

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Blagdon, 2013 NSPC 93

Date: October 22, 2013

Docket: 2467169

2467175

2467177

Registry: Halifax

Between:

Her Majesty the Queen

v.

Shalamar Blagdon

SENTENCING DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: October 18, 2013

Decision: October 22, 2013

Charges: sections 86(2); 92(1); and 94(1) of the *Criminal Code*

Counsel: Rick Woodburn, for the Crown

Geoff Newton, for Shalamar Blagdon

By the Court:

Introduction

[1] On March 24, 2012, Shalamar Blagdon was a passenger in a car driven by Kojo Clayton. Also in the car was a .32 calibre, partially loaded revolver. I have convicted Mr. Blagdon of three offences arising out of these facts. The issue I now have to decide is whether Mr. Blagdon should receive a conditional sentence. There is no dispute that his sentence should be a custodial one: the question is whether it is more appropriate for him to serve it in jail or in the community under strict conditions.

Facts

[2] There is an extensive discussion of the evidence and my factual findings in my trial decision. (*R. v. Blagdon*, [2013] N.S.J. No. 404) In brief, Mr. Blagdon and Mr. Clayton were out together in downtown Halifax in the early morning hours of March 24, 2012. An altercation in a bar led to Mr. Clayton using the .32 calibre revolver to shoot at a man while chasing him on the street. None of the shots hit anyone and Mr. Clayton abandoned the pursuit. Mr. Clayton and Mr. Blagdon left the downtown in Mr. Blagdon's grandmother's car with Mr. Clayton driving. The police pulled the vehicle over and discovered the gun in the glove box. The gun was stored carelessly, lying loose in the glove box. Mr. Blagdon admitted at trial that he had no firearms license or registration.

[3] Mr. Blagdon had been sitting in the front passenger seat directly in front of the glove box. I found that he had to have known the revolver was there. I found he could have exercised control in relation to it, as the car belonged to his grandmother.

[4] On August 2, 2013 I convicted Shalamar Blagdon of three offences: careless storage of the .32 calibre revolver, without lawful excuse, contrary to section 86(2) of the *Criminal Code*; possession of the .32 calibre revolver knowing that he was not the holder of a license or registration certificate for it, contrary to section 92(1) of the *Criminal Code*; and being the occupant of a motor vehicle in which he knew there was a firearm, that is the .32 calibre revolver, contrary to section 94(1) of the *Criminal Code*. (*Blagdon*, paragraph 86) I acquitted Mr. Blagdon of four other

charges related to the .32 calibre revolver (*Blagdon, paragraphs 8 and 86*), and, applying *Kienapple*, I stayed one further charge. (*Blagdon, paragraph 88*)

[5] One of Mr. Blagdon's acquittals was in relation to a charge of unlawful possession of the .32 calibre revolver for the purpose of committing an offence. I found that his possession of the revolver could not be connected to the shooting. (*Blagdon, paragraph 87*) I also acquitted Mr. Blagdon of a section 95(1) charge, that is, possession of a loaded, prohibited weapon as I found there was no evidence that Mr. Blagdon knew the gun was loaded. I thought it likely that he knew as he would have heard the three shots fired by Mr. Clayton but the evidence did not reach the standard of proof beyond a reasonable doubt. (*Blagdon, paragraph 87*)

Crown and Defence Positions on Sentence

[6] The Crown submits that only a term of actual incarceration will adequately reflect the denunciation and deterrence required in this case, which the Crown asserts are the primary sentencing principles to be emphasized. The Crown is seeking a sentence of two (2) years. The Defence argues that a conditional sentence of twelve (12) months is the appropriate sentence. It is the Crown's view that, while Mr. Blagdon is a candidate for a conditional sentence in that his offences do not carry disqualifying mandatory minimum sentences and his presence under sentence in the community would not endanger community safety, a conditional sentence would be inconsistent with the fundamental purpose and principles of sentencing as set out in sections 718 to 718.2 of the *Criminal Code*. (*section 742.1, Criminal Code*)

[7] The Crown and Defence agree that the sentences I impose in this case should be concurrent.

