

Citation: *R. v. Hickey*, 2025 YKTC 6

Date: 20250206
Docket: 24-00739
23-00498A, 24-00667
24-00693, 24-00676A
24-00676B, 24-00676C
24-00740, 24-00876
24-00872, 24-00693A
24-00741, 24-00692
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

MARCUS IVAN EDMOND HICKEY AKA MARCUS HICKEY

Appearances:
Karlena A. Koot
Amy Chandler

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

THE COURT: This decision was delivered from the Bench in the form of Oral Reasons. The Reasons have since been edited without changing the substance.

[1] CAIRNS T.C.J. (Oral): Mr. Hickey is before the Court having entered pleas to a number of charges. I will review those again for the record and am drawing on the document filed by counsel titled “Logistics of Guilty Plea on February 6, 2025”.

[2] With respect to Information 24-00667, Mr. Hickey entered a plea of guilty to Count 1, an offence contrary to s. 356(1)(a) of the *Criminal Code* (the “Code”) that he

stole documents sent by post — and those were at Whitehorse Correctional Centre — taking them before they were in the possession of the addressee. They were not intended for him.

[3] Mr. Hickey has entered a plea of guilty on Information 24-00876, Count 1, that on the September 20, 2024, he did have in his possession a Honda generator, the property of Kyle Bartel. I note that the generator was found close by and returned.

[4] Mr. Hickey has entered a plea of guilty to 23-00498A, as amended, an allegation that on August 15, 2024, he failed to report.

[5] With respect Information 24-00692 that he, on September 26, 2024, had in his possession a bicycle. I note that the bicycle was also located. That is an offence contrary to s. 354(1)(a) of the *Code*.

[6] On Information 24-00693, as amended, on September 26, 2024, he stole a wallet of Xavier Quash and a purse of Barbara Morris. As well, Count 2, that on September 26, 2024, he committed mischief, and there was damage to a motor vehicle of Xavier Quash. With respect to the theft charge, the rings of Ms. Morris were returned. I do not know if it was confirmed about the \$100 that were in the wallet of Xavier Quash.

[DISCUSSIONS]

[7] No restitution is sought in relation to the damage to the vehicle.

[8] Information 24-00693A, on October 14, 2024, is an allegation contrary to s. 145(5)(a) of the *Code*, that Mr. Hickey failed to comply with a curfew on his release order.

[9] With respect to Information 24-00739, there are two counts that have been pleaded to. Count 1 is in relation to trafficking tools contrary to s. 355.2(a) of the *Code*. Count 2 as amended involves the possession of property — largely tools — of a number of listed people: Emmet Kapaniuk, Bruce Montgomery, and Derrik Anderson. I believe that is all of them. I understand also that the tools stolen from the named individuals were returned. There is, however, restitution of \$250. I believe it is for Reid Hoitz. You said Kyle Bartel but perhaps you could confirm, \$250?

[DISCUSSIONS]

[10] There is an Agreed Statement of Facts, but it has already been read in, so I will not review it again. At this point, in relation to the charges that Mr. Hickey has entered pleas to, he has been in custody for 126 actual days. When that is calculated at the credit of 1:1.5, that is 189 days, or approximately just over six months.

[11] Both Crown and defence agree that a custodial sentence is warranted for the offences that are before the Court.

[12] The Crown's position is that some additional time to the pre-sentence custody is warranted, and they are seeking a global disposition of nine months, followed by a fairly limited probation order of 12 months. The Crown also filed two cases which I have

reviewed, but given some of the differences, I find them to be of little assistance in this disposition.

[13] On behalf of Mr. Hickey, defence counsel seeks a sentence of time served, around six months, followed by a probation order of 12 months, which is somewhat more rehabilitative in nature than that proposed by the Crown.

