

SUPREME COURT OF YUKON

Citation: *R. v. Miller*, 2009 YKSC 36

Date: 20090414
Docket No.: 07-00728A
07-00728B
07-00728C
07-00728D
07-00728E
08-01504
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

BRIAN LESLIE MILLER

Before: Mr. Justice R.S. Veale

Appearances:
Jennifer Grandy
Emily Hill

Counsel for Crown
Counsel for defence

REASONS FOR SENTENCING DELIVERED FROM THE BENCH

[1] VEALE J. (Oral): Brian Miller pled guilty and was convicted of possession of cocaine on February 22, 2008, for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. He also pled guilty and was convicted of three breaches of recognizance contrary to s. 145(3), the first being on March 14, 2008, when he was found in a bar or tavern; the second on September 19, 2008, when he was in possession of alcohol in a bar; and the third on March 26, 2009, when he was consuming alcohol. The substantive offence involved possession of ten

small bags of powder cocaine amounting to five grams with a street value of \$500.

[2] At the moment, Mr. Miller has been in custody for approximately 20 days, which would be credited at 35 days based on a 1.5 to one multiplier.

[3] The Crown is seeking a sentence of incarceration of nine to ten months, allocated with eight months to the substantive charge and two months consecutive for the three breaches of recognizance.

[4] The defence acknowledges the seriousness of the substantive offence and the three breaches of recognizance and concedes that it rules out a conditional sentence. Rather, the defence seeks a six-month sentence of incarceration on the substantive offence and time served, at 35 days, for the three breaches of recognizance.

[5] Up until Mr. Miller's failure to appear at his sentencing date in October 2008, he was a candidate for a conditional sentence, but his inability to maintain a job and his inability to follow the orders of the Court have ruled out the appropriateness of a conditional sentence.

[6] Mr. Miller is 30 years old and he was raised in both Yellowknife and Whitehorse and is a graduate of F.H. Collins High School in Whitehorse. He has a supportive mother and stepfather. His mother is present here today in court to support him.

[7] His natural father was an alcoholic and he died in 2006. Mr. Miller had a very close relationship with his father and attributes some of his present circumstances before the Court to his father's recent death. Mr. Miller is not an addict but certainly has been a recreational user of cocaine and alcohol in the past, and certainly should

recognize the addictive properties of drugs and alcohol.

[8] Drug offences are treated very seriously in the Yukon because they can do a great deal of damage in this community, even where we are involved with a small street trafficker. The effects of drugs can have very serious impacts on the community. As a result, specific attention is paid to the denunciation and deterrence aspects of sentencing, but nevertheless the importance of rehabilitation cannot be ignored.

[9] Having reviewed the sentencing precedents, for which I thank counsel for providing, I am of the view that the range of incarceration in this case is from six to 12 months. From a strict application of the denunciation and deterrence, I would sentence Mr. Miller without hesitation to a ten-month imprisonment because of the seriousness of the offence and the need to deter him from pursuing a career in the drug trade. However, Mr. Miller is now painfully aware of the downside of drug use and the drug business.

[10] Mr. Miller made a personal apology, tearfully, in court to his mother and the Court for his criminal behaviour. I confess that I hear a lot of deathbed repentances from convicted persons who want to reduce their sentences but carry on with their criminal behaviour. However, in this case I see a glimmer of hope that Mr. Miller may have learned something in his recent incarceration, and learned a lesson that it would be a wasted life to continue down the path that you have been on for the past year or so, and it would also, of course, dishonour the memory of your deceased father.

[11] I am satisfied, from hearing Mr. Miller and his mother, that he is serious about continuing his education by attending Thompson Rivers University in British Columbia to

pursue a Bachelor of Arts degree in psychology. With the assistance of his mother he has considered the courses that he will have to take, he has contacted the university and he has recently sent in his high school transcript. While the cost of this education will be considerable, and to some extent that may cast some doubt on the possibility of it occurring, I am satisfied that there is a realistic possibility that it will be pursued. It would be unfortunate to ignore this hopeful educational plan by focussing only on denouncing Mr. Miller's past conduct. I am sure that the 30 days spent in jail have had an impact on him and he appreciates that this educational opportunity may be a way out of your criminal life style.

[12] In my view, a fit sentence for Mr. Miller is six months incarceration on the possession for the purpose of trafficking conviction and 35 days time served for the three breach of recognizance offences.

[13] There will also be a firearms prohibition under s. 109 of the *Criminal Code* for ten years commencing today.

[14] All the cash, drugs and mobile telephone and other things seized will be forfeited under s. 16 of the *Controlled Drugs and Substances Act*.

[15] There will be a probation period for one year, commencing on his release, with the following conditions:

1. That he keep the peace and be of good behaviour;
2. That he notify his probation officer in advance of any change of name, address, employment or occupation;
3. That he take such alcohol assessment, counselling, programming and

treatment as and when directed by his probation officer;

4. That he abstain absolutely from the possession, consumption or purchase of alcohol, non-prescribed drugs and other intoxicating substances, and that he submit to a breathalyzer, urinalysis and bodily fluids or blood test upon demand by a peace officer or a probation officer who has reason to believe that he has failed to comply with this condition;
5. That he make reasonable efforts to find and maintain suitable education or employment and provide the probation officer with all necessary details concerning your efforts.

[16] Mr. Miller, I think you should take this as a wake-up call, and you are being given an opportunity that may not come to you again. You are 30 years old but still a young man with a full life ahead of you, and if you take this educational opportunity you have a chance to put all this behind you and you will be a happier person, and I know your mother will be as well. So I wish you luck, sir. Anything further?

[17] MS. HILL: Yes, just one moment. I just had two questions about the terms. Did the Court impose the second statutory term, to appear before the Court when required to do so?

[18] THE COURT: No. Should I?

[19] MS. HILL: I believe you should.

[20] THE COURT: Add that to it then, thank you.

[21] MS. HILL: And also, I believe that the Court imposed a

requirement to provide samples, and it's my -- if I heard correctly; provide breath samples?

[22] THE COURT: Yes.

[23] MS. HILL: It's my understanding, and I think my friend agrees, that the *R. v. Shoker*, [2006] S.C.J. No. 44, decision from the Supreme Court of Canada says that can only be imposed with conditional sentences and not with probation orders.

[24] THE COURT: Thank you. So the abstention clause, then, will just be an abstention clause without any further submissions for breathalyzer or urinalysis. You agree with that, do you not?

[25] MS. GRANDY: Yes, that was my understanding. Ms. Hill is ever more prepared than I am. I didn't know the name of the case, but.

[26] THE COURT: It was a shocker though, eh?

[27] MS. GRANDY: It was a shocker, but I believe that it's only available on conditional sentences.

[28] THE COURT: I think that is correct.

[29] MS. GRANDY: I do have copies of a forfeiture order, if the Court's prepared to endorse that?

[30] THE COURT: Yes.

[31] MS. HILL: I've reviewed that. It's fine.

[32] MS. GRANDY: Save the paperwork for later on. And if I can ask for the remaining charges to be marked as withdrawn, please?

[33] THE COURT: So ordered.

VEALE J.