

Citation: *R. v. Profeit*, 2009 YKTC 39

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08-00068
Registry: Whitehorse

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

REGINA

v.

TANANA MAE PROFEIT

Appearances:
David McWhinnie
Lynn MacDiarmid

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Ms. Profeit has entered guilty pleas to offences contrary to s. 4(1) of the *Controlled Drugs and Substances Act* for the possession of crack cocaine; s. 142(2) for a breach of recognizance in failing to appear in court when required to do so; s. 266 *Criminal Code* assault; and a s. 5(2) *Controlled Drugs and Substances Act* (“CDSA”) for the possession of crack cocaine for the purpose of trafficking. She has also entered guilty pleas to two offences of driving while disqualified, contrary to s. 266 of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153 (“MVA”).

The circumstances are as follows.

Circumstances of Offences

[2] Section 266 *MVA* offences: On February 18, 2008, Ms. Profeit was the driver of a vehicle that pulled out of a Tags Food and Gas store on Fourth Avenue in Whitehorse requiring a police vehicle to take evasive action in order to avoid a collision. Subsequent investigation showed that Ms. Profeit was a disqualified driver, having been given a 90-day roadside suspension on January 13, 2008.

[3] The second 266 *MVA* offence occurred on February 23, 2008. At that time a vehicle being driven by Ms. Profeit was observed at Shipyards Park. She was disqualified from driving at that time as well, as a result of the *MVA* suspension.

[4] Section 4(1) *CDSA*: A search ensued incident to arrest after the motor vehicle stop on February 23rd found Ms. Profeit to be in possession of flakes of crack cocaine, cocaine residue, and a crack pipe and a small chunk of cocaine which appeared to be for personal use. Also located was a scale, X-Acto knife and a cell phone.

[5] Section 145(1): Ms. Profeit was released on a recognizance which required her to attend court and on March 19, 2008 she failed to do so.

[6] Section 266 *Criminal Code* and 5(2) *CDSA* offences: An agreed statement of facts was filed in this matter on July 3, 2008. The original sentencing hearing was set for July 18, 2008. However, by the date set for the sentencing hearing there had been a breakdown in the solicitor-client relationship. There were numerous delays following for the purpose of allowing Ms. Profeit to retain counsel. Ms. MacDiarmid was

ultimately retained and the sentencing hearing proceeded with one major change in the agreed statement of facts.

[7] The facts, as amended by agreement are as follows:

1. On the morning of April 29 2008 Jay Taylor was given some drugs by Tanana Mae Profeit. He was “fronted” the drugs, meaning that he did not pay for them at that time. Jay Taylor is a self admitted cocaine addict who had purchased crack from Tanana Profeit and John Eriksen several times over the preceding couple of months.

2. Later in the evening, Jay Taylor spoke with Ricky Linklater (known as JD) who told him to phone John Eriksen and Tanana Profeit who were quite upset about the money owing. They told Taylor they would meet him at Tags on 4th Avenue in Whitehorse where Linklater arrived in a taxi followed by Profeit and Eriksen in a brown BMW. They told Taylor to come for a ride. Profeit was driving the vehicle with Eriksen in the front passenger seat and Linklater was in the back seat next to Taylor.

3. While in the vehicle Eriksen, Profeit and Linklater were calling him a rip off, a liar, a rat and a thief. Taylor tried to make a phone call and they told him not to touch his phone. The three took Taylor out [insert to] the Long Lake Road and parked the vehicle.

4. Eriksen and Linklater got out of the car and Profeit told Taylor to get out of the vehicle and “to take his punishment like a man.” Eriksen and Linklater punched and kicked Taylor while Profeit encouraged them and was heard to say at one point, “slice him up JD, fuck him up.”

[8] JOHN ERIKSEN: Excuse me, I never gave him drugs and I never laid a finger on him.

[9] THE COURT: Mr. Eriksen, do not worry about that. Your matter has been dealt with and I deal with that in this decision, okay?

[10]

Linklater told Taylor he “would cut him up.” At some point during the beating, Eriksen went after Taylor with a metal pipe which he swung at Taylor’s head. Taylor ducked and the blow missed. Taylor was in fear for his life and he ran into the woods, calling police from a house in the area.

