IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *McGinnis*, 2006 YKSC 59

Date: 20061109
S.C. No. 06-01501
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

LEN KENNETH MCGINNIS

Before: Mr. Justice L.F. Gower

Appearances:
John Phelps — For the Crown
Gordon Coffin — For the Defence

MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): Len Kenneth McGinnis has pled guilty to the offence of break and enter and commit theft under s. 348(1)(b) of the *Criminal Code.* The offence was committed on December 19, 2005, at a hotel room in Whitehorse. The offender was arrested December 21, 2005, and held in custody. At the time of his arrest and at the time of the commission of the offence, he was serving a conditional sentence, which was due to expire January 9, 2006. He has been detained in custody since his arrest and therefore is entitled to credit for ten months in pre-sentence custody on the current charge.

[2] Procedurally, Mr. McGinnis had a bail hearing on March 9, 2006. I understand that at or about that time he retained counsel from British Columbia, one Peter Jensen. An election was entered April 5, 2006 and in June the matter was set for trial in late September to accommodate Mr. Jensen's schedule. I am informed although the trial date was set, it was always anticipated this matter would be resolved without the need for a trial. However, negotiations between the Crown and Mr. Jensen did not bear fruit, and Mr. Jensen ceased acting for Mr. McGinnis around the end of July. Mr. Coffin took over as defence counsel and confirmed a resolution of the matter with the Crown.

[3] The facts have been presented by way of an Agreed Statement of Facts, and I will paraphrase from that.

[4] On December 19th, a person known to Mr. McGinnis as “Joseph” asked him to help with a job. Joseph told Mr. McGinnis that a man residing in Room 209 at the Airline Inn was a drug dealer. The job proposed by Joseph was for Mr. McGinnis to come along as backup while Joseph stole marijuana, cocaine and cash from the room. As explained by Joseph, there were expected to be at the most four adults in the room and Mr. McGinnis' role was to assist Joseph if he were attacked by anyone in the room. For that assistance, Mr. McGinnis was to receive a portion of the drugs and the cash taken.

[5] At first, Mr. McGinnis declined to assist, but once Joseph told him that the man in the room abused children, he eventually agreed.

[6] At no time during the discussions of the job did Joseph indicate that any weapons would be involved.

[7] At about 10:30 p.m. on December 19th, Joseph and Mr. McGinnis went to the Airline Inn, travelling in Mr. McGinnis' car. They approached Room 209 and Joseph knocked on the door and asked for Amanda. Both Joseph and Mr. McGinnis had their faces covered when they approached the room. On calling out for Amanda, they were told by the occupants that they had the wrong room. Joseph kicked the door open and in doing he so pulled the covering from Mr. McGinnis' face and pushed him into the room. The room was occupied by Norman Simmons, Melody McGrath, and her two children aged ten and one and a half.

[8] Upon the door being kicked in, Ms. McGrath yelled that she was calling for help and began calling the front desk. As the two offenders entered the room, Mr. McGinnis' face was exposed. Norman Simmons attempted to defend the room by attacking Mr. McGinnis with a baseball bat, striking him in the head. Mr. McGinnis then took the bat from Mr. Simmons, forcing him down onto a bed. While this was happening, the other offender sprayed bear spray at Norman Simmons. Melody McGrath was, at that time, covering her two children, attempting to protect them from the attack.

[9] Joseph then took a safe from the room, followed closely by Mr. McGinnis. The victims advised the RCMP that the safe contained approximately $3,800. That money was never recovered.

[10] As a result of the room invasion, Mr. Simmons suffered a bruised left eye. All of the occupants of the room suffered irritation in their eyes and lungs from the bear spray.

[11] Ms. McGrath recognized Mr. McGinnis as a patron of a local bar, which led the RCMP to his arrest on December 21st at the office of his probation officer. He provided

a statement to the RCMP on December 21, 2005, admitting his involvement in the incident but failing to identify his co-offender.

[12] I am advised that the individual named Joseph has absconded with the safe and the stolen money, and Mr. McGinnis has not seen any of the people involved in the incident since.

