Citation: *R.* v. *Brace and Stewart*, 2008 YKTC 41

Date: 20080515
Docket: T.C. 07-10139
07-10140
07-10143A
Registry: Whitehorse

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

REGINA

v.

ROGER EARL BRACE
AND TYLER JAMES STEWART

Appearances:
Kevin Komosky — Counsel for Crown
Jennifer Cunningham — Counsel for Mr. Brace
Elaine Cairns — Counsel for Mr. Stewart

REASONS FOR SENTENCING

[1] FAULKNER T.C.J.(Oral): On November 22, 2007, Mr. Roger Brace, also known as Roger Tashoots, and Tyler Stewart kicked in the door of the Maurice Cardinal residence in Watson Lake, entered and attacked the occupants. One occupant, James Frank, was punched in the head, knocked to the floor, then kicked. He suffered a cut on his mouth which required a number of stitches to close. A second occupant, Matthew Hanchar, was also assaulted, although less seriously.

[2] The attackers then turned their attention to Mr. Cardinal. However, he managed to evade them and ran out of the house. He proceeded to the hospital, which is across

the street, from where the police were summoned. The intruders left, but threatened they would return the following day. When he left, Mr. Stewart took a case of beer belonging to one of the occupants.

[3] It should be noted that there was a fourth occupant in the house, but he was apparently passed out or asleep and did not become involved in the proceedings. When the police arrived, Mr. Brace and Mr. Stewart were gone. The police noticed the broken lock on the door and fresh blood on the kitchen floor. Interestingly, the police also noted other damage to the house. However, Mr. Cardinal says that this damage occurred during an earlier break-in, which had been perpetrated the previous day when no one was at home. It should be added that there is no evidence that connects Mr. Brace and Mr. Stewart to this earlier incident.

[4] The incident of November 22 was characterized by the Crown as a home invasion, and, indeed, it was. I am, of course, mindful of the admonition in *R*. v. *Bernier*, 2003 BCCA 134, that such a term lacks precision. Clearly, however, this case involves the following factors. First, there was a breaking and entering of a dwelling house. Second, the home was occupied, to the knowledge of the perpetrators, and thirdly, there was an intent to confront and attack the occupants of the house.

[5] Although any such crime is extremely serious, I agree with the defence that what occurred here was toward the lower end of the scale and, indeed, I think the Crown would agree that the facts here are not equivalent to the facts of such cases as *R*. v. *Moore*, [2008] B.C.J. No. 600, *Bernier*, *supra*, and *R*. v. *Vickers*, [2007] B.C.J. No. 2471. In this case, the intruders were not armed and the intrusion was brief. The occupants

were not frail or elderly, and, indeed, as I think it was Ms. Cunningham pointed out, they seem to have taken a fairly robust view of the incident. Nevertheless, two of the occupants were assaulted and attempts were made to assault one of the others. One of the victims suffered a substantial injury and there were threats and intimidation offered to the occupants.

[6] One of the other distinguishing factors between this and many of the cases of home invasion is that it appears here that, although the reasons were never revealed, there was some history between the attackers and the attacked. I do not know this history, and it would certainly be pure speculation on my part to suppose what it might be. Nevertheless, it is a fact that the attackers and the attacked were acquainted. This incident could, in some respect, be characterized as a settling of accounts as much as a home invasion. Of course, if the motive were a settling of accounts, it makes the case somewhat different, though not necessarily less serious, than the cases normally classified as home invasions.

[7] Counsel on both sides referred to a substantial number of sentencing cases in so-called home invasion situations. As I have already indicated, the facts of many are more serious than what happened here. An effort was made to distinguish others whose facts might be arguably more similar. It is always difficult to compare and contrast one case to the next. The facts are never identical and the circumstances of the offenders involved are infinitely variable.

[8] For example, in *R.* v. *Kakfwi,* [2006] N.W.T. J. No. 9, the offender had a more serious criminal record, but he also entered an early guilty plea. In *R.* v. *Cletheroe*,

[2007] Y.J. No. 75, the attackers were armed, but Cletheroe also had suffered serious and permanent injuries when the intended victim repelled the attack with a gun. Thus, the offender had already suffered very significant consequences for his actions.

[9] In *R*. v. *Germaine and Moses*, [2007] Y.J. No. 87, and dealing particularly with Mr. Moses, it appears that the motive for the attack was particularly reprehensible and the degree of violence and intimidation was arguably more extreme than in this case. It is also true, as has been noted this morning, that Mr. Moses had a more serious criminal record. However, Moses also entered a guilty plea in contrast to the offenders in the case at bar.

[10] Also instructive, in my view, are the Yukon cases of *R*. v. *Henry*, [2002] Y.J. No. 91, *R*. v. *Sterriah*, [2003] Y.J. No. 54, and the recent decision, *R*. v. *Sidney*, 2008 YKTC 40. But all of these precedents can do no more than establish a range of sentence.

[11] In this case, the Crown submitted that the range was from three to nine years and sought a sentence of three years less credit for time served. Given the most recent appellate court decisions in such cases, particularly *Bernier*, *supra*, *Vickers*, *supra*, and *Moore*, *supra*, it might have been argued that the range has been moved even higher; certainly it is not less.

[12] I was also referred to some cases which were below the range contended for by the Crown, but by and large these were cases decided prior to the enactment of s. 348.1 of the *Code*, which made it a statutorily aggravating circumstance to break and enter a dwelling house known to be occupied and to use violence and threats of violence toward the occupants.

[13] The defence sought sentences in the range of time served. In my view, such a disposition would be wholly unfit, given what occurred. The maximum sentence for breaking and entering a dwelling house is life imprisonment. The fact that the home was known to be occupied and that the occupants were subjected to violence is a statutorily aggravating circumstance.

[14] In such cases, the need to deter and denounce such conduct, coupled with the maintenance of public safety, mandates a substantial period of imprisonment. I certainly take into account all that has been said regarding the backgrounds and present circumstances of these offenders, including the fact that they are aboriginal offenders. However, none of these factors would justify imposing a sentence far below the normal range.

[15] In the result, Mr. Brace and Mr. Stewart, you are each sentenced on Count 2 to a period of imprisonment of three years. You are entitled to credit for the time already served, which is now in the range of six months. Applying the usual calculation for pre-sentence custody results in a credit of nine months, leaving a remanet of two years and three months still to be served.

[16] I should also add that some attempt was made to distinguish the situation of Mr. Stewart and to seek a lesser sentence for him. In my view, this was clearly a joint enterprise and there would be no real basis on which the Court could properly distinguish between the two offenders. I would also note, parenthetically, that a slightly shorter territorial sentence for Mr. Stewart might actually work to his disadvantage as compared to a short penitentiary sentence meted out to his co-accused.

[17] With respect to the theft charge for Mr. Stewart, 30 days to be served concurrently. The surcharges are waived.

[18] In addition, it is appropriate that orders be made whereby each offender will provide samples of bodily substances for the purpose of DNA analysis and banking. There will also be orders whereby both offenders will be prohibited from having in their possession any firearm, ammunition, or explosive substance, or any cross-bow or restricted weapon, for a period of 10 years following their release from imprisonment. They are prohibited from having in their possession any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for the remainder of their life.

[19] THE CLERK: The remaining counts?

[20] MR. KOMOSKY: Your Honour, I believe the Crown conditionally stayed them upon entering the conviction. That should be made final.

[21] THE COURT: Yes, they should have been conditionally stayed.

_____
FAULKNER T.C.J.