SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. McGuigan*, 2017 NSSC 195

Date: 2017-07-04
Docket: CRH No. 452321
Registry: Halifax

Between:

Her Majesty the Queen

v.

Anthony Franklyn McGuigan

Decision on Sentence

Judge:	The Honourable Justice Robert W. Wright
Heard:	July 4, 2017, in Halifax, Nova Scotia
Written Decision:	July 13, 2017
Counsel:	Janine Kidd, for the Crown Alfred Seaman, for Mr. McGuigan

Orally by the Court:

[1] On May 29, 2017, the first day of his scheduled trial, the accused, Anthony Franklyn McGuigan, entered a change of plea to guilty to the offence of break and enter of the private residence of Joan Marie Boniface and committing theft of property therein, contrary to s. 348(1)(b) of the *Criminal Code*. Count 2 of the Indictment of theft of property exceeding $5,000 was stayed under the Kienapple principle. Sentencing was then put over until today to procure a Pre-sentence Report (PSR) and for sentencing briefs to be filed.

[2] In giving a brief recitation of the facts underlying the plea of guilty, I will paraphrase from the synopsis of facts contained in the Crown's brief. On April 1, 2015, Joan Boniface came home from work and discovered that her home at 14 Seabreeze Drive in Eastern Passage, Nova Scotia, had been broken into. She left for work around 7:15 that morning and returned around 4:40 that afternoon. The window under the back deck was smashed. No one was there when Ms. Boniface got home. She noticed blood on her bureau and that several things were missing. She immediately reported the break-in to the police, who arrived on the scene that day and took several swabs of blood from various parts of the house. Ultimately,

under a DNA analysis, the swabs of blood taken matched that of a known sample from Mr. McGuigan, which tied him to the crime.

[3] A day later, Ms. Boniface also gave the police a handwritten list of items that were taken during the break-in and the total value of the property (as estimated by her) was approximately $6,500.

[4] After having been admitted to hospital on July 6th, Ms. Boniface died unexpectedly on July 11, 2015, for reasons unrelated to this offence.

[5] The current PSR provided to the Court, dated June 26, 2017, is an update from an earlier PSR in July of 2016, when the offender was sentenced for the offence of attempted theft of property valued under $5,000 and a breach of recognizance. There have been no significant changes from that report, in terms of background, education and employment, financial situation, and health and lifestyle.

[6] Mr. McGuigan is now 45 years of age. He was raised in a single-parent home with his mother, and they resided with his grandparents until he was 15. He reported that he suffered a great deal of physical and mental abuse from his grandfather, which was confirmed in an interview with his mother. He has a grade 12 education and has had two long-term relationships, from which he has two

grown children, one from each relationship and with whom he now has little contact. He is now single and living at his mother's home, surviving on disability benefits since a workplace accident in 2010 in the construction industry, in which he worked from time to time, which resulted in a broken neck injury. He continues to suffer from chronic pain and has poor balance as a result.

[7] His biggest concern, however, is his mental health condition. His family physician confirmed in an interview that Mr. McGuigan suffers from schizophrenic tendencies exhibited by his paranoid and delusional behaviour. He is currently on medications for that and has sought further help from community mental health services, with whom he had made an appointment on July 6, two days hence. He has no substance abuse history, but adds that he also suffers from depression and anxiety.

[8] His mother explained that her son will continue to reside with her, as she is able to be a positive support for him and to assist him through his mental health issues. She described her son as a very caring person who is not violent and does not have a temper.

[9] Mr. McGuigan does, however, have a criminal record which includes a sentencing on November 1, 2012, on two charges of break and enter and

committing an offence, also under s. 348(1)(b) of the *Criminal Code*, for which he received two consecutive 12 month conditional sentences. His most recent conviction was for the offence of attempted theft under $5,000, for which he was sentenced to 19 days intermittent custody and 12 months probation. He also has two convictions for possession of property obtained by crime under $5,000, with offence dates of January 2015 and November 2009. In addition, he has a conviction for mail theft committed in 2010 and a fraud conviction from 2008. He also has four convictions for breach of recognizance and a dated conviction for impaired driving and a common assault.

[10] The sentences meted out for these past convictions are relatively minor, which is indicative of their lesser gravity compared to the present case.

[11] The position of the Crown is that Mr. McGuigan should be sentenced to a four year term of imprisonment in a federal penitentiary. The Crown also seeks a restitution order under s. 738 of the *Criminal Code* in favour of the home insurer, Economical Insurance Company, in the amount of $4,945.87, being the sum reimbursed to the homeowner for the stolen property. Also, a mandatory DNA order is sought under s. 487.04 and 487.05(1).

[12] The Defence position is that a period of federal incarceration is warranted on the facts of the case, but that it should be set at two years plus one day. The Defence takes no issue with the ancillary orders sought by the Crown.

[13] The purpose and objectives of sentencing and the principles to be considered are set out in s. 718, 718.1 and 718.2 of the *Criminal Code*. Those to be emphasized in break and enter convictions, as often reiterated in such cases, are deterrence (both general and specific), denunciation and to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community.

