

Citation: *R. v. Harvey*, 2018 YKTC 32

Date: 20180727
Docket: 17-00515
17-00515A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Lambert

REGINA

v.

GAGE ERIC HARVEY

Appearances:

Keith D. Parkkari

Gregory Johannson

(Agent for Malcolm E.J. Campbell)

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] LAMBERT J. (Oral): Gage Harvey has pleaded guilty to one count of robbery, contrary to s. 344, which occurred on November 5, 2017, and one count of breach of recognizance for failing to report to a bail supervisor on November 22, 2017, shortly after his release on bail.

[2] The facts that gave rise to the charge of robbery are set out in an Agreed Statement of Facts, which provides as follows:

1. Gage Harvey was employed at the Whitehorse Save-On-Foods Store stocking shelves on Friday, Saturday and Sunday nights during October and early November, 2017. Following his night shift on Sunday, October 22,

2017, managers at the store discussed dismissing Mr. Harvey due to performance and attitude issues.

2. On Tuesday, October 24, 2017, Mr. Harvey was terminated from the Save-On-Foods payroll and his access code for the store's secure doors was deactivated. There were several secure doors at Save-On-Foods and every employee selected their own code for use to gain entry through these doors.
3. Mr. Harvey was never told that he had been dismissed from Save-On Foods because store managers decided to give him another chance to show that he could improve his performance. The decision not to dismiss Mr. Harvey was not communicated to the payroll department however, and his store access code was not reactivated.
4. When Mr. Harvey arrived for work at 10:03 pm on Friday October 27, 2017, he was not able to gain entry to the store because his personal access code had been deactivated.
5. Between Friday October 27 and Sunday November 5, 2017, Mr. Harvey either had other employees provide him access to the store, or he used other employee's codes to gain entry through the store's secure doors. Specifically, he used Patrick Adams's secure access code to enter the E-commerce/Employee entrance shortly after 10:00 pm on Friday November 3, 2017.
6. The cash office at Save-On-Foods is located just inside the Ecommerce/Employee entrance door which faces the customer parking lot.
7. The cash office regularly contained cash required for the daily operation of Save-On-Foods. When the store is open for business there is money at each till and there is also money held in a large, compartmentalized safe in the cash office for use when tills have to be replenished. The store has a video surveillance system which records the cash office.
8. Only store managers and people who worked in the cash office had access to the cash office using their specific codes. Regular employees were not given access to the cash room nor the safe. A unique code is required from each person authorized to enter the safe. Mr. Harvey did not

have authorization to enter the cash office or the safe, and he had no work related reason to enter the cash office.

9. At 6:06 am on Sunday, November 5, 2017, Mr. Harvey entered the cash office using the access code of assistant manager Mr. Adams. Inside the cash office, Mr. Harvey placed a small camera under a desk and focused the lens towards the safe. He then left the cash office.
10. Vanessa Blake was employed by Save-On-Foods and she was working on Sunday, November 5, 2017. She had responsibilities associated to the cash office. She first entered the cash office at 5:42 am that morning but, she was elsewhere in the store when Mr. Harvey entered the cash office and placed his camera.
11. At 6:10 am, shortly after Mr. Harvey left the cash office, Ms. Blake returned and continued with her work which included opening the safe using her unique safe code. Her safe code was visible and recorded on the camera placed in the room by Mr. Harvey.
12. At 6:57 am, Ms. Blake observed the camera under the desk and picked it up however she did not recognize it as a video camera and she set it down on the desk.
13. At 7:23 am, while Ms. Blake was again out of the room, Mr. Harvey re-entered the cash office using Mr. Adams's access code. He retrieved his video camera from the desk.
14. At 11:17 am, while dressed in black, wearing gloves, and with his face partially covered, Mr. Harvey entered the E-commerce/Employee entrance at Save-On-Foods and he entered the cash office. The access code belonging to Mr. Adams was used to gain entry through both doors. Ms. Blake was not inside the cash office when Mr. Harvey entered.
15. Once inside the cash office, Mr. Harvey used Ms. Blake's safe code and unlocked the compartment of the safe where the daily float is kept. Mr. Harvey took the bills and coins and put them inside a black backpack he was carrying. He then tried to access the bottom compartment of the safe but because a key held by the armoured car service is required to unlock it he was unsuccessful.

