Citation: *R.* v. *Loyer*, 2009 YKTC 36

Date: 20090408
Docket: 07-00573A
08-00631
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

JESSE LEE LOYER aka JESSE WARREN

Appearances:
Jennifer Grandy — Counsel for Crown
Lynn MacDiarmid — Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Jesse Lee Loyer has entered guilty pleas to six offences under the *Criminal Code of Canada*. Four of these offences are offences contrary to s. 733.1(1) of the *Criminal Code* and there is one s. 5(1) offence and one s. 5(2) offence under the *Controlled Drugs and Substances Act*.

[2] The circumstances with respect to the 733.1(1) offence as set out on the 07-00573A Information are that Mr. Loyer was placed on a probation order that arose out of a conviction for an offence under s. 266 related to the new partner of Mr. Loyer's former common law spouse, Ms. Brault. He received a probation order in addition to some credit for time served, and one of the terms of this probation order was that he have no contact with Dean Nakamura and that he have no contact with Vanessa Brault except

with permission. There are standard exceptions attached with that permission, or conditions. The order was subsequently amended on February 1, 2008 to include his son, Asher Brault in the no contact, except with certain prescribed permissions.

[3] On June 21, 2008, at the Shipyards Park solstice celebration where Ms. Brault was acting as a photographer, Mr. Loyer had contact with Dean Nakamura and Asher Brault and spoke to them. On July 11, 2008, again Mr. Loyer was talking to Mr. Nakamura and Asher Brault and made an attempt to speak to Ms. Brault when she approached, which she refused to respond to. Again, on September 19, 2008, Mr. Loyer spoke to Asher Brault outside of the Photovision store when Asher was there with Ms. Brault, and asked for a hug from Asher. He repeated this 20 minutes later when Ms. Brault and Asher left the store.

[4] Subsequent to that, on December 5, 2008, Mr. Loyer was contacted by an individual wishing to speak to him about the martial arts. This individual happened to be an undercover officer who was acting as part of an investigation in which Mr. Loyer was a target. Mr. Loyer and this undercover officer met and spoke about martial arts. The undercover officer asked Mr. Loyer what he did for work and was told by Mr. Loyer that he sold weed and he had been doing that for a number of years.

[5] The undercover officer made inquiries about the cost of marihuana per gram and Mr. Loyer offered to help out the undercover officer with purchasing some marihuana. At that time Mr. Loyer told the undercover officer that he could make good money, up to $2,000 a week, selling marihuana.

[6] They went to Mr. Loyer's residence at the Roadhouse apartments and Mr. Loyer

sold 3.7 grams of marihuana to the undercover officer for approximately $50 from what the undercover officer observed to be about a half full Ziploc bag of marihuana. I am not certain what size Ziploc bag this was. Mr. Loyer then told the undercover officer, when asked what he was going to be doing the rest of the evening, that he was going to walk around and make money.

[7] Subsequent to this, on December 17th, the undercover officer contacted Mr. Loyer again and indicated he wished to purchase an eighth of an ounce. Mr. Loyer met the undercover officer at a coffee shop in Whitehorse where he was arrested. When searched incidental to this arrest, Mr. Loyer had on him two-eighths of an ounce of marihuana in two separate packs. A search warrant was executed on his residence and two baggies of marihuana and some scales and drug paraphernalia were also located. I believe the quantity in the apartment was one ounce.

[8] Mr. Loyer has a criminal record going back to 2002. It has various entries for uttering threats, fail to comply with undertakings and probation orders. Of particular relevance in this case is a 2003 conviction for possession of a Schedule II substance; a 2005 conviction for trafficking in a Schedule II substance, for which Mr. Loyer received four months custody and the mandatory prohibition order under s. 109 of the *Criminal Code*, and a 2008 conviction that, although the criminal record indicates was for possession of a Schedule II substance, I was advised by both counsel in fact should have been a conviction for trafficking.

