

Citation: *R. v. Linklater*, 2004 YKTC 30

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Docket: T.C. No. 03-00360
T.C. No. 03-00600
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

Regina

v.

Richard William Linklater

Appearances:
David McWhinnie
Gordon Coffin

Counsel for the Crown
Counsel for the Accused

REASONS FOR SENTENCING

[1] LILLES C.J.T.C. (Oral): This is the matter of Richard William Linklater.

Mr. Linklater has pled guilty to one count of attempted robbery and one count of robbery. Those counts are more specifically set out in the Informations that brought him to court as follows:

Count 1: On or about the 14th day of September, 2003, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that he did attempt to steal money from 3542 Yukon Ltd. while armed with an offensive weapon, to wit: a hypodermic needle, contrary to section 344(b) of the *Criminal Code*.

Count 2: On or about the 15th day of September, 2003, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that: he did steal \$570 from Roadhouse Off Sales while armed with an offensive weapon, to wit: a knife, contrary to Section 344(b) of the *Criminal Code*.

[2] In addition, as a result of an incident that occurred while he was in custody, Mr. Linklater pled guilty to assaulting a corrections officer by spitting on him. That offence date is December 28th, 2003.

[3] Mr. Linklater was arrested on September 16th, 2003 on an outstanding federal parole violation. While in custody, he was interviewed about the robbery charges. He made several inculpatory statements which were the subject of a *voir dire* on his trial. On January 14, 2004, I found the statements to be voluntary and admissible. On January 20, 2004, in light of my ruling on the *voir dire*, Mr. Linklater entered guilty pleas to the two counts. On February 23rd, I directed the preparation of a pre-sentence report. Mr. Linklater has been in custody now for approximately seven and a half months.

Circumstances of the Offences

[4] In the early morning of September 14, 2003, just before 1:00 a.m., Mr. Linklater entered the store known as Riverside Grocery in Whitehorse. He brandished a hypodermic needle covered with blood at the clerk, stating "I have AIDS. Now give me all your money." The clerk called out to a co-worker in another part of the store to call 9-1-1. Mr. Linklater then fled the store.

[5] On September 15, 2003, just before 11:00 p.m., Mr. Linklater entered the Roadhouse Off Sales. The clerk saw him enter but had his back towards Mr. Linklater. He thought Mr. Linklater was going towards the coolers to take out an item or items for purchase, but instead, Mr. Linklater entered behind the counter. Mr. Linklater brandished the knife, holding it close to the clerk's stomach, stating "give me the money or I will stab you." Mr. Linklater tried to open the cash register but was unable to do so without the clerk's assistance. Linklater removed a number of bills totalling \$570 and before he left the store, he warned the clerk, "Don't move or I will stab you."

[6] On December 28th, 2003, Corrections Officer John Emery was dealing with a fire in the Linklater cell. Mr. Linklater was upset and spit at Mr. Emery. The spittle struck Mr. Emery below the ear. Because of concerns about the transmission of communicable diseases to Mr. Emery and by Mr. Emery to his family members, this incident caused grave anxiety and inconvenience for Mr. Emery.

Family History

[7] Mr. Linklater is a young aboriginal man aged 22 years. His mother and stepfather abused alcohol and he witnessed violence as he was growing up. He was raised primarily by his grandmother, who died in 2002. His parents are currently separated and he stays in touch with his stepfather in Whitehorse. His

two siblings are also in Whitehorse and have visited him at the Whitehorse Correctional Centre on a regular basis.

Education

[8] Mr. Linklater quit school at a young age. He is functionally illiterate and suffers from low intellectual functioning and learning disabilities. In an earlier report, he was reported as being in the borderline to mild mental retardation range. He is quite possibly FASD. While in custody as a youth, he worked very hard at school subjects and received glowing reports. He is more likely to succeed in such areas as carpentry, mechanics, hunting and trapping. His low intellectual functioning will limit his ability to succeed in the formal trades. He would benefit from a psycho-educational assessment as well as a medical assessment for FASD.

