

File No:
Registry: Victoria

In the Provincial Court of British Columbia

REGINA

v.

K.P.

**REASONS FOR SENTENCE
OF
THE HONOURABLE JUDGE WISHART**

COPY

Crown Counsel:	T. Hodge
Defence Counsel:	R. Neary
Place of Hearing:	Colwood, B.C.
Date of Judgment:	May 25, 2012

[1] THE COURT: Mr. P. entered pleas of guilty with respect to Counts 2, 3, 4 and 5 on the information. Those offences arise from May 29th of 2010.

[2] Counsel explained that although it has been almost two years to get to this point, there were some issues in the beginning with respect to Count 1, and once those resolved guilty pleas were entered and then the delay since then has been in relation to the preparation of reports.

[3] Count 2 is what is commonly known as a charge of mischief, and that is in relation to a motor vehicle, and that count carries a two year maximum sentence. Count 3 is careless use of a firearm, again has a two year maximum. Count 4 is possession of a weapon for a purpose dangerous to the public peace, which has a 10 year maximum, and Count 5 is carrying a concealed weapon, which has a five year maximum.

[4] There are no mandatory minimums in relation to any of these counts.

[5] It is the position of Ms. Hodge for the Crown that a jail sentence is required, and that this is not a sentence that ought to be served in the community as a conditional sentence order, as this would not meet the principles of deterrence and denunciation, which must be paramount.

[6] Mr. Neary, on behalf of Mr. P., agrees that a jail

sentence is within the appropriate range, but argues that based on the particular facts of this case, deterrence and denunciation can be met through a conditional sentence order.

[7] I will go through the facts briefly.

[8] Shortly after 4 a.m. on the date in question Mr. P. used a shotgun to fire shots at the vehicle of L.C.. This vehicle was parked on Pandora Avenue. Mr. C. was not in the vehicle, or anywhere in the vicinity.

[9] Mr. P. fired three shots and there was damage to the window, the side and tire of Mr. C.'s vehicle. Police received calls of shots fired from people who heard the shots from their homes in the area. This was a residential neighbourhood. Mr. P. was stopped in his vehicle a short distance away and he was cooperative with the police.

[10] Mr. C. was interviewed, he admitted to being the aggressor in an incident earlier in the evening involving Mr. P. They had both been at a friend of Mr. P.'s home, it was a small gathering but Mr. C. arrived with friends and at some point he sprayed a hose at a female friend of Mr. P. The two, Mr. C. and Mr. P., did not know each other previously.

[11] Mr. P. acted impulsively in shooting at Mr. C.'s vehicle. The intent appears to have been only to cause damage to that vehicle.

[12] Mr. P. had the required firearms acquisition certificate for the shotgun and had it in his vehicle because he had been using it for target practice earlier that day.

[13] There is a pre-sentence report and a psychological assessment prepared with respect to Mr. P., and the background of Mr. P. is set out in those reports. He is currently 27 years old, and he was 25 at the time, and he has no criminal history whatsoever.

[14] Mr. P. was on his own at approximately age 18 and has worked to support himself since that time. He currently works full-time at a car dealership in Victoria and he enjoys the support of his aunt and uncle. He lived with them in their home from roughly ages 16 to 18 and they continue to be close. Mr. P. has also worked for four years with a friend's maintenance business doing power washing and roof and gutter cleaning. He is described as being reliable and a hard worker.

[15] By all accounts Mr. P. is a hard working young man living what I would call a normal life. He does not have any issues with alcohol or drugs and enjoys good relationships with friends and family members.

[16] Mr. P. participated in a psychological evaluation with Dr. S. Dr. S administered the HCR-20, which is a risk

assessment tool, and concluded that Mr. P.'s score reflects that he is at a low to moderate risk to reoffend.

[17] There was no further information provided in that psychological assessment as to what factors on the HCR-20 led to this risk assessment, as Mr. P. has no prior history of violence, so in some respects the psychological assessment is of limited assistance to me with respect to the specific aspects on that test which led to the conclusion that his risk was low to moderate.

[18] Dr. S expressed concerns regarding Mr. P.'s insight surrounding these offences and his willingness to participate in treatment. Mr. Neary cautioned as to the weight to be put on this opinion and provided further context to the comments that were attributed to Mr. P.

