



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Bourgeois*, 2018 NLCA 13

Date: March 1, 2018

Docket: 201701H0038

BETWEEN:

TREVOR BOURGEOIS

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Harrington and O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Corner Brook

Appeal Heard: February 15, 2018

Judgment Rendered: March 1, 2018

Reasons for Judgment by Welsh J.A.

Concurred in by Harrington and O'Brien JJ.A.

Counsel for the Appellant: Mark Gruchy

Counsel for the Respondent: Lisa M. Stead

Welsh J.A.:

[1] Trevor Bourgeois pleaded guilty to and was convicted of attempted armed robbery, contrary to sections 344 and 463 of the *Criminal Code*, and possession of a weapon for the purpose of committing an offence, contrary to section 88(1) of the *Code*. He was sentenced to four years imprisonment.

[2] Mr. Bourgeois applies for leave to appeal his sentence. The issues under appeal relate to the potential effect of the offender's mental health issues as a mitigating factor in sentencing and the provision of a pre-sentence report where the offender fails to participate adequately.

BACKGROUND

[3] The trial judge briefly described the circumstances surrounding the offences (2017 NLPC 1316A00485):

[1] On July 31, 2016, at approximately 6:15 a.m., Mr. Bourgeois entered one of the Tim Hortons restaurants in Corner Brook. He had a large knife in his hand. The blade of the knife was four to five inches long.

[2] Mr. Bourgeois walked up to the counter of the restaurant, while holding the knife in front of him. The knife was clearly visible. Mr. Bourgeois repeatedly demanded money. The employees of the restaurant scattered. Mr. Bourgeois walked around the restaurant for a short period of time and then left.

[3] Shortly thereafter, the police received a complaint that a person was walking on Main Street in Corner Brook with a large knife in his hand. The police responded. When they located Mr. Bourgeois, one of the officers drew his police revolver and told Mr. Bourgeois to drop the knife. Mr. Bourgeois dropped the knife and was arrested. Mr. Bourgeois made a reference to being hungry.

[4] The trial judge found that the knife had been drawn before Mr. Bourgeois entered the restaurant indicating that he had “considered his actions” in advance (trial judge’s decision, at paragraph 49). Further, while he did not threaten anyone directly, his actions created a threat to each employee in the restaurant. The judge found that walking along Main Street with a large knife in his hand “caused the police not only to respond, but for one of the officers to remove his sidearm from its holster”, creating a potentially dangerous situation (decision of the trial judge, at paragraph 50). Finally, the trial judge concluded that, although the conviction is for attempted robbery, “very little separated his offence from a completed robbery (trial judge’s decision, at paragraph 52).

[5] Mr. Bourgeois, born in September 1981, has a criminal record beginning in 1999 and consisting of convictions for assault, aggravated assault, disguised with intent to commit an offence, and robbery.

[6] The trial judge imposed sentences of four years for the attempted robbery and six months, to be served concurrently, for possession of a weapon for the purpose of committing an offence.

ISSUES

[7] The issues on appeal relate to: (1) questioning Mr. Bourgeois regarding the circumstances surrounding the offence for purposes of the pre-sentence report; (2) failure of Mr. Bourgeois to participate in the interview for the pre-sentence report; (3) the effect of Mr. Bourgeois' mental health issues on the determination of the sentence; and (4) characterization of the offences as a single criminal venture.

ANALYSIS

Leave to Appeal

[8] Leave to appeal is required because this is an appeal by Mr. Bourgeois as to sentence only (section 675(1)(b) of the *Criminal Code*). The test to be applied is whether the appeal is "frivolous in the sense of having no arguable basis or sufficient merit" (*R. v. Hillier*, 2016 NLCA 21, 377 Nfld. & P.E.I.R. 121, at paragraph 7).

[9] In this case, the test for leave to appeal is satisfied given the issues related to consideration of Mr. Bourgeois' mental health in sentencing. Accordingly, I would grant leave to appeal.

The Legislation

[10] Section 343 of the *Criminal Code* describes the offence of armed robbery:

Every one commits robbery who

...

(d) steals from any person while armed with an offensive weapon or imitation thereof.

Commission of an armed robbery is an indictable offence for which the offender is liable to imprisonment for life (section 344(1)(b) of the *Criminal Code*).