Purpose and Principles of Sentencing

[8] In sentencing Mr. Blagdon I am guided by the sentencing provisions of the *Criminal Code*. Section 718 of the *Criminal Code* sets out the objectives a sentence must achieve: denunciation, deterrence – both specific and general, separation from society where necessary, rehabilitation of the offender, reparations by the offender, and the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[9] Sentencing is profoundly subjective. (*R. v. Ipeelee*, [2012] S.C.J. No. 13, paragraph 39; *R. v. Wust*, [2000] S.C.J. No. 19 paragraph 21; *R. v. M. (C.A.)*, [1996] S.C.J. No. 28, paragraph 92; *R. v. Shropshire*, [1995] S.C.J. No. 52) In determining a fit sentence, "...the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(a) of the *Criminal Code*), as well as objective and subjective factors related to the offender's personal circumstances." (*R. v. Pham*, [2013] S.C.J. No. 100, paragraph 8; *R. v. Nasogaluak*, [2010] S.C.J. No. 6, paragraph 44)

[10] Assessing moral culpability is a fundamental aspect of determining the appropriate sentence: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code*) Proportionality is "closely tied to the objective of denunciation", promotes justice for victims, and seeks to ensure public confidence in the justice system. The principle of proportionality,

...ensures that a sentence does not exceed what is appropriate, given the blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. (*Ipeelee*, paragraph 37)

Pre-Sentence Report dated September 12, 2013

[11] There is consensus that the pre-sentence report for Mr. Blagdon is a positive one. Mr. Blagdon is 29 years old. He has a Grade 12 education and is employed, working as a prep cook at a Halifax pub. He has held this job for approximately three years and is well regarded. His supervisor was interviewed for the pre-sentence report and described Mr. Blagdon as "a good worker", who is punctual and gets along well with others. Mr. Blagdon would like to return to school and qualify as a chef: his supervisor confirmed this aspiration and told the author of the pre-sentence report that he will do whatever he can to help Mr. Blagdon "get through this difficult time." (*pre-sentence report, page 4*)

[12] Mr. Blagdon is a new father with a ten month old son. He lives with his girlfriend and their baby. His girlfriend describes him as "a great father". She told

the author of the pre-sentence report that she was shocked and upset by Mr. Blagdon's charges, describing them as "very out of character." She and Mr. Blagdon have been involved for 5 to 6 years.

[13] Mr. Blagdon has a 9 year old daughter who lives in western Canada and a 6 year old son who lives in central Nova Scotia. He has limited contact with his daughter but speaks regularly to his son. He advised the author of the pre-sentence report that he provides financial support for these children when he is able to do so.

[14] Mr. Blagdon has family support and is close to his aunt who raised him, his three sisters, and two half-brothers. His aunt, while disappointed in Mr. Blagdon, continues to be supportive and advised the author of the pre-sentence report that: "he is supposed to learn from his mistakes as he is a man now."

[15] There is no indication of Mr. Blagdon having any substance abuse or mental health issues.

Prior Criminal Record

[16] In June 2006, Mr. Blagdon, who had just turned 22, was given a suspended sentence and 24 months' probation for a break and enter that occurred in November 2005. Mr. Blagdon successfully completed his probation including a period of community service. The pre-sentence report notes that while Mr. Blagdon had a very poor attitude at the start, he was "compliant and respectful" as he approached the conclusion of his sentence. (*pre-sentence report, page 5*) He apparently observed his curfew condition without any problems.

[17] Mr. Blagdon had no further conflict with the law until June 2010 when he was charged with refusing a breathalyzer demand. When he was sentenced in January 2011, he received the mandatory minimum statutory fine and a year's driving prohibition. In October 2011 he was charged with driving while disqualified and, in November, he was sentenced to 14 days in custody.