[13] Mr. McGinnis was unaware that there were any children in the room prior to attending at the Airline Inn. Mr. McGinnis did not profit from this crime in any way by keeping any of the drugs or cash.

[14] Mr. McGinnis' personal circumstances are as follows. He is 41 years of age. He was born in British Columbia. His parents separated when he was about five years old, and he has not seen his father since he was about seven years old. He was raised by his mother and his grandmother and moved back and forth between their two houses. However, after his grandmother died, he moved with his mother to Watson Lake. His mother, unfortunately, suffered from an addiction problem and substance abuse, and Mr. McGinnis left his mother's home at the age of 12.

[15] He then moved to Surrey, British Columbia, where he proceeded to live on the streets for the next few years, although he continued sporadic contact with his mother. She died of an overdose of non-prescription drugs about four years ago.

[16] Mr. McGinnis' education was such that he left school at a grade seven level, but then re-attended at a college program in California in the late 1980’s, where he studied

auto body and mechanics. He claims to be a journeyman in the auto body field and has made that his living since then, once owning his own shop.

[17] He was married for a period in the early 1990's, and had a daughter from that marriage who is now 15 years of age. Unfortunately, he relapsed in the late 1990's, and has throughout his life, as I understand it, continued to experience problems with drugs and alcohol.

[18] He says that growing up on the streets exposed him to the criminal elements and that he lived that lifestyle for several years. However, in recent years, he has been working to change that and has made significant efforts. He says that upon his release he intends to move to Prince George, British Columbia, to take up employment as an auto body mechanic with one Rene Krogh. Mr. Krogh provided a letter on an earlier occasion to the courts indicating that he does indeed carry on business in the Prince George area and has known Mr. McGinnis for several years. He feels that he would be an asset to his new business and will be ready, willing and able to employ Mr. McGinnis, as well as to offer him guidance on a personal level.

[19] I gather that both defence and Crown counsel have recently spoken with Mr. Krogh, and have confirmed that his offer remains current, contingent upon Mr. McGinnis being released from custody. Mr. Krogh has even offered to drive up to Whitehorse if need be, to help transport Mr. McGinnis down south to establish a new residence in Prince George, so that he can begin his employment with Mr. Krogh.

[20] As I have said, Mr. McGinnis has indicated that he wishes to turn himself around. He filed a letter with the Court to that effect. It says that he has had a lot of time to think

about matters, in his last stretch of pre-sentence custody in particular, and wants to become a role model, not only for his 15-year-old daughter, but for other young children as well.

[21] According to his counsel, he wants to show the Court and his community that he is "serious" that he wants to change his lifestyle. In that regard, he has indicated a willingness to abide by whatever conditions the Court may impose, if a probation order is part of the overall sentence.

[22] Mr. McGinnis says that he has remained clean and sober while in custody and hopes to build on that by getting additional help upon his release. He says that AA and NA were not "offered to him" while he was in remand, although he did speak with Mr. Kyle Keenan, his case manager, about that. He says that he may have been pre-disposed to the disease of alcoholism as a result of his mother suffering from the same disease and that he was in fact drinking and drugging at the time of the current offence.

[23] The aggravating circumstances in this matter include the fact that this hotel room is a “dwelling house”, as defined in the *Criminal Code*, and therefore, the maximum punishment for this offence, under s. 348(1)(d), is imprisonment for life. That is among the most serious of the offences in the *Criminal Code*. In addition to that, s. 348.1 of the *Criminal Code* specifies that I must consider the home invasion aspect of this crime as an aggravating circumstance.

[24] I accept defence counsel’s point that Mr. McGinnis did not know that children would be present in the room, and therefore, I do not specifically consider that as an aggravating circumstance. While I suppose Mr. McGinnis could have reconsidered his

options upon entering the room and discovering the presence of the children, it appears as if the events unfolded very quickly. He was, in fact, pushed into the room by the co-offender and immediately called upon to deal with Mr. Simmons and the baseball bat.