16. Mr. Harvey then moved to the top compartment of the safe which he was successful in opening and he removed cash in the amount of \$7059.00. He put the cash in his backpack.
17. At this point, Ms. Blake re-entered the office. Mr. Harvey immediately pulled out a replica hand gun which was actually a functioning BB gun, and he told Ms. Blake to get out of the way. When she did not do so immediately, Mr. Harvey shot a BB at the wall to the right of Ms. Blake and then he shoved her aside and left the cash office. In her statement to police, Ms. Blake stated that she thought the gun was a fake, and then he fired it and nothing came out that she was aware of. She thought it had the sound of an air pellet gun.
18. Mr. Harvey fled the store through the E-commerce/Employee entrance and turned right and ran towards the south along the side of the store towards the back of the parking lot. He left the area in his own vehicle.
19. At approximately 2 pm on Wednesday, November 8, 2017, Cst. Kelly Manweiller arrested Mr. Harvey in the parking lot at the Qwanlin Mall. Mr. Harvey was inside his car eating pizza and handling \$100.00 bills at the time of his arrest. Mr. Harvey's car was secured and towed to an RCMP secure bay for a subsequent search under authority of a warrant.
20. In a warned statement provided following his arrest, Mr. Harvey initially denied responsibility for the robbery but after he was confronted with Save-On-Foods video surveillance footage he confessed and told Cst. Manweiller that he had committed the robbery. He also stated that the video camera and pellet gun were in a safe in his car.
21. On Wednesday, November 15th, 2017, Mr. Harvey's black 2005 Toyota Avalon was searched by police. Numerous items linking Mr. Harvey to the robbery at Save-On-Foods were seized, including:
 - \$400.00 in cash from the passenger side floor;
 - A "Sentry" brand safe containing a roll of five dollar bills totaling \$100.00;
 - a loaded BB gun powered by CO2 which resembles a hand gun;

- a small video camera containing footage from Save On Foods and an envelope with written numbers matching the combination for the safe at Save On Foods
 - A cash box containing \$1005.00 in five dollar bills;
 - A wallet containing \$1200.00 in one hundred, fifty and twenty dollar bills;
 - Black sunglasses which were similar to the ones Gage HARVEY was wearing during the robbery;
 - A box of CO2 cartridges and a container of "Copperhead" brand BBs
22. The total amount of cash seized from Mr. Harvey was \$2705.00.
23. On Friday November 15th, 2017, deleted images were recovered from the video camera that had been found in the safe inside Mr. Harvey's vehicle.
24. The camera contained recorded images of Ms. Blake entering her access code into the safe. The video also shows that Ms. Blake picked up the camera and looked at it before she set it down on the desk in the cash office.
25. Another video recovered from the same camera shows that Mr. Harvey also positioned the camera to record the safe in the office at Mark's Work Warehouse, the other place he was employed.
26. The manager of Mark's confirmed to investigators that Mr. Harvey had been left alone in the Mark's office and would have had an opportunity to set up the camera however nothing had yet been taken from their safe.
27. Production Orders were obtained for Mr. Harvey's Royal Bank and CIBC accounts. Transaction records show that on Monday, November 6, 2017, Mr. Harvey deposited \$1000.00 cash into one of his RBC accounts and \$800.00 cash into his CIBC account. He also "loaded" \$200.00 onto a CIBC Prepaid Visa credit card.

[3] The facts on the charge of breach of recognizance speak for themselves and do not need elaboration. Suffice it to say that I have not been advised that further charges have been incurred since his release.

[4] Crown counsel seeks a sentence of three years in the penitentiary, along with the required ancillary orders. Defence counsel seeks a suspended sentence and probation for three years, along with the ancillary orders. In my view, both positions are untenable and these are my reasons why.

[5] The principles of sentencing have been codified in ss. 718 to 718.2. It is important to quote from those now so that the sentence can be properly understood.