[9] The criminal record seems to indicate 30 days and five months pre-sentence custody plus probation for the 2008 offence, although the warrant of committal seems to

indicate 30 days in addition to four month pre-sentence custody. In the face of these two conflicting documents I am inclined to treat this as the five months set out on the warrant of committal, which, defence counsel also advised me, was for conviction after trial.

[10] Mr. Loyer has approximately 111 or 112 days in pre-trial custody, which both counsel have agreed works out to five and a half months credit.

[11] An aggravating factor pointed out by the Crown in this case is the fact that, at the time of this offence, Mr. Loyer was on a subsequent probation order, or a different probation order to the one I mentioned earlier that arose out of an assault matter. The second probation order was the one connected to the 2008 trafficking conviction, and had a clause in it that he abstain absolutely from the possession of controlled drugs and substances, which, of course, he was not complying with when he was arrested on December 17th.

[12] Crown is suggesting firstly, and indicating this by way of a joint submission with defence counsel, that on the three s. 733.1 convictions that a sentence of 45 days concurrent to each other, and concurrent to whatever sentence is imposed for the remaining offences, would be appropriate. I agree with that. It is clear that the breaches of the no-contacts in this case were matters of circumstance and not matters of planning. That does not mean they are not serious. They are serious. The no-contact order is in place for a reason, and, fortunately, the contacts did not result in any apparent further conflict. There is, as I indicated, a reason why these no-contact orders take place, and notwithstanding that these happened by way of circumstance in a public

place, as difficult as it may be for Mr. Loyer in the circumstances to walk away or to avoid the contact, that is what he must do, and he did not do it, and he knew that that was wrong. But as far as no contact breaches go, and accepting that all such breaches are serious and should be treated seriously, these are somewhat towards the lower end due to the more circumstantial nature of them and the public setting, and the lack of anything else flowing from them.

[13] With respect to the remaining charges, Crown submits that a sentence of 15 to 18 months would be appropriate, noting the aggravating factor of the criminal record and, as I stated, the fact that Mr. Loyer was on probation at the time of these offences for having committed the same offence.

[14] Another aggravating factor that the Crown points to is that Mr. Loyer's participation in trafficking was not addict-driven trafficking but was basically for profit as a lifestyle choice, while recognizing that he was nonetheless a street level trafficker. Crown points to the principles of denunciation and general deterrence as being the primary factors when it comes to cases of drug trafficking.

[15] With respect to the issue of specific deterrence, in his discussions with the undercover officer, Mr. Loyer had indicated that he would likely be looking at a penitentiary sentence if he was busted for trafficking again. So it appears that he was aware of significant consequences that could flow towards him yet nonetheless chose to continue to traffic in drugs. So it places specific deterrence into somewhat of a different box in that knowledge of a penitentiary sentence was not enough to deter him specifically. What would, is the question the Court has to ask itself.

[16] With respect to mitigating factors, there is the fact that we are dealing with guilty pleas, one being the morning after the December 17th offence, and the later guilty plea of March 31st, which nonetheless was indicated from the start as being part of what Mr. Loyer intended to do. There was never any indication that these matters were going to be resolved any way other than by guilty plea.

[17] Crown also points to the Static Risk Assessment as noting Mr. Loyer to be a high risk to re-offend. Crown addressed the issue of a conditional sentence as not being appropriate in the circumstance, but given defence counsel's position on this and some brief comments I will make later, I can indicate that I concur with the Crown's position on this in the circumstances of both the commission of these offences and the pre-sentence report provided for this disposition.

[18] Defence counsel is taking some issue with respect to the range sought by Crown counsel on the basis that this is just too high of a jump from the five months Mr. Loyer got after trial in 2008, and places too much weight on deterrence and denunciation in making this jump, and to some extent it contravenes the proportionality requirements involved in sentencing. Defence counsel distinguishes the facts of this case from a case where Mr. Loyer was going around and actively seeking people to purchase marihuana from him, in that in fact the undercover officer approached him, and while certainly not inducing Mr. Loyer to do something it is clear that Mr. Loyer does regularly, at least in this instance, came to Mr. Loyer, which created the opportunity for the sale.

