PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Wilson*, 2022 NSPC 43

Date: 20221130
Docket: 8484396, 8484397, 8536678, 8536681, 8536682, 8536839, 8536842, 8526548, 8526549, 8526552, 8526556, 8553576, 8589595, 8589597, 8589598, 8589599
Registry: Pictou

Between:

His Majesty the King

v.

John Henry Wilson

SENTENCING DECISION

Judge:	The Honourable Judge Del W Atwood
Heard:	2022: 22, 30 November in Pictou, Nova Scotia
Charge:	Sections 86, 91, 145, 320.14, 320.16, 348, 351 *Criminal Code of Canada* Section 4, 5 *Controlled Drugs and Substances Act*
Counsel:	Bronwyn Duffy for the Public Prosecution Service of Canada Herman Felderhof for the Nova Scotia Public Prosecution Service Robert M Sutherland for John Henry Wilson

By the Court:

Synopsis

[1] John Henry Wilson is before the court for an array of conveyance, property, controlled-substance, and administration-of-justice offences committed between 8 November 2020 and 6 August 2022.

[2] The federal prosecutor seeks a term of imprisonment of between 18 months and 2 years for the controlled-substances charges; the provincial prosecutor seeks a term of imprisonment of between 30-36 months for the *Criminal Code* charges.

[3] Defence counsel seeks a sentence of 30 months for all charges.

[4] All counsel are agreed that Mr Wilson is entitled to a remand credit; I reckon that credit entitlement as 180 days or 6 months.

[5] For the reasons that follow, the court sentences Mr Wilson to a term of imprisonment of 5 years, less the remand credit of 6 months, along with ancillary orders and restitution orders.

Summary of charges

Case	Charge (All cases under the *Criminal Code*	Process (S=summary I=indictable	Circumstances of offence

	unless specified otherwise.)		
8484396	320.14(1)(a) Drug-impaired operation of conveyance.	S Maximum penalty as in § 787; minimum fine of $1000; mandatory § 320.24 prohibition of a minimum of 1 year and up to 3 years.	8 Nov 2022: Mr Wilson arrested after fleeing scene of 2-vehicle collision. Fails SFST. Drug evaluation determines controlled substance impairment. Urinalysis reveals presence of 3 impairing substances.
8484397	320.16(1) Leaving the scene of an accident.	S No minimum penalty; maximum as in § 787; discretionary prohibition up to 3 years.	See case 8484396.
8536678	348(1)(b) Break-and-enter commercial premises.	I Maximum sentence of 10 years; secondary-designated DNA offence.	2 Aug 2021: Mr Wilson and 2 accomplices drive to a commercial property with a rental vehicle. While disguised with a hoodie and wearing gloves, Mr Wilson uses a tool to break open a padlock. Once inside the business, Mr Wilson and accomplices steal five oil tanks valued at $8768.75, which Mr Wilson later sold online.
8536681	351(1)(a) Possession of break-in instruments.	I Maximum sentence of 10 years;	See case 8536678.

		secondary DNA offence.	
8536682	351(1)(a) Disguise with intent.	Maximum sentence of 10 years; secondary DNA offence.	See case 8536678.
8536839	348(1)(b) Break-and-enter commercial premises.	I Maximum sentence of 10 years; secondary-designated DNA offence.	24 August 2021: Mr Wilson uses a chain saw to cut through a chain-link fence at a commercial property, and steals 10 oil tanks; admits to police taking 2; Mr Wilson informs police that "they're easy to get rid of." Business loss: $12591.81.
8536842	351 Possession of break-in implements.	I Maximum sentence of 10 years; secondary DNA offence.	See case 8536839.
8526548	5(2) *CDSA* Possession of cocaine for the purposes of trafficking	I Maximum sentence of life imprisonment. Secondary DNA offence. Mandatory § 109 prohibition order.	1 Sep 2021: Warranted search of Mr Wilson's home leads to seizure of: • 3.5 g cocaine; • digital scale and score sheets; • 10g methamphetamine for personal use; • two unlicensed and unsecured firearms; • 9mm ammunition.
8526549	4(1) *CDSA* Possession of methamphetamine.	I	See case 8526548.

