

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

GARY MILLER

Transcript of the Reasons for Sentence delivered by the Honourable Justice K. Shaner, sitting in Yellowknife, in the Northwest Territories, on 2nd day of October, 2015.

APPEARANCES:

Ms. K. Lakusta: Counsel for the Crown

Mr. P.J. Harte: Counsel for the Defence

Charges under s. 163.1(4)CC Criminal
Code of Canada

1 THE COURT: On August 19th, 2015, Gary
2 Miller pleaded guilty and was convicted of
3 possession of child pornography contrary to
4 Section 163.1(4.1) of the Criminal Code. That
5 offense carries with it a mandatory minimum
6 sentence of six months incarceration and a
7 maximum sentence of five years incarceration.
8 The Crown and the defence are very far apart in
9 what each views as a fit sentence in terms of the
10 custodial portion. The Crown seeks a custodial
11 sentence of 18 months to be followed by three
12 years of probation, and the defence supports
13 the probationary period, but suggests the
14 custodial portion of the sentence should be
15 closer to the length of the mandatory minimum.

16 An Agreed Statement of Facts was read into
17 the record at the sentencing hearing. Mr. Miller
18 was in possession of over 1,000 videos and still
19 images in electronic format, which meet the
20 definition of child pornography. He used various
21 file-sharing programs to download those images
22 over a number of years on a repeated basis and he
23 shared them with others using peer-to-peer
24 networks, which allowed others to view the videos
25 and images that he himself downloaded.

26 At the sentencing hearing, the Crown
27 presented a representative sample of the type of

1 child pornography found in Mr. Miller's
2 possession. These images varied in seriousness
3 by which they were rated; however, they were all
4 disturbing and, frankly, they were all very
5 sickening.

6 The children ranged in age, but they were
7 all just that: children. And they were being
8 abused and degraded in ways that defy
9 comprehension. In my view, they depict nothing
10 short of torture.

11 Mr. Miller gave evidence at the sentencing
12 hearing. He is 63 years old, and he is
13 originally from Ontario. He is well-educated.
14 He has no criminal record. He came North in the
15 mid 1990s, first to do temporary work, and then
16 this gradually turned into full-time work. He
17 rose up in the ranks of the mining industry,
18 eventually reaching the superintendent level,
19 something which carried with it a significant
20 financial reward. He had friends and a life in
21 Yellowknife. He also enjoyed a good relationship
22 with his son in Ontario, of whom he had shared
23 custody with his former partner and who is now an
24 adult.

25 All of that is now gone. Mr. Miller
26 described how being charged with, and now
27 convicted of, possessing child pornography has,

1 in his view, destroyed his family relationships.
2 Shortly after he was charged, his son wrote him a
3 letter and asked him never to contact him again.
4 He has since made contact with Mr. Miller again,
5 but he expressed that he remains very angry.
6 Mr. Miller lost his job. He is close to
7 financial ruin. This has fractured his
8 relationship with some of his own siblings, and
9 his social circle now consists of a mere handful
10 of individuals.

11 There are both aggravating and mitigating
12 circumstances that I need to take into account in
13 passing sentence on Mr. Miller. Although
14 Mr. Miller has been convicted of possession of
15 child pornography, it was admitted that he
16 participated in distributing the images and
17 videos, something which has been found to be an
18 aggravating factor in a number of cases. The
19 size and collection of the videos and images is
20 also aggravating. And as the Crown pointed out,
21 over half of these were videos depicting sexual
22 activity between adults and children, some of
23 them very young, and one of which depicted
24 bestiality.

25 These factors have been noted as aggravating
26 in a number of cases, including *R. v. Kwok* [2007]
27 OJ No. 457 and 2007 CarswellOnt 671, at paragraph

1 48.

2 There are a number of mitigating
3 circumstances in this case as well. Mr. Miller
4 entered a guilty plea, and he has accepted
5 responsibility for his actions. He pulled no
6 punches. This is borne out even further by the
7 fact that he arranged for and has attended
8 counseling aimed specifically at helping
9 individuals address their use of child
10 pornography. The counseling is highly
11 specialized, and it is not without cost, which
12 Mr. Miller has paid himself in the sum of
13 approximately \$8,000 as at the date of the
14 sentencing hearing in August.