Aggravating Factors

[18] Mr. Woodburn submits that the aggravating factors in Mr. Blagdon's case are the fact that the revolver was loaded and in an accessible place in the car. He contrasts the facts in this case with those in two other Nova Scotia cases decided in

the Provincial Court: *R. v. Patton*, [2010] N.S.J. No. 214 and *R. v. Hill*, [2011] N.S.J. No. 276. These cases both dealt with handguns, which were unloaded and in less accessible locations than the glove box of a small compact car.

[19] In *Patton*, the gun was a .32 calibre, Smith and Wesson. It was hidden in a box in Mr. Patton's apartment. Mr. Hill's gun was a .32 calibre revolver, stashed in the rear toolbox of his Dodge Ram pickup.

[20] In their unloaded condition, the Patton and Hill handguns were not as potentially lethal as the gun seized from Mr. Blagdon and Mr. Clayton. Although in light of the section 95(1) acquittal, the Crown cannot ask that I find Mr. Blagdon knew the revolver was loaded and treat this knowledge as an aggravating factor, the fact that has been established is that the gun *was* loaded. The loaded condition of the gun is an aggravating feature of this sentencing.

Mitigating Factors

[21] Mr. Woodburn points out that Mr. Blagdon does not get the mitigating benefit of a guilty plea. That is correct. However, Mr. Blagdon's decision to plead not guilty cannot be treated as an aggravating factor. He is not to be penalized because he exercised his right to go to trial. Mr. Blagdon has now, through the remarks of his lawyer in the sentencing hearing, accepted responsibility, acknowledging that he made a bad decision with significant consequences. That acknowledgement is relevant to the issue of Mr. Blagdon's potential for rehabilitation and I regard it as mitigating.

[22] Although at 29, Mr. Blagdon is not what would typically be described as a youthful offender, in *R. v. Johnston*, [2009] N.S.J. No. 349, a 27 year old was described as "relatively youthful." (*paragraph 32*) Mr. Blagdon committed these offences when he was 27.

[23] I have already reviewed Mr. Blagdon's positive pre-sentence report and noted that he is gainfully employed and has assumed the responsibilities associated with being a new father. I accept that he is serious about his responsibilities: this was further confirmed by his statements to me at the end of the sentencing hearing when he spoke of wanting to continue to be able to provide for his family.

[24] It is also mitigating that Mr. Blagdon does not have a significant criminal record. I note as well that he has strictly complied with restrictive release conditions, including house arrest, for the past fifteen (15) months.

Emphasizing Denunciation and Deterrence

[25] The *Patton* and *Hill* decisions I mentioned earlier both emphasize denunciation and deterrence. These sentencing principles are at the forefront of any sentencing that concerns handguns. The courts regularly confront cases where illegal handguns have been seized, sometimes after their use has led to tragedy. Driving in the heart of the city with a loaded, fully functioning handgun loose in a glove box is dangerous and highly irresponsible. Illegal firearms are a clear and present danger in our communities and, in sentencing for offences in relation to them, denunciation operates as a powerful expression of a "symbolic, collective statement" rejecting an offender's conduct. (*M. (C.A.)*, paragraph 81) Offences involving loaded, illegal handguns will attract stern condemnation by the courts.

Other Sentencing Principles

[26] It is not only denunciation and deterrence that judges must address in sentencing for firearms offences. The principle of restraint must also be considered: separation from society is only to be ordered "where necessary" (section 718(c), *Criminal Code*); an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances (section 718.2(d), *Criminal Code*); and all available sanctions other than imprisonment, that are reasonable in the circumstances, should be considered for all offenders...(section 718.2(e), *Criminal Code*) These statutory provisions have been described by the Supreme Court of Canada as serving Parliament's objective of giving "increased prominence to the principle of restraint in the use of prison as a sanction..." (*R. v. Proulx*, [2000] S.C.J. No. 6, paragraph 17) At least, that was Parliament's objective, and it remains an objective that is relevant to this sentencing.

Mr. Blagdon's Moral Culpability

[27] I am sentencing Mr. Blagdon for being in a car in which he knew there was a firearm. It was a firearm for which Mr. Blagdon had no license or registration certificate and it was carelessly stored.

