Citation: *R.* v. *Bourne*, 2009 YKTC 133

Date: 20091124
Docket: 08-00788
Registry: Whitehorse

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

REGINA

v.

JOHN WAYNE BOURNE

Appearances:
Noel Sinclair — Appearing for Crown
Gordon Coffin — Appearing for Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): In November of 2006, John Wayne Bourne was found in possession of 43 Tylenol 4 tablets. These tablets contain codeine. Mr. Bourne was charged with possession of the tablets. Some time later, based on an opinion from an RCMP expert, a second Information was laid charging Mr. Bourne with possession of the tablets for the purpose of trafficking.

[2] Subsequently, Mr. Bourne provided his legal counsel with a prescription, apparently issued to Mr. Bourne, for 30 Tylenol 4 tablets. Counsel forwarded the prescription to Crown counsel requesting the charges be withdrawn. As the

prescription was for 30 tablets and Mr. Bourne had possessed 43, the charges were not dropped. However, based at least in part on the prescription provided, the Crown elected not to proceed with the possession for the purpose of trafficking charge but contented itself with a guilty plea to the charge of simple possession.

[3] At sentencing, Mr. Bourne was dealing with the possession of a controlled drug charge as well as an unrelated mischief charge. In speaking to the drug charge, Crown counsel submitted, firstly, that Mr. Bourne had been found with 43 pills in his possession but also said as follows:

> At the time, he was asked whether he had a prescription; his answer wasn't really given to that particular question. …
>
> It later came to the knowledge of the police and the Crown that Mr. Bourne indeed had a prescription, but for a number of 30 pills, Your Worship (sic), making his possession of 13 pills over that limit unlawful, pursuant to the *Controlled Drugs and Substances Act*, and that's what he's to be sentenced on today ….

Later in his submissions, Crown counsel said the following:

> … it's not a case where Mr. -- it was absolutely unlawful for Mr. Bourne to possess. He did have a prescription for the -- for the drugs that he was in possession of at the time, but his possession exceeded the limits set out in that prescription. So therefore, I would submit [that] this makes the matter a little less serious than if it was out and out possession.

[4] For his part, defence counsel said the following to the Court, and I quote:

> Dealing first with the possession charge, Mr. Bourne was having problems with his teeth before he got a prescription from the doctor. It took him some time to get in to see the doctor. He did purchase some Tylenol 4's, he then got the prescription filled, put all the pills in one package, one container, and that's what he was found with, so they were in

> excess of the 30 pills of Tylenol 4 that he was to be in possession of, or that he had a prescription for. I would submit that based on that, and considering his record, the excuse he had, although he had no excuse to purchase the pills other than through a prescription, a fine in the amount of $100 would be appropriate, with a victim fine surcharge.

[5] At the sentencing hearing defence counsel tendered the prescription to the Court as an exhibit. However, it was not actually marked and at the conclusion of the proceedings, the Court directed that it be returned to counsel. Mr. Bourne ultimately was fined $400 and a $60 surcharge for possessing the 13 Tylenol 4s.

[6] Clearly, the Court proceeded on the basis that Mr. Bourne only illegally possessed 13 pills, as he had a prescription for the remaining 30. I quote from my decision, since I was the sentencing judge:

> … it is true that we are only talking about 13 Tylenol 4's ….

[7] The prescription that led to this erroneous conclusion later proved to be a forgery and Mr. Bourne has now entered a plea of guilty to the following charge:

> On or between January 19th, 2007 and [the] 27th day of April, 2007, at or near Whitehorse, Yukon Territory, did unlawfully commit an offence in that: he did wilfully attempt to obstruct the course of justice in a judicial proceeding by producing a fraudulent prescription, contrary to Section 139(2) of the Criminal Code.

[8] It goes almost without saying that obstruction of justice is a very serious matter, striking at the heart of the court process. Such an offence calls for a sentence which will deter and denounce such conduct.