[19] Interestingly enough, defence counsel also brought out, from the undercover officer's notes, that when the officer made some enquiries into the possibilities of

purchasing cocaine, Mr. Loyer was quite clear that he was not involved in that and that neither should the undercover officer get involved in cocaine because it basically is not a good thing to be involved with.

[20] If I did not say it before I will say it now, defence counsel's suggestion is that a range of eight to 12 months plus 12 months probation would be appropriate.

[21] The pre-sentence report filed indicates that Mr. Loyer has had somewhat of a dysfunctional childhood, marked by broken homes and some difficulties with his first stepfather, who was physical both towards his mother and, at least on more than one occasion, himself. He left home at the age of 14. By that time he had a second stepfather who certainly seemed to be much of an improvement over the first one. But Mr. Loyer has basically, other than returning home for a period of time at the age of 16, had a transient lifestyle. He nonetheless has a supportive mother.

[22] He has a limited education, leaving school in Grade 11. His social development is marked by friends who clearly are involved with the drug trade and have criminal records; those in his involvement in martial arts who are not; and then some other individuals that he really does not know whether they have much of a criminal involvement or not. He has had sporadic employment. He is single.

[23] He was in a relationship with Ms. Brault for some years and they have a child, Asher, who is now seven years old, and this relationship has been the source of some of the conflict that Mr. Loyer previously found himself in with the law, over his inability to deal with the break-up of that relationship in an appropriate manner.

[24] He has had some counselling through the Family Violence Prevention Unit in 2002, 2004 and 2008, and has taken the For the Sake of the Children program that is offered to assist partners who have separated, and who have children. I am not really sure, from the report, what the outcomes of his involvement in these programs has been. As indicated before, he has a significant interest in the martial arts and wishes to pursue that. It appears he has achieved some recognized skill in that area at times. He has residency at the Roadhouse Inn, or otherwise on the street as sort of his residency in Whitehorse.

[25] The Problems Relating to Drinking Assessment, shows him to have a moderate level of problems with alcohol, and the drug abuse assessment places him as having a substantial level of problems, although this appears to be with marihuana. He was noted in the report to be cooperative and remorseful. Significant within the report and causing some concern has been his rationalization of his behaviour regarding the use of marihuana, seeing this as being a drug that does not cause harm, and this rationalization and orientation of criminal thinking, insofar as the use of and trafficking in marihuana, has had a significant impact on the individuals he spends time with and on his ability to find a legal means of operating and living within the Whitehorse community.

[26] The LSI-R risk assessment places him at a high risk to re-offend. Now, this is a Static Risk Assessment that looks at historical factors, but clearly notes that the harm factors that contribute to his risk are his associates, are his lack of employment, which seems to lead him to employing himself in the trafficking of marihuana, and his pro-criminal orientation and attitude. It is very clear that if these do not change he is just going to continue to do what he does. If these change, then his risk assessment goes

down and he, I would assume, would not do this.

[27] It is important for Mr. Loyer to upgrade his education, to gain employment, to change his associates, and to change his attitude, according to the report.

[28] The report does not recommend a disposition such as a conditional sentence in the sense that, based on Mr. Loyer's current circumstances and lack of residential and employment stability, that it would be difficult for him to serve a conditional sentence and, as I indicated, although such a sentence is not foreclosed in cases of drug trafficking, even in the cases of repeat drug traffickers, it certainly requires specific, structured living, employment, educational and other such factors before the principles of deterrence and denunciation could appropriately be met and the administration of justice in the community satisfied by a conditional sentence. This is not that case and defence counsel has quite properly not pursued it in this case.

