

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. John*, 2005 YKSC 14

Date: 20050304
Docket: S.C. No. 04-01542A
S.C. No. 04-01542
S.C. No. 04-01543
S.C. No. 01-00628C
S.C. No. 04-00426
Registry: Whitehorse
Heard: Ross River

BETWEEN:

HER MAJESTY THE QUEEN

AND:

ERIC LOGAN JOHN

Before: Mr. Justice L.F. Gower

Appearances:
John W. Phelps
Malcolm Campbell

For the Crown
For the Defence

MEMORANDUM OF SENTENCE DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): Eric Logan John plead guilty, on January 18, 2005, to two counts of breach of probation, one count of escaping lawful custody arising August 29, 2004, and one count of resisting a police officer on September 1, 2004. The breaches are related to the latter two charges.

[2] The facts have been largely agreed to and were supplemented by some additional evidence that was called at this sentencing hearing in Ross River.

[3] Mr. John was on probation imposed August 11, 2004, for a period of 18 months. The conditions included that he abstain absolutely from possessing or consuming alcohol and also that he report to a probation officer and the RCMP on a proscribed basis.

[4] On August 29, 2004, the RCMP advised Mr. John that he was under arrest for breaching his probation order as a result of consuming alcohol. Corporal Bear attempted to approach Mr. John, but a number of female onlookers impeded his progress. He grabbed Mr. John by his arm telling him again that he was under arrest. Mr. John broke free from Corporal Bear's grip and fled into the woods, claiming that he had a gun in his back pocket. Corporal Bear was new to the community, it was dark and he was unfamiliar with the area. He decided not to pursue Mr. John at that time.

[5] Corporal Bear also testified that when he initially pulled up to the area where Mr. John was located, he called to him, but Mr. John ducked down behind the girl that he was standing beside. He eventually had a conversation with Mr. John, determined that he had been consuming alcohol and advised him that he was going to have to arrest him for breaching his probation order. Mr. John then began to walk away.

[6] Corporal Bear got out of the police vehicle, approached him and followed him around the police vehicle but was impeded by the girl who had been standing next to him while he was previously crouched down. He had to be told a second time that he was under arrest and that is when Corporal Bear grabbed his arm.

[7] Mr. John pulled away and Corporal Bear had to go to the police vehicle to obtain his taser weapon. He saw Mr. John moving away into the woods and the last thing he heard him to say was "Fuck off, pig, I've got a gun, a .45, in my back pocket."

[8] The offender also failed to report by telephone to his probation officer over a period from August 23rd to 30th, on some three occasions, and also failed to report to the RCMP on September 1, 2004.

[9] With respect to the resisting arrest count, Corporal Bear obtained a warrant for the arrest of Mr. John as a result of the incident on August 29th. On September 1, he and Constable Rogoschewsky located Mr. John at a residence in Ross River. Corporal Bear advised Mr. John that he was under arrest.

[10] It appears that when the officers approached Mr. John, he was sitting on some steps around the back of the residence and one Ms. Reddies was standing between his legs facing him. The officers pulled out their tasers and announced their intent to use them if he did not surrender himself into their custody. He was told repeatedly to show his hands to the officers. He failed to respond to those directions. Instead, he put his left arm around the front of Ms. Reddies, who is now standing facing the officers, so that Mr. John was behind Ms. Reddies.

[11] Again, he was told repeatedly to show his hands and, at one point, was told to let Ms. Reddies go. It is common ground that Ms. Reddies was not being held against her will, but the officers at the time did not know that. The accused moved in an upward and backward direction up the steps with Ms. Reddies, and again the officers issued commands to show his hands and to surrender himself. He failed to do so and as a

result he was tasered by Constable Rogoschewsky and pepper sprayed by Corporal Bear. He rolled onto his back, adopted a defensive posture and appeared ready to fight. Consequently, Corporal Bear instructed Constable Rogoschewsky to taser him a second time, which she did. Mr. John initially stopped resisting and was apprehended, with handcuffs placed on him with his hands behind his back.