15 Mr. Miller seems to have insight into what
16 led him to view child pornography and what he has
17 to do to ensure that he does not go down that
18 same path again. Of note in his testimony was
19 that upon reading the victim impact statement of
20 Vicky, which was filed by the Crown, he
21 appreciated, all be it, for the first time, the
22 extent of the harm caused by child pornography,
23 and that as a consumer, he was participating in
24 that abuse and harm. That realization came late,
25 but it did come, and it was acknowledged.

26 Mr. Miller also appeared truly remorseful
27 and willing to accept punishment including jail.

1 Mr. Miller is a first-time offender. In many
2 cases, I have noted that has been considered a
3 mitigating factor, but in my view, it is
4 misguided given the type of offense that this is.
5 People who consume child pornography do so in
6 secret. They do it quietly and from behind a
7 computer screen in the safety and privacy of
8 their own home. The case law is replete with
9 examples of people like Mr. Miller, a seemingly
10 typical, law-abiding upper middle class male, who
11 get caught after repeatedly downloading, viewing,
12 and sharing these horrible images, sometimes
13 thousands of times before they are finally found
14 out.

15 Unlike the victim of an assault or a
16 robbery, these victims cannot go to the police
17 and report the consumers. They have no idea who
18 is watching. All they know is that someone is.
19 Thus, it is not surprising that consumers like
20 Mr. Miller are discovered relatively rarely,
21 often through the tireless efforts of
22 investigators who have to cast a wide net and
23 often after engaging in this behaviour
24 repeatedly.

25 Accordingly I do not find the fact that
26 Mr. Miller is a first-time offender mitigating.
27 As I alluded to earlier, this has cost Mr. Miller

1 a great deal on a personal and financial basis.
2 His loss pales, however, in comparison to what
3 child pornography costs its victims.

4 As I noted, one of the exhibits that was
5 tendered by the Crown is a series of victim
6 impact statements from a young woman referred to
7 as Vicky, a victim of child pornography. She was
8 horribly abused by adults, some of whom were
9 adults she trusted. Images and videos of her
10 abuse continues to exist and be circulated on the
11 Internet and these images continue to be
12 downloaded. Some of them even showed up in
13 Mr. Miller's collection. Vicky continues to be
14 victimized by this, now a young adult.

15 Unlike an offender whose sentence will end
16 and whose criminal activity will inevitably fade
17 into oblivion, victims of child pornography
18 continue to be victimized and reminded of their
19 plight and experiences from the continual
20 production and consumption of child pornography.

21 As noted in the *R. v. Stroempl* [1995] OJ
22 No. 2772 and 1995 CarswellOnt 1775 at paragraph
23 9, primacy must be given to the principles and
24 objectives of general deterrence and denunciation
25 in cases of possession of child pornography.
26 This was also noted by the Alberta Court of
27 Appeal in *R. v. Andrukonis*, 2012 ABCA 148, 2012

1 CarswellAlta 864 at paragraphs 30 and 31.

2 Child pornography, it has been noted in many
3 of the cases, exists only because there is a
4 market for it. Downloading it, possessing it,
5 and sharing it allows that market to flourish,
6 and it encourages the production of even more
7 which, in turn, encourages the degradation,
8 humiliation and torture of children. Thus the
9 Courts must consistently send out a strong
10 message that possessing it, just possessing it,
11 will attract meaningful penal consequences.

12 The cases submitted by the Crown suggest
13 that a custodial sentence significantly higher
14 than the six-month mandatory minimum is warranted
15 in these circumstances. In my view, the
16 objectives of denunciation and deterrence would
17 not be met by a sentence which is close to the
18 mandatory minimum. That should be reserved for
19 the least serious cases, of which this is not
20 one, given the nature and volume of the material
21 in Mr. Miller's possession, and given that he
22 allowed it to be shared.

23 The 18 months custodial sentence sought by
24 the Crown is within the appropriate range, even
25 given the guilty plea; however, I do think that
26 Mr. Miller's efforts in seeking out,
27 participating in, and paying for treatment which,

1 as I said, began without waiting to be sentenced,
2 are commendable and should be reflected in a
3 sentence that is somewhat less than what the
4 Crown seeks. In my view, a custodial sentence of
5 16 months, followed by 3 years of probation is
6 appropriate in this case.