[28] I am not sentencing Mr. Blagdon for any offences related to the use of the firearm. It was used by Mr. Clayton out of view of Mr. Blagdon. While I found that Mr. Blagdon would have heard the gun shots and would have to have known it was Mr. Clayton shooting the gun, on the evidence, Mr. Blagdon's criminal culpability only arose once he got into the car with Mr. Clayton after the shooting. Had Mr. Blagdon walked away, abandoning Mr. Clayton and the car, there would have been no basis on the evidence to have convicted him of anything.

[29] The Crown has submitted that Mr. Blagdon's moral culpability is greater than that of either Mr. Patton or Mr. Hill, whose cases I referred to earlier in these reasons. In Mr. Woodburn's submission, the fact of the revolver being loaded and readily accessible in the glove box is what distinguishes, in a negative way, the degree of Mr. Blagdon's culpability from that of Patton and Hill.

The Patton and Hill Sentencing Decisions

[30] Mr. Patton received a four month jail sentence for possessing an unloaded .32 calibre handgun hidden in a box in his apartment. Campbell, P.C.J.'s decision focuses on denunciation and general deterrence. (*Patton, paragraph 10, 13*) It was significant to his imposing only a four month sentence that Mr. Patton's gun was unloaded and not found on a person, in a vehicle, or on the street. (*Patton, paragraph 30*) The Crown sought an 18 month sentence and the Defence recommended a fine of \$200 - \$300. No one addressed the issue of a conditional sentence so Campbell, P.C.J. was left to evaluate its suitability without the benefit of any submissions. He concluded that a conditional sentence would not adequately serve the principles of denunciation and deterrence. (*Patton, paragraphs 39 – 40*) He did not address any other sentencing principles such as proportionality, restraint, or rehabilitation. There is no discussion in the decision at all about rehabilitation. With respect, that, in my view, limits its utility.

[31] Mr. Hill was the subject of police surveillance because it was believed that he was trafficking in drugs. A search of Mr. Hill's truck, incident to his arrest, located the unloaded .32 calibre revolver in the rear toolbox. Mr. Hill was on parole at the time - September 2009 - having been sentenced in 2005 to a five year penitentiary term for drug trafficking. His criminal record began in 1988 and included earlier drug offences, possession of stolen property, and breaches. Mr. Hill was also subject to a firearms prohibition order. He pleaded guilty to possession of a firearm while prohibited and to being the occupant of a motor vehicle in which he knew there was a firearm.

[32] Hoskins, P.C.J. found it "particularly aggravating" that Mr. Hill was on a firearms prohibition. (*Hill, paragraph 20*) While he noted that Mr. Hill had a "relatively positive" pre-sentence report, and was a skilled worker with a "tremendous work ethic", he rejected the Defence recommendation for a conditional sentence. He concluded that Mr. Hill represented a substantial risk to the community because of a number of factors: his criminal record, the substantial prison sentence he received in 2005, the fact that he was on parole and a firearms prohibition order when he committed the current offences, and his two convictions for non-compliance of court orders. (*Hill, paragraph 54*)

[33] Hoskins, P.C.J. also held that a conditional sentence in Mr. Hill's case would be inconsistent with the principles of denunciation and deterrence and addressed in considerable detail the serious problem of handguns and their threat to community safety and security. (*Hill, paragraphs 58 – 72*) Mr. Hill received a sentence of 12 months with Hoskins, P.C.J. indicating that had the handgun been loaded, the term of incarceration would have been higher. (*Hill, paragraph 75*)

Conditional Sentences

[34] A conditional sentence is a sentence of imprisonment to be served in the community. Such a sentence is only possible if I conclude that a penitentiary term is not appropriate in this case. (*R. v. Proulx, [2000] S.C.J. No. 6, paragraph 58*)

[35] Mr. Woodburn's submissions on the conditional sentence issue have been candid and fair. It is his position that a conditional sentence is inappropriate for Mr. Blagdon solely because such a sentence would be inconsistent with the

sentencing principles of denunciation and deterrence. Mr. Woodburn indicated it is not his position that a penitentiary sentence is required here; he expressly did not rest his opposition to a conditional sentence on that basis. He explained that his recommendation for a two year sentence was not to be taken as a recommendation for a penitentiary sentence. In his oral submissions he indicated that if an offender is going to be doing a substantial provincial jail sentence of eighteen months or more for example, he might as well be sentenced to a federal term of two years.