[12] Constable Rogoschewsky testified, and I accept her evidence, that Mr. John was repeatedly asked by the officers to put up his hands during this second incident and he failed to do so.

[13] As he was being taken to the policy vehicle, Mr. John began yelling and walking cooperatively with Corporal Bear. He was apparently trying to get Ms. Reddies' attention. He was told by Corporal Bear to stop and abide by the Corporal's commands but was not responsive. As a result, the corporal had to taser him again at the stun level in his back, which caused Mr. John to begin walking again.

[14] The offender then started acting up a third time. He began turning away from the corporal who ultimately was required to again use his taser on stun mode. Eventually, he took Mr. John to the ground. Constable Rogoschewsky assisted and the offender was placed in the rear of the police vehicle. At this point, he was quite excited and aggressive towards the police in general and began to say threatening things to the officers.

[15] Mr. John was taken to the Ross River health centre to have the taser probes removed and to be generally checked over. While en route, Mr. John made suicidal comments in Corporal Bear's presence and, again, threatened acts of aggression

towards police. While being attended to at the health centre, he continued to make numerous similar comments with threatening overtones, including remarks of a suicidal nature.

[16] Ultimately, Mr. John agreed with Constable Rogoschewsky's suggestion that he be sedated by medication at the health centre. That calmed him down so radically, that Corporal Bear described it as being like "turning on and off a light". He was extremely mellow after the medication was administered.

[17] A psychological assessment was done on Mr. John and a written report, dated October 19, 2004, was filed at this hearing. The report indicates that Mr. John, who was then 22 and is now a 23 year old Kaska male, is single with no dependents and has a grade10 level of education.

[18] I am told by his counsel that Mr. John has had sporadic employment when he has been out of jail, but has not had much time of freedom since he has been incarcerated for approximately three and a half of the last five years. I will deal with his record in a moment.

[19] The psychological report states that Mr. John's father died in his late 30s from alcohol intoxication, and his mother, who is currently in her mid-50s, has a serious drinking problem. He has seven brothers and sisters, four of them are drinking too much. He claims that his formative years were marked with social instability, emotional instability and parental deprivation. His parents were unable to provide for him and he was ultimately raised by his aunt and uncle. He stated to the psychological staff that he got into drinking heavily in his teen years and by the time he was in his late teens, he

began questioning his own drinking behaviour. He has been admitted numerous times to Whitehorse General Hospital for aggressive and impulsive behaviour and continues to have ongoing problems with his temperament and emotions, as well as his behaviour.

[20] It is important to note that when he was interviewed about these offences, he said that he had been binge drinking for almost a week around that time. He clearly accepts the fact that he has serious problems with alcohol and substance abuse and poor impulse control. He states that he hates authority figures and it does not take much to get him going once he is feeling frustrated with being told what to do. He finds it quite difficult to regain his composure and control, and he tends to demonstrate impetuous and wanton aggression against others whenever he is under the influence of alcohol or stress.

[21] He was diagnosed by the psychological staff as someone who is suffering from alcohol and substance abuse with a violent temper, against a background of anti-social personality disorder. In the course of his treatment, he disclosed that he has been upset by the fact that one of his best friends shot himself in the last year and he has not yet dealt with that loss. That is significant because Mr. John himself has made comments to indicate that he also has suicidal ideas. He said that over the years, he has fallen victim to drugs and alcohol in order to dampen down his bereft and grievous emotional tones.

[22] He also acknowledges the fact that his alcohol abuse has become out of control and has affected his functioning in the community. His life now seems to revolve around drinking and obtaining alcohol. At the same time, he believes that he has reached a

state where he wishes to cease the habit completely, providing he is offered a definite treatment program and professional help in a secure and structured setting.

[23] His overall intelligence is above the average range. He made the following statements to his psychiatric staff:

I know now I am an alcoholic. It gets me into trouble. Makes me not care any more. Makes me suicidal as well as mean and violent. It is like every time I get mad, I drink more and more and hate the world and hate myself even more. I do not want any probation because it has done very little to my ongoing problems. I need a more structured setting where I can feel at ease and address my anger, drug and alcohol abuse as well as attitude related issues.