[25] It is an aggravating circumstance that Mr. McGinnis was motivated purely by greed and the desire to obtain cash and/or drugs. There is no evidence that he was desperate because of his addiction problem to participate in the offence. Rather, he acted as hired help and referred to this, I understand, as a "job", suggesting that this was not something which was out of character for him. Indeed, the facts indicate that Mr. McGinnis had complete disregard for the impact of his involvement on others. In the case of *R.* v. *Prokopchuk*, 2004 BCPC 278, Challenger Prov. Ct. J. said at para. 24:

> "Because the motivation for such offences is greed, a significant jail sentence is required in order to dissuade people from the lure of easy money. The Court must ensure that if people are caught, the penalty will outweigh the potential profit."

[26] It is a further aggravating circumstance that Mr. McGinnis intended to be masked in the commission of this crime and that his intention was only thwarted by his co-offender at the last moment. In the case of *R*. v. *Jankovick,* 2004 ABPC 162, Norheim Prov. Ct. J. referred to the circumstance in that case, where the accused had concealed her face with intent to commit an indictable offence, and he said at para. 18:

> "This particular crime, and most others, are made more difficult to resolve when an accused is masked or disguised. Had this accused not told an undercover about her involvement it may have never come to light. Offenders must know that if they wear a disguise and are subsequently convicted, there will be additional consequences."

[27] It is further aggravating that there is evidence here of planning and deliberation. It is aggravating that Mr. McGinnis has an extensive criminal record with some 22

convictions, including three break and enter convictions in the early 1980's, as well as an aggravated assault in 1999, and, most recently, a spousal assault, a damage to property offence and a possession of firearm offence in 2005. It is aggravating that he was on a conditional sentence at the time he committed this crime. Finally, it is aggravating that the money was never recovered, and therefore, Mr. Simmons and Ms. McGrath have been deprived of their property.

[28] The mitigating circumstances are that Mr. McGinnis has entered a guilty plea and though it did not come early, it was always his intention to resolve the matter without a trial. The victims were spared the trauma of testifying, and the state was saved significant time and expense by not having to proceed with either a preliminary inquiry or a trial. It is mitigating that Mr. McGinnis acknowledged his responsibility early on, by providing a statement to the police upon his arrest, about three days after the offence. However, even here Mr. McGinnis never provided full and complete information, because he failed to identify his co-offender. Though his previous counsel may have played a role in that, it was always open to Mr. McGinnis to instruct his counsel to request an opportunity to give a further statement to the police, and that was never done.

[29] It is mitigating that Mr. McGinnis was the follower in this crime. He had to be cajoled into participating by the co-offender, who planned and instigated the offence. It is mitigating that Mr. McGinnis was not previously aware of the presence of the children in the room, nor was he aware that any weapons would be involved (although on this latter point, it might be something that Mr. McGinnis could reasonably have expected to be the case). It is mitigating that Mr. McGinnis' involvement was secondary to that of

the co-offender; indeed, it appears as if the co-offender used him as somewhat of a distraction or interference by removing his mask and pushing him into the room first.

[30] It is mitigating that Mr. McGinnis did not profit from the crime, and it is mitigating that there are significant gaps in his criminal record between the years 1987 and 1998 where there were no entries, and more recently between 1999 and 2005. The longest previous jail term that was imposed was seven months, which was in 1998.

[31] The positions of counsel on the sentence I should impose are as follows. The Crown suggests that the range here is three to four years; that Mr. McGinnis should be given two for one credit for his pre-sentence custody; and therefore, I should impose a sentence of two years less a day, plus two years probation. That would be the equivalent of a 44-month sentence.

[32] Defence counsel suggests that the range is about two and a half years, and that after credit for pre-trial custody, which should be at least, if not more than, two for one, I should impose an additional six months jail, plus two years probation.