[11] Section 463 addresses attempts to commit an offence:

Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit ... offences:

(a) every one who attempts to commit ... 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;

[12] Section 88(1) provides for the offence of possession of a weapon for a dangerous purpose:

Every person commits an offence who carries or possesses a weapon ... for a purpose dangerous to the public peace or for the purpose of committing an offence.

The Crown proceeded by way of indictment on that charge.

Pre-sentence Report

[13] Defence counsel requested a pre-sentence report which was prepared with limited information because Mr. Bourgeois refused to cooperate with the reporter and to consent to a review of his medical records.

Questions Regarding Circumstances Surrounding the Offence

[14] Counsel for Mr. Bourgeois submits that it was improper for the reporter to ask Mr. Bourgeois about the circumstances surrounding the offence, and that that question caused Mr. Bourgeois to refuse to cooperate with the interview. There is no evidence that this is the reason Mr. Bourgeois failed to cooperate. He pleaded guilty to the offences on the basis of facts submitted to and accepted by the trial judge.

[15] In order to complete an assessment for a pre-sentence report, a question as to the circumstances surrounding the commission of the offence is a valid avenue of investigation. That information may assist the reporter, for example, in assessing the offender's prospects and the likelihood of re-offending. In this case, the reporter concluded that an assessment as to Mr.

Bourgeois' suitability for community supervision could not be made due to his decision not to participate adequately in the interview.

[16] In addition, Mr. Bourgeois' failure to participate or provide information led the reporter to state that his "attitude and plans for the future are unknown", and that, without access to Mr. Bourgeois' medical records, "his current diagnosis is unknown and treatment options are not known".

Offender's Failure to Participate

[17] Counsel for Mr. Bourgeois submits that, in the circumstances, the judge should have ordered a further pre-sentence report. Counsel relies on sections 723(3) and (4) of the *Criminal Code* dealing with the production of evidence and compelling the appearance of a witness:

(3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.

(4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.

[18] While those options were available to the judge, he did not exercise his discretion under these provisions for the purpose of obtaining further information where Mr. Bourgeois had refused the opportunity to provide information to the Court by means of the pre-sentence report that was prepared. There is no indication, and counsel does not advance the position, that Mr. Bourgeois was incapable of deciding whether to cooperate with the reporter. Sections 723(3) and (4) are discretionary. No request was made at the sentencing hearing to engage either of these provisions. It cannot be said that the trial judge erred in not taking action as authorized under section 723.

[19] Similarly, section 721 of the *Criminal Code*, which authorizes the Court to require the preparation of a pre-sentence report, was not engaged on the facts of this case. A report had already been requested by defence counsel, prepared and provided to the Court. It was incomplete as a result of Mr. Bourgeois' failure to provide necessary information to the reporter.

[20] This is different from the situation where, for example, a reporter has failed to address an issue, such as, when an offender claims indigenous status. In that case, relevant considerations must be addressed in the report

or an additional report would be requested by the court. Section 721 may also be engaged where, having received an incomplete report, defence counsel asks the court to request a further report. Another circumstance when the court may request a pre-sentence report is where the offender is self-represented.

[21] In this case, the trial judge received a pre-sentence report and no request was made by counsel for an additional report. In the circumstances, the judge did not err in proceeding on the basis of the report that had been submitted.

Effect of Mr. Bourgeois' Mental Health Issues

[22] Mr. Bourgeois submits that the trial judge erred by failing to consider his mental health issues when determining his sentence. He submits that it is not necessary to establish a connection between his mental health condition and the commission of the offences.

[23] As a general proposition, in determining an appropriate sentence, the offender's mental health may be a relevant consideration. That issue is discussed in *R. v. Martin*, 2018 NLCA 12, where the Court accepted that Ms. Martin's mental health issues were properly considered as a mitigating factor. At paragraph 12, the decision of the trial judge is quoted:

[7] Ms. Martin's culpability is also mitigated by her mental illness and her drug addiction. Her mental health issues are obvious from the evidence supporting these convictions and are acknowledged by the Crown. In the 2000 decision in *R. v. Peters* [2000 NFCA 55, 194 Nfld. & P.E.I.R. 184], Green, J.A. (as he then was) stated the following at paragraph 19:

... the mental illness of an offender will often be considered a mitigating factor in sentencing even though it is not of the sort that would establish a verdict of not criminally responsible on account of mental disorder at the time of the commission of the offence. The focus in sentencing such offenders may properly therefore be placed on mechanisms that will promote rehabilitation and treatment, rather than on punishment. This is especially so where lengthy prison terms are often regarded as counterproductive, even in cases not involving the mentally afflicted. ...