		Maximum sentence of 7 years.	
8526552	86(2) Unsafe storage of firearms.	S No minimum penalty; maximum as in § 787; discretionary 110 prohibition.	See case 8526548.
8526556	91(1) Unlicensed possession of a firearm.	S No minimum penalty; maximum as in § 787; discretionary 110 prohibition.	See case 8526548.
8553576	145(2)(b) Failure to attend court.	No minimum penalty; maximum as in § 787.	17 March 2022: Mr Wilson failed to attend court as required.
8589595	91(1) Unlicensed possession of a firearm.	S No minimum penalty; maximum as in § 787; discretionary 110 prohibition.	6 August 2022: Police conduct a warranted search of Mr Wilson's residence and find two unsecure firearms, one in the living room and one in the dining room. At the time, Mr was subject to a firearm prohibition in undertaking # 232066.
8589597	86(2) Unsafe storage of firearms.	S No minimum penalty; maximum as in § 787;	See case 8589595

		discretionary 110 prohibition.	
8589598	145(4) Breach of undertaking.	S No minimum penalty; maximum as in § 787.	See case 8589595.
8589599	145(2)(a) Failure to attend court.	S No minimum penalty; maximum as in § 787.	28 July 2022: Mr Wilson fails to attend court and a bench warrant is issued.

Circumstances of Mr Wilson

[6] The court has a presentence report [PSR] dated 15 November 2022. Defence counsel presented the court with biographical information on Mr Wilson. Mr Wilson made an allocution to the court.

[7] Mr Wilson is 46 years old.

[8] He lived at home until he was 15 years of age, and then began living independently. His childhood and adolescence were mostly unremarkable; however, a neighbourhood youth sexually abused him.

[9] Mr Wilson ended up estranged from his parents.

[10] He completed adult high school in 2011; he enrolled in an electrical-engineering program in 2014, and he has completed part of the program's requirements.

[11] He is in a common-law relationship with a person who was an accomplice in the 2 August 2021 break-in.

[12] Mr Wilson has an adult child of an earlier relationship.

[13] He worked as a train operator for twenty years. While on the job, he witnessed a collision which led to a fatality; this has a traumatic effect upon Mr Wilson.

[14] Mr Wilson began experimenting with controlled substances and beverage alcohol when he was 12 years old; he has experienced chronic substance-use disorder since then. His substances of choice are methamphetamine and opiates.

[15] Mr Wilson has sought clinical intervention in the past. He completed a 3-month program at Talbot House in 2019, and attended Narcotics Anonymous after that.

[16] Mr Wilson has been substance-free while on remand.

[17] The PSR discloses a remote-in-time prior record. Mr Wilson's last findings of guilt were in 2005, when he received a 2 year, 3 month federal sentence for break-and-enter and theft-over offences; prior to 2005, he had been sentenced to fines, probation, and short terms of imprisonment.

[18] Mr Wilson entered guilty pleas to the charges before the court.

Circumstances of the offences

[19] The break-and-enter offences involved some degree of planning and premeditation: Mr Wilson forcibly entered commercial properties looking for oil tanks which he knew were readily marketable. He brought tools to aid his entry into these businesses. He was disguised on one occasion. The property was not recovered. These sorts of offences have significant impact on local businesses and the court has seen a significant spike in this sort of activity over the past three years: thefts of industrial, utility, construction, automotive or consumer metal for resale in order to finance controlled-substance use.

[20] The § 5(2) *CDSA* count would be situated within the petty-retailer category of trafficking as that category was described in *R v Fiefield*, [1978] NSJ No 42 at ¶ 7; I believe that the court may infer safely from the contents of the PSR that Mr Wilson sold cocaine to support his methamphetamine use.

