

Citation: *R. v. Vandrie*, 2017 YKTC 24

Date: 20170504
Docket: 15-00809A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Wyant

REGINA

v.

KESSIE ANN VANDRIE

Appearances:
Michael Van Klaveren
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] WYANT J. (Oral): At the outset, I want to extend my appreciation to both counsel for their complete submissions and for the filing of the cases before me — and to the Crown for writing out its submission because it, in fact, gives the Court the opportunity to ensure that the relevant facts of this particular matter are clearly stated on the record.

[2] As the Crown pointed out, this is a theft that occurred, generally over a one-year period, between January of 2014 and February of 2015, in the amount, as the Crown noted, of \$46,939, the majority in 2014, and then an additional amount up until February 12, 2015. The theft involved numerous transactions, in fact, 55 transactions.

[3] I believe it is fair to say that when one reviews the elements of this particular theft, the theft itself was deliberate, planned, premeditated, and took place over an

extensive period of time. As both counsel have acknowledged, this is clearly a breach of trust situation that has been acknowledged both in s. 718 of the *Criminal Code* in the sentencing principles and, generally, by courts for many years as an aggravating circumstance when it comes to the imposition of sentence.

[4] This particular accused, Ms. Vandrie, was the Comptroller for Mic Mac Motors here in Whitehorse for a period of four years and not only had that position of trust but, I note in the victim impact statement that was filed, there was a personal aspect to this.

[5] In her victim impact statement, Ms. Wilcox notes that not only was Ms. Vandrie working for the family's automotive dealership but, over the course of time, they became quite good friends. They took trips together and their families spent several days together. In a sense, there is that aggravating feature of not only being in a position of trust in relation to her job with Mic Mac Motors but also being a very good friend, a close friend, of the victim in this particular case.

[6] When the victim says in her victim impact statement there is a sense of betrayal, the Court understands that sense of betrayal. There is always a sense of betrayal, of course, when someone takes money after having been given a position of trust to guard your interests, but it is exacerbated, in my respectful view, in this particular case by the personal sense of betrayal. It clearly comes through in Ms. Wilcox's victim impact statement.

[7] Sentencing is not just about Ms. Vandrie but also about the effect of the offence on the victim and the community at large. It is important to note that there is a significant

amount of stress and effect on both Ms. Wilcox personally and on her business that resulted from this accused's criminal actions.

[8] Crown counsel, in his submission, talked about not only the particular loss that was involved here but also about the additional costs that the dealership has articulated: generally about \$53,300 to untangle this web of deceit and then a loss of perhaps \$54,000 in accounts receivable and an estimated \$30,000 in overtime to employees of the company. Those are not matters for which the Crown seeks restitution, nor would it be appropriate for this Court to order that restitution. But against the backdrop of the aggravating circumstances, clearly, we are talking about an amount well in excess of \$100,000 that also had a financial effect on the victim, in addition to the actual amount of money that they lost.

[9] And so when Crown counsel talks about the effect on the victim, not only was there an effect on the company, on its employees, on its owners, and on its managers in the work of untangling this, but clearly, the stress of all that becomes clear in Ms. Wilcox's victim impact statement.

[10] While I think it is fair to say that would probably be the case in most types of breaches of trust that are fairly sophisticated, over a period of time, causing noteworthy costs in person hours and stress to untangle them, nonetheless, these are significant aggravating circumstances, in my respectful view, in this particular case.

[11] The fact remains, as Crown counsel suggests, that this was a very planned and deliberate theft, in fact masked by false entries that required a great deal of forensic accounting and work to uncover and detect the crime.

[12] This was not a situation where Ms. Vandrie just decided one day, “you know what, I have been stealing money, I am going to come clean to my employer and let them know what I have been doing”. No, she actually left the employment of Mic Mac Motors and took up some other employment. There was not an admission of her involvement until such time as the circumstances of the theft were uncovered, which took, as I say, a great deal of time. She created false entries and corrupted the ability to detect the crime. It took a great deal of effort over a period of time to detect it. Clearly, this was not only planned and premeditated, but sophisticated on her part during the time of the theft.

[13] Why did she do it? Essentially, for her own profit and gain.

[14] There is no suggestion this was done because there was a gambling addiction, as the Court sometimes sees, or because there were significant addiction issues whether to drugs or alcohol. No, as Crown counsel suggests, this was done essentially for Ms. Vandrie’s own personal benefit in order to travel and to spend money on a lifestyle, which is sometimes the motivation.

