Citation: *R. v. Ayotte*, 2014 YKTC 21

Date: 20140509
Docket: 13-00477
13-00477A
13-00491D
13-00501A
13-00501F
Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

TIM AYOTTE

Appearances:
Joanna Phillips — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR SENTENCING

[1] CHISHOLM T.C.J. (Oral): Mr. Tim Ayotte has pleaded guilty to a number of *Criminal Code* offences for which he is being sentenced. All of these matters occurred in October of 2013 in Whitehorse.

[2] On October 1st, police responded to a 911 call. Police observed Mr. Ayotte outside the residence from which the initial call had been placed. They activated their emergency equipment and told him to stop in order to arrest him for an alleged assault. He ran from them, but was subsequently located. As police attempted to arrest and subdue him, he actively resisted. He was released the following day on an Undertaking.

[3] On October 9th, Mr. Ayotte and two other individuals assaulted two people on the Millennium Trail in the downtown area. Mr. Ayotte punched the male victim while one of his associates kicked the person. His other associate assaulted the female victim. The victims contacted the police to report the assaults. The police went to the area and located Mr. Ayotte and the other assailants. The police told Mr. Ayotte that he was under arrest for assault. He fled from police, who were unable to locate him. Mr. Ayotte was under the influence of alcohol, contrary to a condition of his earlier release; a warrant issued for his arrest.

[4] In the early morning hours of October 16th, Mr. Ayotte and two associates broke into and entered a residence occupied by Tyler Smith. Mr. Smith had fallen asleep on his couch and was awoken by three masked individuals breaking into his residence. The three intruders took the victim to the ground and one of them sprayed him in the face with bear spray. The three hollered at him, asking where his "stash" was. He was dragged to the door and told not to move. They continued to yell at the victim, demanding to know where his money was. Mr. Ayotte hit the victim in the back of the head with an axe handle. The intruders took a television, laptop, cell phone, and left the residence. The three assailants fled the residence in a stolen motor vehicle.

[5] The police, later that morning, located the stolen motor vehicle and subsequently obtained a search warrant for a nearby residence. They located Mr. Ayotte and his two associates in a crawl space in the home.

GRAVITY OF THE OFFENCES

[6] The most serious of the offences committed by Mr. Ayotte is commonly referred to as home invasion. Although always treated seriously by the courts, a break and enter, which falls into the home invasion category, is now a statutorily aggravating factor on sentencing. Prior to this amendment to the *Criminal Code*, the British Columbia Court of Appeal stated in *R. v. Bernier*, 2003 BCCA 134:

> [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.

[7] These types of offences have become all too common, even in smaller cities such as Whitehorse.

[8] The break and enter and robbery involved a significant amount of violence to the victim. He suffered a concussion, which produced severe headaches. His eyes still bother him as a result of the effects of the bear spray.

[9] Mr. Ayotte states that he was under the influence of hard drugs at the time and was desperate to find a way to get another fix. Although I understand the desperate situations of those plagued by drug addiction, this cannot be used as a crutch to justify the type of violent crimes to which Mr. Ayotte has pleaded guilty.

[10] There was also some level of premeditation to the break and entry and robbery, as the perpetrators arrived masked with bear spray in hand. Although Mr. Ayotte states he located in the house the axe handle he used as a weapon, he cannot escape the fact that the he and his cohorts arrived at the house ready to perpetrate violence on the victim.

[11] As a result of the violent nature of these matters, the sentence imposed must denounce this behaviour and deter Mr. Ayotte and others from this type of conduct. At the same time, I must impose a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender.

DEGREE OF RESPONSIBILITY OF THE OFFENDER

[12] Mr. Ayotte is 22 years of age. He is of First Nation heritage. He has amassed a criminal record, both as a youth and an adult, which includes notably four convictions for assaultive behaviour. Despite his moderate record, for an individual of his age, he has spent relatively small periods of time in custody.

[13] He comes from a very troubled background. It is reported his parents' relationship was characterized by alcoholism and violence. Mr. Ayotte himself was the subject of physical abuse. It is reported he was exposed to alcohol abuse and witnessed violence in the home. He was taken into temporary care on occasion before becoming a permanent ward of Family and Children's Services at the age of six.

[14] He was a difficult youth to manage and despite numerous interventions, his behaviour deteriorated. He was assessed for Fetal Alcohol Spectrum Disorder, when it

was known as Fetal Alcohol Syndrome, but is not reported to display symptoms of FASD. From testing done in 2007, he is reported to have a lower end IQ at the 14th percentile. His processing speed was reported at the 2nd percentile.

[15] He was assessed as a youth as having Asperger Syndrome. According to Mr. Ayotte, during his youth, he was placed on different medications in an attempt to control his behaviour. His attendance at school was erratic. As he grew older, his behaviour deteriorated and he came into trouble with the law at the age of 16. He was described as oppositional and deviant to rules and structure in his group home. His tumultuous and difficult childhood explains in part why he is before the criminal courts. There have also been reports of mental health issues in his past.

[16] On the other hand, the defence argues that he displays insight with respect to his present situation and he wishes to make positive changes. At this sentencing hearing, Mr. Ayotte spoke about the difficulties he had growing up. He acknowledges that he has caused others significant problems over the years. He would like to participate in intensive counselling while in custody.

[17] One of the problems identified in 2007 was that Mr. Ayotte was unable to develop pro-social attachments. This factor is still present today. Based on the report from the correctional centre, which outlines a number of incident reports, he continues to be oppositional in his behaviour towards others, specifically those in positions of authority. On the other hand, it was positive to see he has the support of one of his sisters who attended the sentencing hearing.

SENTENCE

[18] The Crown seeks a global sentence of imprisonment in the five to seven year range. The defence submits that a more appropriate sentence is between two to three years. Mr. Ayotte has been in custody for just over 200 days.

