Citation: *R.* v. *Crompton, Bland and Anderson,* 2012 YKTC 50

Date: 20120509
Docket: 10-00823
10-00848
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

JASON RICHARD CROMPTON,
MICHAEL STEVEN BLAND and
KYLE LAWRENCE ANDERSON

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to section 486.5 of the *Criminal Code*.

Appearances:

Jennifer Grandy	Counsel for the Crown
André Roothman	Counsel for the Accused Crompton
Bibhas Vaze (via teleconference)	Counsel for the Accused Bland
Melissa Atkinson	Counsel for the Accused Anderson

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Jason Crompton, Kyle Anderson and Michael Bland have each entered a plea of guilty to a single count of aggravated assault, contrary to s. 268 of the *Criminal Code*.

[2] The circumstances of the offence are disturbing, to say the least. On March 8, 2011, R.H. and P.L. were at home in their apartment located in the log cabin skyscraper when they heard a knock at the door. Ms. H. went to the door but did not open it when she noted an individual with a covering over his face. When the covering was removed, she recognized Mr. Crompton and opened the door, as he was, or had been, a friend to

both she and Mr. L.. Mr. Crompton pushed his way in, followed by Mr. Bland, who entered with his face covered, carrying a red bat. Ms. H. grabbed Mr. Bland's coat in an attempt to stop him, while Mr. Crompton began striking Mr. L. in the legs with a claw hammer. Ms. H. let Mr. Bland go as Mr. Anderson entered the apartment with a machete-type knife.

[3] Mr. Bland hit Mr. L. on the hand with the bat. Mr. L. was told to hold out his hand, at which point Mr. Anderson cut Mr. L. with the knife, severing his pinky finger between the knuckles. While the rest of the finger was located, it could not be reattached. There was a further laceration to Mr. L.'s other hand. Surgery was required. With respect to long-term prognosis, I am advised that Mr. L. has regained more use of his hand than had been expected.

[4] The three defendants were located and arrested on March 10, 2011. They have been in custody since their arrest.

[5] In terms of background, Mr. Crompton is 29 years of age, born and raised in Surrey, B.C. His childhood was a chaotic one, including a mother with addiction issues, an abusive step-father, and time spent in foster care. He developed his own issues with both drugs and alcohol at an early age and became involved in drug trafficking, as is reflected in his criminal record. In addition, he has a related conviction for assault causing bodily harm.

[6] Mr. Anderson, a member of the Boston Bar First Nation out of British Columbia, is 24 years of age. While his actions can be described as the most egregious during the assault, he has the least serious criminal record. While he does have drug-related

convictions, there are no previous offences of violence. A number of letters from family members and his girlfriend have been provided in support of Mr. Anderson. He has also developed an interest in pursuing a career in the pipefitting trade, and has secured the support of his First Nation to allow him to pursue training in this regard.

[7] Mr. Bland is 31 years of age. While his childhood was not a difficult one, he became involved in drug use and the street life in Victoria, B.C., as a teenager. He has expressed an interest in changing his life. He has a supportive fiancé, who has provided a letter indicating her willingness to support him in making the necessary changes and noting the important role he plays in her son's life. He has also secured employment upon his release with a company involved in window and door installation. He, too, has a criminal record, which includes drug-related convictions and a conviction for aggravated assault.

[8] The appropriate length of sentence in this case is not a particularly contentious issue. I have a joint submission before me for a sentence of two years less a day. What is at issue is the credit to be afforded to each of the defendants for 14 months spent in pre-trial custody.

[9] Dealing first with the joint submission, there is no doubt that the suggested sentence falls at the extreme low end of the range, given the nature and seriousness of the circumstances before me. Indeed, I would be extremely reluctant to impose such a sentence were it presented in any form other than a joint submission.

[10] In the Ontario Court of Appeal case of *R.* v. *Cerasuolo,* 2001 CanLII 24172, Finlayson J.A. stated:

> 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: … 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.
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> 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. While we cannot over emphasize that these agreements are not to fetter the independent evaluation of the sentences proposed, there is no interference with the judicial independence of the sentencing judge in requiring him or her to explain in what way a particular joint submission is contrary to the public interest and would bring the administration of justice into disrepute.

