<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *R. v. Spilchen*, 2021 NSSC 252

Date: 20210629
Docket: *Kentville*, CRK No. 497987
Registry: Kentville

Between:

Her Majesty the Queen

Plaintiff

v.

Leif Spilchen

Defendant

SENTENCING DECISION

Judge: The Honourable Justice Kevin Coady

Oral Decision: June 29, 2021, in Kentville, Nova Scotia

Counsel: James Fyfe, for the Plaintiff
Leif Spilchen, Self-Represented Defendant

By the Court:

[1] It is unclear what drove Leif Spilchen to attempt to rob the Canning Credit Union on June 14, 2018. What is clear is that Mr. Spilchen's planning lacked just that – planning. He obviously neglected to determine when the Credit Union opened. He arrived too early. The doors were locked. That fundamental oversight foiled his efforts and resulted in aborting the entire enterprise and making a run for it. Unfortunately, for Mr. Spilchen, the planning of his escape was equally not well thought out. The escape vehicle could not be missed and he left a trail that was easily followed. The entire enterprise was an unmitigated disaster and the attempted escape was an impossibility. The whole thing was over in less than an hour.

[2] On April 19, 2021, I convicted Mr. Spilchen of several offences arising from his attempt to rob the Canning Credit Union (2021 NSSC 131). The most serious conviction, and the heart of this case is attempted robbery pursuant to s.343(d) of the *Criminal Code*. The secondary convictions include wearing a face mask (s.351(2)); flight from police (s.320.17); operating a conveyance while prohibited (s.320.18), and breach of probation (s.733.1). Section 344 of the *Criminal Code* is the penalty section for robbery and sets the maximum sentence at life

imprisonment. Mr. Spilchen has a prior, relatively recent, conviction for robbery. The section also enacts minimum punishments.

[3] Given that in convicting Mr. Spilchen I found no evidence of a “restricted weapon”, a “firearm” or a “weapon”, the seven and five year minimums found in s.344(a)(a.i) do not apply to Mr. Spilchen. The object in his hand in the Credit Union can best be defined as an “imitation thereof” as set forth in s.343(d) of the *Criminal Code*. The issue of a minimum is moot given Mr. Spilchen’s record. The appropriate sentence will exceed all minimums set forth in s.344.

[4] Mr. Spilchen has been convicted of attempted robbery, not the completed offence of robbery. Does that make any difference to his sentence? The trial evidence established that but for Mr. Spilchen’s approach to the crime, the offence of robbery would have been completed. If he arrived at the Credit Union after 9:30 a.m., the events of June 14, 2018, would have turned out quite differently. If that had occurred, a robbery conviction would surely be entered. Mr. Spilchen went far beyond mere preparation. This is not a case of abandonment. He did not suddenly have a change of mind, his mind was changed for him. Mr. Spilchen’s intention was to commit the robbery while armed with an imitation handgun.

[5] There is no stand alone offence of attempted robbery with its own proscribed punishment. Section 463 of the *Criminal Code* addresses attempts:

> **463** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences:
>
> > (a) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to be sentenced to imprisonment for life is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years;

Attempt is defined in s.24 which states:

> **24** (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
>
> (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

Robbery has a maximum sentence of life imprisonment, and thus, by virtue of s.463(a), a person convicted of attempted robbery is guilty of an indictable offence and liable to imprisonment for 14 years.

PRINCIPLES OF SENTENCING:

[6] The fundamental purpose of sentencing is to ensure respect for the law and the maintenance of a just, peaceful and safe society. Sentencing is not an exercise

of vengeance; it is an exercise of retribution. Lamer C.J.C. distinguished the two concepts in *R. v. M(CA)*, [1996] 1 S.C.R. 500. Writing for the unanimous Court, he held at paragraph 80:

> Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

[7] The purpose, objectives and principles of sentencing are outlined in ss.718 and 718.3 of the *Criminal Code*. Section 718 sets forth the following objectives:

> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[8] Section 718.1 directs a sentencing Court to ensure that the sentence is “proportionate” to the gravity of the offence and the degree of responsibility of the offender. The Supreme Court of Canada has described proportionality as the

"fundamental principle" of sentencing which could aptly be described as principle of fundamental justice under s.7 of the Charter (*R. v. Ipeelee*, 2012 SCC 13)

[9] Statutory aggravating and mitigating factors are contained in s.718.2 under the heading "Other Sentencing Principles". In *R. v. Arcand*, 2010 ABCA 363 the Court of Appeal described the relationship between the fundamental proportionality principle and those secondary sentencing principles at paragraph 63:

> Interpreting the secondary principles as complementary to, and consistent with, the proportionality principle gives weight and meaning to the secondary principles while maintaining, as Parliament clearly intended, the integrity and primacy of the proportionality principle. Thus, sentencing judges are not free to pick and choose one principle out of s. 718.2 to the exclusion of the others, much less ignore the proportionality principle. The object of the sentencing exercise is to draw on all sentencing principles in determining a just and appropriate sentence which reflects the gravity of the offence and the degree of moral blameworthiness of the offender.

