's market where so many of those drugs are not just what they profess to be. Cocaine is mixed with fentanyl; I am not suggesting this was in your uppermost thoughts, but this is the danger of what you were doing.

[11] The possession of firearms. Every day, in whatever environment you live, we hear of gun violence. The only purpose of having a weapon when you are in a city, such as the weapon that you had, is for the purpose of intimidation and/or to commit serious harm. We hear every day of people being killed by guns that are illegally held. Such as children, somebody the age of your little grandson, could be in the wrong place at the wrong time. This is why guns have been described so often as a scourge in our society, and I believe they are.

[12] Finally, your actions regarding the break, enter, and assault. I recognize it is your right to disagree with my decision, but my decision was made on the evidence that I received. Going through the door of the bedroom where a seriously ill woman was, with nary a care for those people's well-being but with a goal in mind, was incredibly serious.

[13] Those are the aggravating factors of the offences.

[14] Next, there is your criminal record. I was saddened to read in Dr. Lohrasbe's report of your estimate of the amount of time you have spent out of custody since you were 14 years old. You have spent 36 years with less time out of custody than perhaps are days in one year.

[15] There are some mitigating factors. In particular, the two offences to which you have pleaded guilty today are the two most serious of offences to which you have pleaded guilty. You saved a great deal of court time. You acknowledge your wrongdoing, and from that I take it that you have remorse. You have your partner here, who clearly cares a great deal for you. Most importantly, you have your *Gladue Report*. I must recognize this report not only for the contents, which were extraordinary, but for the fact that there are institutional and systemic factors as to why you, as being a member of that community, are here today.

[16] So, weighing all of the aggravating and mitigating factors considering your history and circumstances, and looking at you, I agree that the joint submission, or the almost joint submission, is one that I accept.

[17] On the charge of threatening and break, enter, and assault, there will be the

following sentences: 12 months on the threats; and two years concurrent on the break, enter, and assault.

[18] I will deal with the pre-trial custody in a moment.

[19] With respect to the firearms charges, there will be a sentence on the possession of the unlawfully held restricted weapon a two-year sentence concurrent to the break, enter, and assault; and 18 months concurrent on the breach of your lifetime prohibition order.

[20] With respect to the conspiracy, there will be a sentence of 22 months of jail, starting today, going forward, and it is consecutive.

[21] I will give you credit. Given all of the mitigating factors — and one that I will mention in addition, is the COVID conditions during the period of time that you have been in custody. I think, without evidence, I can acknowledge that life changed for everybody on the outside and it changed much more for those people on the inside and continues to do so. This includes lockdowns, lack of ability to social distance, and the fear that if COVID hits the jail there is a possibility it can hit a lot of people.

[22] You have served 300 days of pre-trial custody. I will give you credit for 480 days of pre-trial custody, thereby leaving 30 months on your sentence.

[23] In addition, there are the ancillary orders.

[24] The DNA order. You have probably had it taken previously but you will submit yourself at the officer's demand to provide a DNA sample. This is for the break and

enter.

[25] On the firearms, there will be a further lifetime prohibition order, that you are not to have in your possession any weapons, firearms, ammunition, or explosive substance for the rest of your life.

[26] There is going to be a forfeiture order prepared and I will sign that if it has not already been provided to the clerk.

[27] Finally, the order that is really, to put it in common terms, "driving the bus" here, for the joint submission is that you be considered a long-term offender and, therefore, receive a supervision order that matches that designation.

[28] When Mr. Dieno was giving his submissions, I raised the issue of whether you really understood what that means. This means you are on a leash that is less than a foot long. I have never known of authorities who deal with long-term offenders to be reluctant about laying a breach order, if the circumstances warrant it, and there is not much discretion vested in those officers/public servants who have the task of supervising you. It could be something as small as a small amount of possession of cocaine or a small amount of possession of marijuana, if you are forbidden to have marijuana.

[29] In order to impose a long-term supervision order, I must look at the objectives. What are these supervision orders meant to do?

[30] First, they are meant to protect the public, so put you on that short leash.

[31] Second, to look at your history and circumstance, and seize on whatever opportunity of rehabilitation and reintegration into society is possible. Otherwise, it would just be the straight to a dangerous offender designation.

[32] Let me make this clear if I have not already. Ms. Bailey, the Crown, talked about the dangerous offender provisions. This long-term offender designation is just one step below that but within that bracket. This is not like a life sentence with the opportunity for parole. A dangerous offender designation is not that. I have never known somebody who has received a dangerous offender designation to be released from custody. I do not say that to scare you, although it should. I say that to motivate you.

[33] In order to find that the long-term supervision order is appropriate, I have to first be satisfied on one of the offences of which I have found you guilty would, taking all the circumstances, receive a sentence of more than two years. At first blush, Mr. Bailey, I did not know anything about you. I was, indeed, surprised when Ms. Bailey asked for the order, but then I saw your criminal record and I understood. I am satisfied that, because of your record, and because of the, frankly, frightening circumstances in which you were involved, and I found you subjected the people in this house to, a sentence of two years was almost at the bottom of the range.

