

Citation: *R. v. Casey*, 2011 YKTC 35

Date: 20110601
Docket: 11-00020
11-00020A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

DANIEL ROBERT CASEY

Appearances:
David McWhinnie
Brook Land-Murphy

Appearing for the Crown
Appearing for the Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Daniel Casey is before me for sentencing with respect to two counts to which he has entered pleas of guilty. The first and most serious is a break and enter into a local business. The second is a breach of the keep the peace term of his probation order.

[2] The break and enter occurred on the 10th of March 2011. There was a report made to the police with respect to a break and enter having occurred during the course

of the evening hours. When the employees arrived the following morning, they noted the front door to be smashed in, numerous items to have been thrown on the floor, and a general mess and general damage to have occurred within the facility. In addition, a cash bag was found on the floor, and it was noted that approximately \$2,000 in cash and cheques was missing from that bag, as well as what are described as pre-loadable gift cards.

[3] Mr. Casey was later arrested, having attempted to use the gift cards that were taken in the break and enter. Upon his arrest, he admitted responsibility for the break and enter, and indicated that he had been drinking at the time. He was cooperative with the police. He was subject to a probation order during that time which included a number of conditions, including a condition that he keep the peace and be of good behaviour. He was released on process following the break and enter, again with numerous conditions.

[4] Then on the 14th of May 2011, there was a report made to the RCMP of a group of individuals in a motor vehicle in the Riverdale area throwing water balloons at people in the neighbourhood. The police located the described vehicle, and in fact observed the door open and a water balloon thrown at an individual. They stopped the vehicle, and Mr. Casey was noted to be amongst the group, in breach of his keep the peace condition of his probation order.

[5] Mr. Casey comes before the Court with a prior criminal record. Notwithstanding the fact that he is only 22 years of age, since 2002 he has managed to amass a significant number of criminal convictions, the majority of them for related offences.

There are numerous property offences, including four prior convictions for robbery, and there are numerous convictions for failing to comply with terms of either release orders or probation orders.

[6] In terms of appropriate disposition, the real issue that is before me today is whether or not a conditional sentence is appropriate. Crown takes the position that an eight to ten month custodial term is appropriate. Defence argues that a seven to nine month conditional sentence would be appropriate in all of the circumstances.

[7] There is a great deal of information before me with respect to Mr. Casey in the form of previous pre-sentence reports, bail assessment reports, and a *Gladue* report that was prepared with respect to a trio of robbery convictions in Toronto in, I believe, 2007 or 2008. There are also numerous letters of support, including Ms. Smith, who is Mr. Casey's spouse, his grandmother, Joy Cohnstaedt, as well as two of his employers from Mountain Air Estates.

[8] From the information before me, there is a great deal of information with respect to, firstly, Mr. Casey's background. I should indicate that Mr. Casey himself has been before me on a couple of prior occasions for sentencing purposes. So, much of the information was already familiar to me prior to sitting down to review it again today. I have commented on his background and circumstances in previous decisions, and I will do so again today, as it is relevant to the outcome.

[9] I think it is fair to say, having reviewed the information, that Mr. Casey comes from a very dysfunctional and unstable background, characterized by a complete and utter lack of stability and supervision, and a fair amount of abandonment over the years.

Many of his early years were spent in the care of his mother, who herself has problems with the criminal justice system, as well as a significant addiction issue. Not surprisingly, Mr. Casey was exposed to the abuse of substances and subjected to physical abuse at an early age. He himself began using marihuana at the age of 10, alcohol to the point of blacking out by the age of 12, and was actively addicted to cocaine by the age of 15, living in circumstances, as was indicated, of gross neglect and abuse. There was also direct parental encouragement in relation to the use and abuse of substances, which included his dealing drugs to be able to provide financial assistance to his mother, again, at a very early age.

[10] So Mr. Casey does come before the Court with an extremely unfortunate background. He also comes before the Court with support, and individuals who have a lot of positive things to say about him. In the reports before me, there is information from Constable Eyvi Smith, who worked with Mr. Casey a few years back as a young man. He speaks highly of him, and of his potential. His instructor, while he was in the Young Offender Facility, who similarly speaks highly of him and his potential. There is a letter of support from his grandmother, Joy Cohnstaedt, who is now a retired university professor, and she similarly has routinely provided him letters of support and spoken of his potential. As indicated, there is also a letter of support from his spouse and from his employers. He has apparently been employed with Mountain Air Estates for just under a year, and the two owners, I take it, of that company, Mr. Lillico, and Mr. Little, speak very highly, again, of his potential, and also his job performance. So there are positives with respect to Mr. Casey and his circumstances.

[11] As I indicated, however, in my earlier discussions directly with Mr. Casey, the concern that I have in this particular case, in considering whether or not a conditional sentence is appropriate, has to do with the fact that much of what I have heard here today I heard before, on the last occasion when I sentenced Mr. Casey. In fact, I heard it the time before that, on the first occasion when I sentenced Mr. Casey.

[12] I accept, as the information is pretty clear before me, that there are a great number of individuals who feel that Mr. Casey has a great deal of potential, and in fact has the potential to be a leader in his community if he is able to get his addiction under control. My struggle in this particular case is, the only real thing that is different before me today, than I noticed on past occasions, was the fact that he has made some improvements in the area of employment. Where in the past he has held employment for a few months here and a few months there, he has maintained this particular job for almost a year. That is a positive; that is a change; that is an improvement.

