

Citation: *R. v. Rathburn*, 2013 YKTC 90

Date: 20131104
Docket: 13-00290
13-00308
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Chisholm

REGINA

v.

STEVEN TROY RATHBURN

Appearances:
Terri Nguyen
Lynn MacDiarmid

Counsel for the Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] CHISHOLM T.C.J. (Oral): Steven Troy Rathburn has pleaded guilty to the possession of stolen property and to possessing prohibited and restricted weapons, contrary to s. 354 and s. 91(3) of the *Criminal Code*, respectively. These offences occurred on July 20, 2013, and the offender has been in custody since that date. The Crown has proceeded by indictment on both charges.

FACTS

[2] The RCMP commenced an investigation into the offence of manufacturing and trafficking in firearms, having received source information about such activity. Their

investigation led them to the 10-year-old daughter of Mr. Rathburn, who provided information which confirmed the initial source information.

[3] On July 20, 2013, the police executed a search warrant at the residence of Mr. Rathburn and located three stolen firearms: two rifles and one nine-millimetre handgun. These firearms had previously been reported as stolen. The police also discovered a small cache of weapons which were being manufactured on the property, as well as other paraphernalia. In total, the police seized 12 other firearms, either prohibited or restricted; a substantial amount of ammunition; pistol and rifle assemblies and components; body armour plates; an armoured facemask; silencers; flare suppressers; and other weapons' parts.

[4] A second search warrant was subsequently executed to enable a search of a computer located in the residence. The police located weapon schematics and assembly instructions, as well as score sheets. The commercial operation that they had unearthed was significant.

[5] Mr. Rathburn and his roommate, whose matters are still before the Court, were living at the residence and were arrested. It became apparent to the police that this second individual, not Mr. Rathburn, was the principal actor in this illegal endeavour. The principal player obtained components of prohibited and restricted firearms, which were assembled in a shed, adjacent to Mr. Rathburn's trailer. Mr. Rathburn was not involved in the actual trafficking of these weapons, but did assist in the manufacturing of them.

POSITION OF THE PARTIES

[6] The Crown acknowledges that the offender has entered early guilty pleas and that he has assisted the RCMP in their investigation. The Crown seeks a prison term of two years less a day, noting the sentencing principles of denunciation and deterrence. It should be noted that the Crown has advised that the offender was “significantly helpful” to the police subsequent to his first statement. The Crown also acknowledges that the pleas of guilt should be considered to have been made early in the process.

[7] The defence suggested a period in the range of 12 to 16 months imprisonment is a more proper sentence, considering Mr. Rathburn’s role in the crimes. It should be noted that Mr. Rathburn dismissed his defence counsel partway through these proceedings and retained new counsel.

[8] The matter was adjourned to allow defence and Crown counsel, if they chose, to file case law in support of their respective positions. No case law was submitted.

CIRCUMSTANCES OF THE OFFENDER

[9] A comprehensive Pre-Sentence Report has been prepared for this sentencing. Mr. Rathburn is 40 years of age and comes before the Court with no prior criminal record. He was born and raised in the Yukon and is of Métis heritage. He describes his home life growing up as stable, although his father was an alcoholic. He has a Grade 10 education and has completed some educational upgrading, including some online computer studies through Athabasca University.

[10] He held various jobs between 1988 and 2003, and maintained employment after suffering from a psychotic episode in 1998 and while continuing to endure mental health issues for the next five years. In 2004, he suffered what the author of the Pre-Sentence Report describes as a severe psychotic episode, after which he was diagnosed with schizophrenia. He has been prescribed and has taken medication for this condition since the initial diagnosis. He also takes an anti-depressant medication and has been diagnosed with a generalized anxiety disorder. He has been unable to maintain employment in the last ten years, although under the supervision of various medical professionals, he has done “extremely well over an extended period of time.”

THE DANGER OF FIREARMS

[11] Courts have found that the illegal possession of restricted and prohibited weapons should attract significant penalties. I refer to *R. v. Jarsh*, 2007 BCCA 189, *R. v. Borecky*, 2013 BCCA 163, and *R. v. Zhu*, 2013 BCCA 416.

