R. v. Sutherland and Taylor, 2007 NWTSC 94

S-1-CR2006000085

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

WADE SUTHERLAND AND GARRY ROBERT TAYLOR

Transcript of the Reasons for Sentence by The Honourable Justice J.Z. Vertes, at Yellowknife in the Northwest Territories, on November 5th A.D., 2007.

APPEARANCES:

Ms. C. Gagnon: Counsel for the Crown

Mr. M. Hansen: Counsel for the Accused Sutherland

Mr. P. Falvo: Counsel for the Accused Taylor

Charge under s. 348(1)(a) Criminal Code of Canada

THE COURT: The two offenders, Wade Sutherland and Garry Robert Taylor, have each pleaded guilty to a charge that on May 11th, 2006, they did break and enter a dwelling house, here in the city of Yellowknife, with intent to commit an indictable offence contrary to Section 348(1)(a) of the Criminal Code. The potential maximum penalty for that offence is life imprisonment.

The circumstances of the offence are fairly straightforward. The two offenders went to the home of the victim in this case in the evening for the purpose of obtaining marijuana. When no one answered the door they decided to break in. When they got into the residence they were surprised to find the victim at home. The victim grabbed a baseball bat for defensive purposes but this was taken away from him by Sutherland. The victim then, under a pretext, managed to draw the two offenders outside and then he ran back into his residence from where he contacted the police. The offenders did not attempt to re-enter the residence.

The victim and these offenders knew each other and I was told that they had a past relationship but I was not given any details about that.

The offender Sutherland is 30 years old. He has a Grade 11 education and worked at the time as a labourer and first-aid technician for a local engineering firm. He has a criminal record. As a young offender, he was convicted of 16 offences between 1990 and 1994. As an adult, he was convicted of 14 offences between 1994 and 2001. These include crimes of violence such as assault and assault with a weapon and related crimes of break and enter. He has served significant periods in jail.

The offender Taylor is 27 years old. He has a Grade 12 education and works in the prospecting business for an exploration company. He is also an artist. He lives with his grandmother and contributes to expenses. He too, however, has a criminal record, both as a young offender and as an adult. Between 1994 and 2003, he was convicted of 16 offences, including assaults. He too has served time in jail. The only difference between him and Sutherland is that Taylor has no prior break and enter convictions.

Crown counsel emphasized that this incident, while relatively less aggravating than it could have been, has had a lasting impact on the victim and his family. This is confirmed by the Victim Impact Statement. Therefore the sentences to be

imposed should be custodial (to address the need for both personal and general deterrence) but should be such as to enable a lengthy probation period as a protective measure. This, of course, means that any custodial term has to be kept under two years since the Criminal Code does not permit probation to be added to a sentence longer than that.

For Sutherland, Crown counsel recommends a net sentence (after taking into account time spent in pre-trial custody) of two years less one day plus probation. For Taylor, Crown counsel recommends a sentence of 12 months plus probation. The difference is the fact that Sutherland has 18 prior convictions for break and enter offences while Taylor has none. This fact alone, I agree, warrants some difference.

When two men, two men who are still relatively young as these two offenders, accumulate lengthy criminal records like these two have done, there really is no alternative to imprisonment. The fact that this case took so long to resolve, or the fact that the offence itself was not as serious as it could have been, do not change that. There are, however, some factors that require me to treat the two differently. And I must, of course, sentence

each of them individually since sentencing is very much a case-specific and a person-specific exercise.

With respect to both offenders, I take into account their guilty pleas as mitigating factors. While they are not as mitigating as they could have been - since they came late in the day and only just before trial - they are worthy of some consideration nevertheless. Those guilty pleas have saved time and expense for the administration of justice but, more significantly, they are indicators that these offenders are willing to take responsibility for their actions.

As I previously stated, the Crown recommends for Taylor a term of 12 months imprisonment to be followed by three years probation. Defence counsel for Taylor joined in that submission. While it was not proposed to me as a joint submission, it seems to me that whenever counsel adopt a common position as to sentence, whether by independent decision-making, by coincidence as it were, or as the result of plea negotiations, a sentencing Judge should defer to counsels' submissions provided that the sentence proposed is not unfit in reference to the normal range for such sentences, or an error in principle.

While I may consider 12 months to be on the low side of the acceptable range for this offence committed by Taylor, particularly having regard to his record, it is not, in my opinion, so low, having regard to his circumstances, as to be unfit or unreasonable. I say that because of what I heard about the progress Taylor has made since this offence in coming to grips with his substance abuse problems.

With respect to Sutherland, there was no agreement between Crown and defence. Crown counsel suggests a sentence of three to four years as a gross figure and then reduced by credit for time in pre-trial custody so as to bring the length of imprisonment to two years less one day. Crown counsel did not suggest what credit should be given for pre-trial custody. Defence counsel for Sutherland submitted that an appropriate sentence would be around two years and then, with the application of the usual two-for-one credit for pre-trial custody, that would reduce the actual sentence to one of time served.

First of all, is there a rationale for differentiating as between these two offenders? I have already said that there is - primarily because of Sutherland's more extensive and

related criminal record. What should that difference be? In my opinion, I do not think it can be, as Crown suggests, as much as two or three years. After all, there is nothing in the facts of this offence to differentiate between these two. The Crown does not allege that one of them took a more active role than the other. The only difference is in their records and, as I noted before, the progress that Taylor has made in the past 18 months. But, of course, Sutherland was in custody for much of that time.