[29] The case law filed, and I am not going to go through it, is difficult to strictly apply to this case. Some of the cases are marihuana, some are cocaine; some are addict driven, some are not addict driven, and rather than analyzing them and trying to find a balance them I will simply sum up that when it comes to trafficking and drugs in the Yukon there is a clear distinction between marihuana and hard drugs such as cocaine. There is also a clear distinction between addict-driven traffickers and profit-driven traffickers, and while the line between profit-driven cocaine traffickers and profit-driven marihuana traffickers may be broad, the line between addict-driven cocaine traffickers and profit-driven marihuana traffickers may not be that different, so each case needs to be looked at for its particular circumstances.

[30] There have been cases, or at least a case in the Yukon, where an individual for trafficking in a fairly significant quantity of marihuana got a conditional discharge. That was, and remains, an exceptional case in an exceptional set of circumstances. The cases flow from there up to any number of ranges. So it is hard to glean from all of the cases any clear range of sentencing for this set of circumstances before me, which are two separate yet closely connected instances of trafficking and possession for the purpose of trafficking to the same individual in marihuana in not significant quantities. I am including in this the amount, of course, of marihuana that was located at the residence.

[31] Mr. Loyer indicates that he has a bit of a psychological addiction to marihuana and so he should not be seen as someone who is purely for-profit trafficker, and while I recognize that marihuana use has been part of his lifestyle since he was a teenager to today's date, when he is 31 years old, he still was clearly a for-profit trafficker.

[32] I believe that rehabilitation still remains something that Mr. Loyer is fully capable of taking advantage of and I need to factor that into the sentence that I am going to impose.

[33] One other thing I wanted to say is, the *Curtis* case, [1982] Y.J. No. 4, was filed, and much has been said over the years about the impacts of drugs on northern communities and that impact needs to be recognized, and a distinction has been drawn over the years between hard drugs and soft drugs. Realistically any drugs in our community, without comparing it to any other community, has an impact, and while Mr. Loyer may have been selling to individuals who he believed were well-informed and

were making the choice and were not vulnerable and were not young, what he was doing was still part of a large circle of the drug trade and activity in the Yukon Territory.

[34] While he himself was not personally involved in the sale of hard drugs and it is not shown that he has got any connections to individuals who are doing this, it is still part of the mentality of drug trafficking in the Yukon and that mentality must be deterred at all times. Drugs have a serious impact on the North, and there is a distinction between marihuana and cocaine, sure, but there is still a significant impact, and trafficking in any drugs needs to deterred in the Yukon Territory, including soft drugs, and that form of conduct has to be denounced, which is why those principles still remain of importance.

[35] I am not prepared to jump with a sentence, in these circumstances, as high as the Crown is suggesting, or go as low as defence counsel is saying the range could be. These are two instances of trafficking, albeit to the same person in a short time span, but there is the factor of being on probation at the time, and those are only two of the factors. I have discussed some of the other aggravating and mitigating factors earlier.

[36] As such, the sentence will be, taking into account five and a half months credit for time served, six months, and this will be concurrent on the two drug offences, the s. 5(1) and the s. 5(2), and concurrent to the three 733.1 offences of 45 days, and concurrent to one month for the 733.1(1) for possession. So that means it will be about 11 and a half months on the record, but it will be an additional six months. There will be a probation order for a period of one year.

[37] I had thought of making the probation order much more restrictive and maybe

seeing whether that would be appropriate and possibly taking a little bit of time off the actual custody, but in these circumstances I felt that dressing a probation order up to maybe look a little bit more like a conditional sentence was not the right way to deal with this. So I am not going to put a restrictive probation order on. I am going to put a probation order on that is purely dealing with rehabilitation, so as not to "punish" you, Mr. Loyer, but to actually try to assist you in education and employment and getting on with the productive life that I believe you are capable of doing, both productive in the community and productive in your relationship with your son. This is a relationship I believe, Mr. Loyer, you want to have. I believe it is a relationship your son would want to have with you, if you are someone that he can look up to and be proud of, and you can still make that happen. That is not to say he is not proud of you now; I have no idea.

