PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Walsh*, 2016 NSPC 53

Date: 2016-09-28
Docket: 3012597
Registry: Pictou

Between:

Her Majesty the Queen

v.

Mitchell Scott Walsh

SENTENCING

Judge:	The Honourable Judge Del W. Atwood
Heard:	28 September 2016 in Pictou, Nova Scotia
Charge:	Section 344, para. 463(a) of the Criminal Code of Canada
Counsel:	William Gorman, for Nova Scotia Public Prosecution Service Douglas Lloy, Q.C., for Mitchell Scott Walsh

By the Court:

[1] The Court has for sentencing Mitchell Scott Walsh. Mr. Walsh elected to have his matter dealt with in Provincial Court and pleaded guilty to a charge of attempted robbery under the provisions of section 344-463(a) of the *Criminal Code*.

[2] Sub-section 344 of the *Criminal Code* states:

> 344. (1) Every person who commits robbery is guilty of an indictable offence and liable
>
> (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of
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> (i) in the case of a first offence, five years, and
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> (ii) in the case of a second or subsequent offence, seven years;
>
> (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
>
> (b) in any other case, to imprisonment for life.

[3] Paragraph 463(a) of the *Codes* states:

> Everyone 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;

[4] The facts which the Court heard today were that on 9 July 2016, Stellarton Police were alerted by a 911 call of a robbery that someone had attempted to pull off at around 6:00 p.m. at the Foord Street Tobacco Shop. They spoke with the store clerk; she reported that, just prior to the arrival of police, a young male had entered the store and demanded that she open the cash register. The clerk told the assailant: "I can't open it"; the young male responded: "Yes you can, I have a weapon". The clerk then admonished the young male, "Well, you'll have to use it". At that point, a customer entered the store and the male fled. The store clerk believed that she knew the identity of the failed robber, as he had rented an upstairs apartment nearby; she knew his name as "Mitchell".

[5] Mr. Walsh was apprehended by police very shortly afterwards. He was co-operative with police. He informed them that he had had a knife tucked up his sleeve when he entered the shop; he took police to his apartment, retrieved it and surrendered it.

[6] There were some minor difficulties while Mr. Walsh was in police custody; while not insignificant, no one got hurt. Mr. Walsh was highly stressed when he got picked up; his post-arrest conduct, while no doubt disturbing to one of the arresting officers, should not be taken as completely unexpected.

[7] The prosecution advocates for a range of penalty of three to five years, and submits that a four-year term in a penitentiary would be a fit sentence.

[8] Defence counsel argues for a three-year term, less credit for time spent on remand.

[9] As was stated by the Supreme Court of Canada, sentencing is a highly individualized process: *R. v. Ipeelee*, 2012 SCC 13 at para. 38. In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances as required in para. 718.2(a) of the *Criminal Code*.

[10] The Court must also consider objective and subjective factors relative to the offender's personal circumstances and the facts pertaining to the particular case as required in *R. v. Pham*, 2013 SCC 15 at para 8.

[11] In assessing an offender's moral culpability, the court must take into account the fact that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. That fundamental principle is set out in section 718.1 of the *Criminal Code*. At paragraph 37 of *Ipeelee*, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims and it seeks to ensure public confidence in the justice system.

[12] In the recent decision of *R. v. Lacasse*, 2015 SCC 64, the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of a sentence depends upon the seriousness of the consequences of crime and the moral blameworthiness of the individual offender.

[13] The Court recognized at paragraph 12 of *Lacasse* that determining proportionality is a delicate exercise because both overly lenient and overly harsh sentences imposed upon offenders might have the effect of undermining public confidence in the administration of penal justice.

[14] In determining an appropriate sentence, this court is required to consider, pursuant to para. 718.2(b) of the *Criminal Code*, that a sentence should be similar to sentences imposed upon similar offenders for similar offences committed in similar circumstances. This is the principle of sentencing parity.