[14] In terms of Mr. Hickey's background, he is a fairly young man — 34 years old, I am advised. He is Métis. He is from New Brunswick originally, but he moved to the Yukon a number of years ago in attempt to get himself back on track. He indicated in some of our earlier exchanges that he was in a bit of trouble in New Brunswick, and he came to the Yukon to live with his father. I believe that was in Watson Lake. His mother continues to live in New Brunswick. He completed his Grade 12 education, and then said he began working and has worked very hard. He has worked as a driver, and he was able to learn, on various jobs, mechanical skills. He has good skills as a mechanic, although he does not have a licence or formal qualifications.

[15] Mr. Hickey indicates that there was a period of time that he did well, but it is apparent, because of the way he is before the Court, that he succumbed to struggles with addictions in relation to substance abuse. I have been advised that his addictions are what bring him before the Court today and have brought him before the Court on numerous other occasions. He has a fairly lengthy criminal record dating back to 2012. The first entry in 2012 is from New Brunswick. I note, following that, there was a gap between 2012 and about 2018, and then his criminal record starts up here in the Yukon and runs quite steadily since that time. While his record has a significant pattern of

property offences as well as breaches of court orders, I did not note any entries on his record for violent offences.

[16] Today, in speaking with Mr. Hickey, he appeared to me to be an articulate and well-spoken young man. He acknowledged the struggles that he has been facing and he expressed remorse for the impact his actions have on the community and the individuals impacted by his property crimes. It is clear he also acknowledges that the substance abuse that lands him before the Court has a significant impact on him and his ability to live a positive life. In my view, while he does not have an easy road before him, given his relatively young age, there is hope that he can rehabilitate himself and contribute positively to the community and better his life prospects.

[17] While in custody, he participated in a number of programs, and letters to that effect have been filed with the Court for this sentencing. He successfully completed a Residential Drug Abuse Program (“RDAP”) and a Challenging Thinking program in November 2024. He successfully completed a Getting Started program, part of the Courage to Change series, in December 2024. He also, in December, successfully completed a Traumatic Stress and Resilience program and he successfully completed, in November 2024, a Stopping Abuse For Everyone (“SAFE”) program. These are positive steps. He has clearly been taking advantage of programming available to him in Whitehorse Correctional Centre.

[18] I am also in receipt of a letter from the resident Elder at Whitehorse Correctional Centre, Jerry Sultani, who has been a support to Mr. Hickey while he has been here and notes that Mr. Hickey has been attending an Elder Circle, has been working on his

artistic abilities, and has sewn and beaded many pieces, which has being a very positive step for him.

[19] There is also a letter from a part-time chaplain at Whitehorse Correctional Centre, Tony Ens, also being a support for Mr. Hickey in group settings and on a one-on-one basis.

[20] There is a letter from clinical counsellor Ricki Tardiff, who talks about meeting with Mr. Hickey both in attempts to work towards group treatment — which have been derailed by various reasons which do not appear to be Mr. Hickey’s fault — and also one-on-one connection with Mr. Tardif.

[21] Again, it appears that Mr. Hickey has been making every effort to take advantage of what is available to him while he is in Whitehorse Correctional Centre.

[22] I am also advised by his counsel that Mr. Hickey has connected with a psychiatrist, Dr. Boyd, in relation to various issues that he struggles with, including post-traumatic stress disorder (“PTSD”) and attention deficit hyperactivity disorder (“ADHD”).

[23] These are all the steps Mr. Hickey has been taking since he has been in custody.

[24] In looking forward, I am advised that he has arranged housing with what I will call “a family connection”. This housing is located outside of the downtown core and would allow him to avoid residing at the shelter, where he has resided in the past or has gone for food. The shelter is a place where it is difficult to remain sober because there are

many, what were described as, “temptations” there. As a result, Mr. Hickey has set himself up to be away from that place, in housing.

[25] In terms of employment, one of the issues that was raised is that Mr. Hickey is currently without a driver’s licence, and he needs to get that back because that is something that is important for his ability to work. At this point, he does not have any fines to pay, but he does need to take a test, and then he can get his licence. He previously had employment with Cobalt and hopes to reconnect with them. As mentioned, Mr. Hickey is someone who has worked as a mechanic as well as a driver.

