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Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Judge Barnett

**REGINA**

v.

**STACEY CLETHEROE**

Appearances:  
Kevin Komosky  
Daniel Gellar

Counsel for Crown  
Counsel for Defence

**REASONS FOR SENTENCING**

[1] BARNETT T.C.J. (Oral): Mr. Cletheroe, Mr. Gellar spoke on your behalf quite eloquently. He said, and absolutely correct, that your situation is a very difficult one, not only difficult for you, and it is difficult for you, but it is very difficult for anybody who is trying to assess what might be the most realistic way to deal with you now, taking into account your interests and the interests of society. Your case would present difficulties for any judge and certainly does for myself.

[2] Mr. Gellar also said that when it comes to matters of so-called deterrence that no matter what may be or not be in your mind following the events on the 2<sup>nd</sup> of December last year you have been deterred because you will simply not be able to again do some of the crimes that you were able to do before, and did do before the 2<sup>nd</sup> of December and on that day also. I believe that Mr. Gellar is correct when he says that the wounding you suffered that day is going to be with you in a significant way for the rest of your life. You have, I believe, been physically deterred, and hopefully, deterred also in the sense that if you have not yet thought out something about where your life is going you will do that, and you will head in a significantly different direction. That is what everybody would hope, including, I hope, you.

[3] Mr. Gellar also said that he cannot conceive that anybody looking at your situation would want to follow the path that you chose for yourself. Maybe it is not entirely fair to say that you just chose it for yourself, but you certainly got on a path that Mr. Gellar says he cannot think that anybody would wish to follow in your footsteps.

[4] There are of course a lot of young men who get involved as you did in the life of breaking the law and some of them think that is the way they want to go and keep on going, but nobody, I am sure, who was aware of the consequences that befell you, would want to travel that part of the road that you made for yourself.

[5] If I were dealing only with the offences before the 2<sup>nd</sup> of the December last year I would sentence you in this manner: For the break-in on the 24<sup>th</sup> of October 2005, at Don Wilkinson's place, and I read his victim impact statement, four months. For the break-ins on the 22<sup>nd</sup> of May 2006, here in Whitehorse, where you very literally broke

into a building, you broke through a wall, and then you departed from that place and went to the Raven Recycling and did another break-in there; you fled from the police and a dog was brought in. These things happened when you were on an undertaking, and there were conditions in the undertaking that were not being complied with. On those two break-ins I would sentence you to six months consecutive to the previous break-in, concurrent to each other, and there would be a further sentence of three months concurrent for the breach of recognizance that you pled guilty to.

[6] For the breach of recognizance between the 12<sup>th</sup> of June and the 22<sup>nd</sup> of June 2006, by not reporting to the bail supervisor very promptly as you had agreed to do when a judge or a JP was persuaded to release you from custody, that would be one month more, one month consecutive.

[7] For the 28<sup>th</sup> of June, when you failed to appear in court that is just really a continuation of the previous failure, in my way of looking at it, that would be another one month concurrent.

[8] For the break in on the 4<sup>th</sup> of July 2006, the break-in that was pretty similar to the break-ins back on the 22<sup>nd</sup> of May 2006, clearly you were looking for things to steal to buy drugs, there should be a further six months that is consecutive, and that would add up to 17 months.

[9] Those are the sentences that I would impose for those matters, but you have been in custody for a total of more than 17 months, a little more than 20 months, so those sentences have been served.

[10] That takes me to the much more troubling matter that happened on the 2<sup>nd</sup> of December 2006. In a part of the Yukon, a part of Canada that I think that most people would fairly describe as a fairly remote location, and while one of those offences that day was a break-in, it was markedly different in nature than any of the other break-ins that you had ever committed, as I understand the matters. You were not going to Mr. Whimp's house to steal anything from him that day. You went to his house with another person. Both of you were wearing balaclavas to conceal your identity. You were gloved and you had a weapon, a bar. The two of you started beating on Mr. William Whimp. You were there doing somebody else's dirty work. As I understand it, that dirty work was likely connected to an unpaid drug debt.

[11] Mr. Whimp was able to get hold of a loaded .22 rifle, a small calibre rifle that he had in his home. He should not have had it in his home in that manner and he has been dealt with for that, but he shot you and injured you; he injured you significantly. My understanding is that about that time your companion fled but you did not. You apparently said to Mr. Whimp that you were not leaving; "I'm not leaving until you are done," but it may not be the full extent of the story because you were wounded. But Mr. Whimp managed to get a hold of another gun and he shot you again and you suffered two significant wounds, one to each leg. Mr. Gellar describes those wounds by saying your femurs were shattered.

[12] You got medi-vac'd out of the Yukon down to Vancouver where some surgery was done, and you got plates, which you described to me as being about six inches long, which are screwed into the upper areas, if you will, of each leg. Your knees also are involved in that work.

[13] I do not doubt Mr. Gellar. And I do not doubt you when you say that ever since you have been in custody, you have been in constant pain and you are on antidepressants and you need surgery to be done. I am not certain that it could be done now even if you were not in custody, but you will need more surgery, two more operations to remove those plates and screws and after that you will need physiotherapy. But I do not doubt Mr. Gellar when he tells me that for the rest of your life you will be, to some extent at least, handicapped. You have talked with Mr. Szakszon, who has some personal knowledge, he tells us, of this sort of thing. I do not doubt that you will never fully recover from those significant wounds.

[14] That does not mitigate matters but it is certainly not something which a Judge should overlook and say, "Well, that's your own fault." If you had been in Texas I do not suppose we would be in court today at all, and if Mr. Whimp had had a higher powered rifle we might not be in court.