[36] A conditional sentence can only be imposed if the statutory prerequisites are met. The requirements relating to no mandatory minimum sentence and community safety are not in issue here. The Crown does not view Mr. Blagdon as a risk to the community. That distinguishes him from Mr. Hill.

[37] Mr. Woodburn submits that Mr. Blagdon's sentence has to be a sentence actually served behind bars. For a conditional sentence to be ordered, the judge must be satisfied that a sentence of two years less a day (or some lesser amount of time) served in the community is consistent with the fundamental purpose and principles of sentencing. (*section 742.1, Criminal Code; Proulx, paragraph 60*) Mr. Woodburn says a conditional sentence cannot satisfy this requirement. I must now address myself to this issue.

[38] Conditional sentences are intended to be “a meaningful alternative to incarceration for less serious and non-dangerous offenders.” As many members of the public have a poor or distorted understanding of conditional sentencing, I will reproduce the words of the Supreme Court of Canada from *Proulx* to explain it:

21... The offenders who meet the criteria of s. 742.1 [the conditional sentencing provisions of the *Criminal Code*] will serve a sentence under strict surveillance in the community instead of going to prison. These offenders' liberty will be constrained by conditions to be attached to the sentence, as set out in s. 742.3 of the *Code*. In case of breach of conditions, the offender will be brought back before a judge, pursuant to s. 742.6. If an offender cannot provide a reasonable excuse for breaching the conditions of his or her sentence, the judge may order him or her to serve the remainder of the sentence in jail, as it was intended by Parliament that there be a real threat of incarceration to increase compliance with the conditions of the sentence.

22 The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence. It is this punitive aspect that distinguishes the conditional sentence from probation...

[39] A conditional sentence is not a lenient punishment. (*Proulx, paragraph 41; R. v. Wheatley, [1997] N.S.J. No. 173 (C.A.), paragraph 22*) It is punitive, imposing substantial limitations on the offender's liberty, and swift consequences, in the nature of arrest and jail, for breaching conditions. It can provide significant denunciation and deterrence. (*Proulx, paragraphs 41; 102 - 107*) It is not correct to merely refer to a conditional sentence as "house arrest"; it is a sentence of imprisonment and carries "the commensurate level of stigma and restriction to liberty." (*Proulx, paragraph 105; R. v. Atwell, [2007] N.S.J. 459 (P.C.), paragraph 30*)

[40] The Supreme Court of Canada in *Proulx* recognized that a conditional sentence can serve both punitive and restorative objectives. Where both objectives can be achieved, a conditional sentence "is likely a better sanction than incarceration." Incarceration will be a better choice where "the need for punishment is particularly pressing" and restorative objectives are elusive. The principle of restraint favours a conditional sentence over incarceration where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration, "...even where restorative objectives cannot be readily satisfied...." (*Proulx, paragraph 100*)

The Fit and Proper Sentence for Shalamar Blagdon

[41] Mr. Blagdon chose to get into a car where there was a carelessly stored, loaded handgun. This was a very serious mistake. Mr. Newton has submitted that Mr. Blagdon's decision was extremely short-sighted and poorly thought-out. I have been told alcohol may have played a role, presumably impairing Mr. Blagdon's judgment even more. I trust that he now fully appreciates the extent of his bad

choice and the reasons why firearms-related offences carry significant consequences.

[42] I acknowledge that the handgun in this case, because it was loaded, had more potential for lethality than the *Patton* or *Hill* handguns. It had also just been used to perpetrate a serious offence although not one that Mr. Blagdon was involved in. I note however that there is no evidence of Mr. Blagdon having a protracted involvement with the gun, indeed there is no evidence it was his gun. This is not a case where Mr. Blagdon was hiding or transporting his loaded handgun nor is it a case where Mr. Blagdon's connection to the gun related to his involvement in drugs or other illegal activity.

