

Citation: *R. v. McCormick*, 2014 YKTC 37

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Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

KHRISTOPHER GABRIEL McCORMICK,
KYLE ROBERT McCORMICK, AND
ALLEN JOHN RAYMOND YAKLIN

Appearances:

Joanna Phillips

Michael A. Reynolds

Nils F.N. Clarke

Gordon R. Coffin

Counsel for the Crown

Counsel for Accused Khristopher Gabriel McCormick

Counsel for Accused Kyle Robert McCormick

Counsel for Accused Allen John Raymond Yaklin

REASONS FOR SENTENCING

[1] CHISHOLM T.C.J. (Oral): Kyle McCormick, Khristopher McCormick, and Allen Yaklin have each entered guilty pleas to break and enter with intent to commit an indictable offence, robbery, and possession of stolen property.

[2] Khristopher McCormick, in addition, has pleaded guilty to a breach of recognizance, resisting arrest, and uttering threats.

[3] In the early morning hours of October 16, 2013, Messrs. McCormick and Yaklin and one other associate broke into and entered a residence occupied by Tyler Smith. Mr. Smith had fallen asleep on his couch and was awoken by masked individuals breaking into his residence. While Kyle McCormick acted as a lookout, the three others took the victim to the ground with Mr. Yaklin spraying him in the face with bear spray.

[4] The three hollered at him asking where his stash was. The victim was dragged to the door and told not to move. The three continued to yell at the victim demanding to know where his money was. Mr. Ayotte, who has already been sentenced for this matter, struck the victim in the back of the head with an axe handle.

[5] The intruders fled the residence in a motor vehicle, which had been earlier stolen, with personal property of the victim.

[6] The police, later that morning, located the stolen motor vehicle and subsequently obtained a search warrant for a nearby residence. They located Mr. Yaklin in the house and the other three assailants in the crawl space in the home.

[7] Mr. Khristopher McCormick was on a recognizance on October 16 and breached a term of that Court document by having communication with Mr. Ayotte.

[8] On October 9, 2013, the Whitehorse RCMP was investigating a complaint in the downtown area. The police had reasonable grounds to arrest Mr. Khristopher McCormick. When they advised him he was under arrest, he took off running. He later approached the two complainants who had phoned the police and told them he would kill them.

[9] The most serious of the offences to which the offenders have pleaded guilty is commonly known as home invasion-robbery. The courts have considered denunciation and deterrence to be the predominant sentencing factors in this type of case. The *Criminal Code* deems this type of offence to be statutorily aggravating in terms of sentencing.

[10] The British Columbia Court of Appeal in *R. v. Bernier*, 2003 BCCA 134 stated at para. 36:

Because home invasions are a violent form of burglary, sentences for these offences should not be tied so closely to the range of sentences ordinarily given for simple house breaking. Courts can do their part to preserve a citizen's right to live in security by imposing progressively severer sentences on those offenders who commit this type of crime. This will let the criminal element know that if they are found guilty of a home invasion type crime, they will spend a long time in jail.

[11] In the present case, there was violence perpetrated on the victim, resulting in injuries to him. He has been affected both physically and psychologically by these events. There was also a certain amount of premeditation involved in the commission of these offences, as the perpetrators possessed both bear spray and masks for these crimes.

[12] All three offenders were under the influence of drugs and/or alcohol at the time of the home invasion-robbery and possession of stolen property offences.

[13] In looking at the circumstances of each, it is clear that *Gladue* factors are present for each offender.

[14] With respect to Mr. Yaklin, he is a 21-year-old and comes before the Court with no criminal history. He is of First Nations descent. He emerged from a troubled childhood with neither positive role models nor pro-social skills. His friends are involved in criminal behaviour. He spent time in foster care and with his aunt before making the choice as a teenager to return to live with his mother. While living with her, he experienced trauma, viewing both domestic violence and substance abuse.

[15] According to the Pre-Sentence Report, he is the type of individual who can be manipulated by others. He is described as being a follower in this incident, although he did, in wielding and employing the bear spray, clearly accede to the direction given.

[16] He has been in a relationship for the past five years and has a two-year-old son. Although the relationship has been on and off again, Mr. Yaklin's spouse is apparently supportive of him. She does not have substance abuse issues and has not been involved in the criminal justice system. She is obviously the type of person with whom Mr. Yaklin should be spending time.

[17] Mr. Yaklin has spent the equivalent of six months in pre-trial custody. He has been offered the opportunity and has voluntarily taken advantage of programming while in custody, including a substance abuse management program. He was an active participant and demonstrated motivation to change. It is also noted that Mr. Yaklin confessed to his crimes and identified the involvement of others to the police.