Section 718.2(a) sets out the factors that "shall be deemed aggravating circumstances". I find the following are relative to Mr. Spilchen's sentencing:

> (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and *Conditional Release Act*

[10] Section 718.2(b), (d), and (e) sets forth the following principles that apply to Mr. Spilchen's sentencing:

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

DENUNCIATION AND DETERENCE:

[11] The Crown argues that denunciation and deterrence are the primary sentencing objectives in Mr. Spilchen's sentencing. I do not disagree. Given his criminal record, and the fact that he did the same thing in 2015, indicates that while rehabilitation is always in play, it is a long-term objective. It appears to the Court that Mr. Spilchen has become institutionalized. The events of June 14, 2018, are compelling evidence that Mr. Spilchen struggles to live in the community. Those struggles include addiction, mental health, poverty, as well as limited educational and employment opportunities. Mr. Spilchen has a lot of challenges ahead of him; if he hopes to be a pro-social member of society when he is released from prison.

AGGRAVAGATING FACTORS:

[12] The following aggravating factors must be considered in crafting a fit sentence for Mr. Spilchen:

- His criminal history – on probation at time of the offence;
- The use of an imitation handgun in the attempted robbery; and,
- The discharge of that imitation handgun in the Credit Union foyer and the fact the staff had no way of knowing it was an imitation.

It is unfortunate to say that while this list is short, Mr. Spilchen's entire circumstances can be termed aggravating. That is not to say that I see nothing positive in his life, but they appear to be buried under the struggles I referred to earlier. It is obvious that if Mr. Spilchen intends to live in the community, he must rehabilitate himself. Otherwise his criminal history will repeat itself.

MITIGATING FACTORS:

[13] It gives me no pleasure to state that the search for mitigation is challenging. It appears as if Mr. Spilchen has had a rough life with a lot of setbacks. That history explains why he is always in conflict with the law. I consider that a minor mitigating factor.

CRIMINAL RECORD:

[14] Mr. Spilchen's criminal record is a very aggravating factor – between 1994 – 2017 (21 years) he was convicted of 54 offences. He has been sentenced on 30 different occasions including 19 that resulted in incarceration.

[15] Adding to the aggravation is Mr. Spilchen's propensity for robberies:

- 1999 – conviction for robbery in British Columbia;
- 2003 – conviction for robbery in British Columbia;
- 2005 – 2006 – robbery convictions in British Columbia for which he received a six-year sentence; and,
- 2015 – convicted of robbery in relation to a Credit Union in Hantsport, Nova Scotia. He was sentenced to the equivalent of four years.

[16] Associated with the record, it appears as if Mr. Spilchen's time out of jail has been brief.

[17] Obviously Mr. Spilchen has not shown the ability to rehabilitate himself and to escape his criminal lifestyle. The prognosis post 2021 is not promising unless structural life changes are made. Although his comments today show acceptance, insight, and some hope for rehabilitation tied to future sobriety.

RANGE OF SENTENCE:

[18] In *R. v. Morton*, 2011 NSCA 51the Court of Appeal affirmed a three-year starting point for the offence of robbery. It further stressed that denunciation and deterrence must be the primary considerations.

[19] A review of the caselaw suggests that criminal history and the circumstances of the offence can drive that number into double digits.

As in *O'Brien* where the intruder wore a mask and threatened with a knife – who had 70 prior convictions – 6 years – 6 months.

Or as in *Brewer* where the intruder used a sawed-off shotgun to rob a Credit Union – who had a lengthy record – 11 years, N.S.C.A.

Or as in *Welt* where there was a mask, an imitation handgun, and forcible confinement, he received 8 years.

Conclusion

[20] So I set the range between 3 years and 10 years – for the attempted robbery conviction.

[21] The Crown seeks a total sentence of 9 years for all 5 convictions, starting with 7 years for the attempted robbery.

Mr. Spilchen's position is that no violence was intended and that is was only an attempt to steal.

After weighing the principles, and the mitigating and aggravating factors, I order the following sentence:

- Count 1 – Case 8353222 – attempted robbery – 7 years;
- Count 2 – Case 8353223 – wearing a mask - 6 months concurrent;
- Count 9 – Case 8353231 – failing to stop – 6 months concurrent;
- Count 10 – Case 8353232 – prohibited driving – 6 months concurrent; and,
- Count 11 – Case 8353233 – probation order – 6 months concurrent.

[22] Total sentence 7 years.

Mr. Spilchen has been on remand since June 14, 2019 – more than 2 years – he has been on remain for 745 days.

He will receive 1.5 credit against sentence which gives him a credit of 1118 days.

Seven years equals 2555 days

Credit 1118 days

Leaves 1437 days go forward (3.9 years)

DNA Order

Lifetime Firearms Prohibition

Two year driving prohibition

Forfeiture Order

Coady, J.