

Citation: *R. v. Nieman*, 2009 YKTC 66

Date: 20090603
Docket: 08-00808
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Worship Justice of the Peace Cameron

REGINA

v.

RICHARD PHILIP NIEMAN

Appearances:
Ludovic Gouaillier
Fia Jampolsky

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] CAMERON J.P.T.C. (Oral): Mr. Nieman is before the Court having pled guilty to one count under s. 348(1)(a) and one count under s. 733.1(1).

[2] March 7th, police were alerted to a break and enter taking place at the business of Kutters Hairstyling. They attended at the business area and found Mr. Nieman, in fact, in the business. The front window had been smashed with a rock. It was clear that he had rummaged around in the business. He had in his possession a computer mouse. The damage to the window was \$150.

[3] He was on probation at the time with a number of conditions including an abstain condition and Mr. Nieman was extremely intoxicated at the time of this offence; so much

so that he does not recall the offence, but he does not dispute the facts.

[4] Mr. Nieman is a young man, 23 years old, with an unenviable record. In relation to these offences he has 20 prior property convictions, 26 prior process convictions. This has a recent 2008 conviction for a very similar offence for which he received seven months. He has now been in remand since March 7th.

[5] Crown is seeking nine to 12 months of custody and an extended period of probation, in the range of three years. His current probation goes to the end of 2009.

[6] Mr. Nieman has, of course, been involved in the system for most of his life, to be quite honest. At this stage he has reached the point where he has been involved, essentially, since he was old enough to become involved, and therefore there are a number of assessments and documents out there in regards to trying to deal with the circumstances that Mr. Nieman finds himself in. There have been diagnoses out there, significant diagnoses that recognize Mr. Nieman suffers from significant cognitive delay and impairment brought on through alcohol-related neurological disorders. It is clear that Mr. Nieman continues to function within society, however, is likely unable to function within society's norms and/or rules.

[7] I think Mr. Nieman's counsel has done a very, very good job of putting forward the circumstances and the difficulties that we have in trying to deal with Mr. Nieman. It is very complete and I thank you for your clear, hard effort in putting together so much material, Ms. Jampolsky. It is the view of the Court that we are becoming more and more aware of persons such as Mr. Nieman and how inappropriate it is that they wind up within our system. It is understood why they are here. Their behaviour in the

community brings them here once they have failed to maintain good order in the community. But the problem is that we must recognize that these individuals are, firstly, unable to behave on their own within the community, and that that is entirely not of their doing.

[8] As such, that tragedy is that we are so wrapped up in our confines of defining exemptions within our system that we do not allow for this very clear circumstance where we have physical brain damage, irreparable brain damage and underlying dysfunction therein, and yet we cannot identify it as one of the exempting areas. I am hoping that will be fixed before long. We are certainly compiling a lot of material around it. Mr. Nieman is one of many individuals that finds himself in adult court being treated as an adult, when in actual fact his responsibility for his personal actions today is indicated at those of a ten-year-old at best, and there is no court system for ten-year-olds in our country.

[9] It is absolutely clear to this Court that custody does not do anything in any way to benefit Mr. Nieman in his position. It is also very clear that custody does not in any way deter others that may be in his position. His custody does not deter them. They cannot rationalize that he is in custody for what he did and that if they did the same they would suffer the same fate. And those are some of the key principles that we are to look at when we are sentencing.

[10] But I do not think that we should lose focus on the fact that the courts continue to have to deal with public protection and that must remain a consideration in sentencing. The one thing that incarcerating Mr. Nieman and others like Mr. Nieman does is

protects the public from further offences by them. Of course, it is a Band-Aid situation because Mr. Nieman cannot be locked up and placed in custody indefinitely. So it is only for a period of time that he winds up in custody.

[11] So that brings us to the concerns that were raised by Mr. Nieman's counsel and the concerns that this Court continues to have, and those are: what can we do with him; what can we do with Mr. Nieman; how can we support him in a way that keeps him out of trouble, keeps him out of other people's businesses, keeps him from, basically, being a nuisance. As of today's date, I am unaware that there has been sufficient effort on behalf of the government to provide what is necessary. It is clear we need housing, we need the supports that are there, as pointed out, not simply to monitor but that are there to, in fact, essentially guide these individuals through their lives and act as their external brain.

[12] Mr. Nieman apparently realizes himself that when he has done best is when he has had such a person. Unfortunately, we do not have that system yet set up and yet we are still dealing, we still have to deal with Mr. Nieman.

[13] I appreciate the position put forward that the treatment team and support team for Mr. Nieman requires some time to try to put things in place for Richard upon his release. I appreciate that, that particular need and being informed of it.

[14] I think that there are two things that I have to do. I want to hope, certainly, that whatever is put in place for Mr. Nieman upon his release is sufficient structure that he can work within it, because I know that, for Richard, he has had a lot of structured support. I know that Ms. McLeod has opened her home to him, where essentially she

was there at his side to support him and to try to be his external brain. However, of course, as is only natural, she has to sleep, and the next thing we know, Richard, you have gotten up and left. That is not to say that she failed. It is to say that the system is failing you. What we need is we need sufficient people so that when you get up, if one is sleeping, there is another that is awake, to be with you, to help you make your decisions, because it is very clear on your own you are incapable of making decisions. You, therefore, seek out others, and if it is in the middle of the night, guaranteed, the others that you seek out are the ones that are going to be making the wrong decisions for you.