[11] In this instance, Crown has alluded to a number of factors giving rise to the joint submission, including frailties in the Crown's case and concerns with requiring the complainants to return to the Yukon to testify. I am satisfied, based on the submissions of counsel, that the joint submission of two years less a day, while on the low end, would not, in the circumstances, be contrary to the public interest, nor would it bring the administration of justice into disrepute.

[12] With respect to the more contentious issue of remand credit, each of the defendants seeks enhanced credit of one and a half to one. The calculation of remand credit is now governed by s. 719. Of particular relevance are subsections (3) and (3.1) which read:

> (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
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> (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

[13] In the decision of *R.* v. *Vittrekwa*, 2011 YKTC 64, Cozens C.J. concluded "...that the loss of statutory remission is clearly a consideration that can allow a sentencing judge to consider time spent in pre-trial custody as a circumstance that could justify an offender receiving credit for this time at a one and a half to one ratio." During the course of the sentencing hearing, Cozens C.J. heard detailed evidence regarding the application and calculation of the earned remission provisions applicable in Yukon, which he summarized as follows:

> The fifteen days of remission a sentenced inmate can earn in a month is broken down into three categories of five days each, based on: the inmate's behaviour, the inmate's participation in programming and case planning, and the inmate's participation in employment. If the inmate is not directed to participate in programming or no employment is available, he or she is automatically credited the full five days remission in these categories. A failure by the individual to meet expectations in any of the three categories could cause him or her to fail to earn the full five days monthly credit for that category, although that is not necessarily what will occur.

[14] The practice which has developed since the *Vittrekwa, supra,* decision is for counsel to seek a letter from Whitehorse Correctional Centre summarizing a defendant's performance in these three categories while on remand. The Whitehorse

Correctional Centre has routinely declined, however, to include an opinion as to the likelihood of a particular defendant having received full remission. Following this practice, I have been provided with letters from Whitehorse Correctional Centre summarizing the performance of all three defendants while on remand.

[15] Mr. Crompton and Mr. Bland are in much the same position when one views the summaries of their performance. In terms of programming and employment, Mr. Crompton has been involved in educational programming and made requests for additional programming. He has made several requests for employment, but none has been available. Mr. Bland has completed both the Violence Prevention Program and the Addictions Awareness Program with positive reviews of his participation. He has engaged in two separate employment opportunities, though one was lost as a result of behavioural issues. Indeed, it is the category of behaviour in which the primary concerns arise with respect to both defendants. Both have managed to amass 43 negative entries with respect to their behaviour. For Mr. Crompton, the total number of entries was 152, with the remainder being positive. For Mr. Bland, the total number of entries was 188, again, with the remainder being positive.

[16] While it is not difficult for me to conclude that Mr. Crompton and Mr. Bland are entitled to enhanced credit on the basis of lost remission, the question is how much credit is appropriate? Counsel for Mr. Crompton argues that Mr. Crompton should receive full enhanced credit under the categories of employment and programming, and, as roughly two-thirds of his behavioural entries are positive, should receive two-thirds of the enhanced credit under the behaviour category.

[17] Counsel for Mr. Bland argues that Mr. Bland should receive full enhanced credit on the basis that the report provided from Whitehorse Correctional Centre does not indicate that he would not have received full remission, notwithstanding the numerous behavioural problems identified. Unfortunately, absent additional evidence, it is virtually impossible for me to determine with any degree of certainty how remission for the time spent in remand would have been calculated by Whitehorse Correctional Centre, but I am hard-pressed to conclude that the negative behaviours identified would have had no negative impact on earned remission.

[18] Based on all of the information before me and balancing all of the relevant factors, I am satisfied that credit of 1.4 to one is appropriate recompense for any lost remission for both Mr. Crompton and Mr. Bland. Having spent, by my calculation, 426 days in remand, credit at 1.4 to one would be roughly 597 days. Having accepted the joint submission for a sentence of two years less a day, or 729 days, once credit for remand is applied, the sentence for both Mr. Crompton and Mr. Bland will be 132 days.