[15] The Court notes that there are not those circumstances that sometimes exist — and certainly existed in *R. v. Samson*, 2014 YKTC 33 — where there may have been underlying personal circumstances that gave rise to the theft and then those personal circumstances or issues were dealt with by the accused.

[16] So when one comes to the circumstances of the offence, the Court certainly agrees with the description, generally, of Crown counsel that this was a major theft, a sophisticated theft, and a planned and deliberate theft that took a great deal of time — I

believe it took eight months to uncover — and it was all done for the personal benefit of the accused.

[17] There are certain mitigating factors, of course, and they are important for the Court to note.

[18] Ms. Vandrie comes before the Court with no prior criminal record. She has entered a guilty plea, which is an expression of remorse and an acceptance of responsibility. That guilty plea, I accept as unequivocal. She expressed remorse both in the pre-sentence report and in her statement to the Court today.

[19] The only thing I would say in disagreement to something that Ms. Vandrie said today, is when she said, "This is not who I am", Ms. Vandrie, this is actually part of who you are. What you did is part of who you are and will always be a part of who you are.

[20] In relation to the cases provided by counsel, let me say this:

[21] I will deal, first of all, Mr. Roothman, with your suggestion that a conditional discharge is appropriate. It is absolutely not appropriate in these circumstances, for a variety of reasons. While I recognize that discharges can be appropriate even where principles of deterrence and denunciation are significant principles — the courts have clearly said that — in my respectful view, there are a litany of reasons why a discharge is not appropriate in these circumstances.

[22] It is certainly in your client's interests and, in fact, in most cases, the Court would observe, a discharge is in the interests of an accused. The Court recognizes that Ms. Vandrie has no prior record. She has some aspirations to become a nurse. Having a

criminal record may, in fact, impair her in the pursuit of that goal. In fact, a criminal record may impair her even in her present or other employment. The Court is not unmindful of that fact.

[23] But in this Court's respectful view, the imposition of a conditional discharge would not appropriately give voice to what are significant principles of sentencing in this matter, which are the principles of general deterrence and denunciation.

[24] The Court is satisfied Ms. Vandrie does not need to be personally deterred. Most people who commit breaches of trust do not need to be personally deterred. There is not the aspect of personal deterrence, but there are significant aspects of general deterrence and denunciation and while they can find a voice in a conditional discharge, in my respectful view, that would not be appropriate here. A reasonable person looking at the circumstances of this offence — looking at the sophistication, looking at the number of transactions, looking at the amount of money, the period of time, and the motivation, and, I might say, the lack of payment of restitution — those factors, among many others which Crown counsel has articulately suggested, in my respectful view, take a conditional discharge right off the table.

[25] So on the second test for a conditional discharge, while it might be in her interests, it would be absolutely contrary to the public interest and, in my respectful view, contrary to the principles of sentencing in s. 718 to consider a discharge.

[26] While I recognize the imposition of a criminal record may have significant effects on her, that, in my respectful view, is one of the consequences that Ms. Vandrie will suffer as a result of this very planned and deliberate breach of trust and the theft.

[27] I will not go through all of the cases in great detail. Obviously, defence counsel submitted the *Samson* case from the Yukon, which then went to the Court of Appeal as a reason why a discharge might be considered to be appropriate, and also filed *R. v. Etienne*, (1989), 49 C.C.C. (3d) 572 (B.C.C.A.), case with the same idea in mind.

[28] Crown counsel, in his submission, talked about the differences between *Samson* and *Etienne*. There are a litany of those differences and I will not go through all of them, except to adopt what Crown counsel said, most particularly the fact that in *Samson*, the theft had been committed because of depression and underlying illicit drug use. The defendant had repaid all of the money. The amount of money was a lot smaller. There was a lot of public shaming in her small community. She was an active and contributing member of the community. There were significant *Gladue* factors.

[29] The sentencing judge, Judge Cozens, found that there were exceptional circumstances that would take this out of the normal type of sentence, which he acknowledged would be a conditional sentence as that was available at that time. These were exceptional circumstances - "rare and unusual" that, in his respectful view, satisfied him that an:

[72] ... ordinary, reasonable, fair-minded member of society...would not find this disposition to cast the administration of justice into disrepute.

[30] He imposed a conditional discharge, and that was upheld by the Yukon Court of Appeal, quite appropriately.

[31] However, almost every one of the factors that were present in *Samson* are not present here.