[33] Returning to the case law provided, the *Jankovick* decision, cited above, was a guilty plea to robbery and a separate offence of wearing a mask. The former attracted a sentence of 30 months and the latter a sentence of four months, for a total of 34 months. There were mitigating circumstances acknowledged by the Court in that case. The offender had stayed out of trouble for about two years and had apparently turned her life around. It appears that she was in custody for a portion of that time, being about five and a half months, because she was subsequently arrested for trafficking and breaching her probation about a month after the robbery. However, she was then

apparently released and was on her own, on some form of pre-trial release process, before she was sentenced on the robbery. It was also noted that she was a relatively young person, 21 years of age, with an infant child, and that she eventually cooperated with the police by giving a full statement, and I emphasize full, after she was arrested on the charges. The sentencing judge was satisfied that the offender had already achieved, on her own, more toward her rehabilitation than one might reasonably expect from a period of incarceration.

[34] *R*. v. *J.H.R.*, 2003 YKSC 69, involved a home invasion scenario of breaking and entering and committing the indictable offence of forcible confinement. However, that case was decided on the basis of a joint submission for an effective sentence of 26 months. The accused there was a much younger man of 24 years of age with a significantly lesser record than that of Mr. McGinnis. He had only one prior offence of violence, and one prior related offence of forcible entry. He had never served a sentence of longer than 30 days. So for all of those circumstances, *J.H.R*. is of limited assistance to me as a sentencing precedent.

[35] *R. v. Prokopchuk,* cited above*,* involved a sentence of two years less a day, but the sentencing judge there clearly acknowledged, at para. 39, that that sentence was outside the lower end of the range. The case involved a home invasion into residential premises where there was a marijuana grow operation. The offender and a co-accused went to those premises at about midnight, forced entry into the home with a pry bar through the front balcony door. They were each armed with bear spray and restraints. One of the male occupants heard them; there were two young children in the home. The adult male was restrained by the offender while the co-accused went to harvest the

marijuana. Although it is not entirely clear from the reasons for sentence what Challenger J. ultimately accepted as the appropriate range, she did make reference to the range, in para. 26, as being as much as five to 14 years for a home invasion-type robbery, and later, at para. 30, to a lower range of three to four years.

[36] In any event, the sentencing judge clearly found, at para. 38, that Mr. Prokopchuk had demonstrated "exceptional circumstances." His record was dated, minor, and unrelated, such that he was referred to as having acted out of character. There was clear potential for his complete rehabilitation. He had provided a letter of apology to be forwarded to the victim. He had provided a full statement to the police (once again, I emphasize full). He had been compliant with his bail conditions and there had been no further offences. He had good support from his family, his friends and an employer in the community. He had, in particular, upon his apprehension, apologized to one the investigating police officers, who had been a dog handler, because he had sprayed both the officer and the dog with pepper spray. He was apparently concerned about the impact that had upon the officer and his dog.

[37] Because *Prokopchuk* was a case that involved exceptional circumstances, it is also of limited assistance to me as a sentencing precedent.

[38] There were two cases filed from this jurisdiction by the name of *R*. v. *Sterriah*. The first is reported at 2003 YKTC 37. There the sentencing judge was dealing with a home invasion where the offender had attacked an elderly woman for the purpose of obtaining money and alcohol. There was some bruising to the woman's face and elsewhere on her body. The injuries were described as quite significant. The

sentencing judge referred to the range as being one of approximately four years. However, the distinguishing feature in that case is that he gave the accused almost three-for-one credit for his pre-sentence custody of eight months and therefore reduced the eventual sentence to one of two years in a penitentiary. It should also be noted in that case that the offender was convicted after trial, so there was no guilty plea. The offender also had a previous conviction for a very similar attack on the same victim and was on probation at the time of the offence.

[39] The other *Sterriah* case is reported at 2001 YKTC 22. That case also involved an elderly victim, a male in his 70's, apparently not in good health. The offender had entered the gentleman's residence, threatened to kill him if he did not give him money, menaced him with a broomstick and then stole all of the money which the victim had, which was some seven dollars. The offender there had been held in custody for about five months, although the sentencing judge did not expressly state how much credit he was giving to the offender. If I assume that he gave him the usual two-for-one credit, then the sentence of two years less a day, when combined with the credit time, would effectively total about 34 months. The sentencing judge also referred to the offender as having a criminal record which was serious, persistent and in many ways related. However, the firearms prohibition which was imposed was limited to a period of ten years. Therefore, under s. 109 it would seem as though that was the first offence that the offender had on his record where violence was used, threatened or attempted.