[9] In Mr. Bourne's case, there was a fraud perpetrated on the Court. It was premeditated and required some degree of sophistication on his part. Moreover, it was a fraud that worked. The prescription influenced the exercise of the Crown's discretion, influenced the representations made to the Court by both counsel, and influenced the Court's ultimate sentencing decision in Mr. Bourne's favour.

[10] It is true that the charge faced by Mr. Bourne was not the most serious of charges; nonetheless, the potential difference in outcome was substantial. Mr. Bourne clearly faced a jail sentence if convicted on the possession of the purpose charge. Even if he had only been convicted of simple possession (but without any prescription and for all 43 pills), there may also have been a custodial sentence, though clearly of much less duration, since Mr. Bourne had a prior related conviction for which he had received a short sentence of imprisonment.

[11] It was argued that obstruction of this kind is less serious than perjury, and reference was made to several cases where that proposition is, indeed, set out in the judgment. I must confess to some degree of difficulty with this proposition. Testimony given by a witness may or may not be believed, however, documents tendered by a party are often given considerable weight, particularly whereas here, they purport to be authored by a professional person in the ordinary course of business. In this case, it is clear that counsel relied on the document and the Court relied on it.

[12] At the time of the commission of this offence, Mr. Bourne had less of a criminal record than he now possesses and that must be kept in mind in sentencing. It was later in 2007 that he was convicted of serious drug and firearms offences resulting in

an overall sentence of 33 months. While that sentence has not yet expired, Mr. Bourne had been released on parole when he was re-arrested on the obstruction of justice charge.

[13] In my view, this case is most similar to the cases of *R.* v. *Taft*, [2003] B.C.J. No. 444, and *R.* v. *Carter*, [2004] B.C.J. No. 633, in that those cases also involved fraudulent documents put before the Court for sentencing purposes. It should be noted, however, that in *Taft*, the deception was discovered before sentencing. In *Carter* it was not, and, as here, the forgery was relied on by the Court in making its disposition. Mr. Carter received two years in addition to a credit of four months for time served. On the other hand, it also appears that Mr. Carter had a much more extensive prior criminal record.

[14] The case of *R.* v. *Corbett*, [2006] B.C.J. No. 1211, is also somewhat factually similar. In that case, Mr. Corbett prepared an affidavit including a forged letter from an employer. The affidavit was tendered to the court to be used on an application to vary bail conditions. As in *Taft*, the forgery was discovered and was not relied upon and the bail variance application did not proceed. Sentenced to 18 months at trial, Mr. Corbett's sentence was reduced to one year on appeal to the Court of Appeal.

[15] Given the success of Mr. Bourne's endeavours, I believe that a fit sentence in this case would fall somewhere between that handed out to Messrs. Corbett and Carter. Thus a fit sentence, in my view, would be in the order of 15 to 18 months imprisonment.

[16] Mr. Bourne is entitled to credit for the time already spent in custody, which now totals 197 days. Grossed up at the usual rate of 1.5 to 1, that time would result in a credit just short of ten months. The credit calculation here is complicated somewhat by the fact that Mr. Bourne has not yet completed his existing penitentiary sentence. While it is true that Mr. Bourne was on parole prior to his arrest on this charge, nonetheless he has, while in remand, been moving toward the expiry of his existing sentence. Thus he has been incarcerated when, assuming his parole proceeded without problem he would not have been in jail. Still the time has not been entirely attributable to this charge because it has brought him 197 days closer to the end of his existing sentence.

[17] While the point is an interesting one, I will leave for another day in full argument by counsel the effect of any these circumstances should have on credit calculations.

[18] In the result, I impose a sentence of 15 months but allow ten months credit for time already served, leaving a remanet of five months yet to be served. Since I direct it to be consecutive to his existing sentence, I have taken totality into account.

[19] The surcharge is waived.

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FAULKNER T.C.J.