[32] As I said, there is no underlying suggestion of addiction issues.

[33] There is suggestion of depression, which the Court acknowledges was only diagnosed afterwards. I think it is fair to say, Mr. Roothman, in fairness to your client, given all the circumstances, it would not be a far reach for the Court to conclude that those issues probably pre-dated the actual diagnosis, although I do not have any evidence. In fairness to your client, I think that may be a reasonable conclusion to come to.

[34] But there just is not the type of mitigating explanation that we have seen in other cases, or the rehabilitation as we saw in *Samson*, or the payment of restitution, or the exceptional circumstances that, in my respectful view, taken in totality could bring a discharge even into consideration.

[35] Let me make this parenthetical comment. In breach of trust cases — and I alluded to this, I think, in one of my interjections — it is not unusual to see people with breach of trust cases lacking a prior record. It is not unusual to find that there is planning and premeditation or that the methodology is deliberate. As well, it is not unusual to find that when you assess their risk to re-offend, that it is usually a low risk, and the Court accepts that.

[36] There is nothing unusual in this case, in my respectful view, and it is, in fact, why people without criminal records are given positions of trust and have the opportunity to

then take advantage of their situation to the detriment of someone else. After all, they are looked upon as someone who is valued, who can be trusted, who can be left alone, and then they commit the theft.

[37] It is not unusual that, having been caught, many people register as a low risk to re-offend because the circumstances of their offending behaviour are quite unusual. Whether people start stealing because they think they are not going to get caught or they are going to pay it back and rob Peter to pay Paul, so to speak, one will never know.

[38] In this particular case, I can clearly conclude that Ms. Vandrie knew what she was doing and did it in a deliberate fashion.

[39] As I say, lack of prior record, guilty plea, acceptance of responsibility, remorse, all of those things are here but nothing completely unusual.

[40] I will agree with you, Mr. Roothman, that if a conditional sentence order was available in these circumstances, as it was prior to the amendments in the *Criminal Code*, that this would likely be a case where a conditional sentence order would be seriously considered by the Court. But a conditional sentence order, even when it was available, was a sentence of imprisonment. It may be a sentence of imprisonment in a different locale than a correctional facility, a jail, or a penitentiary, but, nonetheless, it is a sentence of imprisonment in the community. I agree, it was created in order to shed our jails of low-level offenders, particularly those with property offences, but it was a jail sentence.

[41] When one looks at whether or not a period of probation is called for, I will again agree that a probation order properly crafted in the right circumstances can reflect principles of sentencing, all of them, including deterrence and denunciation. It is not just a rehabilitative sentence; it can include those particular aspects.

[42] But in this particular case, again, in looking at all of the cases that have been filed, Crown counsel is right when he suggests that to impose a period of probation under a suspended sentence alone, the Court would have to find that there were rare or exceptional circumstances and in reviewing all of the authorities, I accept, for the purpose of this sentencing, that that is, in fact, a correct statement of the law. There need to be exceptional circumstances.

[43] There is nothing exceptional in this theft, frankly. In fact, quite the opposite in the manner and purpose, the amount, the length of time, or the number of transactions, there is nothing in the offence that is exceptional. And, frankly, there is nothing in the background of this offender that I can say, in a cumulative effect, that this Court could comfortably find exceptional circumstances. Guilty plea, remorse, those are standard in most of these types of cases when guilty pleas are entered. I have already alluded to the fact that there does not appear to be any type of reason for motivation, other than for personal profit or gain. There is no payment of restitution as there has been in many of the cases. We are now here in May of 2017 with a situation where the complainant is still out a significant amount of money and will have to pursue that in another forum after the Court, as it will, grants the standalone restitution order that the Crown suggests.

[44] There is nothing else. Ms., Vandrie may have been depressed. There is nothing that says she absolutely was. She may have been. Yes, there were certainly issues in her life, as you pointed out, Mr. Roothman, personal issues, some roughness in her life. Those are things that I am certain weigh upon her and have weighed upon her. But, frankly, there is nothing — although they are tragic — nothing that this Court can look at to say that they add up in some cumulative sense to a background or an upbringing that would explain this particular theft.

[45] She was, as Crown counsel suggests, brought up relatively well and relatively well-to-do. She was given a position of responsibility. There is nothing exceptional in her background, as there was in other cases such as *Samson*, that this Court can find; no motivation, no addiction issue that was dealt with or anything of that nature; no significant other contributions to the community that sometimes you see in these particular cases. Nothing is exceptional in her background.