[14] Section 718.1 codifies the cardinal principle in sentencing of proportionality; that is to say, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 goes on to identify additional principles to be considered in appropriate cases, notably that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[15] The aggravating factors present here are recognized by Crown and Defence counsel alike. Particularly aggravating is the premeditation and planning involved by selecting the home of one of his mother's friends and using his mother's friendship with the victim opportunistically to break into and to steal items of value from her residence while she was at work. The nature of the property stolen adds to the aggravation. It was mostly heirloom items that would have been irreplaceable, especially a silver tea set and many pieces of jewelry. Her passport was stolen as well.

[16] A further aggravating factor, of course, is Mr. McGuigan's criminal record which, as noted earlier, includes a conviction in 2012 for two counts of break and enter and committing an offence. The Court is informed that those two break and enters were made into houses that were under construction at the time. Certainly, however, the gravity of the present case appears to surpass any unlawful conduct of which Mr. McGuigan has been guilty in the past.

[17] The only mitigating factors to be recognized are Mr. McGuigan's guilty plea and acceptance of responsibility. The change of plea is only a limited factor however, because it was only made on the first day of trial after two Crown witnesses appeared on hand to testify, one of whom was a DNA expert who had travelled from Alberta and whose purpose was to establish the identity of the

perpetrator from her DNA blood analysis. The Court does note as well, however, Mr. McGuigan's expression of remorse which he has just made.

[18] The objective seriousness or gravity of a break and enter offence is reflected by Parliament having set a maximum penalty of life imprisonment if the offence is indictable and if it relates to a dwelling house. This is reflective of the sanctity and security expectations that private homeowners are entitled to enjoy. When it is violated, it has very harmful effects upon the homeowners and on the community at large.

[19] That said, there is a trio of appellate decisions in this province which speak to the range of sentencing to be imposed in serious break and enter cases. They begin with *R. v. Zong*, [1986] N.S.J. No. 207 (N.S.C.A.) and continue with *R. v. McAllister*, 2008 NSCA 103 and *R. v. Adams*, 2010 NSCA 42. All three of those cases involved break-ins of business premises, namely a pharmacy in search of drugs in *Zong*, the Amherst Justice Centre in *McAllister* where some cheques were stolen, and several break-ins of self-storage units in *Adams* respectively.

[20] In the most recent of these cases, *Adams*, Justice Bateman reviewed the law as follows at para. 38-39:

> [38] In *R. v. McAllister, supra*, cited by the Crown at the sentencing hearing, this Court confirmed that the starting point for this offence continues to be three

> years' imprisonment. The benchmark derives from this Court's decision in *R. v. Zong*, [1986] N.S.J. No. 207 (Q.L.). The actual length of sentence may be adjusted up or down to reflect aggravating and mitigating factors. Both *McAllister* and *Zong* involved breaks into business premises.
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> [39] … It is significant that in each of *Zong* and *McAllister*, the three year sentence was imposed for a single offence. In any event, the benchmark was not set for Mr. Zong or Mr. McAllister in particular, but is a statement by this Court, that the appropriate starting point sentence for this offence is three years. Clarke C.J.N.S. said, at p. 433:
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> > This Court has frequently observed that it looks seriously upon the invasion of property by break and enter and it has expressed the view that three years' imprisonment is a benchmark from which a trial judge should move as the circumstances in the judgment of the trial judge warrant.

[21] Thus it was that three year sentences were meted out in both the *Zong* and *McAllister* cases. In *Adams*, the appropriate range was increased to a five or six year sentence, although that case was based on a far more egregious fact situation than the present case and it should be distinguished accordingly.

[22] One more case authority deserving of mention is *R. v. Perrin*, 2012 NSCA 85, in which the Crown appealed a sentence of 30 days imprisonment on the 21 year old offender who had, without any apparent advance planning, broken into a boarded-up summer cottage and stolen speakers and some copper piping valued at about $180. The Court of Appeal noted in that case at para. 22 that on a number of occasions (and four were cited) that it has imposed or upheld non-custodial or short jail sentences for break and enters over a wide range of circumstances, but obviously in less serious cases than the one presented here. Ultimately, the Court

of Appeal held in *Perrin* that while a 30 day sentence was a lenient one, it was not demonstrably unfit and hence was upheld.

[23] Nonetheless, as I review both the aggravating and mitigating factors which exist in this case, along with the circumstances of this offence and this offender, I conclude that this case is one where the benchmark of three years imprisonment should be adhered to. I am not persuaded by Crown counsel that it should be increased by reason of the existing aggravating factors, nor am I persuaded by Defence counsel that it should be decreased, especially where the intrusion here was into a private dwelling.

[24] Mr. McGuigan is therefore sentenced to a three year term of imprisonment in a federal institution. The Nova Scotia Court of Appeal has sent a strong message of deterrence that this sentence is appropriate, even for a single offence of break and enter and commission of theft, which is an offence all too prevalent in our community and elsewhere.

[25] I would add to this decision the Court's recommendation to the correctional authorities that Mr. McGuigan be referred to their mental health services at an early date to assist with his rehabilitation.

[26] Finally, two ancillary orders are to be granted; namely, a mandatory DNA order pursuant to s. 487.051 of the *Criminal Code* as well as a restitution order in favour of Economical Insurance Company for its indemnity payout of $4,945.87.

[27] The Court is also obliged to impose the mandatory victim surcharge of $200, but the offender will be granted an additional year in which to make payment of that amount following the termination of his sentence.

Wright, J.