

Citation: *R. v. Brockman*, 2010 YKTC 32

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Docket: 09-00388
09-00389
09-00646A
09-00646B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

SHANE RANDY BROCKMAN

Appearances:
David McWhinnie
David Christie

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Shane Randy Brockman has entered guilty pleas to two offences. These both arise out of British Columbia.

[2] On September 14, 2005, Mr. Brockman had warrants out for his arrest. He came to the attention of the RCMP in 2009 and he took steps to have these charges waived up here.

[3] The charges are, firstly, that he operated a motor vehicle while disqualified in the Province of British Columbia, contrary to s. 259(4) of the *Criminal Code*. Circumstances are that he had received a driving while disqualification as a result of an impaired driving

offence in 2000. He never obtained his licence properly after that and under the British Columbia motor vehicles legislation the disqualification continued.

[4] He was stopped by the RCMP in British Columbia on September 14th, and while speaking to the police officer at that point in time, they found out he did not have a driver's licence. He indicated that he had a pound of marihuana in the car. This was worth \$2,300. The purpose that he had the marihuana was not for personal use, but it was also not for trafficking for commercial profit. It was more a question of him bringing it back to a work camp to distribute amongst friends; so it was more in the context of social trafficking. This is the s. 5(2) *Controlled Drugs and Substances Act* offence.

[5] His criminal record has convictions going back to 1983. I note he is currently 47 years of age. Of particular relevance are two driving while disqualified convictions in 1999, for which he received a \$200 fine, and in 2002, for which he received a \$1,000 fine. He has two prior impaired driving offences, in 1998 and 2000, and as well, as I had missed this in what I said earlier, a driving while disqualified in 2000 for which he received 30 days. So the driving disqualifieds were a \$200 fine, 30 days, and then, subsequent to that, another \$1,000 fine.

[6] I note that the period of incarceration for the driving while disqualified was a Yukon conviction. The two fines were in British Columbia, and in the Yukon, driving while disqualified almost invariably results in a jail sentence, according to the case law that has flowed from *R. v. Battaja*, [1990] Y.J. No. 208. That may not be the case in every other jurisdiction, and I say that noting, to some extent, that this offence occurred in British Columbia and not in the Yukon.

[7] There is one prior simple possession of a narcotic in 1989.

[8] Crown is suggesting that the driving while disqualified be treated by way of a four month sentence of imprisonment, constituted of the time served he has built up to date, followed by a sentence of six months for possession for the purposes of trafficking the marihuana, noting, of course, that the Court needs to consider the totality of the sentencing, if the sentences are to be imposed consecutively, as well as requesting the mandatory s. 109 firearms prohibition and the standard forfeiture order.

[9] Defence counsel does not take any particular opposition to the sentence being sought by the Crown.

[10] I will deal with it this way. With respect to the driving while disqualified, while the offence happened in British Columbia, he is currently a Yukon resident. There is one driving conviction in the Yukon before for driving while disqualified. I am going to impose a sentence of three months time served.

[11] With respect to the offence of possession for the purpose of trafficking, I am going to impose a consecutive sentence. That sentence will be five months. It will constitute one month time served and another four months going forward that will be in the form of a conditional sentence order. I am satisfied that this sentence can be served conditionally in the community.

[12] It is a total of eight months, which reflects the totality principle of custody and also takes into account what I see in the pre-sentence report with respect to Mr. Brockman, his submissions to the Court today, and, frankly, the absence of any criminal

convictions since 2002, and nothing since the offence dates in 2005 that this matter before me today is on.

[13] I note in the pre-sentence report that he has a moderate level of problems with drugs and alcohol. I also notice that the Criminogenic Risk Assessment, which is largely a static risk assessment and looks historically at the risk, has him as a high risk. I believe in the circumstances, though, that while that may be a high risk based on the factors they used to analyze it, he really does not pose a high risk if he deals with any of the substance abuse problems he has had. So I am going to downgrade that risk in the report, using a non-historical approach, and a more progressively anticipatory approach. I believe he is serious about trying to deal with the matters that he has and I believe that he has the potential to do so.

[14] So there will be a further four months on a conditional sentence order. The terms will be:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a supervisor immediately upon your release from custody and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
4. Remain within the Yukon Territory unless you have written permission from your Supervisor or the Court;

5. Notify the Supervisor or the Court in advance of any change of name or address and promptly notify the Court or the Supervisor of any change of employment or occupation;
6. Reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor.

[15] Is there any reason in this case I should deviate from the normal house arrest with permission exception clause for conditional sentences? It is not really addressed at all.

[16] MR. CHRISTIE: I mean treatment, I know he could get exceptions for that or for work. I can't think of anything else [indiscernible]. The other, I mean those, I'm sure he would get permission for those exceptions. There's nothing that he has planned immediately that I can say otherwise, but yeah.

[17] THE COURT: Nothing, okay.

[18] This is a jail sentence served in the community. It is not like a probation order, so the conditions are intended to be restrictive. There will be a condition that:

7. At all times you are to remain within your place of residence except with the prior written permission of your Supervisor for the purposes of employment, for counselling, or for such other reasons as are considered appropriate.

So at least that makes it clear that employment and counselling are there, but there will be other exceptions that you need to keep in contact with your Supervisor, of course.