[15] What is also very clear from your history is that, generally speaking, it starts with you, I assume, finding a party or finding some way to be drinking, and that, invariably, your troubles escalate once you have been drinking. It really means that for the rest of your life you should not drink. That is what it means. You have enough problems to try to deal with for the rest of your life that you should not be adding to them a catalyst such as alcohol.

[16] I propose to deal with this matter today in this fashion. I agree that the further 45 days would be appropriate, and so what I will do is, Madam Clerk, it will be indicated as a six-month sentence less time served of four and a half months. I do believe that I do have a duty to attempt, as best I can, to protect the public, and inasmuch as I could do that by simply leaving you in custody longer, I think that there is some benefit, at this stage, to monitoring. I would like to think there will be better tools made available some time in the future. The government says there will be; they just have not yet produced them.

[17] So at this point, the only tool I have to do that is probation. I do not want to make the probation onerous, and I think that perhaps the best compromise I can come up with is a probationary period which has you:

1. Report to the probation officer immediately upon your release and thereafter as often and in the manner directed by them; and
2. Abstain from the possession and/or consumption of alcohol.

[18] The reason for that condition is not because I think it is going to stop you from drinking. It is so that if you drink you can be picked up. Unfortunately, that means that if that is going to be the case we are likely to see your criminal record just simply expanding. I just cannot do anything other than that, as far as have to have that control in place, because we know that if you are left to drink, you invariably wind up with some further trouble.

[19] Now for the most part, again your counsel made it quite clear, it seems to be a matter of protecting the public against broken windows and stolen wallets, which they need protection from. They are not that serious things. But your record does have a little bit of violence in it, so sometimes if you are left to drink too much, you may find yourself violent. Those people need to be protected too.

[20] So I believe that by making it that simple, I do not know if you will continue to understand it or even abide by it, but what it does is it allows the enforcement people to, in fact, haul you in when you become closer, or higher at risk, to reoffend. All you have to try to remember, over and over and over again, everyday, is that you cannot drink. While you are on probation you cannot drink. It is the only thing you have to remember.

If you forget about that, you are likely going to wind up arrested again.

[21] That is going to be in place for a period of two years. So it will go side-by-side with your existing probation until November and then it will carry on, on its own, beyond that for a period of a little over a year.

[22] I do not think there is anything else I can say at this point. I think that basically covers everything, in my view. I guess, Madam Clerk, you need a breakdown of the manner in which the sentence would be. There will be a 30-day sentence concurrent on the 733, just for the math, and the six months will be on the 348.

[23] The victim fine surcharge will be waived as Mr. Nieman is of limited means.

[24] MR. GOUAILLIER: I have a question, Your Worship. Is it an abstain that pertains only to alcohol?

[25] THE COURT: It is. There is nothing before me that indicates that Mr. Nieman has a drug problem. In fact, my recollection is that Mr. Nieman is actually not into drugs, he is quite opposed to them.

[26] MR. GOUAILLIER: The cannabis abuse. When I read the assess -- the diagnosis, cannabis abuse is -- was one of the factors, and also it's mentioned by Dr. Heredia as being one of the problem areas for -- in his report, in terms of behaviour, so.

[27] THE COURT: Okay, I had missed that in Dr. Heredia's assessment.

[28] MR. GOUAILLIER: It's at page 4 on the diagnosis, Your Honour, in the report, and also at the following page in the recommendations.

[29] THE COURT: " ... abstain from ... alcohol or illicit substance use."

Right, okay. I think that that condition should include, then: "alcohol and/or illicit drugs."

The only drugs, then, that you are allowed to be in possession of and/or to use are those that are given to you by a doctor, a qualified doctor who -- for example, your Ritalin, or some such other drug if you wind up with one that is working better for you.

[30] Thank you, and again, Ms. Jampolsky, thank you for your efforts.

[31] THE CLERK: The mandatory conditions, Your Worship?

[32] THE COURT: The mandatory conditions?

[33] THE CLERK: Statutory conditions should also be included on the --

[34] THE COURT: No. I purposely want this, basically, as a safety valve in the event of substance abuse. But I do want him connected with probations. So I was not going to go with the keep the peace and -- to me, all that does, in Mr. Nieman's case, is result in additional 733 charges.

[35] MR. GOUAILLIER: The only problem, Your Worship, is the conditions are mandatory, so it makes the sentence illegal if they're not imposed on the probation.

[36] THE COURT: They are mandatory on a probation order, that we have the --

[37] MR. GOUAILLIER: Yes. Yes, the report and not change the address, I believe.

[38] THE COURT: Well, if we must, we must. I will put it on there. I think

that we are -- I hope that the probation services will get the message that it is not the intent of the Court that Mr. Nieman be breached every time he is seen jaywalking or not keeping the peace. It is more a focus on trying to control if he is abusing any substances.

[39] MR. GOUAILLIER: I'll convey that message.

[40] THE COURT: But those mandatory conditions shall be in place.

[41] MR. GOUAILLIER: And the Crown stays proceedings in relation to the remaining charges.

[42] THE COURT: Remaining charges are stayed.

CAMERON J.P.T.C.