[19] According to Mr. Neary, Mr. P. is not reluctant to participate in treatment; however, he views these offences as completely isolated events and not ones that will be repeated. As such, it is difficult to determine what type of counselling would be of assistance to him, particularly any type of forensic counselling.

[20] Mr. P. has been on bail for almost two years with strict conditions. He has reported as directed and has had no difficulties whatsoever during this period. This certainly

bodes well with respect to his future risk, as this past behaviour indicates what his likely future behaviour will be, and it gives support to this being an isolated incident.

[21] The facts of this case and the personal circumstances of Mr. P. are important as one of the principles of sentencing is that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[22] This is one of the reasons that the court looks at other cases and the sentences imposed there. It provides a range for the type of offence. Where any particular offender's sentence falls within that range is dependent on the specific facts, and on the aggravating and mitigating circumstances of each case. The range determined from other cases does not amount to a minimum or a maximum sentence; it is merely a guideline, but the sentencing remains an individualized process and each case will depend on its own facts, as no two cases are ever identical.

[23] The aggravating circumstances here are that Mr. P. fired the shotgun and that it was fired in a residential area.

[24] There are several mitigating circumstances. Mr. P. has entered pleas of guilty and that, in itself, is an expression of responsibility, and he has also expressed his remorse for

this incident.

[25] In further mitigation, Mr. P. has no criminal record. He spent two years on bail with no incidents. He had the required firearms acquisition certificate for the shotgun. I am satisfied that there was no one in the area at the time that the shots were fired, and that the intent of Mr. P. was just to cause damage to Mr. C.'s vehicle.

[26] It is with these aggravating and mitigating factors in mind, along with the circumstances of the offence and the other personal circumstances of Mr. P. that I consider the sentences that were imposed in similar cases.

[27] All of the cases involving firearms recognized that deterrence and denunciation are the main purposes of sentencing that must be emphasized. The other purposes of sentencing are not to be ignored, including rehabilitation, but deterrence and denunciation ought to be given priority.

[28] The reason for the importance of emphasizing deterrence and denunciation was expressed by Judge Lytwyn at paragraph 2 in the case of *R. v. Bacon* 2010 BCPC 325. That was a case provided to me by Ms. Hodge. That paragraph is as follows:

With firearms offences, denunciation, deterrence and protection of the public are the overriding objectives when sentencing for firearms offences as I am in this case. A sentence with a denunciatory element represents a symbolic, collective statement

that the offender's conduct should be punished for encroaching on our society's basic code of values as viewed in our substantive criminal law.

[29] She then quotes *R. v. C. (M.A)*, [1996] 1 S.C.R. 500 [para. 81].

The courts have been unequivocal in emphasizing denunciation and deterrence when sentencing in firearms cases. The principle of proportionality, however, must not be forgotten. The sentence I impose must speak out against the offences and punish the offender but no more than [is] necessary.

[30] Offences involving firearms are treated in our society as serious crimes, as evidenced by the relatively high maximum sentences available for some firearms offences, and for others there are mandatory minimum jail sentences.

[31] While there is no mandatory minimum jail sentence here, I agree with counsel that the firing of a gun in a residential neighbourhood warrants a jail sentence.

[32] The other issues for me to determine are the length of that sentence and whether it can be served in the community as a conditional sentence order.

[33] A conditional sentence order, sometimes referred to as a CSO, is just that. It is a jail sentence that is served in the community conditionally. If the offender breaches any of the conditions, the offender may spend the balance of the sentence in jail. It is this threat which hopefully motivates

the offender to comply with the terms of their order.

[34] The terms imposed are designed to reflect the fact that it is a jail sentence, so there are typically restrictions on offender's liberty in the form of house arrest or curfew. There are often conditions to protect the public, as well, including that the offender not possess or consume alcohol or drugs, that they not have contact with certain people, restrictions from going to various places and restrictions on possessing any weapons or knives, and conditions with respect to counselling.

[35] This latter condition is aimed at addressing any underlying issues which may have contributed to the offending behaviour, often dealing with drug addiction or alcohol, anger management, relationship issues or mental health.

[36] A conditional sentence order is obviously a less restrictive sentence than a jail sentence served in an institution. However, this does not mean that it is a light sentence. The conditions are often onerous and have a large impact on the offender's life.

[37] Because of the restrictions in the form of house arrest or a curfew, members of the offender's community become aware of the fact that the offender is serving a sentence and the individual often has to tell employers, families, co-workers

and people who live in the neighbourhood that the individual is serving a jail sentence.

