SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Baxter*, 2018 NSSC 299

Date: 2018-10-29
Docket: CR470611
Registry: Pictou

Between:

Her Majesty the Queen

v.

Arthur Stuart Baxter

Sentencing Decision

Judge: The Honourable Justice Patrick J. Duncan

Heard: October 29, 2018, in Pictou, Nova Scotia

Counsel: J. Patrick Young for Her Majesty the Queen
Colin Strapps for the accused

By the Court (Orally):

Overview

[1] Mr. Baxter has entered pleas of guilty to the following charges:

> Count 1: that on or about the 1st day of August 2017, at or near Haliburton, Nova Scotia, he did possess a firearm without being the holder of a licence under which he may possess it, contrary to s. 91(3) of the *Criminal Code*;
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> Count 2: that at the same time and place did break and enter a certain place and did commit therein the indictable offence of theft, contrary to s. 348(1)(b) of the *Criminal Code*;
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> Count 3: further that at the same time and at the same place he did have in his possession property of Judy Russell of a value not exceeding five thousand dollars knowing that all of the property was obtained by the commission in Canada of an offence punishable by indictment, contrary to s. 354(1)(a) of the *Criminal Code*; and
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> Count 6: that he did on or about the 8th day of June 2017, at or near Barney's River, Nova Scotia, commit theft of a motor vehicle, contrary to s. 333.1 of the *Criminal Code*.

The Facts

(a) Circumstances of the Offences

[2] After receiving a complaint from a neighbor, police investigated and found Mr. Baxter living in a tent on the property of Judy Russell. On arrival at the property they found the accused to be in possession of several items belonging to Ms. Russell. He had been conducting a yard sale of items that he had taken from a trailer on the property. Some items had been sold. The police were able to recover some of the items and the loss to Ms. Russell has been described by the Crown as "nominal".

[3] Mr. Baxter was also found to be in possession of a shotgun that he found in the Russell trailer. He did not hold a licence to possess a firearm.

[4] Acting on another complaint, and following investigation, the police determined that Mr. Baxter stole the 2015 Chevrolet Silverado truck of Beverly Williams. It was recovered in a commercial parking lot in New Glasgow. There were wallets and cash belonging to Ms. Williams and her husband, inside the vehicle. Purchases valued at approximately $1,317 were made using Mr. Williams' debit card. An amount estimated between $1,200 and $1,500 cash was alleged by Ms. Williams to be in the truck when it was stolen. The money was not recovered.

Whether or not the Williams recovered their loss through insurance or other means is unknown – what is apparent is that Mr. Baxter does not have the means to make restitution.

(b) Circumstances of the Offender

[5] Mr. Baxter is 51 years of age, and has a very substantial criminal record that includes 106 prior convictions that begin approximately 35 years ago. These offences have occurred persistently over those years, and in seven different provinces. My review of the record indicates that the offences are largely property related crimes. There are no crimes of violence.

[6] As he described it today Mr. Baxter has had a lifelong compulsion to steal that he does not understand. He wonders if there is a physiological or psychological reasons for his behavior. That is something that, given his history, may be worth exploring with Correctional Services while he is serving his sentence.

(c) Impact on the Victim and/or Community

[7] I do not have victim impact statements in this case, although I am satisfied that the opportunity to do so was provided to the complainants. I am aware that thefts that involve breaking and entering into properties, have been commented upon very negatively by the courts in this province and in other provinces. Generally speaking, denunciation and deterrence are considered primary factors to consider in imposing sentence in such cases.

Legal Parameters

Count 1

[8] Section 91(3) provides a maximum punishment of a term of imprisonment not exceeding five years.

Count 2

[9] Section 348(1)(b) - break and entering into a place other than a dwelling house - case carries a maximum punishment of imprisonment not exceeding ten years.

Count 3

[10] The offence of having property valued under $5,000, proceeded upon by Indictment under s. 355(b)(i), carries a maximum punishment of a term of imprisonment not exceeding two years.

Count 6

[11] Finally, the offence of the theft of a motor vehicle under s. 333.1, proceeded upon by Indictment, carries a maximum punishment of imprisonment for a period not exceeding ten years.

Positions of Crown and Defence

[12] The Crown and the defence have presented me with a joint recommendation. The sentence proposed totals 57 months. There has been time spent in pre-sentence custody. Counsel agree that the accused should get a credit of 21 months for that time. The result is a go-forward sentence, beginning today, of three years in custody.

Mitigating and Aggravating Factors

[13] In terms of the mitigating and aggravating factors in this case, clearly a guilty plea is always something that is considered to be mitigating. It is an expression of acceptance of responsibility. In this case it saved considerable cost and inconvenience to the public that would be associated with a jury trial, as was the election in this case.