[34] Secondly, I have to find that there is a substantial risk that you will reoffend. This is where I consider who you are and what you are. As I said to Mr. Dieno, you have been in custody or receiving custodial sentences since you were 14 years old. The records seem to show that you never went to school very much, that you had three moms — the one you really did not know anything about, the second one who you

thought was your real mom, and then your dad's second spouse. You had a father who has been described as roguish. I think that is a generous interpretation of what your father subjected you and your brother to, and maybe your other siblings, but I do not know that.

[35] In reading the reports that I received, the *Gladue Report* and Dr. Lohrasbe's report, it brings home to me — and I say this to you to provide further motivation — how important having a real parent in the life of a young child is. Whether it be a parent or grandparent, these people have the responsibility to fashion a child's life to be better than theirs, not worse. You did not have that growing up. However, you have that opportunity if you follow through here.

[36] You have committed crimes of violence, crimes of weapons possession, crimes of driving, crimes of dishonesty — the latter probably being committed in order to further a lifestyle of horrific addiction, and that addiction has grounded you all these years. The pursuit of escape through noxious drugs has defined you.

[37] Is there a substantial risk that you will reoffend? On your record alone, absolutely, the answer is yes.

[38] The next question that I have to answer is: Is there a reasonable possibility of eventual control of you in the community? If I look at your record alone, which probably scores of judges have, the answer would probably be no. However, I disagree with that, and I disagree with that on good grounds. Those are, one, that beacon of sense and light that you have in your brother Robert. He got through this by acknowledging who he was, acknowledging and taking responsibility for his actions, and embracing his



Indigenous roots, which led him to the self-reflection that he ultimately used to succeed. It is extraordinary what he did, and he sees in you what you have to do. I do not know if you have a copy of this report, Mr. Bailey, but your brother's insight is something that shines through. He knows you better than anybody, he knows what you have to do, and he knows it is a long road. However, like he did, he thinks you can find your way along that road. You have to change a lot for that to happen.

[39] I see that you have, over the years, embraced your Indigenous roots, embraced the marvellous traditions of your roots. However, you have failed in truly embracing them because you have gone back to your old ways. I described your old ways as knee-jerk. In reading through everything that I received, including your most recent Whitehorse Centre Correctional reports, I concluded that you do not think; "Oh, I shouldn't be doing this." You react. That is what you have always done. I do note that in, I think March and April of this year, you involved yourself in two courses, maybe because your sentencing was coming. Whatever motivates you to get there is fine by me because it is about self-preservation.

[40] One of the most meaningful reports I read, which really describes what Mr. Dieno says is your old self, was, when you were asked to describe what happened in the dangerous driving charge where you went through a stop sign and caused serious injuries to two people. You said, "I gambled, and I lost." What was extraordinary about that is, yes, you lost your freedom, but your knee-jerk reaction was, upon that horrific accident and the good Samaritan getting out of his car to go and help the people that had been so injured, you jumped into his car to get away. It was all about you. When you said, "I gambled, and I lost", it was about you, not about those people who you

injured. That is what I mean is your knee-jerk reaction. It is about you. This is where you have to start, at the very beginning.

[41] The report of Dr. Lohrasbe speaks about your motivation. He believes if you remain motivated, you can make significant inroads into who you will be. The challenge is keeping that motivation going. You have probably heard it before: once an addict, always an addict. The question is what you do with that addiction.

[42] Like your brother, who fell off the wagon a few times, you cannot afford to do that anymore. That is why I am hopeful that you will be permitted to participate in these high-intensity, multi-target programs through whatever penitentiary you are sent to. If you do not get in — I am not sure you can do it on your own. However, you have got to find a way, because there is a bigger goal out there than just not getting into some program.

[43] Mr. Dieno talked a lot about aging. I say this with great respect to Mr. Dieno and I say it to myself and maybe Mr. Sinclair — because I know he is about to retire — but you are a long way from being old. Aging comes to those who allow themselves to age. You are a long way from being old, so I am not as optimistic about aging being a factor upon which you can rely to say, “Oh, well I’ll be less of a risk as I get older, and I’m old now.” You are not old. Some might say you are in the prime of your life — ask the President of the United States.

[44] Can you be managed once you are in the community? The answer is not yes as Dr. Lohrasbe says so. Dr. Lohrasbe’s opinion is a big part of it, but there are the two parts of it. Your brother is a classic example. If you remain motivated, the answer has to

be yes, because the beacon for you is not just your brother, but your daughter who never had a father. It was her right to have a father. For you to be a father was a privilege. You never fulfilled her right to have a father. Let your grandson have the right to a granddad.