5. Injuries to Jay Taylor included a large welt on the side of his head, bruising and scratches to the face and an injury to one leg. He was treated by EMS staff.

6. A Feeney Warrant and later a search warrant was obtained and police attended room 247 of the Westmark and arrested Linklater, Eriksen and Profeit. The following items were seized:

- 12.8g cocaine
- 15 rocks of crack
- debt lists
- digital scale
- drug packing with cocaine residue
- crack pipe kit
- steel wool
- 2 mobile phones
- 2 cans of bear spray
- needles and syringes

7. Ricky Linklater provided a warned statement to police indicating that Jay Taylor owed him money and as a result he took Taylor out of town and assaulted him. He claimed the drugs in the hotel room were his alone and that he had acted alone in the assault.

8. All 3 co-accused have been in custody since April 29th, 2008.

9. On or about June 14th, 2008, while at the WCC Tanana Profeit wrote a letter to Sid Smarch in which she states that Linklater was paid to take responsibility for the offences and that he was now backing out of the deal. As a result she wanted Linklater and Taylor “fucked up” (see letter attached).

[11] Now I note that at the earlier sentencing of John Eriksen on April 6, 2009, the facts agreed to place Mr. Eriksen in a less responsible role with respect to initiating the contact with Mr. Taylor and the actual participation in the assault than as stipulated to

in this agreed statement of facts.

[12] Now the following are excerpts of the letter of June 14, 2008, referred to in paragraph 9 of the agreed statement of facts:

Wouldn't mind having some contacts in jail because I want someone fucked up if and when he goes down. The little bitch I paid \$1,000 to take the fall is rolling over on us. His name is Ricky Linklater...

I'm going to make sure this guy's life is living hell and will do anything to make him miserable and fuck up his shit...

The other little punk bitch who ratted us out is named Jay Taylor...

I'm quite sure he knows he'll get fucked up if he gets sent here... I lost a lot 'cause of that little fucker. I'm going in debt as we speak, Sid...

It's really hard to collect debts owed to me too. First thing I'm doing when I get out is buying a fresh can of bear spray and going "collecting." Want to help me fuck some people up? Ha Ha Ha...

I figure as long as we have a few grand when I get out, we'll be doing good in no time. Gotta have at least enough for an oz., then just flip and flip, you know how easy it is!!...

Try to find out about Mike + Joe for me, PLEASE. Joe, for sure, I know he'll stomp that little fucker.

[13] Ms. Profeit has a criminal record with 43 entries from April 1994 to April 2007.

Of most significance in this case are Whitehorse charges in 1994 for assaulting a police officer, for which she received a suspended sentence and probation for 18 months; two 1995 assaults in Whitehorse, for which she received a \$250 fine and 30 days custody intermittent; a 1998 assault in Vancouver, for which she received 60 days concurrent to other charges; and a 2006 267(a), assault with a weapon times three, in Whitehorse, for which she received one day, 60 days consecutive to other charges and

30 days consecutive.

[14] She also has charges, all out of Vancouver, that include a 1998 possession contrary to s. 4(1) *CDSA* times two, for which she received 14 days concurrent on each with other charges; a 1999 possession for the purpose of trafficking, for which she received two months; a 2000 possession for the purpose of trafficking, for which she received three months; two 5(1) trafficking charges in 2000, for which she received 60 days on each; and a 2005 possession for the purpose of trafficking for which she received four months. She also has a motor vehicle driving abstract which indicates that on April 22, 2008 she was convicted of two 266 driving while disqualified offences.

Position of the Parties

[15] The federal Crown takes the position that Ms. Profeit is more of a central controlling figure in the drug trade in Whitehorse as compared to an addict-driven trafficker. As such, the possession for the purpose of trafficking offence alone could attract two to two and a half years. When the other offences are considered in totality, a sentence of 30 to 40 months jail should be imposed. This sentence should be consecutive to any time for the *MVA* s. 266 offences.

[16] Crown counsel is also seeking forfeiture of the items seized, as well as a s. 109 firearms prohibition order for life, although, as notice has not been filed, only the mandatory minimum of ten years must be imposed. The Crown is also seeking a DNA order for the s. 266 secondary designated offence.