[12] In the recent *Zhu* decision, *supra*, Mr. Justice Harris stated:

[21] Firearms are a scourge in our society. The possession and use of firearms poses unacceptable risks to the public and the police. There is no doubt that both must be protected from the illegal possession and risk of use of unlawful firearms. ...

[13] The dangers associated with the illegal possession of firearms are obvious. In *R. v. Thompson*, 2007 ONCJ 342, the Court spoke of the rationale of the various *Criminal Code* provisions related to firearms:

[11] In my view, the purpose of these sections is to negate the risk posed by the illegal possession of loaded firearms. The risks to life and limb are obvious when such handguns are possessed by individuals who are not properly licensed and registered to own them. It may well be that

the risk is posed by their use by untrained or inexperienced individuals; it may be the risk arises when individuals have ready access to such weapons when they get involved in emotionally volatile situations such as physical conflicts; it may be that the risk is posed by individuals who may use them in pursuit of other criminal activities or enterprises; or it may be simply the risk posed by the fact that illegal possession may lead to their unsafe storage such that the guns can be taken, stolen, or mishandled by other parties who come upon them.

THE PRINCIPLES OF SENTENCING

[14] The fundamental purpose of sentencing as set out in s. 718 of the *Criminal Code* is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions with objectives which include:

- (a) denouncing unlawful conduct;
- (b) deterring offenders and others from committing offences;
- (c) separating offenders from society, where necessary;
- (d) assisting in rehabilitating offenders;
- (e) promoting a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

As per s. 718.1 of the *Criminal Code*:

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

[15] The Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, stated:

[37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. ...

Later, in the same paragraph, the Court says:

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. ...

[16] Section 718.2(e) of the *Criminal Code* states, that:

[A]ll 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.

[17] As outlined in *Ipeelee, supra*, and *R. v. Gladue*, [1999] 1 S.C.R. 688, the Court must impose a sentence that fits the offence, the offender, the victim, and the community.

CASE LAW

[18] In many of the possession of prohibited and restricted firearms cases before the courts, the possession of firearms is part of the drug trade and drug charges are present. The sentencing decisions reflect this aggravating factor. Although this is not the case in the facts before me, this is nonetheless a very serious matter.

[19] In *R. v. Jarsch, supra*, the Court upheld a sentence of 21 months imprisonment for a 33-year-old offender who had been found with a number of illegal weapons in his vehicle, and convicted of, amongst other charges, possession of a loaded prohibited firearm. The offender, who had a limited criminal record, had been found guilty after trial.

[20] The Court in *R. v. Nguyen*, 2005 BCCA 115, agreed that an 18 month global sentence for an 18-year-old offender who had pleaded guilty to firearm and drug offences, namely: trafficking in cocaine, possessing a loaded restricted weapon without holding a proper licence, and possessing a machine pistol without having a licence. The offender had no criminal record. The Court of Appeal noted that the concurrent 12 month periods of incarceration on the weapon charges, one of which attracted a mandatory minimum sentence, were too lenient, but that a global 18 month sentence was appropriate. Justice Southin noted at para. 5:

In my view, the sentences which the learned judge here imposed on the possession of weapon charges could well have been much higher and the sentence imposed on the trafficking charge much less. It appears to me from the cases which have been cited to us that the judges of the courts below are taking far too lenient an approach to the possession of restricted weapons which patently have some illicit purpose. ...

[21] The *Thompson case*, *supra*, involved offences of possessing a loaded firearm and breaching a weapon's prohibition. Upon entering guilty pleas, the 21-year-old offender, who had a prior criminal record, was sentenced to 20 months incarceration, minus pre-trial custody, plus three years of probation.

[22] Although the case before me does not involve loaded firearms, the circumstances surrounding it are serious and the above noted decisions assist in determining a proper sentence.

ANALYSIS

[23] Even though Mr. Rathburn was not the principal actor, the illegal situation in which he participated is a very serious one. The introduction of illegal firearms into this

community cannot be tolerated. The principles of denunciation and deterrence are the primary sentencing principles to be considered.