[38] The conditional sentence order regime is a recognition by parliament that a real jail sentence has little effect on recidivism rates or rehabilitation. A sentence served in the community can be tailored to meet the specific needs of the offender while still addressing deterrence and denunciation.

[39] The leading case on this point is that of *R. v. Proulx*, the decision of the Supreme Court of Canada. Reading from that decision, the Supreme Court of Canada made the following observations concerning conditional sentence orders:

A conditional sentence can provide significant denunciation and deterrence. As a general matter, the more serious the offence, the longer and more onerous the conditional sentence should be.

. . . a conditional sentence will be better than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community.

[40] The availability of the option of conditional sentences, along with other recent amendments to the *Criminal Code*, follows from parliament's clear message to the judiciary to reduce the use of incarceration as a sanction.

Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence

are particularly pressing, incarceration will generally be the preferable sanction. . . . a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of lesser importance, depending on the nature of the conditions imposed, the duration of the sentence, and the circumstances of both the offender and the community in which the conditional sentence is to be served. A conditional sentence may be imposed even where there are aggravating circumstances, although the need for denunciation and deterrence will increase in these circumstances.

[41] Sometimes because of the circumstances of the offence and the offender, a conditional sentence order is not able to meet the purposes of deterrence and denunciation. Again, it depends on the circumstances of the case.

[42] On the other hand, conditional sentence orders have been given for offences much more serious than the ones committed by Mr. P.. Conditional sentence orders have been given for offences of manslaughter and sexual assault, to name a few.

[43] The issue for me is whether deterrence and denunciation can be adequately addressed in Mr. P.'s case through a conditional sentence order. Ms. Hodge and Mr. Neary provided caselaw which is relevant both with respect to the appropriate range of the sentence for similar offences, as well as whether the sentence should be a traditional jail sentence or a conditional sentence order.

[44] The cases provided to me by Ms. Hodge indicate a range of

sentence between six months and 21 months in custody. In the *Jarsch* and *Los* cases, the offences carried one year mandatory minimum sentences, so they are less helpful in terms of range. A conditional sentence order was not an available option in either of those cases, because of the mandatory minimum sentence.

[45] The court in those cases did not comment on the conditional sentence order option because of those mandatory minimums. The court in those cases did, however, comment on the need for sentence to emphasize deterrence and denunciation.

[46] The *Ettawakapow* and *White* cases are from the 1980s. The conditional sentence order provisions were not enacted until 1996 and therefore a conditional sentence order was not an option in those cases, and not surprisingly, it was not considered by the court.

[47] The *Cheema* case is the only case in which a conditional sentence order was available as a sentence, as there was no mandatory minimum, and the case was after 1996. The judge determined that a conditional sentence order was not appropriate in that case and Mr. Cheema was sentenced to six months in jail.

[48] Mr. Cheema had no criminal record. The case involved an

incident at a nightclub. Once outside the nightclub Mr. Cheema obtained a handgun and fired five shots into the air. One of the shots went through a second storey window of the club and the bullet was found in the ceiling of the bar. Two patrons had glass fall on them as a result of this shot. There were approximately 250 people outside the club at the time that the shots were fired.

[49] Mr. Cheema appealed his sentence of six months in jail, arguing that he should have been given a conditional sentence order.

[50] In upholding the jail sentence imposed by the trial judge, the Court of Appeal found that a conditional sentence order would not meet the principles of denunciation and general deterrence, and the court said the following at paragraphs 17 and 18:

In the case at bar, we have a group of people involved, both inside the bar and moving outside into the parking lot. I am of the view that discharging a handgun in a public place, a parking lot, outside a nightclub where approximately 250 people are milling about and there has been some kind of altercation or dispute between various parties, creates an extremely dangerous set of circumstances. It is only good fortune that serious injury or death did not occur. We all are aware of the number of serious injuries and even deaths that have occurred recently by the use of firearms, [and] handguns.

In my opinion, the offence that occurred in the case at bar does not qualify for a conditional sentence, although I do not wish to be understood to be saying

that all firearm offences are precluded for the use of the conditional sentence pursuant to s. 742.2 of the *Criminal Code*.

[51] That is the end of that quote.