[26] That is Mr. Hickey’s background and what he has been involved with since he has been incarcerated.

[27] The primary issue before me today is really the length of the custodial sentence to impose and the type of probation order to follow. In particular, there has been a proposal by defence counsel that the length of Mr. Hickey’s sentence can be reduced because of state misconduct towards him on three occasions. Defence counsel has argued that Mr. Hickey was mistreated by police during his arrest on a number of charges. I will reference those directly.

[28] With respect to Information 24-00876, there was an arrest on September 20, 2024, in relation to the theft of the Honda generator. I am told by defence counsel that his arrest by a plainclothes officer was captured on video and that he was punched and kicked, suffering some injuries, but there were no photos filed, and no particular injuries noted. The Crown did not dispute that the arrest occurred in this manner.

[29] With respect to Information 24-00693, an arrest occurred on September 26, 2024, in relation to mischief, namely, breaking the window of Mr. Quash's truck and also the theft of Mr. Quash's wallet and the purse of Ms. Morris. On this occasion, I am told that Mr. Hickey was riding his bicycle, and a police vehicle rode alongside him. The police in the passenger side of the vehicle attempted to grab him from the open window of the moving vehicle. I view this as very serious and potentially extremely dangerous for Mr. Hickey, as he could have fallen in front of the vehicle and been very seriously injured. Luckily, that did not happen. However, he said he went to the ground and, on the ground, was punched and kicked. And again, the Crown is not disputing that the arrest occurred in this manner.

[30] With respect to Information 24-00739, dated September 20, 2024, this is an arrest for trafficking tools. Again, Mr. Hickey was riding his bicycle. I am told he was hit by a police vehicle. He then crashed his bike and was taken to hospital to be treated for his injuries. After being treated at the hospital, he was then taken into — I believe it is the side of the hospital — to depart to the police station. In that location, it is alleged that he was struck by police, leading to serious injuries that are shown in photographs taken by Whitehorse Correctional nurses. Those photographs were handed up to the Court. I do not believe they have been filed as exhibits, but we will file them. They show there is an injury to his forehead, which required stitches, which I understand arose from falling off his bike after being struck by the police vehicle, and a very significant black eye.

[31] There is also a photograph of his ear, which shows some injuries more difficult to see, that I am advised were about two weeks later.

[32] At that time, he was also put into a spit mask despite his injuries, which involved quite a bit of bleeding. I am told that the location where this assault took place is under video surveillance, but the video evidence was not preserved. As indicated, Mr. Hickey received stitches and had a serious black eye. When he was at the Whitehorse Correctional Centre, the nurses there ensured he had CT scans to make sure there were not any further injuries to him. Again, the Crown is not disputing that the arrest occurred, or that these assaults occurred, or that the police actions caused these injuries.

[33] The Crown is not disputing the defence counsel's argument that the police used excessive force, resulting in injuries to Mr. Hickey, and the defence is asking me to take this state conduct into account as a mitigating factor in Mr. Hickey's sentence.

[34] Defence counsel filed the Supreme Court of Canada's decision in *R. v. Nasogaluak*, 2010 SCC 6, in support of this argument, and I will draw from that case.

[35] In that case, the Crown disputed that the force used by the police officers was outside of their authority, but in para. 32, the Court stated:

...police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

[36] Paragraph 33 refers to s. 25 of the *Code*, and I read:

The legal constraints on a police officer's use of force are deeply rooted in our common law tradition and are enshrined in the *Criminal Code*. This case engages s. 25 of the *Code*, the relevant portions of which are reproduced below:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

...

(b) as a peace officer or public officer,

...

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

...

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

[37] Turning now to para. 34:

Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis. If [the] force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner. [citations omitted]

[38] I will say in, this case, there is no evidence here that Mr. Hickey was attempting to flee.