[17] The Territorial Crown seeks a period of incarceration for the *MVA* s. 266 offences, pointing to the facts that Ms. Profeit was an unlicensed and suspended driver

at the time of these offences, and the close proximity in time to the January 13, 2008 suspension, as well as Ms. Profeit's ability to obtain other vehicles to drive, given that her own vehicle was impounded, all showing a flagrant violation of the MVA requirements.

[18] Defence counsel submits that a sentence of two years less one day would be appropriate for all the offences. She suggests a further six months probation. Defence counsel submits that Ms. Profeit is closer to the addict-driven trafficker than the profit-motivated one.

[19] Defence counsel is not seeking an order Ms. Profeit be ordered to serve any additional time that may be imposed conditionally in the community. Defence counsel is suggesting a firearms prohibition be imposed that is less than life.

Aggravating Factors

[20] The assault was related to drug collection activity. The combination of violence and association with enforcement in the drug trade is a significant aggravating factor and cries out for sentences that focus above all else on general deterrence and denunciation. The effect of drugs and violence linked together, albeit not necessarily contemporaneously, cannot but help to elevate the degree of seriousness of the offence of s. 266 as compared to an assault charge standing alone.

[21] This was not addict-driven trafficking, notwithstanding that Ms. Profeit is, or was at the time, a cocaine addict. She had some degree of control over the participation of others. That said, while her trafficking appeared to support her basic needs, there is no evidence that she was purchasing high ticket items or building a large bank

account. She is situated somewhat between the pure for-profit traffickers and the clearly addict-driven trafficker.

[22] There is the indicia of further violence in drug trafficking in the future, as contained in the letter that was written on June 14, 2008, and there is the criminal record with the related assaults and drug offences. I note that the sentences for all these offences are in the lower end and conclude, with respect to the possession for the purpose of trafficking and trafficking offences in Vancouver, that these offences appear to be related to findings more consistent with addict-driven trafficking than strictly for-profit trafficking, but nonetheless indicate that Ms. Profeit has engaged in a persistent criminal lifestyle and is capable of resorting to violence in certain situations.

Mitigating Factors

[23] There is a guilty plea. This was fairly early but was delayed due to counsel issues and reaching a final agreement on the previous agreed statement of facts. I note that in the end the change Ms. Profeit sought was contrary to her own position in this matter, unlike many cases where individuals are trying to improve the facts for their own benefit, and the personal circumstances of Ms. Profeit, including her addiction to cocaine.

Principles of Sentencing

[24] The paramount sentencing factors in drug trafficking cases are deterrence and denunciation. These principles also apply equally to cases of violence that are related to the drug trade and culture, in particular when connected to the enforcement of drug debts.

[25] Trafficking in drugs, and in particular hard drugs such as cocaine, is a crime whose victims can be found far beyond the individuals who become addicted to the drugs. Families can be torn apart by either the loss of the individual to the addiction itself or to the violence that all too often accompanies the drug trade. In Canadian society this violence has found innocent victims on numerous occasions, whether they be extended family members or passers-by caught in the crossfire of the violence.

[26] Children suffer immense harm from the effects of addiction in their home, whether this addiction be from pre-natal impact or from physical and/or emotional violence in the homes that they should be safe in. The future of these children and their families is damaged and all of society pays the price.

[27] I am not going to attempt to compare the effects of drug trafficking in the Yukon to other communities south of us. These communities no doubt experience serious harm from the effects of the drug trade. I concur, however, with the comments of Faulkner J. in *R. v. Holway*, 2003 YKTC 75, wherein dealing with the impact of the drug trade in the Yukon, he states at paragraph 7:

...northern communities are already struggling with disproportionately high rates of addiction, while scant resources are available to deal with the problem. The last thing we need is more drug traffickers. Courts in the North have quite properly held that they are entitled to take these local conditions into account and have consistently held that deterrent sentences are warranted and that, given our circumstances, the need to maintain a deterrent trumps other sentencing considerations in cases involving trafficking in hard drugs.

[28] While rehabilitation of the offender is always an important sentencing consideration, it will, other than in exceptional circumstances, often involving drug

treatment court participation such as the Yukon Community Wellness Court, take a back seat to deterrence and denunciation.