Criminal History

[9] Mr. Linklater has an extensive criminal history going back to when he was 13 years-of-age. Although now only 22 years old, he has accumulated 45 criminal convictions, including 18 break and enters, two escape lawful custody and three unlawfully at large, two obstruct peace officer and one narcotics conviction. He was most recently convicted for an armed robbery and was sentenced to the federal penitentiary. Shortly after his return to Whitehorse on parole, he committed the offences for which he is now being sentenced. He is currently in custody on a parole violation until September of this year.

Work History

[10] Mr. Linklater has a very limited work history due to his young age and frequent incarceration. He has two summer job placements with the Kormandy's out in the bush outside of Dawson City, where he did well. While in the federal penitentiary, he asked to be placed in segregation because he was being victimized by other inmates, apparently because of accumulated drug debts. As a result, while at the federal penitentiary, he did not participate in any programming.

Substance Abuse

[11] Mr. Linklater started using marijuana and alcohol at age 14. More recently, cocaine and heroine have been his drugs of choice. He committed the current offences while under the influence of these drugs with a view to getting some more money so that he could obtain more drugs. Both cocaine and heroine were apparently readily available in the federal penitentiary. While at the WCC, he completed a two-month methadone program. He appears to be motivated to continue his treatment but is unlikely to follow through unless he is in a structured and closely supervised environment.

Attitudes

[12] Mr. Linklater has shown some empathy for his victims but appears to be more concerned about himself. He wants to stay at the WCC and fears for his safety at the British Columbia penitentiary. He has a positive attitude towards

treatment and would benefit from programming in the areas of cognitive skills development, schooling, basic literacy, assertiveness training and substance abuse counselling, elder counselling and native spirituality.

Victim Impact

[13] The two victims of the robbery and attempted robbery chose not to file Victim Impact Statements. Mr. Emery filed a Victim Impact Statement, underscoring the anxiety the assault caused for him and his family.

Risk Assessment

[14] Mr. Linklater scored at high risk for future violent recidivism and his current level of manageability in the community is low. He has shown little respect for court orders and does not respond well to community supervision. His manageability in the community will increase as he addresses his numerous treatment needs.

Mental Health Concerns

[15] Mr. Linklater has suffered from major depression since age 15. He needs to be evaluated for anti-depressant medication by a doctor.

Pre-sentence Report Recommendations

[16] Based on his current needs and past history, Mr. Linklater's prognosis is not good unless he takes advantage of his institutionalization to complete as

many of his much needed programming as possible. In the past, he has shown himself to be motivated and has impressed teachers and employees by his hard work. On the other hand, he can also be manipulative and will readily withdraw if he does not get his way. Mr. Linklater's needs are many and, notwithstanding several important support persons at the WCC, it is clear that the federal system has many more programs to offer him in the way of appropriate resources programming and treatment.

Relevant Case Law

[17] A number of cases dealing with the sentencing of accused convicted of armed robbery were filed with the Court. The variability in the sentences imposed can be explained by differences in the circumstances of the offender and the offence and the injury to the victim. Some examples will demonstrate the range of sentences imposed.

[18] One, *R. v. Lyons*, [1997] Y.J. No. 94. The victim was a night clerk at the hotel. The weapon used was a butter knife held to his throat. He was a youthful adult. Although he fled the jurisdiction, he later returned and turned himself in to the authorities. There was an early guilty plea and a limited unrelated record. A sentence of 14 months conditional sentence was imposed with 18 months probation with community service and restitution.

[19] Two, *R. v. Clooten*, [2003] Y.J. No. 153. The victim was a clerk in a convenience store who was grabbed by the neck. The weapon was a knife. Mitigating factors were that two days later, he turned himself in and entered an early guilty plea. The sentence was two years in custody with 18 months probation.