[40] Having considered the principles and purposes of sentencing in s. 718 to s. 718.2 of the *Criminal Code*, the circumstances of Mr. McGinnis and the circumstances of this offence, I am satisfied that the range here is at least three to four

years. However, based largely on Mr. McGinnis' professed desire to turn himself around and to seek whatever counselling and support may be available, as well as employment in Prince George with Mr. Krogh, I would conceptually impose a sentence of three years imprisonment. I will give Mr. McGinnis credit for his ten months of pre-sentence custody at the rate of two-for-one. I will not give greater than two-for-one for a number of reasons.

[41] First, according to the letter that was filed from Mr. McGinnis' case manager, Kyle Keenan, shortly after Mr. McGinnis was taken into custody, he made a request to be assessed as a protective custody inmate and stated that he was expecting problems with other inmates because a child was involved in his most recent charge. I take it that refers to the children who were in the hotel room. Also, he made references to people who were out to get him because of what he knows. However, the only incident which Mr. Keenan was aware of, and confirmed, involving any potential threat or danger to Mr. McGinnis was when an inmate by the name of Byron Page had made threats from one of the segregation units to the unit that Mr. McGinnis was in. Beyond that, there was no objective evidence that Mr. McGinnis was ever in danger. It appears as though he made his choice, voluntarily, to go into a protective custody status.

[42] Second, I acknowledge that the Correctional Centre did not offer any core programs following Mr. McGinnis' incarceration (those programs would normally include such things as substance abuse management, violence programming and a commitment to change program), because of staffing and space problems. However, there were some minimal opportunities available to Mr. McGinnis to take short one-day

workshops, in areas such as First Aid. Tutoring was also available to Mr. McGinnis. He did not take advantage of any of those opportunities

[43] Third, he claims that he spoke with his case manager about AA and NA, but there was no clear evidence as to what efforts he made to try and attend meetings or whether he could attend meetings. Fourth, he says that he spoke an unspecified number of times with the prison chaplain, but again, there was little or no evidence of the extent to which he tried to take a advantage of that. Given his protective custody status, I would have expected him to try and do more on that front. Finally, it was mentioned by his counsel that he often chose not to take his daily one hour of fresh air time. Again that was a matter of choice, not something that was necessarily forced on Mr. McGinnis.

[44] For all of those circumstances, I do not find that this is a case which falls outside the usual type of situation referred to in *R.* v*. Neudorf*, 187 C.C.C (3d) 190, where, at para. 42, the British Columbia Court of Appeal recognized that the often applied ratio of two to one reflects the harshness of detention due to the absence of programs, as well as the fact that none of the remission mechanisms apply to that period of detention.

[45] Having conceptually imposed a sentence of three years on Mr. McGinnis, giving him credit for 20 months of pre-sentence custody would reduce the sentence to a remainder of 16 months, plus two years probation with the following conditions. You will be subject to the following terms:

1. Keep the peace and be of good behaviour;

2. Notify your probation officer in advance of any change of name, address, or employment;
3. Report to a probation officer within two working days of your release, and then as required by a probation officer and as directed by that person;
4. Take such alcohol assessment, counselling treatment and programming, and attend an alcohol treatment program as and when directed by your probation officer, and abide by the rules of that residence;
5. Abstain absolutely from the possession, consumption or purchase of alcohol, non-prescription drugs and other intoxicating substances as outlined in the *Criminal Code* and in the *Controlled Drugs and Substances Act*;
6. Submit to a breathalyzer, urinalysis and bodily fluids or blood test upon demand by a peace officer or probation officer who has reason to believe that you have failed to comply with this condition;
7. Have no contact directly or indirectly with Norman Simmons or Melody McGrath;
8. Make reasonable efforts to find and maintain suitable employment and provide the probation officer with all necessary details concerning your efforts;
9. Reside as directed by your probation officer and abide by the rules of your residence and not change that residence without the prior written permission of your probation officer;

10. For the first six months of your probation, you will abide by a curfew by remaining within your place of residence between the hours of 7:00 p.m. and 6:00 a.m. daily, unless with the prior written permission of your probation officer;
11. Take such anger management, assessment, counselling and treatment as and when directed by the probation officer.