[39] Turning now to para. 48:

... the sentencing regime under Canadian law must be implemented within, and not apart from, the framework of the *Charter*. Sentencing decisions are always subject to

constitutional scrutiny. A sentence cannot be “fit” if it does not respect the fundamental values enshrined in the *Charter*. Thus, incidents alleged to constitute a *Charter* violation can be considered in sentencing, provided that they bear the necessary connection to the sentencing exercise. As mitigating factors, the circumstances of the breach would have to align with the circumstances of the offence or the offender, as required by s. 718.2 of the *Code*. Naturally, the more egregious the breach, the more attention the court will likely pay to it in determining a fit sentence.

[40] Turning to para. 49:

... s. 718 of the *Criminal Code* describes the fundamental purpose of sentencing as that of contributing to “respect for the law and the maintenance of a just, peaceful and safe society”. This function must be understood as providing scope for sentencing judges to consider not only the actions of the offender, but also those of state actors. Provided that the impugned conduct relates to the individual offender and the circumstances of his or her offence, the sentencing process includes consideration of society’s collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society.

[41] Turning to para. 51, the Court refers to a case of *R. v. Pigeon* (1992), 73 C.C.C.

(3d) 337 (B.C.C.A), 1992 CanLII 869 (BC CA):

... which illustrates the court’s authority to address police violence within the context of ordinary sentencing principles. [In that case] [t]he offender was a Chilcotin man who had fled from police after committing a break and enter. After an officer fired a shot into the air, Mr. Pigeon returned from whence he had fled — unarmed and unaggressive — with the intent to surrender. The officer grabbed Mr. Pigeon by the hair and threw him onto the pavement. Rather than handcuff the accused at this point, the officer lifted him back up and dragged him by the hair to where the other officer was stationed. He threw him onto the ground again and, with the other officer’s foot firmly placed on the accused’s neck, handcuffed him. Mr. Pigeon did not resist arrest or attempt to escape at any time.

[42] Paragraph 53 states:

It is important to note that a sentence can be reduced in light of state misconduct even when the incidents complained of do not rise to the level of a *Charter* breach. ...

[43] And finally, para. 55 states:

... a sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence, without requiring the offender to prove that the incidents complained of amount to a *Charter* breach. Provided the interests at stake can properly be considered by the court while acting within the sentencing regime in the *Criminal Code*, there is simply no need to turn to the *Charter* for a remedy. ...

[44] In essence, what that case is telling us is that police misconduct can be relied on to mitigate sentence, even where a *Charter* breach has not been established.

[45] In this case, I find that I can take this state misconduct into account, as it is linked to this offender and to these particular offences. As noted, defence counsel has linked these allegations to state misconduct to three of the arrests before the Court, and the Crown is not disputing that. As a result, I am in a position where I may take these undisputed, serious allegations at face value and will take them into account in applying Mr. Hickey's sentence.

[46] Sentencing is an individualized process. Its fundamental purpose is to protect society and contribute to the respect for law and the maintenance of a just, peaceful, and safe society. There are a number of principles that we look to when we are imposing a sentence. Section 718.2(a) of the *Code* denounces unlawful conduct and

the harm to victims and community, and, in my view, that is important in this case.

There are a number of victims who were all harmed by these actions.

[47] There is specific deterrence for Mr. Hickey. It is very important to deter him from these kinds of actions. There were clearly a rash of actions that brought Mr. Hickey before the Court on this occasion. Section 718.2(c) of the *Code* is to separate offenders where necessary. Mr. Hickey has already been separated from society for a period of time at this point.

[48] There is also, in this case, rehabilitation. In Mr. Hickey's case, I find that society will best be protected from his offending behaviour by his rehabilitation from his substance abuse addiction — not an easy thing to do. I find a custodial sentence is appropriate, but I find at this point, given the credit he is eligible for in relation to his pre-sentence custody, that no further custody is required.

