PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. T.D., 2012 NSPC 124

Date: [2012/11/02]
Docket: 2491918, 2491932, 2491937,2491945, 2491948
Registry: Halifax

Between:

Her Majesty the Queen

v.

T.D

Sentencing Decision

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated February 14, 2013.

Restriction on publication: **Section 110(1) of the *Youth Criminal Justice Act***

Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this *Act*.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Timothy Gabriel

Heard: October 26, 2012 and November 2, 2012, in Halifax, Nova Scotia

Oral Decision: November 2, 2012

Charges: Criminal Code ss. 344, 355(a), 88(1), 248(1)(b), and Youth Criminal Justice Act 137

Counsel:	Terry Nickerson for the Crown Christa Thompson for the Defence

Gabriel, JPC (orally):

[1] The court has today for sentencing Mr. T.D. He has pled guilty to a number of offences that occurred on July 18th, 2012. These consist of robbery, contrary to section 344, unlawful possession of a 2010 Buick Lacrosse, knowing it was obtained by theft, contrary to section 355(a); unlawful possession of a weapon, contrary to section 88(1); break, enter and commit theft, committed at another residence, contrary to section 348(1)(b); and a section 137.

[2] These offences occurred, under circumstances that have been canvassed by counsel in their very thorough submissions last week, and also in the written briefs that have been filed previously. Although I may not mention each and every fact that has been referenced, or each and every case that counsel have cited, I have considered all of the submissions and all of the authorities to which I've been referred, as well as some other cases.

[3] The facts of this matter can be briefly summarized. Sometime before 5:30 p.m. on July 18th, 2012, T.D. and another individual took a public transit bus from their community of North Preston. They got off in the vicinity of Portland Street,

in Dartmouth, at Eisener Boulevard and went initially to one residence Prince Street, speaking briefly to a female resident on the pretext of determining the bus schedule in the area. Then they went to a neighbouring house.

[4] Their knock at the door was answered by the first victim, an 81-year-old male war veteran suffering from Parkinson's Disease. His car keys were demanded at gunpoint, and when they weren't immediately forthcoming, he was forced into the basement of his home, where he was knocked down and his person was searched. The car keys were found by the accused on the kitchen counter.

[5] T.D. was not the one who wielded the weapon, he was, however, the one who drove the stolen vehicle back to North Preston. During a two to three hour hiatus, he and the other male picked up a few others and they all drove in the stolen vehicle to a Lake Eagle Drive home, where the second victim lives.

[6] The house was broken into, ransacked, and items were stolen. Fortunately, no one was home in the second instance. The individual with whom T.D. had committed the first home invasion was captured on video knocking on the door of the second residence with a gun in his hand. In addition to the stolen items and

the ransacking of the home, some of the possessions were taken from the residence and destroyed.

[7] The accused was the driver of the stolen vehicle. He was not observed, nor is it suggested, that he got out of the vehicle at any time during the second break and enter at the second residence.

[8] The accused has admitted his guilt at the very earliest opportunity. He has a minimal youth record and a somewhat, although not overly, positive pre-sentence report.

[9] He was 15 years old at the time of the offence. His previous record consists of an assault and mischief, both of which occurred on October 9th, 2011, and a mischief which occurred on December 5th, 2011. He was sentenced for all three offences on April 12th, 2012, receiving a conditional discharge and five hours of community service.

[10] For a period of time following that sentence, his maternal grandparents, L. and R.D, (in whose custody he resides), sent him to live in the Niagara Falls

Ontario region with two maternal uncles. It is noted in the Pre Sentence Report that while he lived in Ontario his conduct seems to have improved, his grades in school are said to have picked up, and he was able to complete his grade nine academic year.

[11] On July 14th, 2012, following a visit from his maternal grandparents, he returned with them from Niagara Falls to North Preston, by vehicle, to resume his residence in that community.

[12] The positive changes in T.D.'s life did not, however, survive the transition. He immediately started hanging out with the wrong crowd, and so promptly did the situation deteriorate that the subject offences were committed just four days after he had left Niagara Falls for the drive home to North Preston with his grandparents. Allowing for the length of time that the drive must have taken, he couldn't have been in North Preston any amount of time at all before becoming involved in these very serious offences.

