

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

[REDACTED]

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)
) Kosta Stratos for the Crown
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) Andrew Stastny for [REDACTED]
)
) HEARD: October 27, 2016

REASONS FOR SENTENCE

CORRICK J.

Introduction

[1] At the outset of his trial, [REDACTED] pleaded guilty to possession of a firearm while knowingly not being the holder of a licence permitting such possession, contrary to s. 92(1) of the *Criminal Code* and possession of a firearm while being prohibited from doing so by reason of an order made under s. 110 of the *Criminal Code*, contrary to s. 117.01(1) of the *Criminal Code*. Following his trial, I found him not guilty of possessing a loaded prohibited firearm.

Circumstances of the Offences

[2] On May 29, 2015, [REDACTED] was a passenger in a car that was shot at by unknown persons. The car was owned and driven by [REDACTED] friend, [REDACTED]. Both [REDACTED] and [REDACTED] were struck by the bullets and wounded. [REDACTED] and another passenger waved down a passing police car to help them. As the police car approached them, [REDACTED] attempted to dispose of a gun that was owned by [REDACTED] by throwing it. The police found the gun, which had landed on the road several feet away from the car. The gun was loaded, although I found that the Crown had not proven that [REDACTED] knew that.

[3] At the time, [REDACTED] was prohibited from possessing any weapons by reason of a s. 110 order made in 2012 following his conviction for theft under \$5,000, uttering threats, and two counts of failure to comply with a recognizance.

Legal Parameters

[4] Both offences to which ██████ pleaded guilty carry a maximum sentence of ten years in prison.

Positions of the Parties

[5] Mr. Stratos, on behalf of the Crown, submits that a total sentence of 30 months is the fit disposition in this case. After crediting ██████ for the time he has spent in pre-trial custody, Mr. Stratos submits that a further sentence of 4½ months in prison followed by three years probation ought to be imposed.

[6] Mr. Stratos also seeks a weapons prohibition order, and a DNA order.

[7] Mr. Stastny, on behalf of ██████, submits that a global sentence of 12 to 18 months is the fit disposition for both offences. He also submits that in the circumstances of this case, the sentences imposed ought to be concurrent.

Governing Sentencing Principles

[8] In determining a fit sentence for ██████, I am guided by the sentencing principles set out in the *Criminal Code*.

[9] The fundamental purpose of sentencing, as set out in s. 718 of the *Criminal Code*, is to "contribute, along with crime prevention measures, to respect for the law and the maintenance of a just, peaceful and safe society" by imposing sentences that have one of the following six objectives:

- 1) denouncing unlawful conduct,
- 2) deterring the offender and others from committing crimes,
- 3) separating offenders from society where necessary,
- 4) assisting in the rehabilitation of the offender,
- 5) providing reparations for harm done to the victim or to the community,
- 6) promoting a sense of responsibility in the offender, and
- 7) acknowledging the harm done to victims and the community.

[10] Any sentence I impose must be proportionate to the gravity of the offence and the responsibility of the offender: s. 718.1 of the *Criminal Code*.

[11] I am also required by s. 718.2 to bear the following principles in mind when imposing sentence:

- the sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
- where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- offenders should not be deprived of liberty if less restrictive sanctions may be appropriate; and
- all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

Circumstances of the Offender

[12] ██████ is 28 years old. He was born in Somalia, but came to Canada as a young child. He has five siblings ranging in age from 12 to 30 years. He resides with his parents, who continue to support him. He has a high school education, and limited work experience. He has worked in a call centre and doing manual labour.

[13] ██████ has a criminal record. In August 2012, he was convicted of theft under, uttering threats and two counts of failure to comply with a recognizance. He was sentenced to 75 days in prison and 12 months probation. In September 2012, he was convicted of assault, received a suspended sentence and 12 months probation. Finally, in April 2014, he was convicted of failure to comply with a recognizance and sentenced to 30 days in jail.

[14] ██████ has been in custody since his arrest on May 29, 2015 – 17 months.

Aggravating and Mitigating Factors

[15] I turn now to the aggravating and mitigating factors of this case, which I am required to consider.