[19] As might be expected, there is a wide range of sentences for a home invasion break and enter. In the Yukon, from the decisions I have consulted: *R. v. Brace and Stewart*, 2008 YKTC 41; *R. v. Henry*, 2002 YKTC 62; *R. v. Sterriah*, 2003 YKTC 37; *R. v. Jordan*, 2003 YKTC 104; *R. v. Germaine*, 2007 YKTC 90; *R. v. Sidney*, 2008 YKTC 40; *R. v. Rutley*, 2013 YKTC 19, the range of sentence for this offence is in the range of three to five years.

[20] I have also reviewed a number of decisions from the British Columbia Court of Appeal: *R. v. Bernier*, *supra*; *R. v. Vickers*, 2007 BCCA 554; *R. v. Moore*, 2008 BCCA 129; and *R. v. T.J.F.*, 2008 BCCA 325. 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. Frankel J.A. stated in *Vickers* at paragraph 13:

> While rehabilitation cannot be overlooked, it is of secondary importance in dealing with a case of this kind. This is particularly so when there is no indication that the offender is a good candidate for rehabilitation.

[21] I am mindful of the fact that Mr. Ayotte should receive credit for having entered guilty pleas and taken responsibility for the offences before me.

[22] Considering his age and other information I have been provided with, I cannot say that the prospects of rehabilitation are poor. Rehabilitation will undoubtedly take a lot of time and effort on Mr. Ayotte's part. Based on the reports I have read, his attitude towards those in authority must change for him to benefit from his time in custody and he must become fully engaged in meaningful and in-depth counselling. I recommend that counselling and programming be tailored to his intellectual abilities.

[23] Based on the facts of this case, the circumstances of the offender, the purpose and principles of sentencing, and the case law for similar offences, I have determined a proper global sentence to be that of four years. The breakdown is as follows:

- break and entry: 4 years;
- robbery: 3 years;
- possession of stolen property: 9 months;
- assault: 60 days;
- two 129(a) charges: 30 days each;
- breach of probation: 30 days; and
- fail to appear: 30 days.

[24] Although consecutive sentences would normally be appropriate for the offences pre-dating the break and enter and robbery charges, the result of such a combination would be an unduly harsh sentence. Relying on the principle of totality, I have decided

to make all sentences concurrent to one another so that the overall sentence is a just and appropriate one.

REMAND CREDIT

[25] Mr. Ayotte has been on remand for just over 200 days. He has had some behavioural issues during this time. A report filed by the Crown reveals incidents for which he was disciplined, including, for example, fighting with other inmates, abusive behaviour towards correctional officers and others. For a few of the incidents, he was segregated for short periods of time.

[26] The Crown argues that Mr. Ayotte should only receive 1:1 credit for the time on remand. The defence submits that although Mr. Ayotte has not been a model prisoner, he should still receive more than 1:1 credit.

[27] Section 719(3.1) has been recently considered by the Supreme Court of Canada in the cases of *R. v. Summers*, 2014 SCC 26, and *R. v. Carvery*, 2014 SCC 27. The Court found that the language of the section does not limit the scope of what circumstances may justify enhanced credit. It held that the loss of early release will generally be an appropriate basis for awarding credit at the rate of 1.5:1, even if parole is unlikely. Nonetheless, a lower rate of credit may be appropriate in certain circumstances.

[28] In *R. v. Casselman*, 2014 ONCJ 198 at paragraph 31, Justice Paciocco stated the following when dealing with a request that the offender receive 1:1 credit:

> [31] ... The "day for a day" credit that the Crown is seeking was styled in the enactment that created section 719(3) as a "truth in sentencing" initiative because it calls a day in custody for what it is, a day in custody. In fact the truth is that the use of a 1:1 formula to calculate pretrial custody will in most cases result in harsher treatment for those who are not granted bail than those who are. This is because, absent exceptional circumstances, the typical offender will not serve their entire sentence in jail. They will be released while still under sentence so that the corrections officials can impose conditions on them to assist them in reintegrating into the community. If offender[s] are not released while still under sentence corrections officials would have no authority to monitor or assist them once they leave prison. Many offenders would be released without homes, jobs, and without community support. By releasing offenders before their sentence has expired corrections officials can place conditions on the offender to try to reduce the risk of re-offence after their release. "Under [relevant] legislation, the vast majority of federal prisoners are [therefore] released statutorily after serving two thirds of their sentence": Anthony Doob and Cheryl Webster, "The 'Truth in Sentencing' Act: The Triumph of Form over Substance" (2013) 17 C.C.C.L.R. 365 at 372.

[29] In *Summers*, the Court referred to a sentencing digest which indicated that:

> [25] ... only two to three percent of federal prisoners are not released either by way of parole or 'statutory release.'

[30] To award credit at the rate of 1:1 as suggested by the Crown, I should be satisfied that Mr. Ayotte would only be released from the penitentiary at warrant expiry. I am not of the view this is likely, despite his difficulties at the local correctional centre. For the time spent on remand, I award him credit for nine months in custody.

ANCILLARY ORDERS

[31] Pursuant to Section 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 ten years following the release from imprisonment.

[32] Pursuant to Section 487.051 of the *Criminal Code*, you are to provide samples of bodily substances for the purpose of DNA analysis and recording.

VICTIM FINE SURCHARGE

[33] The victim fine surcharges for the offences are waived.

[34] MS. MacDIARMID: Your Honour, which information and counts do the firearms and DNA pertain to?

[35] THE COURT: To the break and enter, and to the robbery charges.

[36] In terms of the remaining matters, Ms. Phillips?

[37] MS. PHILLIPS: Thank you. Stay of proceedings.

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CHISHOLM T.C.J.