[29] As I pointed out in *R. v. Linklater*, 2008 YKTC 58, at paragraph 14:

...vigilante-type action to enforce drug debts certainly needs to be dealt with by sentences that deter individuals from being involved and reflects society's denunciation of such actions.

Personal Circumstances of Ms. Profeit

[30] Ms. Profeit was 33 years old at the time of the offences. No pre-sentence report was requested or prepared but I note from the submissions of counsel that Ms. Profeit had a father who was alcoholic and generally absent from her life when she was growing up. She did have a mother, however, who provided a fairly stable environment and was a non-drinker. Ms. Profeit left home at 13 and lived on the streets for her teenage years. She became a single parent at the age of 17 of a son who is now 17 years of age, and at that time she attended the Teen Parent Program at F.H. Collins and achieved a measure of stability in her life and, as I understand it, achieved her Grade 11 education.

[31] However, subsequently she was involved in abusive relationships and entered into the world of cocaine and heroin use through a boyfriend. She ended up living on the streets of Vancouver for about ten years in her 20s. She was at the time of these offences a cocaine and crack addict. She has no significant possessions indicative of someone who has profited greatly from the drug trade.

[32] The last one and a half years are said to be the most stable in her life. She is in

a relationship with John Eriksen and they intend to be married. She states that she wants to change her lifestyle and get out of the culture of drugs. She says that the letter of June 14, 2008 was her playing a tough guy and she does not feel that way now. She was very much immersed in the drug trade culture and lifestyle when she wrote it.

[33] I know at this time I can accept Ms. Profeit's explanation given the circumstances then and given the time she has had to think about things, and to measure what her life was and where she wants her life to be. However, there is still a distinction between a case where there is no such indication of violence in the future in the drug trade, and this case. That said, I am not putting any significant weight on the letter as a major aggravating factor.

[34] Ms. Profeit has taken drug counselling in custody and is currently clean and sober. These counselling courses include the White Bison course, Gathering Power, and Traditional Native Parenting. She has also taken the Exploration to Trades program, the Native Arts and Crafts program, she has done one-on-one addiction counselling, she has indicated in Court that she wants to attend a live-in residential treatment program, she has gone to Yukon College while on remand and is attempting to upgrade her high school education and work towards obtaining trade certification for future employment.

[35] I do not doubt that Ms. Profeit wishes to change her life, nor do I doubt that she is capable of doing so. Whether she does or not will ultimately depend on the choices she makes in the future and I am not referring to only those occasions when the

opportunity to involve herself in the drug trade presents itself to her. It is often the less apparent choices, such as that of friends and associates, places to hang out at, and education and employment opportunities available, that can lead to or lead away from involvement in the drug trade.

Sentences for the Co-Accused of the Assault

Ricky Linklater

[36] Mr. Linklater entered guilty pleas to s. 266 and 264.1(1) offences. He was sentenced on August 8, 2008. The facts he agreed to were that he made threats to Mr. Taylor while in the vehicle, pushed Mr. Taylor out of the vehicle, and then was party to the assault committed by Mr. Eriksen. His plea was premised on his role being somewhat lesser than that of Mr. Eriksen.

[37] Mr. Linklater had approximately 50 entries on his criminal record, primarily properly-related; however, he was convicted of robbery in 2001 and attempted robbery, armed robbery and assaulting a peace officer in 2004 and served penitentiary time on both these latter occasions. Mr. Linklater was 26 years old and a cocaine and heroin addict at the time of the current offences. He was sentenced to 15 months custody plus one year probation.

John Eriksen

[38] As stated earlier, Mr. Eriksen entered a plea of guilty to assault. At his sentencing hearing on April 6, 2009 his role was said to be less than Mr. Linklater's. Those facts were accepted at his sentencing hearing, that being that he was less involved than both Mr. Linklater and Ms. Profeit. This contradiction in the facts that

were put forward and accepted can be understood in the context at the time between sentencing hearings and the continual receipt of additional information along the way.