[24] There are, in fact, two ways in which an offender's mental health condition may affect the determination of an appropriate sentence: first, as a mitigating factor where the offender's mental health may reduce his or her culpability or responsibility for the offence; and, second, where the

offender's mental health condition may be relevant in determining the offender's prospects for rehabilitation or the likelihood to reoffend.

[25] The decision in *Martin* is an example of a situation where the judge accepted that the offender's culpability and responsibility for the offences could be said to be diminished as a result of her mental health issues, which were sufficiently connected to the offences to warrant consideration as a mitigating factor in determination of an appropriate sentence. At the sentencing hearing, medical reports from three psychiatrists were entered into evidence. Ms. Martin had previous admissions to the psychiatric hospital. At the time of the offences, she had been certified as an involuntary patient under the *Mental Health Care and Treatment Act*, SNL 2006, c. M-9.1. The offences were committed when Ms. Martin had left the hospital on a pass, as authorized under section 37 of the *Act*. The judge found that the evidence established that there was a connection or nexus between Ms. Martin's mental health condition and the commission of all the offences. In the result, her mental health condition was factored into an appropriate sentence, as a mitigating factor.

[26] In general, the circumstances when an offender's mental health may be a mitigating factor in determining an appropriate sentence, by reducing the offender's culpability or responsibility for the offence, will depend on the particular facts. To be a mitigating factor, there must be a nexus or connection between the mental health condition and the offence. Whether that nexus exists is a fact-specific determination. Similarly, the extent to which the offender's mental health is a mitigating factor, thereby reducing the offender's culpability or responsibility, will depend on the particular circumstances.

[27] That said, in the situation where an offender's mental health does not warrant consideration as a mitigating factor as discussed above, it may, nonetheless, be relevant to determining an appropriate sentence if the mental health condition affects the assessment of rehabilitation prospects or likelihood to reoffend. In assessing those factors, reliance would properly be placed on the pre-sentence report or other relevant evidence or circumstances.

[28] In the case on appeal, regarding Mr. Bourgeois' mental health, the trial judge stated:

[10] ... He is presently being treated for schizophrenia with a monthly injection. This appears to have his symptoms under control. Since being remanded at the West Coast Correctional Centre, Mr. Bourgeois has not had any institutional charges and there have not been any problems with his behaviour.

[11] Mr. Bourgeois has been in custody since his arrest on July 31, 2016. Prior to his arrest he had been involved with the Assertive Community Treatment team in Corner Brook. A letter from one of the Team's members indicates that Mr. Bourgeois has been supervised by the Team since February 14, 2012.

[29] The judge accepted that a mental health issue may affect the determination of sentence by reducing an offender's culpability or responsibility. However, in this case, he concluded that the necessary connection between Mr. Bourgeois' mental health condition and commission of the offences had not been demonstrated. He was satisfied that Mr. Bourgeois' symptoms appeared to be under control at the time of the offences.

[30] The judge made a factual determination that no nexus or connection between Mr. Bourgeois' mental health and commission of the offences had been demonstrated. There is no basis on which to conclude that he erred in that determination and that, as a result, Mr. Bourgeois' mental health issues were not a mitigating factor to be considered in determining an appropriate sentence.

[31] With respect to the question of rehabilitation prospects and the likelihood to re-offend, Mr. Bourgeois refused to participate adequately in the pre-sentence report and offered no evidence regarding the effect of his mental health issues. Accordingly, the trial judge had no information on which to adjust the sentence by reason of Mr. Bourgeois' mental health condition. In the result, Mr. Bourgeois' mental health condition does not provide a basis on which to conclude that the trial judge erred in determining an appropriate sentence.