[13] Counsel have referred to a number of cases. These cases fall, broadly speaking, into three categories: offences committed by adults, some of which

relate to home invasion style robberies; youth sentenced for home invasion style robberies; and youth sentenced for non-home invasion style robberies which are nonetheless violent in nature.

[14] Before dealing with some of these cases, a couple of general points need to be made. It is to be noted that, with the advent of Bill C-10, Parliament has made the concepts of denunciation and deterrence relevant for the first time with respect to youth sentences. While there will be plenty of case law noted as to how these concepts interrelate with the other principles in the *YCJA*, it is important to note that they have no application to T.D.'s case. The accused is entitled to the benefit of the legislative scheme that was in place at the time that the offences were committed.

[15] There are, nonetheless, many factors still in play here. There are *Charter* considerations. There are factors identified in sections 38 and 39 and section 3 of the *YCJA*, among others.

[16] The upshot of it all is that I am to consider incarceration of T.D. only as a last resort, and moreover, that I am to impose the least restrictive sentence upon him which is consistent with the sentencing objectives enshrined in the legislation.

[17] The Crown emphasizes the very serious nature of the home invasion and points out that in *R. v. Fraser* (1997), 158 N.S.R. (2d) 163, which dealt with a 19 year old, hence an adult offender, Justice Pugsley, writing for the court, stated in paragraphs 27 to 33:

> I consider that house invasion robbery of this type should attract a sentence greater than that imposed for armed bank robbery.
>
> This was a premeditated, planned attack on a vulnerable victim, conducted in an atmosphere of violence and intimidation. In a town the size of Springhill it would be common knowledge that Mrs. Brown lived alone. The wearing of masks, and the time of day of the invasion, leads to the reasonable inference that Fraser and his accomplice expected her to be at home to assist them in their search for money or valuables.

[18] Now, I hasten to add here, we're not dealing with a crime committed in a community as small as Springhill, and, moreover, there’s no suggestion that T D wore a mask at the time of the commission of the offence.

[19] The court, (in *Fraser),* went on to point out that it did not view the absence of more aggressive physical assault to be a mitigating factor. If it had occurred, however, it would have been a substantially aggravating factor.

[20] Justice Pugsley went on to indicate his agreement with the comments of the Alberta Court of Appeal in *R. v. Matwiy* (1996), 105 C.C.C. (3d) 251, at page 263:

> We are of the view that the home invasion robbery merits a higher starting-point sentence than the armed robbery of a bank or commercial institution. While offences of violence are abhorrent wherever they occur, offences which strike at the right of members of the public to the security of their own homes and to freedom from intrusion therein, must be treated with the utmost seriousness.

[21] The defence points out, among other things, that *Fraser* involved the sentencing of an adult, albeit a young adult, under the *Criminal Code*, and that the Crown's recommendation of a custody and supervision order of 24 months exceeds that imposed in some other home invasion cases involving young offenders under more violent circumstances. It also exceeds sentences imposed for some “non-home invasion” cases, ones in which more violence was involved.

[22] Some similarities and differences exist between many of the cases to which I have been referred and T D’s circumstances.

[23] As noted, *Fraser* was decided under the *Criminal Code,* pursuant to which a different set of sentencing principles, (although there is also overlap), applies. That said, I cannot be unmindful of the gravity of a home invasion, such as that which occurred here, and the other offences which were committed on the same day. These must be considered in conjunction with the Court of Appeal's views as to the relative seriousness with which these actions are to be viewed.

[24] In *R. v. J.R.L.* (2007) N.S.C.A. 62, Justice Roscoe of our Court of Appeal dealt with an appeal from a decision of Judge John MacDougall of this court. A guilty plea to a break and enter, aggravated assault, assault causing bodily harm, pointing a weapon, pointing a firearm and breach of probation, with one prior, netted a 17-year-old youth six months of deferred custody following 16 days of remand time. Justice Roscoe did not disturb the finding of the trial judge, which was to the effect that the best way to ensure long-term protection of the public and rehabilitation of the offender in that case was through community based treatment programs and parental support.

[25] In the unreported case of *R. v. S.W.,* August 17th, 2012, I sentenced a 16-year-old youth to a 45-day custody and supervision order, followed by 12 months probation. Although he was one of a group of individuals who broke into the residence of a known female to steal drugs that were believed to be on the premises, it was considered that he did not know that there would be a gun involved, and was essentially a bystander who was unaware of the acts of violence being perpetrated in another room of the premises. He had an extremely positive pre-sentence report, was involved in a number of pro-social activities, had exceptional insight and empathy into the feelings of the victim, was extremely remorseful, had employment skills and career aspirations, a positive home environment and excellent prospects of rehabilitation. That S.W.'s situation was an unusual one was conceded by counsel, especially by virtue of the ranges of sentence that each side recommended in relation to that particular youth.