Mitigating factors

[21] Mr Wilson pleaded guilty. A guilty plea is a mitigating factor. Failure to consider a guilty plea as a mitigating factor can be an error in principle: *R v Friesen*, 2019 SCC 100 at ¶ 164 [*Friesen*]. While it has been suggested that a guilty plea offered in the face of overwhelming evidence will not necessarily attract so great a discount of sentence as one tendered in other circumstances (*R v Layte*, [1983] OJ No 2415 at ¶ 8 (Co Ct)), in my view, guilty pleas in cases involving warranted searches—which help conserve limited forensic resources in these challenging times of pandemic—must be accorded significant weight.

Aggravating factors

[22] The break-ins were planned and premeditated, and committed for gain. These were not impulsive act of vandalism, but calculated schemes aimed at stealthy stealing for resale. The impact on business operations must have been significant.

[23] The § 5(2) *CDSA* count does not implicate any statutory aggravating factors in § 10(2) of the CDSA.

General principles of sentencing

[24] In Canadian law, the fundamental purpose of sentencing is to protect society and to contribute, along with crime-prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more objectives, including denunciation, deterrence and rehabilitation: § 718 of the *Code*, and *R v Bissonnette*, 2022 SCC 23 at ¶ 45 [*Bissonnette*]; § 10 of the *CDSA* identifies the same factors, "while encouraging rehabilitation and treatment in appropriate circumstances."

[25] All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing law, and is now codified as the fundamental principle of sentencing in s. 718.1 of the *Code*: *Friesen* at ¶ 30; *R v Parranto*, 2021 SCC 46 at ¶ 10 [*Parranto*] (while the panel in *Parranto* were divided on the issue of starting-point sentencing—a methodology favoured by the majority—they were unified on the organizing principle of proportionality).

[26] Section 718.2 provides a non-exhaustive list of secondary principles that must guide the sentencing process. These principles include:

- the consideration of aggravating and mitigating circumstances,

- the principles of parity and totality,
- and the instruction to consider all available sanctions other than imprisonment that are reasonable in the circumstances.

[27] Parity requires that similar offenders who commit similar offences in similar circumstances receive similar sentences. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality: *Friesen* at ¶ 32; *Parranto* at ¶ 11.

[28] In applying and weighing these secondary sentencing principles, the court must ensure that the resulting sentence respect the fundamental principle of proportionality: *R v Nasogaluak*, 2010 SCC 6 at ¶ 40.

[29] Proportionality in sentencing is an essential factor in maintaining public confidence in the fairness and rationality of the criminal-justice system. It assures the public that the person to be sentenced deserved the punishment that was imposed. Proportionality has a restraining function, as it must guarantee that a sentence is individualized, just and appropriate. It is a cardinal principle: *Bissonnette* at ¶ 50.

[30] The sentencing component of denunciation expresses society's condemnation of the offence that was committed, and is the means by which society communicates its moral values. However, the denunciation criterion must be weighed carefully, as it could, if applied without restraint, be used to justify sentences of unlimited severity: *Bissonnette* at ¶ 46.

[31] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances. Furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances. These principles of restraint are set out in ¶ 718.2 (d) and (e) of the *Code*.

[32] In *R v Gladue*, [1999] SCJ 19 at ¶ 31 to 33, and 36, the Court held that the statutory requirement that sentencing courts consider all available sanctions other than imprisonment was more than merely a codification of existing law. Rather the provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.

[33] The application of restraint criteria does not oust consideration of the other principles of sentencing in § 718-718.2; there is no such thing as a restraint-at-all-costs principle: *R v Proulx*, 2000 SCC 5 at ¶ 96. Put another way, restraint

and rehabilitation do not trump deterrence. All principles and objectives of sentencing must be considered by a sentencing court in arriving at a fit sentence: *R v Howell*, 2013 NSCA 67 at ¶ 16. However, although all factors might be in play, it does not follow that each factor must be assigned equal weight; rather, a delicate balancing of the various sentencing principles and objectives is called for, in line with the overriding principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *R v Suter*, 2018 SCC 34 at ¶ 4.