[15] The court must apply principles of restraint, so 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.

[16] It is appropriate in assessing proportionality that the court examine the potential penalty that might be imposed for an offence. Mr. Walsh is charged with attempted robbery; accordingly, pursuant to the provisions of para. 463(a) of the *Criminal Code*, the maximum potential penalty--unlike full robbery, which carries a potential of imprisonment for life--is fourteen years.

[17] With regard to the seriousness of the offence, I observe that there was no effort by Mr. Walsh to disguise himself. He fled very quickly after a customer had entered the shop.

[18] He had a knife on him, tucked up his sleeve. That was not a good thing; however, he did not attempt to brandish it or show it to the store clerk. In fact, it was he who volunteered to police that he'd had one; the store clerk did not mention it to police.

[19] There was no evidence that Mr. Walsh sought to bring in an accomplice; that is in distinction to a case relied upon by the prosecution, *R. v. Fizli* 2016 NSPC 23, in which Mr. Fizli actively engaged the assistance of a helper in a convenience-store robbery. A further distinctive feature is that Mr. Walsh did not steal any money or tobacco from the clerk, limiting his criminality to attempt. In *Fizli*, the offender made off with a quantity of cash.

[20] Mr. Walsh did not use force against the store clerk; in *Fizli*, the offender attacked the clerk physically.

[21] These are features which I feel lessen the seriousness of the offence.

[22] However, there are aggravating factors here: Mr. Walsh had a knife in his possession. Although he did not wave it around, it was tucked in the sleeve of his hoodie. I draw what I consider to be the common-sense inference that Mr. Walsh had it to use it if he had felt it necessary. Any robbery, attempted or completed, involving the use of weapon, particularly a knife, carries a substantial risk of lethality. This is underscored in *R. v. MacLeod*, 2002 NSSC 142; admittedly, that case was a sentencing for a second-degree murder; however, the facts of the case demonstrate how quickly a robbery with a knife can turn into something significantly more lethal. Nevertheless, it is important that I not overweigh this factor, because Mr. Walsh kept his knife tucked away.

[23] There was a high level of victim impact in this case. The store clerk presented a victim impact statement to the court in which she describes no longer enjoying the work that she has done for fourteen years, as well as feeling in the grip of fear which she described as “the most suffocating emotion”.

[24] I also take into account the high prevalence of convenience-store robbery in Pictou County. The court, within recent memory, has dealt with one convenience store robbery in Pictou, two at the Esso in Blue Acres, one at the Needs in New Glasgow, and those are only the ones that come to mind right away. This is a crime that is occurring with an alarming degree of prevalence in this county and, in my view, there is a strong need for general deterrence.

[25] When assessing Mr. Walsh's degree of moral culpability, I observe that this was an attempt only. Again, there was no actual use of force applied by Mr. Walsh against the store clerk.

[26] Mr. Walsh co-operated with police. Although the prosecution is correct that there is some evidence of planning, the fact is that planning and premeditation can run the gamut of simplicity to great complexity. In my view, there was no great amount of complexity involved in Mr. Walsh's planning of this offence. I draw what I consider to be the reasonable and inevitable inference that Mr. Walsh settled upon his course of action only very shortly prior to embarking upon it.

[27] This was not an anonymized crime; Mr. Walsh did not try to disguise himself; he committed his crime very close to home and did not range far afield to a community where he would have been unknown. This is in distinction to *R. v.*

Piercy, 2014 NSPC 94, which is another case relied upon by the prosecution. Mr. Piercy, who was from Lunenburg County, made his way with cohorts up to New Glasgow, where he committed a full robbery in the Shopper's Drug Mart parking lot; he sprayed his victim with an aerosol can of irritant—bear spray as I recall—to help make a clean getaway. In many respects, the *Piercy* case evinces a significantly higher level of Mr. Walsh's. Mr. Piercy's jointly recommended sentence was two years plus a day. It is a case that the court must take into account in assessing the factor of sentencing parity.