[19] This leaves me with Mr. Anderson. Ironically, of the three, Mr. Anderson appears to have the most positive report with respect to his performance while in custody. In terms of behaviour he has amassed 107 positive entries and only 18 negative entries. He has been attending school and is employed. Indeed, I would not have had much difficulty giving Mr. Anderson enhanced credit at one and a half to one but for the operation of s. 719(3.1). I am advised that Mr. Anderson was subject to a s. 524 application when detained. A plain reading of subsection (3.1), in my view, would preclude me from granting Mr. Anderson anything other than straight one for one credit.

[20] Counsel for Mr. Anderson argues that I should consider enhanced credit in any event, but absent a constitutional challenge I fail to see how I can apply anything other than a plain reading of subsection (3.1). This is the particular part of the sentence that I will tell you I have extreme difficulty with. What this means, effectively, is if Mr. Anderson were entitled to enhanced credit, as Mr. Crompton and Mr. Bland were, he would be serving some seven months less in custody. By operation of subsection (3.1), in my view, I have no option but to credit his remand at one to one unless there is a constitutional challenge placed before me. I do not have that now. In my view, that is the only way that I could fully consider whether there is some possibility of granting Mr. Anderson enhanced credit. On the face of what is here, I cannot; I simply cannot. There have been no compelling arguments placed before me to suggest that I can apply anything other than a plain reading.

[21] Now this, as I said, does result in a significant inequity in treatment for Mr. Anderson as compared to Mr. Crompton and Mr. Bland. I would be prepared to entertain an application for an adjournment in the event that Mr. Anderson would like to consider the possibility of making a constitutional argument as it relates to the application of subsection (3.1). That has not been done at this point, and, based on what is in front of me, I cannot consider enhanced credit.

[22] MS. ATKINSON: Just have a moment.

[DISCUSSION BETWEEN MS. ATKINSON AND THE ACCUSED ANDERSON]

[23] THE ACCUSED ANDERSON: Yeah, just one to one, I'm just going to go with it, just get it over with.

[24] THE COURT: Okay. So I take it from those comments that Mr. Anderson is not interested in pursuing a constitutional challenge with respect to the operation of subsection (3.1); is that correct? Ms. Atkinson; is that correct?

[25] MS. ATKINSON: Yes, I just was quickly outlining the jeopardy that he faces and timelines and so forth, and that's where I was trying to --

[26] THE COURT: Before I close off the option, I want to tell you that my calculations at one to one would leave you with an additional sentence of 303 days --

[27] THE ACCUSED ANDERSON: Yeah.

[28] THE COURT: -- as opposed to the 132 days that Mr. Bland and Mr. Crompton will be serving, because I am able to give them enhanced credit under the scheme as it exists right now, which I cannot do with you because of the s. 524 application.

[29] THE ACCUSED ANDERSON: I think I'm going to have to go for it, actually.

[30] THE COURT: Now, I will tell you, I am not going to give you any guarantees it is going to be successful. What I am telling you is it is the only way that I can even consider the issue, in my view.

[31] MS. ATKINSON: Perhaps we can just stand down for a moment. I see there's a lot of --

[32] THE COURT: I will complete dealing with Mr. Crompton and Mr. Bland so that they can be on their way, and we will stand down for Mr. Anderson to speak further with his counsel.

[33] THE ACCUSED ANDERSON: All right. Thank you.

[34] THE COURT: So with respect to Mr. Crompton and Mr. Bland, I am going to waive the victim fine surcharges in light of their custodial status, but as this is a primary designated offence, there will be an order that each of them provide such samples of their blood as are necessary for DNA testing and banking.

[35] This is also an offence for which there is a mandatory firearms prohibition. So both Mr. Crompton and Mr. Bland will be prohibited from having in their possession any firearms, ammunition or explosive substances. I am going to say for a period of ten years, because there was no indication provided to me that they had previously been subject to orders. So, this being a first prohibition, it would be a period of ten years.

[36] That leaves me with the application on behalf of Mr. Crompton for the return of certain items that he had listed.

[37] MS. GRANDY: The Crown is not seeking forfeiture of any items, so he can certainly get in touch with the RCMP after the file has been closed for the requisite period of time.

[38] THE COURT: Okay. There will be no order of forfeiture. So whatever they have, you can get in touch with them and get it back.

[39] THE ACCUSED CROMPTON: So we just wait until it's closed out. Do you know when we could get in touch with the RCMP?

[40] THE COURT: It generally would be once the appeal period is finished, which would be 30 days from now.