Consecutive and concurrent sentencing

[34] The choice of consecutive or concurrent sentencing is governed by legal principles, with the selection of consecutive sentencing being informed primarily by § 718.3(4) of the *Code*. The general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences: *Friesen* at ¶ 155; *R v Campbell*, 2022 NSCA 29 at ¶ 29-35. Courts have recognized that even manifold offences might be part of "a single criminal adventure": *R v Laing*, 2022 NSCA 23 at ¶

53-54 [*Laing*]; "one continuous criminal act": *R v Oldham* (1975), 11 NSR (2d) 312 (AD) at ¶ 13 (a principle recognized but not applied in that case, as Oldham's offences were done a week apart); "one single criminal enterprise": *R v Brush* (1975), 13 NSR (2d) 669 (A.D.) at ¶ 9; "part of a linked series of acts within a single endeavour": *R v Potts*, 2011 BCCA 9 at ¶ 88, leave to appeal refused, [2011] SCCA No 172.

[35] In imposing sentences for multiple offences, the court should make three sequential determinations: (1) the sentence per offence apart from concurrency and totality, (2) whether the sentences should be concurrent or consecutive under the general principles of concurrency, and (3) whether the cumulative sentence should be reduced under principles of totality—*R v Adams*, 2010 NSCA 42 at ¶ 23. A final step would require allocating remand credit.

Imposing sentences greater than those recommended by the prosecution

[36] Sentencing judges presiding over contested sentencing hearings are required to notify counsel if they are considering imposing a sentence greater than that sought by the prosecution, and should provide counsel an opportunity to make further submissions—*R v Nahanee*, 2022 SCC 37 at ¶ 43 [*Nahanee*]. The court will not be exceeding the recommendations of the prosecution in this case.

Ranges applicable to trafficking-related offences

[37] Trafficking in Schedule I substances has been characterised authoritatively as a serious offence, carrying significant if not staggering health-care and law-enforcement costs, one that tears at the very fabric of society: *Parranto* at ¶ 91; *R v Lloyd*, 2016 SCC 13 at ¶ 26, rev'g 2014 BCCA 224 [*Lloyd*]; *R v Greyeyes*, [1997] 2 SCR 825 at ¶ 6; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, at ¶ 79-80, in a minority opinion which dissented on an unrelated issue. Having said this, the court must avoid extravagant, straw-man reasoning: Mr Wilson's role in this national epidemic is microscopic.

[38] In *R v Joyce*, 2022 NSPC 40 at ¶ 32-43, I reviewed the legislative history of trafficking-related penalties, and some frequently applied sentencing principles.

[39] In *R v Murphy*, 2019 NSCC 105, the Court briefed the relevant authorities thoroughly, and concluded that the normal range of sentence for small, petty retailers in cocaine was 18-30 months; see also *R v LeBlanc*, 2019 NSSC 192 at ¶ 22. I accept this range as correct, with the caveat that general descriptive or prescriptive ranges should speak solely to the gravity of an offence—in this case, low-level, petty-retail trafficking in a Schedule I substance—and should

not be taken as including the characteristics of an archetypal offender: *Parranto* at ¶ 47.

Ranges applicable to break-and-enter for profit, disguise and possession of break-in instruments

[40] Denunciation and deterrence must be emphasised in imposing sentence for profit-motivated break-and-enter offences: *R v Adams*, 2010 NSCA 42, which restated, at ¶ 29, the long-followed 3-year benchmark. See also *R v McAllister*, 2008 NSCA 103 at ¶ 38. Offences involving possession of break-in instruments and disguise—when not coupled with violent offences such as home invasion and robbery—will generally attract sentences in the 2-3 month range—*R v MacLean*, 13 Jun 2013, case 2536967 (PC), conviction aff'd 2014 NSCA 85.

Ranges applicable to weapons offences

[41] Unsafe-storage and unlicensed-possession cases will typically attract lower sentences than those involving the illegal use of a firearm—see *R c Denis*, 2020 QCCQ 2305, which resulted in a suspended sentence for possession of an illegal firearm heirloom. This is a rational distinction: the illegal use of a firearm projects a greater risk of danger to the community than mere unsafe

storage or unlicensed possession. However, courts will tend to treat storage and possession cases more seriously when they are connected to someone engaged in controlled-substance trafficking—see *R v Saoumaa*, 2019 QCCQ 3852 and *R v Cleary*, 2020 NSSC 9: 6-month sentences imposed for careless-storage charges linked to controlled-substance and other illegal activity.