[46] Cases are always guidance to the Court, I would say. No two cases fall exactly the same. Cases can give you guidance in terms of the application of sentencing principles but sentencing is certainly an art and not a science. When you look at all of the cases cumulatively without going through them each individually, it is clear to me that deterrence and denunciation remain significant factors.

[47] In this particular case, with this accused, with what she did, and with her background, denunciation and deterrence would not, in my respectful view, find an appropriate voice in the imposition of a suspended sentence.

[48] That leaves the only alternative that the Court finds. Given all of what I have said in terms of the aggravating and mitigating circumstances, in this Court's particular view, a sentence of imprisonment is the only sentence available to this Court that would adequately give voice, in this particular case, to both the aggravating and mitigating circumstances. In this Court's view, it would not only send the appropriate message to others, but would appropriately reflect this Court's denunciation of this particular offence.

[49] The question then becomes: How much time?

[50] This is not an arithmetic calculation. Crown counsel suggests four to six months, which is, I think, by anyone's standards is probably a very reasonable suggestion in the circumstances. This Court is not unmindful that a period of incarceration for any individual can have a very significant and deleterious effect. Let us face it; jail does not really do much to rehabilitate people. It usually does much the opposite.

[51] In my respectful view, Mr. Roothman, you are right when you tell me that an intermittent sentence is appropriate in these circumstances. If I were to impose a sentence of more than 90 days on Ms. Vandrie, what I would be doing is taking her away from her family, from her job, from her efforts at rehabilitation, from her ability to earn money to pay back restitution. In my respectful view, the deleterious effects of a sentence of imprisonment of more than 90 days would be unduly unfair, and would not be proportionate for this offender and for her offence. While jail is called for, in my respectful view, a period of an intermittent sentence can give voice to that.

[52] I will say for the record, 90 days of imprisonment would be at the very low end of what is appropriate in these circumstances, Ms. Vandrie. However, having regard to what I believe the appropriate principles of sentencing are in this case and how I can intertwine them in a way that both sends the message to others but also respects the fact that your rehabilitation and your contribution to society are important parts of the circumstances, in my respectful view, that can be done by the imposition of an intermittent sentence.

[53] That is what I intend to do. I intend to couple it with a period of probation, which I think is quite appropriate because if there are those issues in your life, and I suspect there are, they are still issues that need to be dealt with. I am satisfied that a Probation Officer would be in the best position to determine if additional assistance is necessary for you in order to help you in your rehabilitation and to assist you personally, and it would also be clearly in the public interest.

[54] Generally, for the record, I accept Crown counsel's observations with respect to the gleaning of the principles of sentencing as Crown counsel went through them, including his gleaning of the appropriate application of those principles in *R. v. Voong*, 2015 BCCA 285 to this particular case, notwithstanding that *Voong*, of course, dealt with a different type of offence. I will say that as a general comment for the record.

[55] The sentence on the charge of theft, Ms. Vandrie, is one of 90 days. I will allow you to serve that intermittently.

[56] In addition to that 90-day sentence, I am placing you on one year of supervised probation. That probation order is there to support your rehabilitation.

[57] The conditions of that probation order are that you:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify the court or your Probation Officer in advance of any change of name or address, and promptly of any change of employment or occupation;
4. Report to your Probation Officer within two working days, and thereafter, when and in the manner directed by your Probation Officer;
5. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer for any issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this order.

[58] Crown counsel asked that I include a condition that you advise any employer of this conviction. I am not making that order at this point in time.

[59] The 90 days is to be served intermittently. You are to attend the Whitehorse Correctional Centre at 25 College Road, Whitehorse, Yukon Territory. You are to attend this Friday, that is, tomorrow, May 5, 2017 at 6 p.m. On Monday, May 8, 2017,

you will be released at 6 a.m. This will simply continue on consecutive weekends until served.

[60] This is an indictable offence. There is an automatic victim of crime surcharge fine of \$200. You are ordered to pay that \$200 forthwith.

[61] As well, I am making a standalone restitution order, as requested by the Crown, in favour of the complainant in the amount of \$46,939.62. That means it is a judgment registered against you, which then can be satisfied by other means by the complainant, the victim.

[62] Ms. Vandrie, if there is an allegation of breach of this order, you can be charged with breaching that court order, which is a separate criminal offence. You could be subject to process by the police; and if convicted, then subject to a range of penalties available under the *Criminal Code*.

WYANT T.C.J.