[52] Mr. Neary referred me to nine cases. In all cases, the court imposed a conditional sentence order. Some of the cases were not offences involving a gun, but involved more serious offences. One involving robbery of a convenience store, which is certainly more serious than the offences before me today. Or they were cases involving violence that was inflicted during an episode of retaliation.

[53] Obviously those cases the court found that a conditional sentence order could meet all of the purposes of sentencing.

[54] In two cases involving a firearm the court did not impose jail at all, imposed a suspended sentence with probation. In two cases involving firearms the court imposed a conditional sentence order.

[55] The facts of the *Kurmaluk* case in which the court imposed a 22 month conditional sentence order are far more aggravating than the facts in Mr. P.'s case.

[56] Mr. Kumarluk was involved in a fight with a Mr. Inukpuk. Mr. Kumarluk obtained a shotgun and as Mr. Inukpuk was fleeing the area Mr. Kumarluk fired the shotgun and hit Mr. Inukpuk's

house. There were people inside the house at the time, although no one was hit.

[57] Mr. Kumarluk had a prior record, but not for firearms offences, and the court commented that firearms related to crimes were a particular problem in that small community.

[58] Mr. Kumarluk had a positive pre-sentence report and he had been sober for more than two years since, between the date of the offence and the time of the sentencing. It was held that the conditional sentence order could meet the principles of deterrence and denunciation in that case.

[59] The review of this caselaw only reinforces the fact that determining an appropriate sentence is an individualized process. Clearly, a conditional sentence order is available for Mr. P.

[60] In my view, there are three factors particular to Mr. P.'s case that distinguish it from many other cases. First, he had a firearms acquisition for the shotgun. Second, he had it with him that day purely by chance, as he had been target shooting earlier in the day. Third, that his only intent was to damage Mr. C.'s vehicle.

[61] The appropriate sentence on all of the facts, in my view, is a sentence of nine months. That sentence is one that can be served in the community as a conditional sentence order.

[62] I am satisfied, given the circumstances of this case and the particular circumstances of Mr. P., that a conditional sentence order can properly meet the principles and purposes of denunciation and can serve as a deterrent to others.

[63] Dealing with the specific counts, that conditional sentence order will apply to Counts 3, 4 and 5. Count 2, which is the mischief count, on that count the sentence will be one of 30 days. It will also be as a conditional sentence order, and all counts are concurrent with one another.

[64] Counsel, at this point I intend to go through the terms of that conditional sentence order, and I will hear further from counsel if there are any submissions with respect to additional terms, or any concern with the wording that I have used.

[65] Mr. P., the terms I am about to read out, these will all be written down for you today, and you will get a written copy of this document, but I will review them at this time.

[66] There are mandatory conditions which include that you shall keep the peace and be of good behaviour, you shall appear before the court when required to do so by the court.

[67] You shall report in person to a conditional sentence supervisor and Mr. P., which probation office have you been reporting to?

[68] THE ACCUSED: Downtown.

[69] THE COURT: I will make the reporting condition as follows. You shall report in person to a conditional sentence supervisor no later than 12 noon on _____, at the probation office at 836 Courtney Street in Victoria, British Columbia, and you shall thereafter report as and when directed by your supervisor and in the manner directed by your supervisor. That will be terms 303 and 304.

[70] On first reporting to the supervisor, you shall inform him or her of your present residential address and phone number and you shall not change your address or phone number at any time without first notifying the supervisor.

[71] There will be a curfew. This reflects the fact that this is a jail sentence and there is a restriction on your liberty. That is in term 308.

[72] For the first two months of this order you shall obey a curfew by being inside of your residence between the hours of 7 p.m. and 6 a.m. each day except as follows: a) with the written consent of the supervisor; or, b) when travelling directly to or returning directly from your place of employment or while in the course of such employment, and you shall provide your supervisor with written details of your employment if requested to do so.

[73] After two months you shall obey a curfew by being inside of your residence between the hours of 10 p.m. to 6 a.m., except with the written consent of the supervisor or when travelling directly to or returning directly from your place of employment, or while in the course of such employment, and you shall provide your supervisor with written details of your employment if requested to do so.

[74] Mr. P., I do not know the setup of where you live, but if it is a house that has a yard, you can be outside in the yard after the curfew, and you are still in compliance with the curfew condition. You will need to be somewhere where you can answer a telephone, as I am about to impose two conditions to assist the authorities in enforcing that curfew.