[49] I also note s. 718.2(a) of the *Code* states that a sentence can be increased or reduced to account for any relevant aggravating or mitigating circumstances related to the offender and this offence.

[50] So, here, the mitigating factors include the guilty pleas. There are numerous offences, and clearly, the guilty pleas saved the Court significant time, as well as the victims of these offences. I am advised by his counsel that Mr. Hickey was always keen to resolve these matters, but it took some time given the number of charges before the Court.

[51] I have heard from Mr. Hickey today that he is remorseful for his actions.

[52] I have also had information put before me about his efforts at rehabilitation while at Whitehorse Correctional Centre.

[53] I also take into account, as just discussed, the use of force by state actors against him on three occasions, causing, on at least one of those occasions, fairly serious injuries as depicted in the photographs that are before the Court.

[54] In terms of aggravating factors, I note that there are quite a number of offences, he has a significant record, and there was an impact on numerous victims. I note that that impact is lessened because many of the items were returned.

[55] Without the state misconduct that has been drawn to my attention, I would have found the Crown's position appropriate. However, guided by *Nasogaluak*, I accede to Mr. Hickey's argument that his sentence should be reduced on the basis that the state misconduct be taken into account. For that reason, I will accede to defence counsel's proposal, and I will just read that out for the Court:

- Information 24-00667, Count 1: a sentence of 15 days;
- Information 24-00876, Count 1: a sentence of 60 days consecutive to Information 24-00667 (I have reduced the sentence proposed by the Crown of 90 days to 60 days because of the state misconduct);
- Information 24-00498A, Count 1: 10 days concurrent;
- Information 24-00692, Count 1 (theft of the bicycle): 15 days concurrent;

- Information 24-00693:
 - Count 1 (mischief charge in relation to Mr. Quash's truck):
30 days consecutive;
 - Count 2, as amended (theft for the wallet and purse): 15
days consecutive;
 - Information 24-00693A (curfew breach): 10 days
concurrent;

- Information 24-00739:
 - Count 1 (trafficking of tools): 20 days (I will reduce the
Crown's proposal of 50 days to 20 days, again, in
recognition of the state misconduct);
 - Count 2: 45 days (I will reduce the Crown's position of 75
days to 45 days)

[56] Those sentences are consecutive to the other sentences imposed. The intent is that that adds up to the time served of approximately six months.

[57] In terms of the probation order to follow, I will impose 12 months.

[DISCUSSIONS]

[58] There will be an order of probation for a period of 12 months, Mr. Hickey. The statutory terms are to:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify your Probation Officer in advance of any change of name or address, and promptly of any change in employment or occupation;
4. Have no contact with Xavier Quash, Barbara Morris, Tobias Guzik, Emmett Kapaniuk, Derrick Anderson, Bruce Montgomery, Reid Hoitz, Kyle Bartel;

[DISCUSSIONS]

5. Remain 50 metres away from 171 Industrial Road (Reid Hoitz' place of work);
6. Report to your Probation Officer within two working days of your release from custody, and thereafter, when and in the manner directed by your Probation Officer;
7. In order to support you in your rehabilitative efforts, Mr. Hickey, you are to attend and actively participate in all assessment and counselling programs as directed by your Probation Officer and complete them to the satisfaction of your Probation Officer for the following issues: substance abuse and any other issues identified by your Probation Officer, and provide consents to release information to your Probation Officer

regarding your participation in any program you have been directed to do pursuant to this condition.

[59] I will waive the victim surcharge, as Mr. Hickey has been in custody and he does not have immediate employment upon his release.

[60] I will not make the restitution order, given it is unclear in the Agreed Statement of Facts who it would be made to.

[61] With respect to the remaining charges, Ms. Koot?

[62] MS. KOOT: Withdrawn, please.

[63] THE COURT: Withdrawn.

CAIRNS T.C.J.