

Citation: *R. v. MacDonald*, 2006 YKTC 3

Date: 20050916
Docket: T.C. 05-00193A
T.C. 05-00198
Registry: Whitehorse

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

REGINA

v.

CHRISTOPHER DANIEL MACDONALD

Appearances:
Edith Campbell
Malcolm Campbell

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] OVEREND T.C.J. (Oral): Mr. MacDonald is charged with breaking and entering the Tim Hortons restaurant on 2nd Avenue near Main Street in Whitehorse on the 21st of June.

[2] There is one issue in this trial and that is whether or not the person shown in the videos, Exhibit 1 on this trial, is Mr. MacDonald or whether the Crown has proven beyond a reasonable doubt that that person is Mr. MacDonald.

[3] Mr. MacDonald had been in custody at the RCMP station and his custodial status was also recorded just prior to his release and he is shown in the video.

[4] In the video at the RCMP station shows a man dressed in clothing which could be said to be similar to the clothing worn by the person who had entered Tim Hortons restaurant. He could be said to display similar features to the person who entered -- showed similar features in the RCMP video to the features shown by the person at Tim Hortons.

[5] While the Supreme Court of Canada in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, has said that I am entitled to look at the videotape and draw my own conclusions with respect to whether or not that is the same person -- whether the person in the video at Tim Hortons is the same person who appears before me today in court, I am not prepared to draw that conclusion today.

[6] The evidence falls far short of satisfying me, just looking at the videos alone, that the person who is in court today is the person who was in Tim Hortons on the 21st of June.

[7] However, that is not the only evidence. The evidence upon which the Crown relies is not my assessment of the photographs but the evidence of Constable Drover. Constable Drover knows Mr. MacDonald. She knew him for some time and had, on more than one occasion, dealt with him prior to the 21st of June. In fact, she had dealt with Mr. MacDonald the day prior to the 21st of June and had made observations about him at that time. She, in giving evidence in court today, looked at the video at Tim Hortons and said that he, Mr. MacDonald, was the person who was shown in Exhibit number 1, the two clips taken at Tim Hortons on the 21st of June.

[8] There were some difficulties with her evidence. She said he was bald and had no hair. Clearly, that does not conform to what is clearly shown on the video while he was in custody at the RCMP station and clearly is not in accord with the evidence of Corporal Cashen or the accused himself. I am satisfied that in fact he had hair and my own conclusion that I can draw from her evidence about him being bald and having no hair is that that was her way of stating that his hair was very closely cropped, and in fact that is in accord with the evidence of Corporal Cashen and is confirmed by an examination of Exhibit number 2 where Mr. MacDonald was in view for a period of 10 or 15 -- most of 10 or 15 minutes.

[9] On the whole of the evidence, I am satisfied beyond a reasonable doubt that the person identified by Constable Drover as Mr. MacDonald in the photograph is in fact the person who has appeared in court today and I find him guilty on Count number 1.

[10] I think I should, just for the record, say that during the course of the trial, evidence was led which might have afforded an alibi to Mr. MacDonald. Mr. MacDonald, through his counsel in his submissions, abandoned any alibi argument.

[11] Any background -- I'm sorry, I'm rushing but I have to get out of here, so I need any background on --

[12] MS. CAMPBELL: On Mr. MacDonald, Your Honour. Yes, maybe I should offer no evidence on the second count on the Information.

[13] THE COURT: Yes. Thank you. Count Number 2 is dismissed then.

[SUBMISSIONS ON SENTENCING]

[14] THE COURT: The accused has been convicted or pled guilty to the offence of mischief in addition to having been found guilty of breaking into Tim Hortons.

[15] On the mischief charge, given his record, I am sentencing him to a term of imprisonment of 30 days. I am making a stand-alone restitution order in the amount of \$122 payable in favour of the City of Whitehorse.

[16] With respect to the breaking and entering Information, as counsel has indicated, it is a more serious charge and involves the theft of some monies from Tim Hortons. Those were monies that were destined for children's camps, but there is nothing before me to indicate that that was something which Mr. MacDonald was aware at the time. So I am not treating the fact that they were children's monies as an aggravating circumstance. It is a breaking and entering into a business premises and theft of between \$200 and \$500.

[17] Regrettably, Mr. MacDonald needs more deterrence. He seems not to yet have got the message that his criminal behaviour is not acceptable. He has a number of convictions for property offences and has received sentences of as much as 11 months for those property offences.

[18] For this particular offence -- Mr. MacDonald, would you stand, please. Mr. MacDonald, on this offence I am taking into consideration that you have spent approximately two and a half months in custody. I am crediting you with double time for that, so it is in effect five months. I am sentencing you to an additional seven months in custody. That is consecutive to the 30 days. I am not applying any probation and I am waiving victim fine surcharge.

[19] MR. CAMPBELL: Your Honour, the length of the stand-alone probation order? Oh, I'm sorry the stand-alone restitution order.

[20] THE COURT: Yes, it is just there. I am sure you will explain to Mr. MacDonald that it is payable forthwith and I hope he doesn't do something that will end up where those things end up.

OVEREND T.C.J.