Ranges applicable to administration-of-justice offences

[42] Charges involving bail violations or the failure to attend court will attract lower-range sentences unless they involve substantive criminal activity in addition to the violation of release terms—see *R v Young*, 2014 NSCA 16 at ¶ 27.

[43] A breach of a court order will normally attract a consecutive sentence, even if the conduct that is the basis of the breach is connected directly to an offence for which a sentence is to be imposed: *R v Harvey*, [1993] NSJ No 211 (CA) [*Harvey*]; *R v BLL*, [1989] NSJ No 12 [*BLL*]; *R v McKenna*, 2014 NSPC 99 at ¶ 8-10, aff'd 2015 NSCA 58; *R v Lewis*, 2012 NLCA 11 at ¶ 78. However, in cases when a substantive criminal charge is linked to a breach count, the court must be cautious not to double tally the effect of the breach; if a breach is penalized by a § 145 charge, it cannot be treated as an aggravating factor in

sentencing for an offence committed at the same time as the breach—see *R v Stewart*, 2016 NSCA 12 at ¶ 27.

Ranges applicable to conveyance offences

[44] Mr Wilson was found guilty of four conveyance-related offences between 1996 and 1999, over two decades in the past. The prosecution took the very fair approach of not tendering notice of greater penalty. Given the operation of the gap principle—*R v Bernard*, 2011 NSCA 53 at ¶ 33-42—I find no reason to depart from the usual first-offence-level penalties of fines for the 320.14(1)(a) and 320.16(1) charges.

R v Adams first step: preliminary determination of a fit sentence for each offence

[45] The following individual sentences are appropriate; this is an *Adams* first-step calculation, and not the final sentence:

- 8484396 320.14(1)(a)—Fine of $1000.
- 8484397 320.16(1)—Fine of $500.
- 8536678 348(1)(b)—36-month term of imprisonment.
- 8536681 351(1)(a)—2-month term of imprisonment.
- 8536682 351(1)(a)—2 month term of imprisonment.

- 8536839 348(1)(b)—36-month term of imprisonment.
- 8536842 351(1)(a)—2-month term of imprisonment.
- 8526548 5(2) *CDSA*—24-month term of imprisonment.
- 8526549 4(1) *CDSA*—1-month term of imprisonment.
- 8526552 86(2)—3-month term of imprisonment.
- 8526556 91(1)—3-month term of imprisonment.
- 8553576 145(2)(b)—1-month term of imprisonment.
- 8589595 91(1)—3-month term of imprisonment.
- 8589597 86(2)—3-month term of imprisonment.
- 8589598 145(4)—1 month term of imprisonment.
- 8589599 145(2)(a)—1 month term of imprisonment.

R v Adams second step: consecutive or concurrent sentencing

[46] The offences of 2 August 2021 (cases 8536678, 8536681 and 8536682) are part of a single transaction, calling for concurrent sentences. The same applies to the offences of 24 August 2021 (cases 8536839 and 8536842), 1 September 2021 (cases 8526548, 8526549, 8526552, and 8526556), and 6 August 2022 (cases 8589595 and 8589597; the breach of undertaking by possessing firearms,

case 8589598, should attract a consecutive sentence). Each of these sets of offences represent separate and distinct crimes and call for consecutive sentences.

[47] This results in a second-step preliminary calculation as follows:

- 8484396 320.14(1)(a)—Fine of $1000.
- 8484397 320.16(1)—Fine of $500.
- 8536678 348(1)(b)—36-month term of imprisonment starting point.
- 8536681 351(1)(a)—2-month term, concurrent.
- 8536682 351(1)(a)—2-month term, concurrent.
- 8536839 348(1)(b)—36-month term, consecutive.
- 8536842 351(1)(a)—2-month term, concurrent.
- 8526548 5(2) *CDSA*—24-month term, consecutive.
- 8526549 4(1) *CDSA*—1-month term, concurrent.
- 8526552 86(2)—3-month term, concurrent.
- 8526556 91(1)—3-month term, concurrent.
- 8553576 145(2)(b)—1-month term, consecutive.

