

Citation: *R. v. Devellano*, 2007 YKTC 80

Date: 20071102
Docket: T.C. 06-00726
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Judge Ruddy

REGINA

v.

BENJAMIN FRANCIS DEVELLANO

Appearances:
Kevin Komosky
Benjamin Devellano

Counsel for Crown
Appearing on his own behalf

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Benjamin Devellano is before me in relation to a single count of possession of crack cocaine for the purpose of trafficking. The incident arose on the 3rd of February 2007, at which point Mr. Devellano was located by the police in the Blue Moon Saloon.

[2] A CPIC search was conducted which indicated that Mr. Devellano was on conditions, one of which was that he not leave B.C. without permission. He was approached and arrested for breach. He was searched subsequent to arrest, and the police located in his possession, 38 rocks of crack cocaine and \$375 in cash.

[3] Mr. Devellano did provide a warned statement and did make admissions in that statement. He did indicate to me as well today that he has had a history of involvement with the police and a history of dealing. He has not in the past ever made admissions. He says that he made admissions with respect to this particular offence because he was interested in turning over a new leaf.

[4] Interestingly, he comes before the Court with no prior criminal record. I have had the benefit of reviewing a pre-sentence report and a psychological assessment that give me some insight into his background. He is currently 23 years of age. There does seem to be a history of difficulty within his family background, and he does appear to have started using substances and also started dealing in substances at a fairly early age.

[5] In terms of aggravating factors, I will reiterate for this decision, that it is significantly aggravating, Mr. Devellano, that this occurred in the north. We have a serious problem with drugs up here, and, as the Crown pointed out, we do not have the same resources to respond to them as a large urban centre.

[6] The dealing of drugs creates significant problems in vulnerable northern communities that we are ill-equipped to respond to. That is a significant aggravating factor. I appreciate some of the comments that you made where you feel that while you may be dealing, those buyers also have a choice. But when you play on somebody's weaknesses, particularly somebody who has an addiction, they do not always have the same degree of choice in buying, whereas if they cannot get it, then they cannot buy it. I think you said yourself, when you are struggling with alcohol, you have real concerns

about being on a condition saying that you have to abstain, because you have real concerns about whether you are able to. The same can be said of an addict buying drugs.

[7] THE ACCUSED: I was able to for seven months.

[8] THE COURT: Okay, but you understand the point that I am making?

[9] THE ACCUSED: Yeah, I understand.

[10] THE COURT: Okay. If you make it available to people, then it is going to create problems. What I am wanting you to understand is that dealing is wrong. Whatever is going on with the person who buys, the person who deals is wrong. That is all I want you to understand. Now, let me finish my decision, okay?

[11] I should finish off the aggravating factors. It is clear, in this particular case, that the dealing was strictly for profit. It is low level but, as Crown has fairly pointed out, it is commercial in intent.

[12] Now in terms of mitigating factors: Mr. Devellano comes before the Court with no prior criminal record. He did enter a relatively early guilty plea. He has taken some steps, both while he was on release and since he has been in custody, and should be given credit for those. Those include his having had a number of sessions with psychologist Craig Dempsey, and having made efforts to try and see Dr. Heredia. It appears that there are some mental health issues that relate to depression and what Mr. Devellano describes as cognitive distortion. It is clear to me that he would benefit from some further work in relation to those issues.

[13] He has also joined AA while in custody and has signed up for the SAM program which begins on Monday, and, indeed, that is one of his reasons for wishing to proceed unrepresented today, so that he can get into that program on Monday.

[14] Crown is suggesting that an appropriate disposition would be in the nine to 12 month range plus a period of probation. I indicated to Mr. Devellano that, in my view, I would go to the lower end of that range if I were going to add probation on to the end of it. I would go to the higher end if I were not.

[15] He has indicated an interest in probation and an interest in dealing with some of his issues. He has a concern with the notion of an abstain clause, as he describes himself as an alcoholic. He is concerned about that kind of condition setting him up for further time in jail.

[16] In all of the circumstances, I am satisfied that my primary considerations are general deterrence and denunciation because of the nature of the offence and where that offence was committed. I am satisfied, as well, that there should be some consideration given to rehabilitation. So for that reason, I am going to go to the lower end of the Crown's range, because I am going to attach a period of probation after.

[17] There will be a sentence of nine months. That sentence will be reduced by credit for three months spent in remand, so you will have an additional six months in custody, and that will be followed by a period of six months probation. I am not going to make it an unduly long one; I think if you are serious about wanting help, that six months after will give you a good start. If you are not, then you are just wasting probation's time.

[18] THE ACCUSED: Okay.

[19] THE COURT: Okay? So the probation will be for a period of six months. It will be on the following terms and conditions:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the probation officer in advance of any change of name or address, and promptly notify the probation officer of any change of employment or occupation;
4. Report to a probation officer immediately upon your release from custody and thereafter when and in the manner directed by the probation officer;
5. Reside as approved by your probation officer and abide by the rules of that residence, and not change that residence without the prior written permission of your probation officer.

[20] If you are serious about dealing with your issues, you should not be in a residence where other people are using, okay? So that gives the probation officer some control over where you live. I am not going to require that you live where they direct you to, but they have to approve where you are living.

[21] THE ACCUSED: I was planning on just, prior to my release, I was hoping to go drilling, like out to a camp job.

[22] THE COURT: You can talk to your probation officer about that.

[23] THE ACCUSED: Is it going to be a problem, though?