Multiple Offences – the *Hutchings* Analysis

[32] In *R. v. Hutchings*, 2012 NLCA 2, 316 Nfld. & P.E.I.R. 211, this Court described a three-step approach to be applied in sentencing for multiple offences. The first step is to assign an appropriate sentence for each offence. The second step is to determine whether any of the offences should be ordered to be served concurrently on the basis that they constitute

a single criminal venture. The third step requires consideration of the principle of totality.

[33] In this case, the trial judge assigned sentences for each offence: (1) attempted robbery, four years imprisonment, and (2) possession of a weapon for the commission of an offence, six months imprisonment.

[34] The judge then proceeded to the second step, that is, whether the offences constituted a single criminal venture. He explained:

[62] In this case, after the attempted robbery, Mr. Bourgeois walked on a main street in Corner Brook with a large knife in his hand. This offence is sufficiently separate from the robbery that it could be the subject of a consecutive sentence. However, since the Crown specifically requested that any period of imprisonment imposed for this offence be ordered to be served on a concurrent basis to any sentence imposed for the attempted robbery offence, I conclude that the periods of imprisonment imposed for each of the offences committed by Mr. Bourgeois should be served on a concurrent basis. ...

[35] The determination to impose a concurrent sentence as requested by the Crown cannot be said to be an error. Submissions of counsel are always an important component in the assessment of an appropriate sentence.

[36] However, I would add that care must be taken not to give an overly broad interpretation to what constitutes a single criminal venture under step two of the analysis. Consideration should be given to factors such as whether the same offence is repeated, rather than different offences; whether the victim is the same; and how the offences may be linked in time. (For a discussion of relevant considerations, see, for example, *R. v. O'Quinn*, 2017 NLCA 10; *R v. Martin*, *supra*.)

[37] In this case, the offence under section 88 related, not only to the attempted robbery, but to Mr. Bourgeois' subsequently walking down the street with the knife exposed. The judge referenced the danger that resulted when the police became involved. In these circumstances, I would have characterized the offence under section 88 as carrying or possessing a weapon "for a purpose dangerous to the public peace" rather than "for the purpose of committing an offence", though the knife related to both. In the circumstances, I would not have characterized the offences as a single criminal venture. The attempted robbery and the later danger to the public peace were, in my view, separate offences.

[38] That said, in imposing sentence, the trial judge considered the relevance of the knife when he imposed a four-year sentence for the attempted robbery. The manner in which Mr. Bourgeois used the knife during the attempted robbery and when he left the restaurant increased the seriousness of the offence resulting in a longer sentence for the attempted robbery.

[39] Regarding step three of the analysis, consideration of the principle of totality, the trial judge referred to relevant factors and concluded:

[65] ... Thus, the overall sentence must reflect both the commission of the attempted robbery and the potential danger to the public and the police by the commission of the offence of possession of the knife for a dangerous purpose, after the attempted robbery was completed.

[66] I conclude that considering the nature of the two offences committed by Mr. Bourgeois and his criminal record, that a period of four years of imprisonment is not unduly long or harsh, in the sense that it is not disproportionate to the gravity of the offences and his degree of responsibility.

[40] At the sentencing hearing, the Crown had requested a total sentence of four to four and one-half years. Defence counsel submitted that thirty-six to forty months would be appropriate. On appeal, Mr. Bourgeois submits that a four-year sentence is demonstrably unfit, though he accepts that a sentence of three years may be appropriate.

[41] Mr. Bourgeois did not address the third step of the *Hutchings* analysis. Rather, he submits that the four-year sentence is demonstrably unfit based on his submission that the trial judge failed to take into account his mental health issues. In view of the discussion above, that position cannot provide a basis for determining that the judge erred in imposing the four-year sentence or in concluding that the sentence should not be reduced based on the principle of totality.

[42] The trial judge reviewed relevant case authority when determining the sentence for the attempted robbery. In assessing the total sentence, he took into account that the use of the knife during the attempted robbery and after he left the restaurant increased the seriousness of the offences. In the circumstances, there is no basis on which to conclude that the trial judge erred in imposing a total sentence of four years imprisonment.

DISPOSITION

[43] I would grant leave to appeal, and dismiss the appeal.

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

F. P. O'Brien J.A.