[13] However, there is nothing else that has been put before me today that demonstrates any other real change overall in Mr. Casey's circumstances or his behaviour. He assures me that things are different now, that he is ready to accept help now, that he is ready to change now and that things, as I said, are different. The difficulty I have is, other than the employment position, there is really nothing before me that demonstrates that that is anything more than talk, and, as I mentioned to him in our earlier discussion, in fact these are things that I have heard from him in the past on previous sentencing hearings.

[14] That led me to raise the question of whether or not Mr. Casey was interested in entering into our Wellness Court process. It is something that he has tried unsuccessfully in the past, but if things are truly different now, my thought was that perhaps now is the time for him to try it again. It was clear to me in the exchange that we had with respect to Wellness Court that he is, in fact, not particularly interested in pursuing that kind of process. That further raises concerns to me as to whether or not things really are different today than they were the last time that I sentenced him. I should note, Mr. Casey has been before the Court on numerous occasions, not just before me, and he has been given a number of chances in the past, not the least of which was a two-year probationary term, upon being convicted of three robberies, in the *Gladue* Court in Toronto. As well, he has been given community-based dispositions on several occasions in this jurisdiction. Notwithstanding those chances, he has continued to offend and continued to breach conditions.

[15] In determining, therefore, whether or not a conditional sentence is appropriate, I have to have regard as to what the test is. The first branch of the test is that I need to be satisfied that placing Mr. Casey on a conditional sentence would not endanger the community, and, in my view, for me to be so satisfied, I need to be satisfied that he would be absolutely compliant with any conditions that I placed him on. Having regard to my earlier comments, I do not think it should come as a surprise that in this particular case I am not satisfied that he will be able to comply any better than he has done in the past.

[16] The second branch of the test speaks to whether or not the sentence is consistent with the principles of sentencing, and Ms. Land-Murphy quite fairly pointed

out that conditional sentences certainly can meet the principles of denunciation and deterrence, and has referred me, not surprisingly, to *R. v. Gladue*, [1999] S.C.J. No. 19.. As indicated, Mr. Casey has previously been given a number of chances, particularly flowing from the *Gladue* case, with his earlier experience in the *Gladue* Court in Toronto.

[17] He is of First Nation descent. His mother is Sechelt First Nation, and his father is of Cree extraction, and as a result s. 718.2(e) does come into play and it is one of the principles that I am required to consider. As is noted in the *Gladue* case, the purpose of that section is:

... to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.

It requires me to consider the unique systemic or background factors that may have played a part in bringing the offender before the Court, and the types of sentencing procedures and sanctions that may be appropriate in the circumstances because of the offender's heritage or connection. There is a great deal of information before me, particularly the *Gladue* report that speaks to the background and circumstances that very clearly have led Mr. Casey to be where he is today.

[18] However, the *Gladue* decision goes on to say that this paragraph should not, however, be taken as a means of automatically reducing the prison sentence of Aboriginal offenders.

The sentence imposed will depend upon all the factors which must be taken into account in each individual case.

[19] Being mindful of the *Gladue* decision of s. 718.2(e) and of the pre-conditions to a conditional sentence in this particular case, I am simply not satisfied that what has been put before me meets the test for a conditional.

[20] I have found this an extremely difficult case, because I do think the employment is the one positive that Mr. Casey has now that he did not have in the past, and I find it very difficult to be in a position where a decision I make today may well have, in fact likely will have, the result of his losing his employment, but all of the information before me today is simply not enough to persuade me that there is anything today that is different in any meaningful way from prior sentencing hearings with Mr. Casey. I am not satisfied the pre-conditions for a conditional sentence are met. I am satisfied that in this particular case there does need to be a custodial term.

[21] The sentence, as put forward by the Crown, is appropriate, in my view. I will, however, in recognition of the fact that Mr. Casey has demonstrated some improvement in terms of being able to maintain employment over the past year, place him at the lower end of that range.

[22] The sentence, accordingly, is going to be for a period of eight months with respect to the break and enter. The breach, I am simply going to apply the remand time that he has already served; he has been in custody for some 19 days. In all of the circumstances, I am satisfied that that is sufficient with respect to the keep the peace breach. So there would be one day deemed served by his attendance in court today on that count, and the record will reflect that he is being credited for the 19 days in pre-trial custody.

[23] It is not my intention to add probation, which I would normally do, but in these particular circumstances, Mr. Casey has been subject to conditions in various forms for many, many years, and they have not proven in any meaningful way to have impacted on his behaviour. If he is serious about change, it will need to come from him, and at this point in time, it does not make sense to further burden already overburdened community resources by placing him on probation.

[24] It is my hope, Mr. Casey, that you use the time in custody wisely, and that I do not see you back once you are out.

[25] Lastly, I have thought, because of the circumstances of this case, long and hard, about the restitution question as well, and when I weigh restitution against the fact that this sentence effectively removes his income, I am satisfied he does not have the ability to pay, and while I would like for there to be restitution for the victims, having ruled as I have, I determine that it is not appropriate to make such an order in this particular case. So there will not be a restitution order.

[26] For the same reasons, I will waive the victim fine surcharge.

[27] The remaining counts?

[28] MR. MCWHINNIE: Should be stayed.

[29] THE COURT: Okay. Thank you.

RUDDY T.C.J.