[39] Mr. Eriksen was 33 years old at the time of the assault of Mr. Taylor. He had a criminal record that consisted of approximately 56 entries including the following: a 1996 assault, for which he received a suspended sentence and probation of 16 months; a 1997 aggravated assault, for which he received ten months and probation of 18 months; a 2001 uttering threats, 90 days conditional; a 2003 267(a) offence, for which he received 90 days and probation of 12 months; a 2004 assault three times, 60 days and probation of nine months, 30 days, and 30 days; a 2006 uttering threats, 60 days concurrent; a 2007 267(a), five months; a 2007 uttering threats, 30 days consecutive; and a 2008 uttering threats, five months.

[40] Ms. Profeit's criminal record, while lengthy, does not indicate quite the same level or degree of assaultive behaviour as either Mr. Linklater or Mr. Eriksen. That said, she was the prime mover of the events that took place that day and as such bears primary responsibility for the intimidation of Mr. Taylor and the assault on him. Her lesser criminal history, and I am not saying this in the context of lesser convictions necessarily but the degree of severity of the sentences she received in comparison to the others, is to be balanced against the degree of moral culpability she bears for the occurrence of events that day.

[41] In consideration of the principle that similarly situated offenders should be given similar sentences, and on balance of the applicable factors in this case, I find that a fit sentence for the assault is therefore in accord with the sentences for Mr. Linklater and

Mr. Eriksen and I impose a sentence of 16 months for her role in the assault.

Possession for the Purpose of Trafficking

[42] With respect to the 5(2) CDSA offence, the range of sentences varies broadly depending on whether the circumstances point to an addict-driven trafficker or profit-driven one, the quantity of drugs involved, the sophistication of the operation, and the criminal history.

[43] In *R. v. Hale*, 2007 YKTC 79, guilty plea for the possession for the purpose of trafficking, a sentence of 12 months plus 18 months probation was given in circumstances where an addict-driven trafficker with a 2001 prior, resulting in ten months custody, was in possession for the purpose of trafficking of 57.5 and 2.7 grams of crack cocaine as well as 29.3 grams of marihuana. Mr. Hale was on release for a trafficking offence at the time of arrest on this charge. He had sought help for his addiction while in custody awaiting sentencing.

[44] In *R. v. Lewis*, 2008 YKTC 10, after trial on a charge of possession for the purpose of trafficking, received a sentence of 12 months plus nine months probation. He was a young man with a significant, persistent criminal record who was considered to be an addict-driven trafficker. 11.6 plus grams of powder cocaine were involved, given that there was an undeterminable amount of cocaine he consumed at the time of his arrest in excess of the 11.6 grams seized.

[45] In *R. v. Ellenise Alexis Profeit*, 2003 YKTC 102, which appears to be after trial, as the sentencing decision states that she was convicted of trafficking on two occasions to an undercover officer in the amount of 2.5 and 2.6 grams of cocaine, she

had an unrelated minor criminal record and was an addict who was acting as a middleman in these transactions and apparently could access larger amounts of cocaine if required. She received a sentence of nine months plus one year probation.

[46] In *R. v. Silver*, 2006 YKTC 32, after a conviction at trial on possession for the purpose of trafficking, a fit sentence for a cocaine user who was considered to be a for-profit trafficker was stated to be 18 to 24 months for 59.3 grams of powder and crack cocaine. I note that 2007 YKCA 4 clarifies the amount that was stated in the trial decision on this matter, which was different than what was stated on the *voir dire* decision. Mr. Silver had no criminal record, a wife and child, as well as two other children, had attended Yukon College while in custody and apparently ceased his cocaine use since being charged. His sentence was reduced to 15 months due to the totality principle as he had a minimum one-year sentence imposed for a related weapons offence.

[47] In *R. v. Naiker*, 2007 YKTC 58, this was possession for the purpose of trafficking of 95 rocks of crack cocaine. He had no prior record and was strictly a for-profit trafficker. Judge Faulkner stated that:

Giving as much weight as I can to the fact that Mr. Naiker is still a young man, has a supportive family and still has a real chance of rehabilitating himself and making something of his life, I sentence him to a period of imprisonment of 14 months...plus one year probation.

[48] As I stated earlier, Ms. Profeit is somewhere between the purely addict-driven trafficker and the purely for-profit trafficker. Her five prior trafficking-related offences resulted in a total of 13 months imprisonment, with four months being the longest

sentence.