[16] The aggravating features of this case are obvious. ██████ put the public at risk by throwing an illegal firearm, which turned out to be loaded, on to a public roadway. It goes without saying that the proliferation of illegal firearms in our community is an issue of grave concern.

[17] ██████ is not a first offender. He has three prior convictions for breaching a court order – two in 2012 and a further one in 2014. At the time of the commission of these offences, he had

been released on a recognizance, one condition of which was not to possess any weapons. Mr. Adan appears to have difficulty complying with orders.

[18] In mitigation, ██████ is still relatively youthful. He has the support of his parents, who have attended in court. He has no firearm offences on his record, and although his criminal record is not envious, it is certainly not the worst I have seen. He did not use the firearm to menace anyone.

[19] Importantly, ██████ has taken responsibility for these offences. His intention was to plead guilty at an early stage of these proceedings. This was indicated to the judge who conducted the judicial pre-trial in the Superior Court and Mr. Stastny informed me that it was also his intention at the Ontario Court of Justice. The sticking point was ██████ denial that he knew the gun was loaded. The fact that he has pleaded guilty, taken responsibility, and shown remorse, augers well for his rehabilitation.

Sentences Imposed in Other Cases

[20] I am also required to consider sentences imposed on similar offenders for similar offences committed in similar circumstances. I turn to that now.

[21] I have reviewed the decisions to which Mr. Stastny has referred in support of his position. Although the cases assist me in determining the governing principles that must guide my decision, a careful review of them demonstrates that sentencing is not an exact science. It is instead a profoundly individualized process driven by the unique facts of every offence and the unique characteristics of every offender. The circumstances of any case, including this one, can be readily distinguished from any other case.

[22] What is clear from these decisions is that the sentencing goals of denunciation, deterrence and protection of the public are paramount in determining the fit sentence for firearm offences.

What is the Fit Sentence?

[23] Ordinarily, possession of a firearm in breach of a s.110 order by an offender like ██████, who has multiple convictions for breaching orders, would attract a penitentiary sentence. However, in the unusual circumstances of this case, in which ██████ possession of the firearm was fleeting, a penitentiary sentence is disproportionate to ██████ responsibility and the gravity of the offence.

[24] Given ██████ relative youth, his guilty plea, his prospects for rehabilitation, and the unique circumstances of this case, I am of the view that a global sentence of 21 months, before credit for pre-trial custody, is appropriate.

[25] On count #2, possession of a firearm without a licence, ██████ will be sentenced to 15 months. On count #8, possession of a firearm in violation of a s. 110 order, ██████ will be sentenced to 6 months consecutive. The intentional violation of a court order that is made to

protect the public must attract additional sanctions. In addition, ██████ must be made to understand that court orders are to be complied with. For these reasons, I have made that sentence consecutive.

[26] ██████ will receive 21 months credit for the amount of time he has spent in pre-trial custody. I am therefore sentencing him today to one day in jail.

[27] In addition, ██████ will be placed on probation for a period of two years. In addition to the statutory terms, he will have no contact with ██████ and he will take any counselling for vocational or other issues as directed by the probation officer, and sign any releases necessary to permit his probation officer to monitor his compliance with this condition.

Ancillary Orders

[28] In addition, I make the following orders.

[29] First, pursuant to s. 109 of the *Criminal Code*, I order that ██████ be prohibited from possessing any weapon described in that section for ten years.

[30] Second, given that ██████ has been convicted of a secondary designated offence, I make a DNA order pursuant to s. 487.051(3) authorizing the taking of a DNA sample. Given all of the circumstances of this offence, and the relatively minimal impact that such an order would have on his privacy and security of his person, I am satisfied that this order is in the best interests of the administration of justice.

[31] Finally, I impose a \$200 victim fine surcharge on each count concurrent in keeping with the analysis of Justice Carey in the decision of *R. v. Fedele* 2016 ONSC 2305. ██████ will have one year to pay that.

Corrick J.

Released: October 28, 2016

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COURT FILE NO.: CR-16-30000219
DATE: 20161028

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SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

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