- 8589595 91(1)—3-month term, consecutive.
- 8589597 86(2)—3-month term, concurrent.
- 8589598 145(4)—1 month term consecutive.
- 8589599 145(2)(a)—1 month, consecutive.

[48] This would result in a sentence of 102 months or 8.5 years, which would be substantially in excess of the 5-year totals recommended by the prosecution, although not necessarily unduly long or harsh.

R v Adams third step: is the cumulative sentence unduly long or harsh or in excess of the sentence recommended by the prosecution?

[49] The 102 month second-step total operates as the baseline for the third step, which requires the court to determine whether there should be a sentence reduction under the third step, as mandated in the restraint provisions in 718.2(c) of the *Code—Laing* at ¶ 35.

[50] At this stage, the court is assessing totality. The option of concurrency is front-and-centre in the third step. But the test differs from the second *Adams* step. At the second-step stage, it is no longer an issue whether the court is dealing with a single criminal adventure. Rather, the court must assess whether the cumulative sentence is "unduly long or harsh", an outcome which must be

avoided according to ¶ 718.2(c). If so, the cumulative sentence should be lessened. That adjustment maybe achieved by a reduction of individual sentences, or concurrency or both, provided that the final sentence remain proportionate—*Laing* at ¶ 45. A further restraining factor is the sentencing recommendation made by the prosecution.

[51] With this binding guidance and that of *Nahanee* in mind, the final sentence of the court is as follows:

- 8484396 320.14(1)(a)—Fine of $1000, 5 years allowed for payment; a 1-year-plus-4.5-year driving prohibition is imposed under ¶ 320.24(2)(a).

- 8484397 320.16(1)—Fine of $500, 5 years allowed for payment; given the prohibition ordered for case 8484396, a discretionary order in this case is not required.

- 8536678 348(1)(b)—36-month term of imprisonment starting point. A secondary-designated-offence DNA order (to include cases 8536839 and 8526548). A restitution order under § 738 of the *Code* in favour of Emco Corp 158 Terra Cotta Dr, New Glasgow NS $$8768.75.

- 8536681 351(1)(a)—2-month term, concurrent.

- 8536682 351(1)(a)—2-month term, concurrent.

- 8536839 348(1)(b)—36-month term, concurrent. A § 738 restitution order in favour of Wolseley Mechanical, 73 Park St, New Glasgow NS $ 12,591.81.

- 8536842 351(1)(a)—2-month term, concurrent.

- 8526548 5(2) *CDSA*—24-month term, less a 6-month remand credit, for a sentence of 18 months, consecutive. The credit is to be endorsed on the warrant of

committal and on JEIN. A 10-year-plus-4.5-year/lifetime § 109(4) order is granted. Contraband is forfeited.

- 8526549 4(1) *CDSA*—1-month term, concurrent.

- 8526552 86(2)—3-month term, concurrent. Firearms are forfeited. Given the § 109(4) order for case 8526548, I find it unnecessary to order § 110 orders for the firearms offences.

- 8526556 91(1)—3-month term, concurrent. Firearms are forfeited.

- 8553576 145(2)(b)—1-month term, concurrent.

- 8589595 91(1)—3-month term, concurrent. Firearms are forfeited.

- 8589597 86(2)—3-month term, concurrent. Firearms are forfeited.

- 8589598 145(4)—1 month term concurrent.

- 8589599 145(2)(a)—1 month, concurrent.

[52] The total sentence is 54 months; by operation of law, this is served in a federal institution—§ 743.1.

[53] The federal and provincial prosecution will prepare the required forfeiture orders. All other orders will be prepared by the court.

[54] Given the duration of the sentence, victim-surcharge amounts are not imposed as they would constitute an undue hardship.

JPC