[20] Three, *R. v. Moses*, [2001] Y.J. No. 87. This was a robbery and assault on a friend. The accused had a very lengthy record, 70 convictions. The sentence was three years incarceration in a federal penitentiary.

[21] Four, *R. v. Wagner*, [2003] Y.J. No. 92. This is a robbery and an attempted robbery, just as in the case at bar. It involved a gas station attendant. Wagner wore a balaclava, brandished a knife and demanded money. In another case, at the grocery store he demanded money and when refused, he left without the money. Mr. Wagner cooperated and provided an early guilty plea. He was a 26-year old drug addict. He had an extensive record with one prior robbery. His previous longest jail time was nine months. His sentence was three and a half years in total.

[22] Counsel filed several decisions involving robbery with a firearm. These are special cases as Parliament has imposed minimum punishments, and I have not considered them.

Conclusion

[23] In 2001, Mr. Linklater was sentenced to 30 months incarceration, which included two years for robbery. At that time, the sentencing judge described his criminal record as horrendous. It has not gotten any better since. His record of 45 prior convictions is a serious aggravating factor.

[24] Clearly, protection of the public must be an objective of the sentence I impose today. The need to protect the public is not mitigated by Mr. Linklater's aboriginal status, his difficult upbringing or his addiction to hard drugs. The public will not be protected from Mr. Linklater unless he learns to stay away from heroine and cocaine.

[25] Mr. Linklater did plead guilty, but not after the trial had started and the Court had ruled his statements admissible after a *voir dire*. Little, if any, credit should be given to him for this guilty plea. As a mitigating factor, I also consider his youthful age and his low intellectual functioning.

[26] Robberies occur too frequently in this community. The use of a weapon, whether a gun or a knife, increases the possibility of escalating violence, particularly when the person wielding the weapon is grossly intoxicated by hard drugs.

[27] Based on all of the circumstances, the Crown submits that a sentence in the range of four to six years would be appropriate. Mr. Linklater's counsel emphasized the following matters in his submission:

1. Protection of the public, in the case of a youthful adult like Mr. Linklater, can be best met by rehabilitation.
2. General deterrence has less application where the individuals to be deterred are under the influence of hard drugs and are committing robberies to obtain more drugs.
3. On his last sentencing for robbery, Mr. Linklater requested a federal sentence so he could take advantage of the greater variety of programs available there. Instead, he says he became a victim of the system. While in the federal system, he says he was assaulted sexually and became addicted to cocaine and heroin. He said he put himself into segregation to protect himself. As a result, he was not able to participate in programming. He was released from the penitentiary without a plan.
4. Some things have changed, according to Mr. Linklater. He now says he wants to change his life and that as a result of his one-to-one counselling with a volunteer at the WCC, he is now open to change. He believes he can do better at the Whitehorse Correctional Centre than in the federal penitentiary because of the family and other supports that are available locally.

5. Mr. Linklater points to comments in the pre-sentence report and psychological assessment that suggest that the WCC would be an appropriate disposition. For example: “He needs a therapeutic environment to work on his addiction problems.” (Dr. Boer’s report, page 4), “He shows some empathy for his victims.” (Dr. Boer’s report, page 5), “He may be able to make a change with culturally sensitive programming.” (Dr. Boer’s report, page 3), “He presents himself open to change.” (Dr. Boer’s report, page 10).
6. The lack of intensive long-term programming in WCC is a factor against imposing a reformatory sentence. If Mr. Linklater points to his good working relationship with one volunteer and also the availability of short-term programming, the ability to access some programs for his learning disability, his illiteracy and educational upgrading from the Whitehorse community while in WCC.
7. Finally, Mr. Linklater points to the seven and two-thirds months he has spent in custody, and if he received double credit for this time, it would be equivalent to a 15 and a half month sentence. Thus, if the Court were to impose a sentence of two years less one day plus three years probation on stringent terms, it would be equivalent to the Crown’s recommendation of a sentence between four and six years.