[45] When I look at Dr. Lohrasbe's summary, his discussions throughout the report of the various diagnoses you received, and having more than a passing knowledge of some of the mental health diagnoses, I agree with Dr. Lohrasbe that the diagnosis of you as being suffering from bipolar is not one that is based on an assessment of you free from the effects of drugs, because you have never been off the drugs long enough for that be determined. Maybe your grandiose speaking that your brother talked about, that you were a lawyer and such, may be indicative of a classic manic episode, but it is also indicative of a lot of other things: drug abuse and ADHD.

[46] Consequently, I respectfully suggest you cannot rely on the excuse of being bipolar, as Dr. Lohrasbe, who is an expert, considers this to be a questionable diagnosis. In the report he notes that despite your denials of the offence for which you were sent to him, he has been able to look at everything and this allows him to have a reasonable degree of confidence in the following: (i) you are at high risk for future acts of violence; (ii) it is likely that you will benefit — not “may” — he says, “It is likely that he will benefit...” I say this to the Correctional Service who will read this judgment because this is not an opinion that is couched. Dr. Lohrasbe says you will benefit from a high-intensity multi-target violent offender program. He says abstaining from substance abuse and the accompanying lifestyle will be central to your rehabilitation; that aging and maturity will reduce the risk because, statistically, that is what happens; and that

this sentencing proceeding in and of itself, may help reduce that risk because you are facing and have accepted such a meaningful order, that is the LTSO. Dr. Lohrasbe says you must do all the programs and stay away from alcohol and drugs, and you commit yourself to “honesty” — Mr. Dieno talked about your dishonesty, in describing how you were abused, which has deprived you of a settlement that you were so entitled to because of the experience, because you embellished your experience so much so, that you were disbelieved and received nothing.

[47] Your honesty and cooperation is needed with a comprehensive risk-management plan. When you have done all of those things the doctor opines, that risk management in the community is a realistic possibility. He says a lengthy period of — and there is a missing word, but I suspect it is “supervision” — with slow and gradual steps towards lesser supervision is key to your ongoing risk management. He says that periodic risk assessments will assist in planning the specifics for ongoing risk management.

[48] You have to keep going to those assessments because they will help you plot your course for the next X number of months or years. He sees a path for you, and the path starts with abstinence from drugs and alcohol, the accompanying lifestyle, and the people with whom you associate. The pain continues with a need for you to plot your course through how to change your lifestyle.

[49] That allows me to impose the long-term supervision order because I believe, if you do all of those things, the risk of you reoffending can be managed. You will succeed if you follow through.

[50] Finally, what I will say is this. Nobody should have the background that you had

as a child. Nobody should have the father that you had. Nobody should end up, at the age of 15, in a 23-hour-a-day lock-up. Nobody should rape young boys. That was just the start of your life. Is there any wonder that we are here today? No. You cannot change that history. You have to learn to let it not be your story. You have an opportunity to do that now, and that is why I believe, if you follow all of that, your story will be different and it will be as parent and as a granddad, and somebody who had the courage to turn their life around. You have to stop being the go-to person for criminal offences and you have to stop that knee-jerk reaction. It is a long road.

[51] I recommend that you read the steps in Dr. Lohrasbe's report that you need to do and keep that with you and underline it.

[52] I agree that a six-year long-term supervision order is appropriate. I think — not that it is much consolation to you, Mr. Bailey — I will never forget you. I want you to know that, although, you are a classic example of somebody who has been failed by the system and has in turn failed society, you have today assumed responsibility for failing society — and that is a huge step. You are taking responsibility probably for the first time in your life. I sense it is because you have that motivation.

[53] That concludes my judgment.

[54] I will waive the victim fine surcharge on all these counts.

#### [DISCUSSIONS]

[55] I am ordering forfeiture of the handgun, the rifle cartridge, the GLOCK magazine, and the BB gun magazine.

[56] Mr. Bailey, I am being asked, and I do not think, Mr. Dieno, there is any opposition to an order prohibiting Mr. Bailey from communicating with the two victims of the break and enter during the time that he is incarcerated, so I will make that order pursuant to s. 743.21. Mr. Bailey, you are not allowed to contact those two people during the time that you are still in custody.

[57] The record of all the reports, the psychiatrist report, and every other report, plus my judgment, will be forwarded to the Correctional Service of Canada for information and case management. They will get everything.

[58] MR. SINCLAIR: And that would include, we hope, the exhibits filed.

[59] THE COURT: Yes.

[60] MR. SINCLAIR: — in the terms that are written in the order.

[61] THE COURT: It is everything that we have, which will include the materials filed on the application process as well and the affidavits.

[62] MS. BAILEY: So, I think we've covered the DNA, the firearms order on the other non-LTSO charges, and I think Your Honour did mention that.

[63] THE COURT: The 109s?

[64] MS. BAILEY: Yes.

[65] THE COURT: Yes.

[66] MS. BAILEY: If I didn't say it already, I direct a stay of proceedings on the

remaining counts on the files to which he's pled guilty.

[67] THE COURT: All right.

[68] MS. BAILEY: Should dispose of that.

[69] I think we very much hope that that's everything.

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McLEOD K.L. T.C.J.