[49] That said, on a consideration of all the above cases, the circumstances of Ms. Profeit's involvement in the drug trade, the other aggravating and mitigating factors, as well as Ms. Profeit's personal circumstances, including, although not specifically mentioned during submissions, her First Nation status, and giving full consideration to the rehabilitative prospects for Ms. Profeit, I find that the appropriate sentence on the s. 5(2) charge would be 15 months custody. Given the totality principle, however, I will reduce the sentence to 12 months. This shall be served consecutive to the s. 266 *Criminal Code* sentence for the offence of assault.

[50] There will be a sentence of 30 days consecutive for the s. 4(1) offence and 30 days concurrent for the s. 145(2) offence. There will be a sentence of 30 days concurrent to each other but consecutive to the remaining offences for the s. 266 *MVA* charges, again keeping in mind the principle of totality.

[51] Therefore the total sentence will be 30 months less credit for her time in remand at Whitehorse Correctional Centre.

Remand Credit

[52] Ms. Profeit has almost exactly one year pre-trial custody for which she is to receive credit. Defence counsel suggested that Ms. Profeit be credited at a rate above the usual 1.5 to one due to the somewhat harsher conditions at WCC for female inmates. The problem that I have, however, with this submission is that Ms. Profeit's status on remand is essentially the same as if she was a serving prisoner. She has the same access to programming that female inmates serving sentences do. To credit her

above the 1.5 to one would be to grant her a credit not available to the serving female inmates who are in the same conditions.

[53] If in fact the conditions for female inmates at WCC are more difficult than for male inmates, and I note that I have no evidence before me of this being the case for the time period that Ms. Profeit was in custody on remand status, then the correct way to reflect this unequal treatment would be to reduce the sentences for all female accused from the sentences given to similarly situated male inmates. In order to accede to such a submission for a reduced sentence for an offence committed by a female offender I would require evidence to be before me of the differential conditions at WCC.

[54] Therefore, Ms. Profeit will be given 18 months credit for her time in custody on remand. This will be applied as follows: 16 months for the s. 266 offence and 2 months for the s. 5(2) CDSA offence. Ms. Profeit will serve a further 10 months on the s. 5(2) offence and one month consecutive on the s. 266 offences and the s. 4(1) offence.

Probation

[55] I have considered the appropriateness of probation for Ms. Profeit. I note that she initially clearly expressed a wish to make a clean break from the system but subsequently agreed that probation may have some benefit for her. She has seven breach of court order convictions, mostly probation breaches, since 2006. Her partner, Mr. Eriksen, is not subject to a probation order.

[56] I believe that while there may be some merit to a probation order, as I believe

that rehabilitation and a change of life is certainly very realistic for Ms. Profeit, in all the circumstances, it would nonetheless be better to give Ms. Profeit the clean break that she wanted so that when she is done this sentence, she is done with the criminal justice system. Therefore there will not be a period of probation to follow this sentence.

[57] There will be a secondary designated DNA order for the s. 266 offence and there will be a s. 109 firearms prohibition for the s. 5(2) CDSA offence. This prohibition will be for life.

Forfeiture

[58] Defence counsel indicated that there was some concern about the items indicated as having been seized, as listed in the agreed statement of facts, and other items which were seized but not listed. As a result, defence counsel has requested that the forfeiture application be set for hearing at a future date.

[59] I will order that all items listed in the agreed statement of facts be forfeited to the Crown. Defence counsel will have 60 days from the expiration of the appeal period to file notice that seizure of any of the listed items is disputed by Ms. Profeit and to commence an application for return of any of these items to Ms. Profeit.

[60] With respect to the matter of any other items in the possession of the RCMP that were seized during the investigation related to these charges, I order that these items be returned to Ms. Profeit subject to the right of the Crown to file notice of a forfeiture application by June 30, 2009.

[61] The victim fine surcharges will be waived.

[62] Are there any other matters other than the remaining charges? Have they already been stayed, the other charges, or?

[63] MR. MCWHINNIE: If they have not, they should be.

[64] THE COURT: Then that concludes all the matters?

[65] MR. MCWHINNIE: It does, Your Honour.

COZENS T.C.J.