[26] The *J.R.L.* and *S.W.* cases to which I have just referred (and a few others to which I have not referred) are the exceptions that prove the rule. Sentencing, particularly with respect to youthful offenders, is not a cookie cutter process. It is an individual exercise. The sentencing regime is flexible enough to recognize extraordinary circumstances in certain cases.

[27] As a matter of fact, our Court of Appeal pointed out in *R. v. S.N.G.*,2007 NSCA 83 (paragraph 33), that the *J.R.L.* case [supra], was “exceptional and extraordinary”, with an unusual constellation of facts. So was my decision in the *S.W.* case to which I just referred. I do not find a similar constellation of facts in T.D.’s case.

[28] The accused has pled guilty to some very serious charges, one of which has aptly been tagged "home invasion". This label, although serving a very useful categorization purpose, does not automatically trigger a particular range of sentence and/or conditions. Sentencing, as I said a few moments ago, is an individual exercise. A youth does not turn into either a cipher or a mere category simply because a tag such as "home invasion" has been applied to one or more of the charges for which he is being sentenced.

[29] What such a reference does do, however, is alert us to the potential of a custodial sentence by virtue of section 39(1) of the *YCJA*. That section lists a number of pre-conditions before a custodial sentence may be considered. The commission of a violent offence is one of them. However, merely because the

court may consider that option, it does not follow automatically that it must be imposed. My consideration is informed by the avowed purpose of the *Youth Criminal Justice Act*, which is stated in section 3. I'm not going to take the time to read section 3 entirely, but some of the principles that are to be gleaned from it tell me that the legislation is intended to "prevent crime by addressing the circumstances underlying a young person's offending behaviour"; "rehabilitate young persons"; "and reintegrate them into society"; ensure that a young person is subject to meaningful consequences, with the object "to promote the long-term protection of the public."

[30] It goes on to say that the measures taken against young persons should reinforce societal values, encourage the repair of harm done to the community, and be meaningful for the individual young person, given his or her needs and level of development.

[31] In *R. v. S.N.G.*, supra, at page 30, our Court of Appeal stated:

> The *YCJA* approach to sentencing is offender-centric. Each case involving the sentencing of a young person is to be decided on an individual basis. Such an approach means that multiple factors pertaining to the particular offence and the particular offender are to be considered in determining sentence. It follows that,

> although parity is one of the many factors to be considered (section 38(2)(b)), determining whether a sentence is within the range of sentences becomes a particularly difficult and delicate exercise.

[32] What meaningful consequences are called for in this case to promote the protection of the public, attempt to assist T.D.'s rehabilitation, address the consequences of his offending behaviour and address the other factors identified in section 3 and the other portions of the *YCJA* to which previous reference has been made?

[33] The defence tacitly (and correctly) acknowledges that restoring T.D. to his home in North Preston (at this time) does not seem like a realistic solution. Although his grandparents are impressive people, and law-abiding ones at that, and they're well respected in their community, there are too many negative external influences being brought to bear on T.D. (which largely stem from his inability to keep away from the wrong crowd) while he's in North Preston.

[34] The defence has indicated that the plan is to put him on a plane immediately and send him back to his uncles, M.D. and T.D., in Niagara Falls. He is said to have done well there during the two and a half months that he stayed with them during the late spring, early summer term.

[35] I have several concerns in relation to this plan and the plan's ability to contribute in any meaningful way to the sentence which I must impose here. The first is that I know very little about it. Neither uncle presented evidence in either affidavit or *viva voce* form. The Crown contends that both have a criminal record listed on JEIN. This too does not help me very much as I don't know what the record consists of, I don't know what the offences were and I don't know when they were incurred. I do know that it's not sufficient to say (as the Crown implied) that, because they're involved in the nightclub industry, that they may have gang or organized crime connections.

