

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Kirk*, 2013 NSPC 55

Date: 20130404

Docket: 2564559, 2563463,
2563462, 2563459

Registry: Pictou

Between:

Her Majesty the Queen

v.

Keith Alexander Kirk

Judge: The Honourable Judge Del Atwood

Heard: 4 April 2013 in Pictou, Nova Scotia

Charges: Section 348(1)(a) *Criminal Code of Canada* x 2
Section 348(1)(b) *Criminal Code of Canada* x 2

Counsel: Bill Gorman, for the Nova Scotia Public Prosecution
Service
Stephen Robertson, Nova Scotia Legal Aid Commission,
for Keith Alexander Kirk

By the Court:

[1] The court has for sentencing Keith Alexander Kirk. Mr. Kirk elected to have his charges dealt with in this court and entered guilty pleas at a very early opportunity in relation to indictable charges of break and enter with intent into the Abercrombie Volunteer Fire Department, break and enter and commit theft involving the Trenton Fire Department, break and enter and commit theft into the First United Baptist Church, and, finally, break and enter with intent into the First Presbyterian Church on MacLean Street in New Glasgow.

[2] The mitigating factors are that Mr. Kirk is authentically and truly remorseful for his actions. When fully sober and presented with the opportunity to reflect on his life, Mr. Kirk understands the self-destructive course that he has pursued over much of his youth and pretty much the entirety of his adult life, and he recognizes that he must overcome his addiction to alcohol if he is to have any hope of living the life of a productive, non-offending member of society.

[3] I take into account, as well, Mr. Kirk's early election and guilty pleas. I recognize, as well, that Mr. Kirk turned himself in and provided an incriminating

statement to police; I do observe, however, that the effect of this is lessened somewhat by the overwhelming array of circumstantial evidence that implicated Mr. Kirk in these break and enters.

[4] There is no evidence before the court of Mr. Kirk engaging in premeditation or planning. I accept that these were spur-of-the-moment offences.

[5] In imposing a sentence, the court must not lose sight of these mitigating factors, and the sentence imposed by the court must not be one that would crush the prospect of rehabilitation for this 26-year old young man.

[6] I take into account the principles of proportionality and restraint as set out in ss. 718, 718.1 and 718.2 of the *Criminal Code*.

[7] With respect to aggravating factors, I observe that two of the break and enters before the court occurred while Mr. Kirk was subject to parole while still serving a 2010 federal sentence imposed for, among other things, break and enter. I observe that two of the charges involved significant property damage and loss to the victimized community organizations. I would note that all of the break and

enters—two fire halls and two churches—targeted community-supported entities. I do agree with the submissions made by the prosecutor that volunteer fire department fire halls and churches play important roles in community vitality.

[8] Obviously, fire halls are involved in activities crucial to community welfare: fire prevention and fire fighting, yes; but community fire halls are used also for functions that are beneficial to community spirit and service. The court must recognize that.

[9] The court takes into account, as well, the important role that churches play in people's lives. Churches are venues where members of the community gather to grieve losses, or to celebrate occasions of great joy. They are often culturally and historically significant in their localities.

[10] Any time a break and enter occurs, those who use or occupy the victimized premises suffer a substantial loss in their sense of security and safety.

[11] These break and enters involved an extensive diversion of policing resources.

[12] I consider as aggravating Mr. Kirk's criminal record which includes, by my reckoning based on the JEIN offender summary, 27 prior findings of guilt: four 733.1 breaches of probation; 11 prior findings of guilt as an adult for 348 and 349 offences. I don't have the CPIC record referred to by the prosecutor, but even without that, the array of prior convictions is, indeed, substantial and alarming.

[13] I do take into account as a mitigating factor that, while serving previously imposed sentences, Mr. Kirk has taken steps to attempt to deal with his alcohol addiction. He provided the author of the pre-sentence report update with a certificate for the National Substance Abuse Program (High Intensity) which he completed in March of 2011. However, it is alarming to the court that very shortly after being admitted to parole in August of 2011, Mr. Kirk, unfortunately, was involved in a drinking-related parole violation and wound up being parole-revoked.

[14] Mr. Kirk made a very impassioned submission to the court that he has never been given a chance. However, the court observes, in reviewing Mr. Kirk's record, that among the early interventions that were attempted by the court were

several probation orders. Mr. Kirk was, in addition to probation, placed on a conditional sentence order in September of 2008. The JEIN report records that, notwithstanding that conditional sentence order of 10 September 2008, Mr. Kirk was back before the court ten days later as a conditional-sentence violator; the conditional sentence was not collapsed, at least not fully, and Mr. Kirk was returned to the community. He was then back before the court on 13 November 2008 for another breach of conditional sentence. Then in 2009, when Mr. Kirk was before the court for two counts of breach of probation, he was given a suspended sentence and placed on a further probation order. In June of 2009, when back before the court for two further counts of breach of probation, Mr. Kirk was placed on another conditional-sentence order; according to, again, the JEIN report, Mr. Kirk wound up violating that conditional sentence and was back before the court on 25 June 2009, placed on an undertaking pending a breach hearing. Ultimately, the conditional-sentence-breach-disposition hearing was conducted on the 22 July 2009; the conditional sentence was not changed or collapsed, and Mr. Kirk was returned to the community. Five days later, on 27 July 2009, Mr. Kirk was back before the court as a conditional-sentence violator; on 12 August 2009, a breach hearing was held, and Mr. Kirk's conditional-sentence order was terminated. In May of 2010, shortly after the expiration of the collapsed sentence,

Mr. Kirk was back before the court and was given his federal sentence of 882 days in relation to an array of charges, mostly involving break and enter, but also charges of breach of probation.