[46] You will be subject to an order under s. 109(3) of the *Criminal Code,* which will prohibit you from possessing any firearms, crossbow, restricted weapon, ammunition and explosive substance for life.

[47] You will be subject to an order under s. 487.051 of the *Criminal Code* to provide a sample for DNA analysis and banking.

[48] The victim of crime surcharge in the circumstances will be waived.

[49] Now, counsel, before I go on, I just want you to remind me about the demand section under the abstention condition. Has that not been recently been commented by our Court of Appeal. Is that something which is now no longer done?

[50] MR. PHELPS: My friend may be able to provide a better update than this, My Lord, but I believe it has been decided that they are not -- it is a *Charter* violation. They are not a legal aspect of the order. In other words, enforcement cannot be done if that is the way enforcement is being relied on. So not too sure if it is the Court of Appeal or if it has gone to the Supreme Court of Canada now, and that is the decision that has been made.

[51] MR. COFFIN: My Lord, I understand that the case went to the Supreme Court of Canada and was upheld.

[52] THE COURT: Was upheld?

[53] MR. COFFIN: Was upheld on that point.

[54] MR. PHELPS: Again, I do not have reference to the cite but that is my understanding.

[55] THE COURT: Returning to the abstention condition of the probation order then, I will delete that portion of my reasons which talks about submitting to a sampling upon demand by a peace officer.

[56] Now, Mr. McGinnis, a word to you before I finish. You have got some more time to do. Take advantage of it. I do not know whether you are going to remain in protective custody status or not, but even if you are, seek out the programming that is going to help you the most. In my respectful view, the programming that is going to help you the most is either going to be AA or NA, or both. Seek them out, talk to your case manager. If you are the squeaky wheel, I am sure, based on my knowledge of how they operate the system over there, they will find a way to get you to a meeting. Whether it is a one-on-one meeting or not, I do not know, but that is the kind of programming that is likely to help you the most while you are in there, in addition to everything else that you can take advantage of.

[57] I am also going to suggest that when you are released, if you do have your probation transferred to Prince George, and you start working there and living there,

seek out the AA groups and the NA groups there and get to those meetings, and get to them on a daily basis if you can, at least for the first 90 days. All right? I am going to ask you to do that for your own benefit. You are the one that says you want to show that you are serious. That is how you will show you are serious, and it will be for your benefit in the long run, because that is the support network that you can always look to. There is always somebody there that you can call. If you have got a problem with drugs and alcohol, they are the folks that will give you the greatest amount of help. All right?

[58] THE ACCUSED: Yeah.

[59] THE COURT: The second thing I am going to suggest to you, and I am not going to make this a condition of your probation, but if you are serious about becoming a role model for your daughter and for other young people, and I think that is a laudable goal, given your experience on the streets as a young person from the age of 12 on, you probably have all kinds of stories which you can share that may be of benefit to other young people. Talk to your probation officer about that. There may be an opportunity for you speak to youth groups and those kinds of things, which would probably be of as much benefit to you as it would be to the audience. So think about those things. If you are serious, then now is the time to walk the talk. Okay?

[60] THE ACCUSED: Okay.

[61] THE COURT: All right. Is there anything else, counsel?

[62] MR. PHELPS: With respect to the remaining outstanding counts, we direct a stay of proceedings, My Lord.

[63] THE COURT: All right. Anything further?

[64] MR. PHELPS: No, My Lord.

[65] MR. COFFIN: No, My Lord.

[66] THE COURT: Thank you.

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GOWER J.