[28] While Mr. Linklater’s arguments are compelling at an emotional level, an objective analysis of the facts, including his performance while in custody

demonstrates that his prospects for rehabilitation and for change are largely, if not entirely, speculative.

1. He continues to paint himself as a victim of the system, unable to take responsibility for his own actions and poor decisions. As a result, his prospects for rehabilitation are almost entirely dependent on what others will do for him, not what he will do to address his many issues.
2. The decisions to take drugs while in the penitentiary and to run up drug debts were his choice and his alone.
3. I am not convinced that he has put himself into segregation in the penitentiary solely as an act of self-defence. He was moved to three other institutions while in custody in order to give him a new start, but he failed to take advantage of these opportunities. He had the support of the native brotherhood to go back into the general population, but he refused to do so.
4. While in the WCC, he has not been able to access programming because he was on parole revocation status. This seems to me to be an unfortunate and arbitrary policy decision which does not account for the offender's needs or his level or risk. Nevertheless, Mr. Linklater again removed himself from the general population by requesting a placement in segregation.
5. Apart from developing a relationship with a volunteer counsellor while at the WCC, Mr. Linklater has done poorly in that setting. He has had five major violations for contraband, setting a fire, damaging jail

property, spitting on a guard, swearing and cursing at guards and throwing chairs. He is assessed as being a difficult prisoner who can be manipulative in order to get what he wants. To his credit, his behaviour has been better since the end of February this year.

6. As Mr. Linklater has been in custody on a parole revocation, he has, in essence, been serving the balance of his earlier sentence for robbery. That suggests that he should not get any credit for his pre-trial custody. On the other hand, the Crown has not satisfied me that Mr. Linklater would not have been considered for parole again prior to the expiry of his earlier sentence.

[29] In these circumstances, I will give Mr. Linklater credit for seven months pre-trial custody on a one-to-one basis without any additional credits.

[30] In the circumstances, an appropriate sentence would be, firstly, for the attempted robbery of Riverside Grocery, after giving Mr. Linklater a credit for seven months pre-trial custody, a period of further custody of five months concurrent to any sentence he is now serving.

[31] Secondly, for the robbery of the Roadhouse Off Sales, a period of incarceration of three years concurrent to any sentence he is now serving but consecutive to the attempted robbery.

[32] Three, for the assault on the Corrections Officer by spitting, a period of incarceration of three months. Due to his youthful age and out of concern for the totality principle, this sentence will be served concurrently to the sentences imposed today.

[33] (Discussion concerning DNA Order and Firearms Prohibition)

[34] THE COURT: The 10-year firearm application will go as requested by the Crown.

[35] Mr. Coffin, victim fine surcharges, request that they be waived?

[36] MR. COFFIN: Yes.

[37] THE COURT: Waived.

[38] Perhaps I can conclude by noting that Mr. Linklater's needs are many, deep-rooted and complex. While in custody, I strongly recommend that the following programs and assessments be made available to him: elder programs based on aboriginal culture; alcohol and drug treatment; informal trades such as carving, carpentry and mechanics; life skills programming; literacy training; a medical assessment for FASD; a psycho-educational assessment; a medical assessment for depression.

[39] I hereby direct that a transcription of these reasons be done forthwith as quickly as possible and that these reasons for sentencing either accompany Mr. Linklater or be sent as soon as possible to the federal penitentiary system where he will be staying. I think it will happen in any event, but perhaps I can also direct that the pre-sentence report and Dr. Boer's assessment also accompany Mr. Linklater to the federal penitentiary where he will be going. I do believe that they are probably sent in any event, but so there is no misunderstanding about that.

[40] THE COURT: Counsel, thank you for your assistance in what was a very difficult sentencing, at least it was for me. The conclusion I came to was not without a lot of reflection and concern. Thank you.

LILLES C.J.T.C.