[18] Kyle McCormick is 22 years of age and he is of First Nations heritage. He has a youth and adult criminal record which includes one assault conviction, breach of court orders, and property offence convictions. His last convictions were in 2011. His

upbringing was unenviable. His mother, who suffers from fetal alcohol spectrum disorder, lived on the streets of Vancouver with her four children, including Mr. McCormick, until he was approximately 8 years of age. She then moved to Whitehorse with her children, where she became involved in a series of unstable and abusive relationships. It appears that the family continued to struggle to maintain housing. As a result, Mr. McCormick has always lived a transient lifestyle. He has never had a positive father figure in his life. He dropped out of school when in grade 9, at which time he was already drinking alcohol and smoking marijuana. He subsequently completed that grade and is presently working on his high school equivalency. He has a sporadic work history.

[19] In terms of the matters for which he is being sentenced, he indicates that he had been smoking crack cocaine prior to the offences. He and his associates decided to rob an individual who they thought had drugs. He did not expect the victim would be assaulted. He is described as having been a follower rather than a leader. As indicated, his role was a lookout for the others, although, in the Pre-Sentence Report, it states that he admits to having taken a small television in the residence.

[20] It appears he has insight into how these crimes affected the victim.

[21] Mr. Kyle McCormick describes his roots and supports as being in British Columbia. He believes he can do well in the penitentiary and benefit from the programming there. He has done well while on remand at the Whitehorse Correctional Centre.

[22] Khristopher McCormick is 21 years of age and is a brother of Kyle McCormick. His unstable and abusive upbringing is similar to that of his brother. He recalls being verbally and physically abused by men with whom his mother associated. He witnessed domestic violence between his mother and her partners. He advises that his mother attended residential school. The author of the Pre-Sentence Report confirms that Khristopher McCormick's mother and all her siblings attended residential school in Port Alberni, British Columbia. His grandparents also attended residential school. One of his aunts indicated that she and her siblings grew up without emotional, physical, spiritual, or intellectual support from their mother.

[23] As described by his brother, Khristopher McCormick recalls living a transient lifestyle with his mother and siblings. His transient lifestyle has continued as an adult. The author of the Pre-Sentence Report has rated him as having a substantial level of problems related to alcohol abuse and a moderate level of problems with respect to his abuse of drugs. He has taken programming in this regard while in remand. He has a grade 10 education and has worked at a number of jobs, including full-time as a painter's assistant from 2011 to 2012. He has a limited criminal record with one adult conviction for which he received a conditional discharge. He describes himself as being high on crack cocaine when the home invasion occurred. He and his associates committed the crime in order to obtain more drugs.

[24] It should be noted that Khristopher McCormick presented a letter of apology to the Court.

[25] The Crown seeks global sentences in the two and a half to three and a half year range for these offenders, reduced for time spent in remand. The Crown has clearly taken this position due to the offenders' respective roles in the crimes as well as the somewhat unique individual circumstances of each.

[26] The defence quite understandably joins in the respective sentences being proposed by the Crown. In fact, Khristopher McCormick has requested a federal penitentiary sentence in addition to the time he has spent on remand even though, based on the Crown proposal, he would be eligible to spend the remnant of his time in the Whitehorse Correctional Centre.

[27] The job of a court when faced with joint submissions can be a difficult one, especially in situations where the sentence the Court might have imposed is different than what is being suggested by way of the joint submission. A court is not bound by a joint submission, as indicated in *R. v. Olson*, 2011 BCCA 8, however, I do keep in mind principles enunciated in appellate decisions such as the Ontario Court of Appeal's decision in *R. v. Cerasuolo* (2001), 140 O.A.C. 114 in which the court stated at paragraph 8:

This court has repeatedly held that trial judges should not reject joint submissions unless the joint submission is contrary to the public interest and the sentence would bring the administration of justice into disrepute: e.g. *R. v. Dorsey* (1999), 123 O.A.C. 342 at 345. This is a high threshold and is intended to foster confidence in an accused, who has given up his right to a trial, that the joint submission he obtained in return for a plea of guilty will be respected by the sentencing judge.

[28] And in paragraph 9:

The Crown and the defence bar have cooperated in fostering an atmosphere where the parties are encouraged to discuss the issues in a criminal trial with a view to shortening the trial process. This includes bringing issues to a final resolution through plea bargaining. This laudable initiative cannot succeed unless the accused has some assurance that the trial judge will in most instances honour agreements entered into by the Crown. ...