[36] I cannot comment on this plan other than to repeat that many of the specifics are simply unavailable. I don't even have T.D.'s report card while at school in North Preston grade nine or his school marks from Ontario to provide me with some sort of a yardstick to measure the alleged academic improvement that has been said to have taken place while he was up there. I have a vague contention that his grades picked up when he was earlier in Niagara Falls and he didn't appear to get in any more trouble during the relatively short period of time that he was there.

[37] What we do know is that both uncles work in the nightclub industry. What hours this entails and who will be home to supervise T.D. if he were to reside with them is an obvious question. Although he appeared to some of the referral sources in the PSR to have done better during the short period he was with them in Niagara Falls, he obviously did not learn lessons of any more than transitory significance. He offended within a day or so of his return to North Preston. In fact, one possible, perhaps cynical, interpretation of his conduct would be to observe that, upon his return to Nova Scotia, he was arguably worse than when he went off to Ontario. He was ready almost immediately to participate in violent offences that had the potential to be very serious, involving guns, and he had never shown such a propensity before that.

[38] In this case, I have considered all of the positive features in T.D's case, which include his youth; the fact that there is some prospect for rehabilitation, although nowhere the prospect that was noted, for example, in the *S.W.* case [supra]; the fact that he's expressed remorse, pled guilty early, and this is the first time that crimes anywhere near this magnitude have appeared on his record.

[39] On the aggravating side, he was a willing participant in offences which included a home invasion, the invasion appears to have been something that was planned, (perhaps not the specific residence but he planned to participate in a home invasion), he planned that a gun would be involved, and it involved knocking down a particularly vulnerable and helpless man in the privacy of his own home, the pointing of a firearm at him, the searching of his residence until his keys were found, the theft of his vehicle and the operation of it, and the accused's willingness to participate mere hours later in a break and enter in which a gun was again involved. Obviously, the potential existed for very serious harm to be inflicted in this second offence, as well.

[40] I have considered all of the principles and objectives encompassed in the *YCJA*. I am of the view that the only way to address T.D.'s rehabilitation is a custodial sentence. I would have considered a total period of 14 months under a custody and supervision order on all charges, followed by a 10 month period of probation on terms that I will note in a moment, to be appropriate.

[41] That said, I recognize he has spent approximately 3 months on remand for which, after hearing submissions from counsel on the point, I credit him with a

total of 5 months. Therefore, the net result of the sentence that I impose will see T.D. serve a further 9 months under a Custody and Supervision Order, to be spent two thirds in custody, and the remaining one third under supervision in the community.

[42] With respect to the 10 month period of probation (which will commence on the expiration of the custody and supervision order) there will be the usual statutory and reporting conditions.

[43] There will also be a requirement that T.D. reside at [...], North Preston, or a place that the provincial director or youth worker may direct, such that if sufficient information is provided to the youth worker about the premises in Niagara Falls, and the other factors at play here, he could (in the Supervisor's discretion) arrange for T.D. to spend a portion of that period of time in those premises with his uncles, but again, it would be contingent upon sufficient factors being made available to make an informed decision.

[44] There will be a curfew observed between 10 p.m. until 6 a.m. the following day during the period of probation. He will remain away from the Prince Street

and Lake Eagle Drive residences where the offences occurred, and there will be no contact or attempt to contact O. M., W. W., W. W. and/or G. M..

[45] He will not associate with or be in the company of the following persons: L.S., D.B., J.T.. He will not associate with or be in the company of any persons known to have a youth or criminal record except as may be incidental to school attendance or employment.

[46] He is not to take, use or possess alcoholic beverages and, except when legally prescribed by his doctor, any drug or controlled substance as defined by the *CDSA*.

[47] He'll not have in his possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance or any weapon as defined by the *Criminal Code*.

[48] There will be a weapons prohibition for two years, and a DNA order. I do not feel, under the circumstances, that a driving prohibition is called for.

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Oral Decision: November 2, 2012

Charges: Criminal Code ss. 344, 355(a), 88(1), 248(1)(b), and Youth Criminal Justice Act 137

Counsel: Terry Nickerson for the Crown
Christa Thompson for the Defence

Erratum:

Page 16, paragraph 41, first line, where it reads "That said, I recognize the approximately four months of remand time that's been spent by T. D. already, and I credit him with this time at a factor of 1.5 times with the total credit being five months.", it should read "That said, I recognize he has spent approximately 3 months on remand for which, after hearing submissions from counsel on the point, I credit him with a total of 5 months."