[24] It is unclear how Mr. Rathburn became caught up in this criminal venture. It has been noted that the only profit he made was that the principal player, his roommate, continued to pay his rent to Mr. Rathburn, who was the leaseholder of the trailer in which they lived.

[25] I am mindful of the fact that the Crown has accepted a guilty plea to the ss. 91(3) and 354 charges. I note that the s. 91(3) offence to which the offender has pleaded guilty has a maximum period of imprisonment of five years, and is not subject to a mandatory minimum penalty that is often present in firearm sentencings. The Crown has underlined the significant assistance the offender has provided to police.

[26] The Pre-Sentence Report indicates that as a result of his low level of criminal history, related risk and medium level of criminogenic needs, the required supervision level for him is rated as low.

[27] Having considered all relevant factors and case law, Mr. Rathburn is sentenced to 16 months incarceration for the s. 91(3) offence, and six months concurrent on the possession of stolen property charge.

REMAND CREDIT

[28] Mr. Rathburn has consented to his remand since the date of his arrest. He is described as a quiet, polite, and respectful inmate. Pursuant to the decision in *R. v. Vittrekwa*, 2011 YKTC 64 and his performance on remand, the circumstances justify an

entitlement to credit at a rate greater than 1:1. For the 100 plus days of pre-sentence custody he is given credit for five months incarceration, thus leaving another 11 months custody to serve.

[29] Pursuant to s. 743.21, for the period of his incarceration he is prohibited from communicating directly or indirectly with Dustin Mackie and Patrick Randall. He is also prohibited from communicating with Tabitha Peever and Alyssa Rathburn, unless he has the prior written permission of his Probation Officer.

[30] In addition to the 16 month period of incarceration, he will be subject to a 12 month Probation Order. The terms of the Probation Order are as follows:

1. He will keep the peace and be of good behaviour;
2. He will appear before the Court when required to do so by the Court;
3. He will notify the Court or the Probation Officer in advance of any change of name or address, and promptly notify the Court or Probation Officer of any change of name or occupation;
4. He is to remain within the Yukon Territory unless he has the written permission from his Probation Officer to be outside the Yukon Territory;
5. He will report to a Probation Officer immediately upon his release from custody and thereafter when and in the manner directed by the Probation Officer;
6. He will reside as approved by the Probation Officer and not change that residence without the prior written permission of the Probation Officer;

7. He will take such counselling, assessment and programming as directed by the Probation Officer;
8. He will have no contact directly or indirectly, or communication in any way with Dustin Mackie or Patrick Randall. He will have no contact with Alyssa Rathburn and Tabitha Peever except with the prior written permission of his Probation Officer, or until such time as all criminal matters related to this incident are finalized.

ANCILLIARY ORDERS

[31] In addition, there will be a s. 110 prohibition order prohibiting Mr. Rathburn from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, and explosive substance. This prohibition is for a period of 10 years.

[32] Section 91(3) is a secondary designated offence under s. 487.04. Having considered the serious nature and circumstances of the offence, and given the minimal adverse impact on the offender's privacy or security of the person, it is in the interests of the administration of justice to make a DNA order pursuant to s. 487.051(3). Accordingly, the offender is required to provide samples of bodily substances that are reasonably required for the purpose of forensic DNA analysis.

[33] Excepting the computer, there is a forfeiture order as against Mr. Rathburn for all items seized by the police.

[34] In the circumstances, the Victim Fine Surcharges are waived.

[35] Is there anything further, counsel?

[CLARIFICATION RE NAMES INCLUDED ON NO CONTACT CONDITION]

[36] THE COURT: Okay. Thank you.

[37] MS. NGUYEN: And, sir, to be clear, the Probation Order applies to both offences?

[38] THE COURT: It does.

[39] MS. NGUYEN: And the firearms prohibition?

[40] THE COURT: Yes. The firearms prohibition applies with respect to the s. 91(3) offence.

[41] MS. NGUYEN: Thank you.

[42] THE COURT: And with respect to the other matters which Mr. Rathburn is before the Court?

[43] MS. NGUYEN: Sorry. Those are all withdrawn.

[44] THE COURT: Thank you.

CHISHOLM T.C.J.