[14] The principal crimes were property crimes, non-violent crimes which, as I have indicated, is consistent with Mr. Baxter's history. The amount of loss suffered was relatively small.

[15] The break and enter, which is, in some respects, the charge that we are most concerned with, did not have the most aggravating features for this offence. First of all, the trailer was unoccupied for a considerable period of time and, in the circumstances which have been described to me, the entry that did not seem to create a risk of running into a homeowner, which is always one of the things that we are concerned with. A break in where the occupants are present can create terror.

[16] It must also be noted, though, that this was a planned and premeditated offence even though it may not have seemed the most serious offence in the context of what was lost by way of the consequences to Ms. Russell. It nevertheless was something

that Mr. Baxter had to think about and carry out. Similarly, that would be true for the theft of the vehicle and the use of the credit card or the debit card.

Principles of Sentencing

[17] I have considered, in reaching my conclusion today, the key principles of sentencing as set out in s. 718 of the *Criminal Code* and subsequent sections.

Joint Recommendations

[18] The parties have asked me to accept their joint recommendation as to penalty.

[19] I have given regard to the decision of Justice Bateman, as she then was, in *R. v. G.P.*, 2004 NSCA 154, in which the approach of a sentencing court in considering whether to accept a joint recommendation was set out. In paras. 13 to 15 of that decision, the following is cited from the decision of then Justice Cromwell in the *MacIvor* case:

> 13 This Court recently considered the sentencing judge's obligation when assessing a joint sentence submission. In *R. v. MacIvor* (2003), 215 N.S.R. (2d) 344; [2003] N.S.J. No. 188 (Q.L.), Cromwell, J.A., writing for the Court, said:
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> > [31] …It is not doubted that a joint submission resulting from a plea bargain while not binding on the Court, should be given very serious consideration. This requires the sentencing judge to do more than assess whether it is a sentence he or she would have imposed absent the joint submission: see, e.g., *R. v. Thomas* (O.) (2000), 153 Man. R. (2d) 98; 238 W.A.C. 98 (C.A.) at para. 6. It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range - in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing from it: see, for example, *R. v. MacDonald*, [2001] N.S.J. No. 51, L.W. et al., *supra; R. v. Tkachuk* (E.A.) (2001), 293 A.R. 171; 257 W.A.C. 171; 159 C.C.C. (3d) 434 (C.A.) at para. 32*; R. v. G.W.C.* (2000), 277 A.R. 22; 242 W.A.C. 22; 150 C.C.C. (3d) 513 at paras. 17-18; *R. v. Bezdan*, [2001] B.C.J. No. 808; 154 B.C.A.C. 122; 252 W.A.C. 122 (C.A.), at paras. 14-15; *R. v. Thomas*, *supra*, at paras. 5-6; *R. v. B.(B.)*, [2002] N.W.T.J. No. 15, 2002 CarswellNWT 17 (C.A.) at para. 3*; R. v. Webster (D.)* (2001), 207 Sask. R. 257; 247 W.A.C. 257 (C.A.) at para. 7.
>
> > [32] Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation.

> [33] …Many of the relevant authorities were reviewed by Fish, J.A., writing for the Court, in *R. v. Verdi-Douglas* (2002) 162 C.C.C. (3d) 37 (Que. C.A.):
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> …
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> [43] ….Appellate courts, increasingly in recent years, have stated time and again that trial judges should not reject jointly proposed sentences unless they are 'unreasonable', 'contrary to the public interest', 'unfit', or 'would bring the administration of justice into disrepute'.
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> ...
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> [51] ….[The] shared conceptual foundation [of these various formulations of the principle] is that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty -- provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.
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> (Emphasis added)

[20] Returning for a moment to Justice Batemen's decision, she also highlighted five points set out in *R. v. Sinclair* (2004), 185 C.C.C. (3d) 569; [2004] M.J. No. 144 (Q.L.) (Man. C.A.) I have reviewed them. They reinforce what I have already said:

> [15] R. v. Sinclair (2004), 185 C.C.C. (3d) 569; [2004] M.J. No. 144 (Q.L.) (Man. C.A.) the Court outlined a recommended procedure for a judge when considering departing from a joint submission arising out of a plea bargain. Steel, J.A., writing for the Court said:
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> > [17] Thus, the law with respect to joint submissions may be summarized as follows:
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> > (1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.
> >
> > (2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.
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> > (3) In determining whether cogent reasons exist (i.e., in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary considerations, systemic pressures and joint

> submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.
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> (4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.
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> (5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.

Fitness of the proposed Joint Recommendation

[21] In making an assessment of the fitness of the proposed disposition, courts must consider the range of sentences that has been imposed in other cases in which the circumstances of the offence and the offender were similar.