All sentencing must focus on the circumstances of the particular offence and the circumstances of the particular offender. Here, the circumstances of the offence are the same. The only difference in the offenders is their related records. Sutherland's is more serious and therefore, in the interests of deterrence, he deserves a more serious severe sanction. I have concluded a gross sentence of two years would be appropriate.

From that sentence of two years, I must take into account time spent in pre-trial custody. The Criminal Code says that a sentencing Judge may take into account any period of pre-trial custody. It does not, however, provide a formula. But the Supreme Court of Canada has

held that ordinarily credit should be given because of the fact that pre-trial custody does not qualify for statutory remission as a regular sentence would, or in the calculation of parole, nor does a prisoner serving pre-trial custody normally qualify for programs. The Supreme Court has said that a normal rule of thumb, although always subject to the sentencing Judge's discretion, is a credit of two-for-one. And that is the normal procedure in this jurisdiction.

But the calculation of credit is still a discretionary matter. Even the Supreme Court of Canada stresses the sentencing Judge's discretion and the absence of a fixed formula. And, because the question of credit is an exercise of discretion, there is no closed category of factors that can be taken into account. It all depends on the circumstances of the particular case.

In this case, the offender Sutherland was arrested shortly after the offence in May 2006. He was released on a promise to appear. He failed to appear in court in August. He was arrested and released again. He then failed to appear for court in September. He was subsequently arrested on November 26th, 2006, and this time he was remanded in custody. He was

ultimately sentenced for his failures to appear. So, taking into account the elapsed time since his arrest, and deducting the time spent serving a sentence, Sutherland has spent 11 months in pre-trial custody. At a credit of two-for-one, that would leave a net sentence to serve of two months.

But, in my opinion, the reason why Sutherland was in pre-trial custody is a relevant factor to consider when exercising my discretion in fixing the credit for that period of time.

In this case, the reason why Sutherland was in pre-trial custody was his failure, not once but twice, to abide by the terms of his pre-trial release. To put it bluntly, it was his own fault. So I fail to see why that should attract the usual two-for-one credit.

Defence counsel has argued that in some ways it can always be said that the reason that an accused person is in custody is his own fault, either because of his record or inability to get bail. But this is why, as a discretionary power, it is open to the sentencing Judge to take into effect different factors and to give them what weight may be appropriate depending on the circumstances. No hard and fast rules can be laid down. So, for example, if someone cannot

get bail because they cannot raise the surety then there may be no reason not to credit pre-trial custody at the usual two-for-one factor. But, if someone is offered bail at reasonable conditions and then refuses it, that may be a different result. Or where, as here, someone was granted bail and then violated the conditions of it, why should he then be rewarded for his own deliberate conduct by being credited for the time he then spends on remand at a two-for-one ratio? I do not think there is any reason to credit that at the usual rate. The offender is not being penalized for his conduct. He is simply disentitled to a greater mitigation of sentence than he would have been if his pre-trial custody was a matter out of his control.

So, for these reasons I decline to credit the period of pre-trial custody at two-for-one. Instead, I think the appropriate credit is simply one-for-one. Therefore on a gross sentence of 24 months, that would result in a net sentence of 13 months.

Mr. Sutherland, Mr. Taylor, please stand.

Wade Sutherland, I sentence you to serve a term of imprisonment of 13 months.

Garry Robert Taylor, I sentence you to serve

a term of imprisonment of 12 months.

In addition, you will each be on probation for a period of three years following your release from imprisonment. The terms and conditions of that probation will be as follows:

1. You are to keep the peace and be of good behaviour.

2. You are to report to court if and when required to do so.

3. You are to report to a probation officer and be under the supervision of a probation officer.

4. You are to keep the probation officer informed of your address and occupation at all times.

5. You are to maintain employment, or be actively seeking employment, or be enrolled in an educational or work skills program.

6. You are to participate in any counselling as recommended by your probation officer.

7. You are to have no direct or indirect contact with the victim or any member of his family. And here, Ms. Gagnon, I will ask you to provide the specific names to the Clerk of the Court so they can be included in the probation order.

If you fail to comply with any of these terms or conditions, or if you breach any of them, you can be charged for that and you can be brought back to court and the terms and conditions can be changed; do you understand?

THE ACCUSED SUTHERLAND: Yeah.

THE COURT: Mr. Taylor?

THE ACCUSED TAYLOR: Yes.

THE COURT: You may sit down.

There will be no other orders, considering the circumstances, nor will there be a Victim of Crime fine surcharge.

Is there anything that I have neglected, Ms. Gagnon?

MS. GAGNON: Not that I can think of, Your Honour.

MR. HANSEN: Sir, the first reporting to the probation officer, I'm not sure...

THE COURT: Within 48 hours of their release. And that should be included in the probation order, Madam Clerk.

THE CLERK: Thank you, sir.

THE COURT: Mr. Falvo?

MR. FALVO: Nothing further, sir, thank you.

THE COURT: Thank you, counsel, for your submissions. We will close court.

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules,

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Lois Hewitt, CSR(A), RPR, CRR
Court Reporter