[29] Cromwell J.A., as he then was, stated in *R. v. MacIvor*, 2003 NSCA 60 at paragraph 31:

... It is not doubted that a joint submission resulting from a plea bargain while not binding on the Court, should be given very serious consideration. This requires the sentencing judge to do more than assess whether it is a sentence he or she would have imposed absent the joint submission: see, e.g., *R. v. Thomas* (2000), 153 Man. R. (2d) 98 (C.A.) at para. 6. It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range - in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing from it ...

[30] And he refers to case law in this regard.

[31] And at paragraph 32:

Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation.

[32] I also take into account s. 718.2(b) of the *Code* which indicates that:

a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[33] I am mindful of the fact Mr. Ayotte, who was a co-accused in this matter was sentenced to a four-year sentence for his role in the matter. He had a more serious criminal record than any of the offenders being sentenced today, had difficulties dealing with those in authority and required "meaningful and in-depth counselling". It was also he who struck the victim in the head with an axe handle. His prospects for rehabilitation were not as positive as the three gentlemen before me today. It is common ground that he was the leader in this matter.

[34] There is a wide range of sentences for a home invasion-break and enter. In the Yukon, from a review of the decisions for this type of offence -- and I have noted a number of decisions -- the range of sentence for this offense is three to five years. As indicated, the principles of denunciation and deterrence emerge as the primary sentencing factors when the sanctity and security of a person's home have been violated. I am referring to a number of decisions from the B.C. Court of Appeal.

[35] However, a range of sentence is not absolute and may be varied either upward or downward if the circumstances call for it. Considering the ages of the offenders and their respective backgrounds and circumstances, the principle of rehabilitation cannot be forgotten or ignored. It is clear that all have the intelligence and potential to turn their respective lives around. The positive steps each has taken while on remand indicate the seriousness with which they take their predicament. These offenders should also

receive credit for having entered guilty pleas and for having taken responsibility for the offences.

[36] The sentences proposed allow for rehabilitation while also emphasizing denunciation and deterrence. As such, I accede to the joint submission of counsel.

[37] Mr. Yaklin, for the break and enter offence, you are sentenced to two and half years in a federal penitentiary. Taking into account your remand time, the amount left to serve is two years, plus there will be a one year probation order, the terms of which I will deal with at the end. The robbery charge, 20 months of jail concurrent, and for the position of stolen property charge, six months jail concurrent.

[38] Kyle McCormick, you are sentenced for the break and enter offence to three years incarceration in a federal penitentiary less 12 months time served, which will leave two years. You will also be sentenced to one year of probation. For the robbery, two years less a day concurrent; for the possession of stolen property, six months concurrent.

[39] And Khristopher McCormick, for the break and enter, two and a half years in a federal penitentiary and, at your request, taking into account a certain amount of your remand time, this will be reduced to two years in a federal penitentiary. For the robbery, 20 months jail concurrent; for the possession of stolen property, six months jail concurrent. And for the other matters which occurred on October 9, 2013, taking into account the principle of totality for the section 129(a) matter, 30 days jail concurrent; for the section 145(3) matter, 30 days jail concurrent; and for the uttering threats, the 264.1 matter, 30 days jail concurrent.

[40] For each of you, the probation period of one year which will attach to the two-year sentence for the break and enter, the statutory terms that apply are:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;
3. That you notify the Court or probation officer in advance of any change of name or address and promptly of any change in employment or occupation;
4. That you report to a probation officer immediately upon your release from custody and thereafter in the manner directed by the probation officer;
5. That you reside as directed by your probation officer and not change that residence without the prior written permission of your probation officer;
6. That you not consume or possess alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;
7. That you provide a sample of your breath or urine or blood for the purposes of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition;
8. That you not attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off sales, bar, pub, tavern, lounge, or nightclub;

9. That you take such assessment counselling and programming as directed by your probation officer;
10. That you have no contact directly or indirectly or communication in any way with Tyler Smith;
11. That you do not knowingly attend within 50 metres of Tyler Smith;
12. That you make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts; and
13. That you provide your probation officer with consent to release information with regard to your participation in any assessment, counselling, and/or programming that you've been directed to do pursuant to this order.

[41] In terms of ancillary orders, for each of you, pursuant to s. 109 of the *Criminal Code*, there will be an order that you are not to possess any firearm, ammunition, or explosive substance for a period of 10 years following your release from imprisonment. And for each of you, pursuant to s. 487.051 of the *Criminal Code*, you are to provide samples of bodily substances for the purpose of DNA analysis and recording.

[42] The Victim Fine Surcharges are waived with respect to all matters.

CHISHOLM T.C.J.