7 Mr. Miller, would you please stand up. Gary
8 Miller, for the crime of possessing child
9 pornography, you are sentenced to a period of 16
10 months' incarceration to be followed by 3 years
11 of probation, the terms of which I will explain
12 to you presently. Do you understand?

13 THE ACCUSED: Yes, I do.

14 THE COURT: You may sit down. From the
15 custodial portion of your sentence, Mr. Miller,
16 will be deducted the time you have spent awaiting
17 sentence to be imposed since your conviction on
18 August 19th, 2015, being 44 days, and that will
19 be credited to you at a rate of 1.5 days for each
20 day spent in custody; thus amounting to a total
21 of 66 days or 2 months and 6 days. And that will
22 be deducted from your sentence. Leaving you with
23 time to serve of 13 months and 24 days in
24 custody.

25 The terms of the probation I am going to
26 impose will be as follows: You will report to
27 Probation Services within two business days of

1 your release from prison, and after that, as
2 directed by the probation officer. You will keep
3 the peace and be of good behaviour, and you will
4 appear in court as required. You will notify
5 your probation officer or the Court of any change
6 of address, employment, name, or occupation. You
7 will abstain absolutely from viewing pornography
8 of any form, be it print, film, video, or other
9 electronic means.

10 You may possess a computer, laptop, tablet
11 or handheld device with access to the Internet.
12 I think that it is unrealistic to expect that a
13 person can function without access to the
14 Internet in this day and age. However, you will
15 not use any of those devices to access
16 pornography of any form on the Internet or other
17 digital network, and you shall surrender any of
18 those devices to the RCMP, your probation
19 officer, or any other authorized individuals upon
20 demand for inspection. As well, you will
21 surrender your passwords and user IDs as
22 required. You will attend treatment as directed
23 by your probation officer and subject to being
24 accepted into the treatment program or programs.

25 I am now going to turn to the ancillary
26 orders that the Crown requested. The Crown
27 requested a DNA order, and you will be required

1 to submit to the collection of bodily fluids for
2 DNA analysis, and you will also be required to
3 comply with the terms of the *Sex Offender*
4 *Information Registry Act*, and that will be in
5 effect for ten years.

6 There will be an order that the materials
7 and items seized in the course of this
8 investigation be forfeited, and, as I indicated,
9 I will execute the forfeiture order that the
10 Crown has filed or submitted to me today.

11 The Crown asked for an order under
12 Section 161 of the Criminal Code. I will make an
13 order under Section 161(1)b, c, and d, under
14 which you will be prohibited from seeking,
15 obtaining, or continuing any employment, whether
16 remunerated or not, or volunteer activity in any
17 capacity that involves being in position of trust
18 or authority in relation to a person under 16
19 years of age. You will have no contact by any
20 means with a person under 16 unless you do so
21 under the supervision of a person approved by the
22 Court or, if this happens during the period of
23 your probation, your probation officer.

24 Once your probation period has ended, the
25 condition requiring you not to use your
26 electronic devices or digital devices to access
27 pornography on the Internet or other digital

1 network will continue, and that order will be in
2 effect for ten years.

3 Crown and defence, is there anything else?

4 MS. LAKUSTA: I believe that is everything
5 from the Crown, thank you.

6 THE COURT: Mr. Harte?

7 MR. HARTE: Yes, Your Honour, I just
8 wanted to be clear. The order in relation to
9 employment or volunteer position, contact with
10 anyone under the age of 16 without supervision,
11 and pornography, that's all in place for ten
12 years?

13 THE COURT: Yes, that is in
14 place for ten years following today.

15 MR. HARTE: Thank you, Your Honour. I
16 have no comments. Thank you.

17 THE COURT: Very well.

18 Ms. Lakusta and Mr. Harte, I will take the
19 forfeiture order with me and execute it, and I
20 will provide it to the clerk to be distributed to
21 you.

22 MS. LAKUSTA: Thank you.

23 MR. HARTE: Thank you.

24 THE COURT: We are adjourned.

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26 **PROCEEDINGS CONCLUDED OCTOBER 2, 2015**

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CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 13th day of October, 2015.

Certified Pursuant to Rule 723
of the Rules of Court



Morgan Biggs
Court Reporter