[75] One is that they can phone your house to make sure that you are where you are supposed to be. Those are terms 311 and 312. You shall present yourself at the door to your residence when the supervisor or any peace officer attends there for the purpose of determining your compliance with curfew condition of this order.

[76] You shall respond personally and immediately to the telephone when a peace officer or the supervisor makes a phone call to your residence for the purpose of determining your compliance with the curfew condition of this order.

[77] I will include a no contact condition with respect to Mr. C., that is term 315, that you shall have no contact or communication directly or indirectly with L.C. Term 319, that you shall not attend at any place which you know to be the residence, school or workplace of L.C.

[78] There will be the no alcohol condition. Mr. P., if you were to serve this sentence in a jail theoretically you would not have any access to alcohol, and this condition again reflects the fact this is a jail sentence. That is term 321, that you shall not possess or consume any alcohol or controlled substance within the meaning of s. 2 of the *Controlled Drugs and Substances Act*, except as prescribed for you by a licenced physician.

[79] There will be a no weapons condition, that is term 327, that you shall not possess any weapon as defined in s. 2 of the *Criminal Code*.

[80] A counselling condition, that you shall attend, participate in and successfully complete any assessment, counselling or program as directed by your supervisor, which may include counselling for anger management, and in any case, you shall comply with all rules and regulations of any such assessment, counselling or program.

[81] I have specifically not included attending at Forensics

in that counselling condition. Although that was a recommendation from the psychological assessment, there was just nothing in that report that indicated that Mr. P. has a psychological problem or any mental health issues.

[82] But I do feel that there could be some benefit from some anger management counselling. So Mr. P., that will be up to the supervisor to determine. If he or she directs you to take that counselling, you are required to complete that.

[83] I know there are some other orders that I need to deal with, but counsel, anything with respect to the conditions on that conditional sentence order?

[84] MR. NEARY: Not from me, Your Honour.

[85] MS. HODGE: The other condition I'd ask Your Honour to consider is the no go to liquor stores, there's that condition on CSOs as well. I'm not sure if Your Honour considered it and decided not to impose it.

[86] THE COURT: I did consider it. He is on a condition not to drink. But I do not have any difficulty with him going to a pub and not drinking.

[87] So obviously you are tempting yourself if you put yourself in that situation, Mr. P. But I think you understand what the consequences are if you are to drink.

[88] The other orders I need to deal with are a forfeiture order, and that is with respect to the three firearms, and the order will be that -- I am not sure of the exact wording, Ms. Hodge, but I know that you will draft this up, that they can be for destruction at the discretion of the police.

[89] With respect to the DNA order, I am going to make that order pursuant to s. 487.051 of the *Criminal Code*, and this is a Victoria file, so Mr. P., I am going to direct you to attend at the Victoria police department next week and they take DNA samples on Tuesday, Wednesday and Thursday mornings at 8:30. Is one of those days better for you than the other next week?

[90] MR. NEARY: He's saying he's not sure of his work schedule for next week Your Honour, so he'll -- he'll make it happen whatever day you direct, or if you could leave it open to those -- one of those days, but he's entirely in your hands.

[91] THE COURT: I will do the wording this way, that you are to attend at the Victoria police department at 850 Caledonia Avenue in Victoria British Columbia by _____, to provide a sample of your DNA upon the demand of a peace officer.

[92] So as long as you have it done by Thursday next week, and as I said, it is Tuesday, Wednesday, Thursdays, right at 8:30 you would need to be there, it does not take very long, Mr. P.

[93] Pursuant to s. 109 of the *Criminal Code*, there will be a required firearms and related items prohibition, and that is for a period of 10 years. It is a lifetime on the restricted items. And counsel, any other orders we need to deal with?

[94] MR. NEARY: No Your Honour, thank you very much.

[95] MS. HODGE: With respect to Count 1, the Crown enters a stay of proceedings.

[96] THE COURT: Yes, thank you. And Mr. P., you are technically in custody until those documents are signed. I am not requiring that you be taken physically into custody, but you are not to leave the court house until you have signed the documents this morning, and then you need to report by noon on Monday downtown. Do you understand all of that?

[97] THE ACCUSED: Yes.

[98] THE COURT: Thank you, counsel, for your submissions in this matter.

[99] MR. NEARY: Thank you very much, Your Honour.

[100] MS. HODGE: Thank you.

(REASONS CONCLUDED)