[28] Mr. Walsh co-operated with police his arrest. To be sure, his post-arrest conduct was not without difficulty and Mr. Walsh's treatment of Cst. MacPherson was, indeed, disgraceful; however, Mr. Walsh turned over to police highly incriminating evidence and he need not have done so; he gave up his right to silence and owned up to what he had done.

[29] And so all of those factors suggest to me that Mr. Walsh's degree of moral culpability is at the lower end of the moderate range.

[30] When I assess Mr. Walsh's suitability for rehabilitation, I consider his prior record. The prosecutor has pointed out properly that a prior record is not an aggravating factor, in that a person before the court for the imposition of sentence

is not to be resentenced for offences committed in the past for which the penalties have been served in full. However, as the Court of Appeal noted in *R. v. Naugle* 2011 NSCA 33 at para. 47, a prior record might provide a court with some degree of insight into an offender's willingness to participate in rehabilitation that might help an offender live an offence-free life and be reintegrated into society successfully. Someone who is likely to respond well to rehabilitative programming ought not to receive a sentence as lengthy as a committed recidivist: the public would need greater protection from the latter, not the former.

[31] I see the presentence report as guardedly optimistic. Although Mr. Walsh has struggled with substance use--particularly the abuse of hydromorphone over the past year and a half--he did get himself admitted into the opiate treatment program. The presentence report informs the court that Mr. Walsh's attendance for the program has been good.

[32] Mr. Walsh was the subject of a 546 day youth custody and supervision order which was imposed 25 September 2012, for charges of robbery, possession of a weapon for a purpose dangerous to the public peace and disguise with intent. For almost a year and a half after what I reckon would have been his warrant expiry date, he remained clear of the law, until March of 2015, when he was charged with a breach of probation. He then remained offence free until he committed this

offence. According to the presentence report, during the period of time that Mr. Walsh was subject to community supervision, "his reporting habits were positive".

[33] In my view, Mr. Walsh responded constructively to past rehabilitative efforts of the court and I have a moderate degree of confidence that Mr. Walsh would be prepared to do so in the future.

[34] Taking into the account the principles of sentencing parity, proportionality and restraint I believe that Mr. Lloy's recommendation in this particular case, is the appropriate one. And therefore, Mr. Walsh, the court imposes a sentence as follows:

[35] First of all, there will be a primary-designated-offence DNA collection order in relation to case #3012597; the warrant of committal that will issue today will carry a 733.41 "no contact" endorsement. While in custody, Mr. Walsh is to have no contact or communication, either directly or indirectly, with the victim.

[36] The court will impose a $10.00 fine and a correlative $3.00 victim surcharge amount, which is the mandatory 30 percent amount, and Mr. Walsh will have 36 months to pay the victim surcharge amount.

[37] Mr. Walsh has spent in custody since his arrest, a period of 82 days. Pursuant to *R. v. Carvery* 2014 SCC 27 at para. 21, I apply a credit of 1.5 days per day of remand time, for a total credit of 123 days.

[38] The Court imposes a sentence of three (3) years imprisonment, less 123 days, giving full *Carvery* credit.

[39] I will order and direct, pursuant to the provisions of section 719 of the *Criminal Code*, that the information and the warrant of committal be endorsed in accordance with the provisions of sub-section 719(3.2) of the *Criminal Code*, "but for the remand credit, the sentence of the court would have been three-years' imprisonment

[40] The Court will also order and direct pursuant to section 109 of the *Criminal Code*, that Mr. Walsh be subject to a mandatory prohibition order. That prohibition order will order and direct that Mr. Walsh be prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm and any crossbow, restricted weapon, ammunition and explosive substance beginning today's date and ending ten (10) years after Mr. Walsh's release form imprisonment. In addition, that order will state that Mr. Walsh be prohibited from

possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition of life.

JPC