[24] The author of the psychiatric report states:

If a person takes an illegal drug, (including alcohol), he is held responsible for any actions he commits whilst intoxicated by the drug. The fact that it has disinhibited him or caused him to be amnesiac for the occasion will be no excuse. It is reasonably evident that Mr. John, having knowingly and willingly taken alcohol, deprived himself of the ability to exercise **self-control and rational judgment and got into this serious legal predicament.** (emphasis already added)

[25] I would certainly adopt and accept those words and they are directly applicable to this sentencing hearing.

[26] According to the psychological report, Mr. John does not suffer from a mental disorder. Attempts have been made to engage Mr. John in community-based treatment programs, but those have not been successful to date. The last portion of the report that I will quote is as follows:

No matter what may be the final outcome of Mr. John's court appearance, it is evident that he must deal with his aforementioned difficulties by engaging himself in various treatment programs such as a residential drug and alcohol treatment program, anger control and management, communication skills as well as life skills exercises.

[27] Mr. John's legal counsel advised me that Mr. John has been in pre-sentence custody since September 2, 2004, at Whitehorse Correctional Centre. He has been meeting on a one-to-one basis with a counsellor by the name of John Graham, until last week when Mr. Graham left. This was general counselling and was also related to his grief issues and his problems with authority. I heard nothing about that counselling touching on Mr. John's alcoholism. He claims to have developed a release plan in consultation with Mr. Graham which is to live with his sister, Melissa John, to continue counselling with Lloyd Ceasar in Ross River, and to acknowledge that he is already on a stringent probation order from last August, which I have already mentioned. He apparently has done well within the structure of the correctional centre and has been a model prisoner.

[28] Mr. John's criminal record is probably the most significant factor in this sentencing. Overall, for a man of 23 years, it is a significant record. It ranges from 1995 to 2004 and I count approximately 44 offences in total. Of that total, there are approximately 13 process-related offences; by that I mean breaches of court orders. There is one resist arrest from 1998; there are two convictions for escaping lawful custody, and two prior convictions for being unlawfully at large, which I conclude are also relevant. There are a number of firearms and weapons offences.

[29] The Crown's position on sentence is that there should be a global sentence in the range of 18 months subject to the usual credit for his pre-sentence custody. The defence asks for a sentence in the range of five and a half months, which, given his time in pre-sentence custody would result in his being released immediately.

[30] The case law referred to by both counsel generally indicates that this type of escape custody, in the nature of a pull-away or a run-away from an officer, involve dispositions in the range of two to four months in custody. I note that the last escape for which Mr. John was sentenced resulted in a 60-day jail term.

[31] I find that the aggravating circumstances on the escape lawful custody count are: Mr. John's attempt to hide; his attempt to evade or get away after Corporal Bear made initial contact with him and attempted to place him under arrest; his non-responsiveness to various commands; and, most significantly, the manner in which he referred in a threatening way to the presence of a hand gun in his pocket, as he was walking away. In all the circumstances, I would impose a sentence of three months for that particular offence.

[32] As for the resisting arrest charge, no case law was filed for that type of offence. The last resisting arrest in Mr. John's case was in 1998, for which he received two months secure custody, but then he was in Youth Court and being dealt with as a young offender.

[33] I find there are a number of aggravating circumstances on this charge also. There was again a repeated failure by Mr. John to obey the commands given to him by both officers, to the extent that a total of four taser applications were required and at

least one use of pepper spray, as well as the use of handcuffs. Most importantly, there was the involvement of an innocent third party.

[34] Notwithstanding that this young woman, Ms. Reddies, was not being held against her will, Mr. John did not cooperate by letting her go and getting her out of harm's way when he was told to do so by the police. That elevated the overall risk of the situation and no doubt contributed to the concerns of the officers. It is also significant that only a few days earlier, Mr. John had made the reference to having a .45 calibre hand gun as he was evading and walking away from Corporal Bear. This elevated the seriousness of the situation, in terms of the perceived risk in the minds of the officers. Mr. John also has a number of firearms related offences and possession of weapons offences on his criminal record, which would have been known at least to Corporal Bear by that time. This was a very dangerous situation and it is fortunate that there was no more harm done than was the case.