[41] THE ACCUSED CROMPTON: Thirty days from now?

[42] THE COURT: Yes.

[43] THE ACCUSED CROMPTON: Okay, and that goes for both of us? I can --

[44] MS. GRANDY: Well, it may depend on the closure of the complete file, unfortunately.

[45] THE COURT: No, that is true. It may depend on what we do with Mr. Anderson, because you are all on the same Information.

[46] THE ACCUSED CROMPTON: Okay. Well -- [indiscernible - overlapping speakers].

[47] THE COURT: But the Crown is not seeking forfeiture of anything.

[48] THE ACCUSED CROMPTON: Okay, so we can get our belongings back.

[49] THE COURT: You can get your belongings back once everything is completed.

[50] THE ACCUSED CROMPTON: Okay.

[51] THE COURT: So we will stand down with respect to Mr. Anderson and he can have some further discussions with his counsel. There is no need to bring Mr. Crompton and Mr. Bland back, nor is there any need, Mr. Vaze, for you to remain on the phone.

[52] MR. VAZE: Yes, thank you.

[53] THE COURT: Except for the remaining counts on this Information as they relate to Mr. Crompton and Mr. Bland.

[54] MS. GRANDY: And Mr. Bland. They can be marked as withdrawn, please.

[55] THE COURT: Okay. Thank you.

(ANDERSON MATTER STOOD DOWN)
(ANDERSON MATTER RECALLED

[56] MS. ATKINSON: Yes, Your Honour, I'd just have a moment. Yes, Your Honour, thanks for that brief break. I've explained all of the situation on the potential timelines and jeopardy that Mr. Anderson would have to undertake if he wished to appeal this part of the section of constitutional challenge, I mean. And he's provided me with instructions that he wishes just to proceed to sentencing at this date and time.

[57] THE COURT: All right. Then as I am bound by subsection (3.1) to apply nothing greater than one to one credit, I would calculate the credit at 426 days. When I subtract that from 729 days, I get a remaining sentence of 303 days to be served by Mr. Anderson.

[58] There was also a guilty plea to a mischief for breaking a window at a local bar. That will be a 15-day sentence to be served concurrently with the sentence that he will be serving with respect to the aggravated assault.

[59] I will waive the victim fine surcharges, given your custodial status, but as I had mentioned earlier with respect to Mr. Crompton and Mr. Bland, it is a mandatory offence for DNA. So I am going to order that you provide such samples of your blood as are necessary for DNA testing and banking.

[60] There is also a mandatory firearms prohibition. You will be prohibited from having in your possession any firearm, ammunition or explosive substances for a period of ten years.

[61] I think that just leaves the remaining counts with respect to --

[62] MS. GRANDY: If they could be marked as withdrawn, please. Your Honour, I was just having a conversation with the clerk in the break, and we were just wondering whether the Warrant of Committal should read two years less a day less the credit, and then time to be served, or the actual 729 days less.

[63] THE COURT: It should read the actual sentence. I am required by the new *Truth In Sentencing Act*, S.C. 2009, c. 29, provisions to state what the sentence should have been, what credit I am giving for remand, and then what the actual sentence is when I reduce it by that credit for remand. So I am required to frame it that way, but I would say, for the purposes of avoiding confusion at Whitehorse Correctional Centre that only the actual sentence should be put on the Warrant of

Committal, else they tend to call because they do calculations somehow differently, and we get a lot of calls. But the actual sentence for him will be 303 days. That is what should be on the Warrant of Committal, and it should be 132 days with respect to Mr. Crompton and Mr. Bland on the Warrant of Committal. The remainder, I do not think, should be included. Does that answer your question?

[64] MS. GRANDY: I'm not sure because the information on the Warrant of Committal also end up on the criminal record on CPIC, and the sentence certainly isn't 303 days or 132 days.

[65] THE COURT: Yes, but would the RCMP enter it from the Warrant of Committal or would they enter it from their file?

[66] MS. GRANDY: I think they enter it from the Warrant of Committal.

[67] THE COURT: Then if that is what they do it from, it should read 729 days as the sentence for each of them, less credit for remand of, for Mr. Anderson, 426 days, and then the remaining sentence of 303.

[68] MS. GRANDY: Thank you.

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RUDDY T.C.J.