[43] The facts in this case are serious enough - a loaded handgun in an accessible location – but even so, I am satisfied that actual incarceration is not necessary to achieve a proportionate sentence that is consistent with the fundamental purpose and principles of sentencing. Both punitive and restorative sentencing objectives can be achieved without sending Mr. Blagdon to jail. Onerous restrictions on Mr. Blagdon's liberty, in the form of house arrest conditions under a conditional sentence will represent denunciation and the terms of his sentence, which will become well known within his circle of friends and acquaintances, can serve the goals of general deterrence. The general public will become aware of this sentence, to the extent attention is paid to any reporting of it, and anyone who thinks a conditional sentence under strict house arrest is a lenient sentence should try it out. There is no parole and no sentence remission for offenders serving conditional sentences. And breaching a condition will result in arrest and probable incarceration for the remainder of the sentence.

[44] As far as specific deterrence is concerned, Mr. Blagdon has already suffered consequences for his actions and it has not been suggested that he requires the experience of being behind bars to reinforce his resolve to be law-abiding.

[45] In accordance with the guidance provided by the *Proulx* decision, I find that in Mr. Blagdon's case a conditional sentence will be better than incarceration at achieving the restorative objectives of rehabilitation, a promotion of a sense of responsibility in Mr. Blagdon, and an acknowledgement of the harm done to the community. (*Proulx*, paragraph 127 (9)) A conditional sentence will keep Mr.

Blagdon employed, provide the opportunity for him to pursue his goal to become a chef, foster his relationship with his new baby, and keep his family intact.

[46] Mr. Blagdon has very strong prospects for rehabilitation and has shown himself through fifteen months of house arrest to be a responsible citizen, working and supporting his family. He does not have a significant criminal record like Mr. Hill. He has been compliant in the past while on court-imposed conditions. The same was not true of Mr. Hill.

[47] In sentencing Mr. Blagdon I must balance all the principles of sentencing and not focus solely on one set of principles to the exclusion of others. I find that a conditional sentence in this case is consistent with the purpose and principles of sentencing and is the sentence that best serves the objectives sentencing seeks to achieve. What I have had to say about the true character of conditional sentences, that they are not lenient, permissive sanctions, is material to my decision to impose one in Mr. Blagdon's case. I do not accept that the significant problem of gun violence in our communities means that all firearms offences must attract actual incarceration in a jail or prison. Sentencing is a highly individualized and nuanced process and only the careful balancing of all factors will achieve its objectives and ultimately serve its fundamental purpose of "contributing to respect for the law and the maintenance of a just, peaceful, and safe society..." (*section 718, Criminal Code*)

[48] The appropriate sentence in this case is a conditional sentence of eighteen months for all three offences – the section 94(1) Count 5, the section 86(2) Count 1; and section 92(1) Count 4. I have taken into account the fact that Mr. Blagdon has already served fifteen (15) months of house arrest.

[49] In addition to the statutory conditions under section 742.3 of the *Criminal Code*, Mr. Blagdon will be on strict house arrest for the eighteen months of his conditional sentence. He will be required to make all reasonable efforts to maintain suitable full time employment or enroll in an educational programme. I will now hear submissions from counsel on the exceptions to Mr. Blagdon's house arrest condition and any additional aspects of the conditional sentence that need to be addressed.

[50] Finally, on the basis of undue hardship I am waiving the Victim Surcharge in light of Mr. Blagdon's ongoing family responsibilities and limited income as indicated in the pre-sentence report.

[51] Mr. Blagdon, I am sentencing you to a period of incarceration in the community. This is not a lenient sentence. I am hopeful that you will make good decisions while you serve it, and will conduct yourself in a positive and pro-social manner, demonstrating that you can be trusted to be a law-abiding, responsible citizen, partner, and father.