

Citation: *R. v. O'Brien*, 2012 YKTC 2

Date: 20111216
Docket: 11-00502A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

REGINA

v.

MICHAEL WILFRED O'BRIEN

Appearances:
Jennifer Grandy
Kimberley Hawkins

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): Dealing with the matter of Michael O'Brien. He comes to the Court having pled guilty at a very early stage of the proceedings to an offence contrary to s. 355(a) of the *Criminal Code*.

[2] The count covers the dates of the 20th and the 21st of October, 2011. The charge is that he had in his possession Canadian currency of a value exceeding \$5,000, knowing that all of the property was obtained by the commission in Canada of an offence punishable by indictment. There is a clear indication that these monies were the product of an illegal drug trade.

[3] The parties made available to me an Agreed Statement of Facts. I am not going to summarize it. It is marked as an exhibit, so it will be available in its entirety in the file.

He was apprehended as a result of a police surveillance that was taking place on October 20th. They observed certain individuals meet and conduct themselves in a way that suggested that some transactions were taking place. Mr. O'Brien was arrested.

[4] There was a search incidental to arrest, and certain monies were found in his possession, as well as a cellular phone. A search warrant was obtained to search his room. A number of things were found consistent with a significant drug trafficking operation: three cellular phones, a vacuum sealer, Canada Post padded mailing envelopes, a package of plastic sandwich bags, a digital scale, but most importantly, almost \$48,000 of Canadian currency divided into various packages. The residence of two other individuals involved with Mr. O'Brien were searched, and additional drug paraphernalia and some small amounts of illegal drugs were found in that residence.

[5] Mr. O'Brien's position is that he was paid a salary to collect monies owing in relation to illicit drugs. He was aware that the currency he had in his possession was obtained by the commission of crime. The money was found in Mr. O'Brien's room, so he was also aware of the size of the operation that he was dealing with, because he would have been aware of the amount of money involved.

[6] Mr. O'Brien comes to court with a significant criminal record and, again, counsel and I discussed his record in the course of their representations. His first conviction in 1995 was for cultivation of a narcotic; and then, in 1996, possession of a narcotic and fail to attend court, 30 days on each concurrent. In 2002, conspiracy to traffic in a Schedule 1 substance. This was a conviction in Whitehorse. He received a total sentence of three years, but, in addition, nine months pre-sentence custody for a period

of three years and nine months. In 2008 in Whitehorse he has a conviction for trafficking in a scheduled substance, and received a disposition of 12 months.

[7] As I mentioned earlier, it appears that Mr. O'Brien has not learned from these previous dispositions. Ms. Grandy, I fully appreciate, continues to be concerned about his future behaviour, and I have acknowledged that I, too, am concerned about that behaviour. Ms. Hawkins, representing Mr. O'Brien, suggests that Mr. O'Brien has done very well in his short period of remand at the WCC. While there, he has become an active student at the Yukon College Whitehorse Correctional Centre campus. He attends regular AA meetings while in the Correctional Centre. He has applied to the College, submitted some material for admissions to the program that begins in 2012. I am advised that he can start that program in January of 2013 in person, taking the early part of the course by way of video-conferencing.

[8] I indicated to counsel that my primary concern in Mr. O'Brien's case is specific deterrence. I think the question of general deterrence can be met by imposing a jail term of some significance but within the Territorial Court range. It is my view that safety of the public can best be achieved by attaching to a period of incarceration a lengthy probation order. I will seek counsel's advice as to what should go into that probation order in a minute.

[9] I should make the comment, for the record, that although Mr. O'Brien's role in this matter appears to be one of a courier transporting money, the amount, as I indicated, was large. Individuals like Mr. O'Brien who courier money or collect money are an integral part of the process, that is to say, the illegal drug distribution process; it

is a necessary part of that enterprise. The enterprise is, clearly, a large one, based on the amounts of money involved, and as he himself has indicated, his involvement was in order to obtain a profit to himself.