[22] The Crown has referred me to the case of *R. v. Zong*, 1986 NSJ 207, a decision of the Court of Appeal in which the court spoke of a benchmark sentence for break and enter offences of three years' imprisonment. In that case, the offender broke into a pharmacy. The court emphasized that the motive was a search for drugs, for which there was a need to emphasize protection of the public. The court also noted the lengthy and serious criminal record of the accused. The court imposed a sentence of three years imprisonment as being one that was fit and proper under the circumstances.

[23] *R. v. Adams,* a Nova Scotia Court of Appeal case reported at 2010 NSCA 42, the principle set out in *Zong* was affirmed. In that case, the offender committed multiple property offences and an offence of perjury. The value of the property was $690,000. It was planned and premediated as a targeted series of thefts from self-storage units. Mr. Adams was an older business person who was a first-time offender. At issue was the appropriateness of a five to six year sentence concurrent to each other as part of the global sentence of eight years imposed for a number of matters. Mr. Adams had no criminal record. Clearly the value of the amounts taken and the degree of premeditation were significant factors.

[24] I have also considered other cases the Crown has provided me, including *R. v. Sinclair*, 2013 NSSC 86, and *R. v. McAllister*, 2008 NSCA 103.

Analysis

[25] I am satisfied that the sentence recommended falls within the range of sentences that have been ordered in other cases where the circumstances of the offences and the circumstances of the offender were sufficiently similar to those in this case.

[26] A lengthy period of incarceration in a federal institution addresses the principles of denunciation, and deterrence – both specific deterrence to the offender, in this case Mr. Baxter, and general deterrence in the sense that it sends a public message to others who might be of like mind and circumstances to those of Mr. Baxter. That is, that if they commit these crimes, the consequences of committing such crimes can be a substantial period of incarceration.

[27] Courts must always assess the potential for the rehabilitation of an offender and determine whether there are sentence options available to support a non-custodial sentence, or one where community supports such as probation after incarceration are preferable.

[28] In this case, any rehabilitative programming will have to be addressed through Correction Services Canada, and, of course, by Mr. Baxter himself. There may be a medical reason for his conduct, but it is not of such a nature as to relieve him of the criminal law consequences for his crimes.

[29] There is probably not much that I could say to you today, Mr. Baxter, that other judges have not said to you on other occasions before today. At some point you are going to have to make a decision as to where you intend to spend the rest of your life, whether it's going to be in prison, or not. At your age, maybe the decision is already evident. It will be up to you to decide how you want to spend your old age.

[30] For the reasons that I have set out, I order the following sentences:

[31] In relation to the break and enter charge, count two of the Indictment, I sentence you to 45 months imprisonment, consecutive to any time you may be serving.

[32] I sentence you in relation to count one, which is the firearm possession without a licence, s. 91(3) charge, to a sentence of six months concurrent to the sentence I have just imposed for the break and enter of 45 months.

[33] In relation to count three, which is the possession of goods valued under $5,000 - that carries a maximum of 24 months imprisonment. Having regard to the fact that you have spent 21 months in jail already, in pre-sentence custody, I sentence you to one day in jail considered served by presence in court.

[34] As to count six, which is the offence of theft of the motor vehicle, that is a separate offence from the others in the sense that it was committed at a different time and place, with a different victim. I sentence you to twelve months consecutive imprisonment on that charge.

[35] The total sentence of the court would be 57 months however, having regard to your pre-trial custody, and the joint submissions of counsel, I am prepared to reduce the amount of sentence by 21 months credit for time you have served. Therefore, the sentence of this court is that you serve three years imprisonment from today.

[36] In reaching this sentence I have considered the principles of consecutive and concurrent sentences, as well as the totality of sentences imposed.

Ancillary Orders

[37] There are also ancillary orders Mr. Baxter. I am required by law to impose a victim surcharge: $200 for each of the four counts of the Indictment, for a total of $800. It is clear to me that you have no present means to pay these monies, and you may not have it in the future but I am obligated to impose it, I order that the sum of $800 be paid by October 29, 2021. That will give you one year past your warrant expiry date, in which to pay.

[38] As a result of the charge of possession of a firearm under s. 93(1), there will be a prohibition order pursuant to s. 110(1)(b) for five years. You will be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance for a period of five years.

[39] In addition, there will be, if you have any weapons, there is a mandatory requirement for a weapons forfeiture order pursuant to s. 491(1)(b) of the *Code*.

[40] These orders will be drafted and provided to you at some time after court.

[41] I have considered the question of whether to make an order for you to provide a sample of your DNA under s. 487.04. Two of these are secondary offences. The Crown is not asking for such an order. I understand that it is a non-issue because there are previous instances where your DNA sample was taken, so it does not serve a purpose. Therefore, I will not make such an order.

Duncan, J.