[38] The terms will be:

1. To keep the peace and be of good behaviour;
2. To appear before the Court when required to do so by the Court;
3. To notify the Court or probation officer in advance of any change of name or address, and promptly notify the Court or probation officer of any change of employment or occupation;
4. To remain within the Yukon Territory unless you obtain written permission from your probation officer or the Court;
5. To report to a probation officer within two working days of your release from custody and thereafter when and in the manner directed by the probation officer;

6. To reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer;
7. To abstain absolutely from the possession or consumption of controlled drugs and substances except in accordance with a prescription given to you by a qualified medical practitioner;
8. To take such drug assessment, counselling or programming as directed by your probation officer;
9. To take such other assessment, counselling or programming as directed by your probation officer;
10. To participate in such educational or life skills programming as directed by your probation officer;
11. To make reasonable efforts to find and maintain suitable employment and provide your probation officer will all necessary details concerning your efforts;
12. To 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 probation order.

I am actually going to add some community service hours.

13. To perform 30 hours of community service as directed by your probation officer or such other person as your probation officer may designate; this community service is to be completed by the end of the ninth month of your probation order.

I will indicate that any hours spent in martial arts classes, training students, under the supervision of an individual approved by your probation officer can be counted as hours towards your community service.

[39] Crown counsel is also seeking a mandatory lifetime firearms prohibition under s. 109. Clearly a mandatory order needs to be made; the question is duration, and the question on that is notice. The circumstances are that, with respect to the December 17th offence, a 5(2), the guilty plea was entered the next day, and Crown is not seeking that it attach itself to that order. No notice was given prior to plea being entered and the strict wording of s. 727 indicates that

> where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

[40] There have been cases which have dealt with firearms prohibitions in the context of the application of s. 727, one of which was filed by defence counsel, and without analyzing it in any particular depth, simply treat the firearms prohibition sought for as being within the meaning of s. 727, and thus, inferentially, looking at it as being a form of punishment for which s. 727 applies.

[41] So a plea had been entered on the December 17th offence prior to any notice being given. I will just say at this point that I would not think that it was the intention of the legislature that entering a guilty plea quickly, perhaps before Crown has even had a chance to look at its file or anything, would necessarily frustrate the ability of the Crown to give notice afterwards, but that is not a matter that features in this case because

Crown counsel is seeking it on the December 5th conviction, for which the notice was orally given on March 30th and the plea entered March 31st.

[42] I have considered the submissions of defence counsel with respect to whether that was or was not adequate notice. I have reviewed some of the case law and the wording of the section and I am satisfied that the notice given by Crown counsel in this case is all the notice that is required under s. 727, and as such I am bound to make an order that prohibits Mr. Loyer from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for life, as he has prior convictions for offences under ss. 5(1) and 5(2) of the *Controlled Drugs and Substances Act*.

[43] There will be an order for forfeiture. I have been provided that order. I understand Madam Clerk wished the order to be re-drafted and that has already been done. Thank you, counsel.

[44] MS. GRANDY: Thank you, Madam Clerk.

[45] THE COURT: Always thanks to Madam Clerk.

[46] Victim fine surcharges will be waived. Were there any other matters?

[47] MS. GRANDY: If I could ask for the remaining count to be marked as withdrawn, please.

[48] THE COURT: It will be marked as withdrawn.

[49] Mr. Loyer, before you go back, I do not know whether this feels harsh or does not feel harsh on you right now. I do not want it to feel harsh. I want you to know you

cannot do this anymore, because the additional six months gets you out probably in four months, which still, for a man your age, gives you a lot of time to make the right choices. I want you to use this as a catalyst. I believe you want to change your life. I believe you can change your life, and I want you to grab what good you can from this and use the time that you have got to set in place a plan for your life that you do not start working on once you are out, but that you have already set in place so that your life, and that includes contact with your son, so that it can start now, not then. If it starts now, I have every reason to believe you will be successful and we will not see you any more. You have possibilities; you have potential. You have options; you just need to take them, and I am confident you can. It is up to you whether you are confident you will, but I hope you make those choices, and I wish you the best.

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COZENS T.C.J.