[15] Accordingly, the court simply cannot accept the proposition that Mr. Kirk has never been given a chance. In fact, Mr. Kirk has been given many chances. Although the court accepts that Mr. Kirk wants to rid himself of his alcohol addiction, and although his pre-sentence report update refers to extensive interventions that have been attempted to try to control his addiction, it is simply the case that the court cannot wait any longer for Mr. Kirk to decide when he will be committed fully to achieving his sobriety and staying out of serious trouble with the law.

[16] The prosecution has referred appropriately to *R. v. Adams*¹, as well as the decisions in *R. v. Leaver*² and *R. v. Zong*.³ There is, indeed, a two-to-three year

¹2010 NSCA 42.

²[1986] N.S.J. No. 324 (A.D.).

³[1986] N.S.J. No. 207 (A.D.).

benchmark for break-and-enter-related offences, and over the past couple of days, this court has had occasion to observe that benchmark in the imposition of sentence for break-and-enter-related offences, most recently in the *Rushton* sentencing yesterday.

[17] What Mr. Robertson has said may very well be correct. It may very well be that the long-term incarceration of Mr. Kirk might not accomplish his specific deterrence. Having said that, having reviewed Mr. Kirk's record, having reviewed the resources that have been available to him, both out of custody and in custody that have plainly not succeeded, the court is unable to conclude that a lenient sentence involving either a short term of incarceration or something involving the service of a sentence in the community—and I do observe that indictable break and enter is no longer conditional-sentence eligible—would be appropriate for the protection and safety of the public. The sentence that the court imposes must not only denounce and deter this particular offender from engaging in this type of conduct—specifically, break and enter with significant victim impact upon community-supported properties—the court must also keep sight of the need for general deterrence; the sentence imposed here today ought to ward off like-minded

individuals who would prey upon community-supported properties, so that all should understand that the penal consequences will be significant.

[18] The court is satisfied, as well, that the only means of accomplishing the long-term protection and safety of the public is, unfortunately, to remove Mr. Kirk from society for a substantial period of time.

[19] I do intend to take into account the principle of totality, and I do intend to give Mr. Kirk credit for the 46 days that he has spent on remand. Applying the principles set out in *Adams*.⁴ I will put on the record first of all the individual sentences the court would have imposed had each charge stood alone. This will not be the final sentence. This is simply a preliminary computation which the court is required to make in accordance with *Adams*. I will then factor in totality and remand credit in coming up with a final sentence.

[20] In relation to the break and enter into the Trenton Fire Department, had that stood alone, the court would have imposed a sentence of three-years' imprisonment.

⁴*Supra*, note 1, at paras. 19-27.

[21] In relation to the break and enter into the First United Baptist Church, had that offence stood alone, the court would have imposed a sentence of three-years' imprisonment.

[22] In relation to the First Presbyterian Church, had that charge stood alone, given the relatively low level of invasion of that property, the court would have imposed a sentence of two-years' imprisonment.

[23] In relation to the break and enter into the Abercrombie Volunteer Fire Department, had that charge stood alone, the court would have imposed a sentence of three-years' imprisonment.

[24] Taking into account the principles of totality and the period of time spent in remand, the final sentence of the court is as follows, and I do believe consecutive sentencing is appropriate here, given the fact that this was not a short-duration spree, but a protracted array of serial break and enters.

[25] The final sentence of the court will be as follows:

[26] In relation to case #2563459, the break and enter into the Trenton Fire Department, the sentence is two-years' imprisonment.

[27] In relation to case #2563462, the break and enter into the First United Baptist Church, the sentence of the court is two-years' imprisonment, to be served consecutively.

[28] In relation to the break and enter into the First Presbyterian Church, case #2563463, a one-year term of imprisonment, consecutive service.

[29] And in relation to the break and enter into the Abercrombie Volunteer Fire Department, taking into account totality, for which the court would have reduced the sentence by one year, and giving Mr. Kirk credit for the 46 days of remand, the sentence of the court in relation to that charge will be one year, 10 months and 14 days to be served consecutively.

[30] The court will order a secondary-designated-offence DNA-collection order in relation to all charges.

[31] There will be no victim-surcharge amounts imposed as the court is satisfied, given the duration of the sentence, that Mr. Kirk would not have the ability to pay any surcharges. Although I certainly recognize the loss that was incurred by the Trenton Fire Department, given Mr. Kirk's very limited means and the duration of the sentence that the court has imposed here today, the court declines to impose the requested Section 738 restitution order.

[32] The sentence of the court in total is six years, ten months and fourteen days.

[33] Mr. Kirk, I'll have you go with the sheriffs, please, sir.

J.P.C.