[10] In the circumstances, I am going to impose a period of incarceration of 14 months. That is in addition to the time he has already served. That would amount to a total of 16 and a half months if credit is given to him, so an additional period of incarceration of 14 months. To that order will be attached a two-year probation term. Let me just check with Ms. Hawkins. When I made that order, I had in mind an abstention clause, and also not attend licensed premises clause. Do you consume alcohol on a regular basis?

[11] THE ACCUSED: No.

[12] THE COURT: No? If I said you are not to consume alcohol, would that create a panic for you?

[13] THE ACCUSED: Oh, no, it's -- I do drink once in a while but not -- about three times a year.

[14] THE COURT: Yes. Okay, so that would not be a hardship?

[15] THE ACCUSED: No.

[16] THE COURT: I was just wondering. When at the Whitehorse Correctional Centre, you did attend AA for a while --

[17] THE ACCUSED: Yeah.

[18] THE COURT: -- so I was wondering whether you thought you had a problem in that regard.

[19] THE ACCUSED: It was more like a --

[20] THE COURT: Something to do?

[21] THE ACCUSED: Just to see how people looked at it.

[22] THE COURT: Okay. You are pretty confident you do not have a problem in that regard?

[23] THE ACCUSED: I don't have a problem, no.

[24] THE COURT: What about other drugs?

[25] THE ACCUSED: None.

[26] THE COURT: So if I said that you might have to give a breath sample or a urine sample at some point, would that be a problem for you?

[27] THE ACCUSED: No.

[28] THE COURT: What is your partner's current -- what is her name?

[29] THE ACCUSED: Evorada (phonetic) Moses.

[30] THE COURT: Is she from down south or is she --

[31] THE ACCUSED: No, she's from Whitehorse.

[32] THE COURT: She is from Whitehorse. I am going to make a first pass at the probation order and then I will come back and ask counsel for their assistance. So a two year probation order:

1. Keep the peace and be of good behaviour; appear before the Court when required to do so by your Probation Officer;
2. Not change your name or address without advising the Probation Officer promptly, similarly not to change your employment or occupation without advising the Probation Officer;

[33] Madam Clerk, I am going to direct that there be a court review of his performance under this probation order at approximately the three month stage after his release, and thereafter any additional reviews as may be directed by the Court.

3. You are to remain in the Yukon Territory unless you obtain the permission of your Probation Officer;
4. You are to report to a Probation Officer within two working days after your release, and thereafter when and in the manner directed by the Probation Officer;
5. You are to reside as approved by your Probation Officer, and not change that residence without the prior permission of the Probation Officer;
6. For the first four months of your probation order, you are to abide by a curfew by remaining within your place of residence between the hours of 9:00 p.m. and 6:00 a.m. daily, except with the prior permission of your Probation Officer, and except in the actual presence of another responsible adult approved in advance by your Probation Officer;

7. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks, failure to do so will be a presumptive breach of this condition;
8. You are to abstain absolutely from the possession or consumption of alcohol and controlled substances, except in accordance with a prescription given to you by a qualified medical practitioner;
9. You are to provide a sample of your breath and urine for the purposes of analysis upon demand of a peace officer who has reason to believe that you may have failed to comply with this condition;
10. You are not to attend any bar, tavern, off-sales or other commercial premises, whose primary purpose is the sale of alcohol;

That term is in there because I am aware that drug trafficking often takes place in licenced premises.

11. You are to take such assessment, counselling and programming as may be directed by your Probation Officer;
12. You are to have no contact directly or indirectly or communicate in any way with any persons known to you to be active in the illegal drug trade;
13. You are to use your best efforts to follow through on your application for intake to the electrical pre-employment program as set out in Exhibit 3, the letter from the Yukon College Admissions Office.
14. If not attending school, you are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

15. You are 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.

[34] Okay, that is my first crack at it. Ms. Grandy?

[35] MS. GRANDY: I would ask that added to your general no contact clause, the specific names of the two individuals that he met with, who have also been charged, are Sydney Gary Tuckey --

[36] THE COURT: So there will be a term:

16. You are to have no contact, directly or indirectly, with Mr. Sydney Tuckey and Ms. Janet Richards.

[37] MS. GRANDY: Yes, and I should just say, just for clarity, that Sydney Tuckey is sort of also known, or perhaps better known, as Gary Tuckey.