[24] THE COURT: That depends on what the probation officer has to say, but you can speak to them about that.

[25] THE ACCUSED: Okay.

[26] THE COURT: Other people do work while they are on probation, but that is something that you will have to sort out with them. I am not going to require you to abstain absolutely, in the circumstances, but I am going to require you to:

6. Take such alcohol and drug assessment, counselling or programming as directed by your probation officer;
7. Take such other assessment, counselling and programming as directed by your probation officer;
8. Have no contact directly or indirectly, or communication in any way with any known drug users or dealers named in writing by your probation officer;
9. Not attend at or within 50 metres of any known drug houses, with those addresses to be named in writing by your probation officer;
10. Not possess any cell phone, pager or wireless message sender/receiver device;
11. Make reasonable efforts to find and maintain suitable employment, and provide your probation officer with all necessary details concerning your efforts;

12. Provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this order.

[27] Okay. So the conditions are primarily about assessment and counselling, and staying away from people that are using or dealing, okay?

[28] THE ACCUSED: All right. Is there any way I can get the communication ban lifted as far as the cell phone goes? Like anything else that will -- because I think if I do get a job, like if I am allowed to go out to the job, to the camp --

[29] THE COURT: Do you know what? If you get a job and that is part of the requirement for your employment, you can speak to your probation officer. They can bring it back and make a pitch about at least amending the condition to allow your probation officer to give you permission. So if you have circumstances, clear facts that require some need for a cell phone that is legitimate, speak to your probation officer and they will arrange to bring it back to court.

[30] THE ACCUSED: Okay.

[31] THE COURT: Okay? I am not going to remove the condition at this point because you have not given me anything that says that you require it, but if that comes up and it is legitimate, talk to your probation officer. They can bring it back to amend it, okay?

[32] THE ACCUSED: Okay.

- [33] THE COURT: Any issues or concerns with the conditions?
- [34] MR. KOMOSKY: No.
- [35] THE COURT: No? Okay. You have an issue with my waiving the victim fine surcharge because he is in custody?
- [36] MR. KOMOSKY: No, that is fine. I would ask that the items seized be forfeited to the Crown.
- [37] THE COURT: Okay. They are seeking seizure of the drugs and money, or forfeiture of the drugs and the money.
- [38] THE ACCUSED: Well, it is not like I am getting the drugs back, right?
- [39] THE COURT: No. But I do want to give you the opportunity to say something if you want to say it.
- [40] THE ACCUSED: They seized a cell phone off of me when I am on a breach; they are not talking about that, though, right?
- [41] THE COURT: We are not dealing with the breach right now.
- [42] THE ACCUSED: Okay.
- [43] THE COURT: We are dealing with the drugs and the money.
- [44] MR. KOMOSKY: Yes.
- [45] THE ACCUSED: Okay. The drugs and the money are fine, yeah, okay.

[46] THE COURT: Okay.

[47] MR. KOMOSKY: Thank you.

[48] THE COURT: Those items are forfeit to the Crown. You will have to address the cell phone when you are dealing with your breaches.

[49] THE ACCUSED: Okay.

[50] THE COURT: The remaining count on that Information?

[51] MR. KOMOSKY: If that can be withdrawn?

[52] THE COURT: Okay. So this Information, the one that had the breach for being out of B.C. and the possession for the purpose of trafficking, that is done.

[53] THE ACCUSED: Yeah.

[54] THE COURT: You have three remaining Informations. There is a fail to appear and a breach, and then there is a four-count Information with four breaches, okay? So you have a total of five breaches and one fail to appear that you need to come back on. When do you want to come back for those?

[55] THE ACCUSED: In a month?

[56] MR. KOMOSKY: Well, why are we putting them off? I have no problem putting them over for two weeks if there is a reason why, but --

[57] THE ACCUSED: Well, I actually wanted to seek counsel for the breaches. Since I have been sentenced for the trafficking, I am not allowed into the program. I should be able to get a minimum sentence.

[58] THE COURT: Okay. Then you want to get a lawyer to deal with the other matters?

[59] THE ACCUSED: Yeah, I --

[60] THE COURT: Okay. Is there a reason you cannot arrange that in the next two weeks?

[61] THE ACCUSED: Well, I am just -- because every time I fire Gordon Coffin, I end up getting him back somehow, so I just want to make sure that if I do hire --

[62] THE COURT: Okay. I will tell you what --

[63] THE ACCUSED: -- get a new lawyer through legal aid, that it's not him.

[64] THE COURT: I will tell you what. What I am going to do is put it to a Wednesday docket, about two and a half weeks down the road. If you have issues at that point, you can make your pitch for further adjournment, okay?

[65] THE ACCUSED: Okay.

[66] THE COURT: I will put it to November 21st at 9:30. That gives you about two and half weeks.

[67] THE ACCUSED: Okay.

[68] THE COURT: November 21st, 9:30. You can sort out your counsel in between and deal with the issues of your pleas at that point in time, okay?

[69] THE ACCUSED: Thank you.

[70] THE COURT: Okay. We have to address the issue of your custody status on those Informations. You are a serving prisoner now, so you are not going anywhere for the next few months. You have been on a remand on consent. Do you wish to continue that until you return on the breaches?

[71] THE ACCUSED: Yeah.

[72] THE COURT: Then that will be so noted on the Informations, and you will be brought back in two and a half weeks time.

[73] THE ACCUSED: Thank you.

RUDDY T.C.J.