[35] Mr. John, I would say to you that you are playing with fire here, if that makes a difference to you. I do not know that it does, but given your record and given what the police know about your history, and given the kinds of comments you were making to the police at the health centre along the lines of "Why didn't you just shoot me" and "Next time I hope you use a real gun"; "I'm trying to commit suicide by being gunned down by the police", that kind of scenario may very well be played out if you continue in this fashion. All I can say is that is self-destructive and if you want to stay alive and have a healthier life, then you are going to have to change your attitude about these things.

[36] I agree with defence counsel that the breaches should be considered as if they were on a spree, as between themselves, and I echo back to the comment in the psychiatric report, that Mr. John acknowledged that he had been drinking for almost a week around the time of these offences. Therefore, any sentence that is imposed for each of the two breaches should be concurrent to each other, but consecutive to the other two offences for the following reason.

[37] I find it is extremely aggravating that Mr. John has some 13 prior convictions for breaches of court orders. You may not like being on probation, but you can not ignore the court orders and, if you do, you are going to go back to jail. With your record, Mr. John, and given your age, rehabilitation is starting to drop off as being something that is of concern to the Court.

[38] What is of concern is getting the message to you, specifically as an individual that this cannot be tolerated. That is called specific deterrence. There is also the idea of general deterrence, which is sending a message to the community that this kind of thing will not be tolerated. There is also denunciation, which says the Court has to recognize the dangerousness of this kind of situation and the fact that it will not tolerate this behaviour.

[39] So from now on in, you are likely to be hammered harder and harder and harder with each sentence the Court imposes. I want to make that point by giving you a three-month sentence for each of the two breaches, concurrent to each other, but consecutive to the other sentences.

[40] I am not going to impose any probation order. This results in a total of 12 months; that is, three months for Count 2, six months for Count 4 and three months for each of Counts 1 and 3, which again will be concurrent, but consecutive to the other sentences. That is a total of 12 months. After allowing you credit -- are you paying attention, Mr. John?

[41] MR. CAMPBELL: He was asking me to explain.

[42] THE COURT: Oh, I'm sorry.

[43] After allowing you the usual credit of two for one for your pre-sentence custody, that will result in a sentence of time served. As I said a moment ago, I am not going to impose any additional probation because you are going to be under probation for approximately another year. And there is already a condition on your probation that you take such alcohol and substance abuse counselling as may be directed, as well as any other grief or any other counselling directed by your probation officer.

[44] I fully hope and expect that your probation officer will direct you to take that counselling, because that is what you need. I think you have recognized that you need it. You are saying, "I need some structure; I need a program," and that is the first step to express your need. Okay? Because all of this is geared toward dealing with your alcoholism. Unless you deal with your alcoholism, everything else is going to go down the toilet. It is as simple as that.

[45] One attendance at residual treatment is not going to fix the problem, but it is a big start. If your probation officer is not on the phone with you or meeting with you and

insisting that you take treatment, then you have the opportunity to say "I want this". Chances are, the cost of the treatment will be covered. If you do not start down that road to recovery, sir, you are going to be in jail for the rest of your life. It is as clear as that.

[46] Part of my reason for imposing a three-month jail sentence for these breaches of probation is to send a very clear signal to any future court that breaches of probation are no longer going to be treated like slaps on the wrist. The probation order is there to help you in your own rehabilitation. It is to guide you, to assist you, to give you some structure. If you are going to ignore them time and time again, then my expectation is that you will go to jail for longer and longer and longer periods.

[47] Are there any questions?

[48] MR. CAMPBELL: The victim fine surcharges?

[49] THE COURT: That will be waived in the circumstances.

[50] MR. PHELPS: Nothing arising, My Lord.

[51] THE COURT: And the other indictments?

[52] MR. PHELPS: Direct a stay of proceedings with respect to all outstanding counts that are before this court.

[53] THE COURT: All right. Thank you.