[38] THE COURT: Okay, aka Gary Tuckey. No doubt in your mind who we are talking about?

[39] THE ACCUSED: Yes.

[40] MS. GRANDY: And the other request I would have, just given the nature of the offence and the number of phones that were involved in the information that the police were able to extract from those phones, I would request that he not possess any cell phone, pager or mobile communication device.

[41] THE COURT: Ms. Hawkins?

[42] MS. HAWKINS: I am just discussing with Mr. O'Brien the requirement of a cell phone for his work. Mr. O'Brien advises me that if he were to have a job truck driving that he would require a cell phone, although not particularly if he's at school.

[43] THE ACCUSED: It can be monitored.

[44] THE COURT: I am sorry?

[45] THE ACCUSED: It can be monitored.

[46] THE COURT: You would consent to having it monitored?

[47] THE ACCUSED: Yes.

[48] MS. GRANDY: The difficulty is, at this point, that with today's technology, that doesn't necessarily help us because the text messages, which is a very, very common way for people to set up meetings, and indeed a way which was used in this case, they're not stored by the telecommunications company. So you're not able to see, if you don't have the phone itself, you're not able to see from a bill, for example, what's going on.

[49] THE COURT: But if he is required to turn his phone over periodically for examination?

[50] MS. GRANDY: Well, again, individuals have the ability --

[51] THE COURT: To delete.

[52] MS. GRANDY: -- we delete them, you know, your inbox only holds sort of a certain number so it --

[53] THE COURT: It is a problem and I guess we are going to have to sort of come down somewhere in between. My view is during the period of probation:

16. You are not to possess a cell phone, pager or mobile paging device, except for employment purposes and as approved by your Probation Officer.

[54] THE ACCUSED: So that will allow me to have a cell phone? Like, for work, I need to be able to --

[55] THE COURT: That means that you could maybe have one for work purposes if it is approved by your Probation Officer. Now, if you are doing everything right and he is satisfied that everything is going well, he is likely to approve it.

[56] THE ACCUSED: Okay.

[57] THE COURT: But if he is having trouble with you and you are not coming to meetings and he is starting to worry that you are doing things that you are not supposed to do, then he is not going to approve it, is he? It is his discretion. Maybe we should add to that:

You will sign all the necessary releases to permit the Probation Officer to monitor your telephone or pager and will, on request, turn over your cell phone for examination for that purpose.

[58] I think that is probably the best we can do. There is nothing that is absolutely foolproof. I could also say you cannot have one and you have one anyway and you may be able to hide it until you get caught. So a lot of this depends really on whether or

not you are prepared to pursue a different path, but if you do not, I will see you again and I do not think we will be so sympathetic the next time. This was the Christmas special, Mr. O'Brien.

[59] THE ACCUSED: Thank you. Would I be able to have a cell phone for -- that my girlfriend can get a hold of me?

[60] THE COURT: Only for work purposes.

[61] THE ACCUSED: Okay.

[62] MS. GRANDY: I'm not sure if Your Honour wants to add it to the order or perhaps just mention it for Mr. O'Brien's benefit, but there are a number of conditions there that do have the option of exceptions that the Probation Officer can provide, and whether you want to add the carry written permission on your person when exercising the exception or whether you just want to leave that to Mr. O'Brien?

[63] THE COURT: No, I think we are fine now.

[64] MS. GRANDY: Just so he understands that if he is exercising an exception to the order, he would be well advised to --

[65] THE COURT: Ms. Hawkins, you will explain that to him. I am not going to make it part of the order, but he can avoid sitting in the tank overnight. If he is exercising one of the exceptions and does not have the letter from the Probation Officer, the police are going to arrest him until he can get his hands on the letter. So he needs to manage his life so that that does not happen.

[66] There is an order of forfeiture here. Any issue with respect to that?

[67] MS. HAWKINS: No issue.

[68] MS. GRANDY: The remaining counts could be marked as withdrawn, please.

[69] THE COURT: Thank you. Counsel, thank you very much for your assistance on this matter.

LILLES T.C.J.