But if you have something that you believe you need permission for, lay it out properly why you think you need it and get permission from your Supervisor.

8. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks.

Even though it is not really a curfew.

Failure to do so will be a presumptive breach of this condition;

9. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner.

[19] Noting your consent, in advance, before coming to Court, which is a critically important factor, frankly, when looking at the appropriateness of a conditional sentence order, that you have decided on your own to do this without being asked by the Court, there will be a term that you are to:

10. Provide a sample of your breath or urine for the purposes of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition;
11. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
12. Take such alcohol and drug assessment, counselling or programming as directed by your Supervisor;
13. Take such other assessment, counselling and programming as directed by your Supervisor;

14. Provide your Supervisor with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this conditional sentence order.

[20] Probation was not discussed. I mean it is sort of a rehabilitative path that he is on. He is older, and I do not know, does Crown have any submission on the appropriateness of probation in this case?

[21] MR. MCWHINNIE: I thought I'd indicated that --

[22] THE COURT: You may have. I may have missed it.

[23] MR. MCWHINNIE: Given his age, that was the part I think I mentioned, he's not a young man at the beginning of his life who's starting down a wrong path. He's been along his life path for the most part already and so if he's going to change, he's going to do it because he's decided to do it, not because of anything that the Court tries to make him do.

[24] THE COURT: No, and probation is not necessarily going to provide him, unless he feels it will provide him, with additional assistance in getting this problem -- I am not inclined to impose it.

[25] THE ACCUSED: Thank you, I really appreciate that. It saves me -- I don't really think I have to say much else, but yeah.

[26] THE COURT: No, you can just agree.

[27] THE ACCUSED: I do agree.

[28] THE COURT: I mean the reality, Mr. McWhinnie is right, at your age, Mr. Brockman, 47, and with the level of control you are able to exercise over your life, should you choose to do so, you are either going to do it or you are not.

[29] THE ACCUSED: Right.

[30] THE COURT: Right. I mean that is just the reality. So you are being given the opportunity to just do it without any supervision over you after these four months are over.

[31] This is an offence for which a firearms order is mandatory, so that order will take place. You shall be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance for a period of 10 years.

[32] MR. MCWHINNIE: Strictly speaking, it's 10 years, starting now, and expiring 10 years after the completion of his sentence.

[33] THE COURT: That is correct. It starts now but it will run for 10 years, from the time your sentence is over.

[34] Is this an offence under the s. 47 DNA secondary designated? I did not think it was.

[35] MR. MCWHINNIE: It wasn't at the time, but I think it now might well be.

[36] THE COURT: Oh yes, s. 5, trafficking and substance in possession for the purpose of trafficking. While it is a secondary designated offence for DNA, but

frankly, in these circumstances, I am not sure that it is necessary, so I am not going to impose a DNA order.

[37] There will be an order for forfeiture of the drugs that were seized.

[38] MR. MCWHINNIE: There is the issue of a driving prohibition.

[39] THE COURT: Yes.

(SUBMISSIONS RE DRIVING PROHIBITION)

[40] THE COURT: There will be a one year driving prohibition prohibiting you from operating a motor vehicle on any street, road, highway or other public place for a period of one year. I should say that is probably a moot point except for, were you to do it - even without insurance, it is always a possibility - you could expect that you would find yourself, if convicted, looking at a much longer period in custody. Even though it is not legally likely, even without this order, that you would be able to drive, it is physically possible, and opportunity will, and no doubt, I am sure, present itself in one form or another, there are repercussions you do not want to face.

[41] Victim fine surcharges will be waived. The remaining counts?

[42] MR. MCWHINNIE: Should be stayed.

[43] THE COURT: All right.

[44] MR. MCWHINNIE: Except for the s. 234 charge, under the B.C. *Motor Vehicles Act*; strictly speaking, when we send the material back, that Information should

go back. I assume that they will not press the matter because it essentially *Keinappled*. It arises from the same time, place and circumstances.

[45] THE COURT: And you are not in a position --

[46] MR. MCWHINNIE: It's a dicey little situation. As I understand it, we've had carriage, that is the Federal Prosecution Service, from fairly early on, because this was both; this is caught by the so-called major/minor agreement.

[47] THE COURT: Right.

[48] MR. MCWHINNIE: We notionally had carriage of it, but to the extent that I'm not a B.C. prosecutor, I think I'm probably straying a little close to the line to start deciding for them what they are going to do. So what we will do is send it back to B.C. with the note that he disposed of Count 1 by a guilty plea and we assume that --

[49] THE COURT: Inviting them to do a paper stay to ensure that it is gone.

[50] MR. MCWHINNIE: That a paper stay might be the outcome.

[51] THE COURT: All right. That concludes your matters. There will be some paperwork ready for you, Mr. Brockman, and make sure you get across the street, speak to your Supervisor, lay out what your expectations are for potential permissions or whatever, then four months. You need to know that a breach of the terms of the conditional sentence order will, in all likelihood, end up with you being arrested and being brought back before a judge, quite possibly me, for a hearing, and that there is a

presumption in law that a conditional sentence breach, if found, will result in a collapse of the conditional sentence and the rest of the time served in custody. That is not always what happens, but you should understand that it is presumed to happen that way unless, for some reason, the Court decides otherwise, which happens.

COZENS T.C.J.