[15] When you break into somebody's house and start beating him with a metal bar, no matter what he may have done or not done to bring some consequences upon himself, but when you go into his house and start beating on him with a metal bar he has every right to get out a weapon, even a deadly weapon, and to use it to defend himself if he can. He did, and that is why the Crown sensibly decided that an attempted murder charge against Mr. Whimp was not going to go anywhere, but that a much lesser charge should be visited upon him, and he was treated gently; I do understand that. He may have other difficulties for other matters, as I understand he does, but it is not a mitigating matter. Mr. Gellar acknowledged that.

[16] It is taken into account that you suffered some very serious and likely long-lasting permanent effects, but if I were to say to you this evening that I could somehow rationalize this and say, "Well, two years less a day plus a long period of probation." -- First of all, I do not believe that a long period of probation would do any good for you or for anybody. If I were to order you today to be on probation, it would not be for a long time, because, in my view, if probation can accomplish anything for you, it will happen sooner rather than later. And you have a dreadful history of not responding to probation. Probation officers in the Yukon are burdened with a lot of work and they do not need to be burdened with persons who likely will not benefit in any great way when other persons might.

[17] If I were to say that I could somehow rationalize two years less a day and a period of long or short probation, I would not be doing you any favour and I would not be doing the right thing. I would not be doing you any favour because I am absolutely confident that Mr. Komosky would say the Crown cannot accept such a ridiculous sentence and must take this to the Yukon Court of Appeal, and I believe the Yukon Court of Appeal would set the matter straight. So not only would I not be doing the right thing but I would not be doing you a favour, because you would be back in court; I am confident of that.

[18] Judges should not, in my view, sentence people in a manner that they know or ought to know just does not correspond with what judges in Courts of Appeal have said must happen. Home invasions, and this was a home invasion, is a terribly serious business.

[19] Mr. Komosky says that the range, in his view, is between three years and up, as much as nine years. He was fair to say, I think, that in your case the low end of the range would be appropriate. You have never received a sentence of anything like that long ever before and Mr. Komosky was not saying that it should be at the upper end of the range. He is not wrong when he says the low end of the range is around three years.

[20] Taking into account, and I do, the fact that you got 17 months which has been served, but you have got a little extra time still remaining, which I should not just totally overlook, and I do not. Taking into account the fact that you suffered some terrible consequences, that in a sense were deserved, but nevertheless I think I properly should, and I do, take them into account, and I am not at all reluctant to do so, the fact that you are a Tahltan man, you are not going back to Telegraph Creek which has never been your home, you can not. However, you have a background which the Supreme Court of Canada says trial judges have to pay some attention to, and the *Criminal Code* says that too.

[21] Taking all of those things into account, the sentence on Count 1 of the December 2<sup>nd</sup>, Information is 30 months. It would be longer than that but I have told you that I am taking certain things into account. On Count 4 the sentence will be 12 months concurrent to the 30 months. So bottom line, you are going to be doing another 30 months. There will not be, there cannot be, a probation order, but I expect that you will you find yourself on parole, and in my view that is appropriate. If it were possible and it seemed advisable that arrangements could somehow be made, that that sentence be served in Whitehorse, I would favour that, but that is not for me to decide.

[22] Mr. Gellar, this is a matter where there should be, I think there must be, a DNA Order. Do you have any --

[23] MR. GELLAR: I have no comment.

[24] THE COURT: Mr. Komosky, you wanted -- you said that needed to be made?

[25] MR. KOMOSKY: Yes.

[26] THE COURT: That order is made. Mr. Komosky, I think in the circumstances here a firearms prohibition order is necessary. Any comments about that?

[27] MR. KOMOSKY: I was seeking a discretionary firearms order.

[28] THE COURT: I said that I think that it is necessary. Mr. Gellar?

[29] MR. GELLAR: Sorry, Your Honour?

[30] THE COURT: The firearms order?

[31] MR. GELLAR: Yes, it is appropriate. Is it a 10 year order or a five order that is --

[32] MR. KOMOSKY: It can be up to 10 years. I would recommend 10 years.

[33] THE COURT: Mr. Gellar?



[34] MR. GELLAR: I have no comment.

[35] THE COURT: Do I need to read the making of that order out in the specific exact words of the Code --

[36] MR. GELLAR: No.

[37] THE COURT: -- or does Mr. Cletheroe understand --

[38] MR. GELLAR: He understands, no guns.

[39] THE COURT: -- that the bottom line is no guns for the next 10 years? Mr. Cletheroe, that is an order you will have to sign. You do not need to stand, sir. That is an order that you will need to sign, and when you sign it, you will read it first, but the order will say that you will must not be in possession of any firearm for 10 years. You must not be in possession of any ammunition and explosives also. These orders are a serious business and if you were found to have any gun, I think you would have to expect a serious jail term as a result of that. These are not minor matters. My understanding, Mr. Cletheroe, is that you are not somebody who depends or is dependant or thinks that he has a particular need for a gun so that he can hunt. You can live with an order that says no guns?

[40] THE ACCUSED: Yes, Your Honour.

[41] THE COURT: Are you sure of that?

[42] THE ACCUSED: Yes, Your Honour.

[43] THE COURT: You do understand what I have said? I think my explanation and bottom line terms is a lot more understandable than reading it out in the court room, but you will read the order before you sign it.

[44] THE ACCUSED: Yes.

[45] THE COURT: Do not throw it away.

[46] MR. GELLAR: Thank you, Your Honour

[47] THE COURT: Mr. Komosky, was there anything else?

[48] MR. KOMOSKY: Your Honour, Crown would apply to withdraw all remaining charges.

[49] THE COURT: Done. Count 1 is 30 months.

[50] THE CLERK: But as far as the DNA order and firearms, it applies --

[51] THE COURT: The DNA order and firearms order relate to Count 1.

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BARNETT T.C.J.