[6] Section 718 provides as follows:

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[7] Section 718.1 provides as follows:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[8] Section 718.2 sets out the principles of sentencing. Section 718.2(e) is of particular importance here and it provides as follows:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[9] As Arthur-Leung J. indicated in the decision of the *R. v. Bajwa*, 2016 BCPC 445, at para. 18:

...Sentencing is an art and unless there is a requirement such as the mandatory sanction or a minimum, it must be crafted taking into consideration the principles of sentencing, the facts before the sentencing judge, and the circumstances of the offender and of the offence itself.

[10] When dealing with young first-time offenders, such as Mr. Harvey, the principle of restraint enunciated in s. 718.2(e) of the *Code* is most important. The competing factors here are that we are dealing with an extremely serious offence which involves some element of planning but which was committed by a young person, being 18 years of age, who had no prior criminal record.

[11] Counsel have referred me to a number of cases, including *R. v. Brogan*, 1999 BCCA 278, a decision which provides the range of sentencing for these types of offences as two to nine years of incarceration.

[12] The Court had this to say at para. 10 of its decision, however:

We have been given a number of cases where robbery with violence has been committed by young men such as Mr. Brogan. An analysis of the range produced by these cases is that the sentencing range is somewhere between 2 and 9 years. The age of the offender, his previous criminal experience, the level of violence, the number of offences, the level of premeditation, whether the perpetrator was disguised or not, the type of weapon used and how it was used, the possibility of rehabilitation, the requirement of deterrence in a particular community, are some of the factors which serve to distinguish one fact pattern from another. None of the cases drawn to our attention fits Mr. Brogan's situation exactly, none could.

[13] The balance of cases quoted by counsel simply reflect that no two cases are alike. In support of its position, the Crown relies on the following cases:

- *R. v. Cornell*, 2007 YKTC 41
- *R. v. Tattersall*, 2016 BCPC 81
- *R. v. Brogan*, 1999 BCCA 278
- *R. v. Davidson*, 2009 BCCA 485
- *R. v. Beattie*, 2015 BCCA 335
- *R. v. Abdulhakim*, 2014 ONSC 495

[14] In *Cornell*, Faulkner J. was dealing with a 25-year-old who pleaded guilty to a charge of robbery and a charge of disguise with intent. The weapon used was a knife. Faulkner J. imposed a sentence of three years in the penitentiary. This case is easily distinguished from the case at bar, when one considers para. 6 of the decision, which provides as:

In this case it is the situation of the offender that really lifts the matter beyond the reach of the precedents cited and most of the robbery cases that I have dealt with. The reason is that Mr. Cornell is, in my view, a career criminal. Though he is only 25 years old, he has a four-page criminal record. It is not only lengthy but is serious, persistent, and, in many instances, related to the present circumstances. Moreover, it appears that these offences were committed within days of Mr. Cornell's release from penitentiary on statutory release, and it must be noted that exactly the same things occurred on Mr. Cornell's release prior to the one before the robbery, that is to say that he committed a new and serious offence within days.

[15] In *Tattersall*, a 31-year-old Métis first-time offender pleaded guilty to robbery, disguise with intent, and a weapons dangerous charge. He robbed a bank using an unloaded pellet gun and made off with a \$3,400. Doulis J. imposed a sentence of two years less one day. In my view, important distinguishing factors here are the age of the accused and the presence of *Gladue* factors.

[16] In *Davidson*, the British Columbia Court of Appeal effectively imposed a three-year sentence for a 25-year-old who pleaded guilty to one count of robbery. He was attempting to obtain painkillers. He had a lengthy criminal record and had been in custody before.

[17] In *Beattie*, the British Columbia Court of Appeal reduced a five-year sentence on a charge of attempted robbery using a sawed-off shotgun, a prohibited weapon. It was reduced to three and one-half years for a 22-year-old who had 26 prior convictions, including a prior conviction for robbery. Obviously, this case is easily distinguished from the case at bar.

[18] Finally, in *Abdulhakim*, Thorburn J., after trial, imposed a sentence of two years less one day for charges of robbery, use of an imitation firearm during the commission of an offence, and disguise with intent for a 26-year-old first-time offender. The victim in that case sustained some bruising. It is important to note that the sentence on the robbery was one year in jail, as there was a mandatory sentence of one-year consecutive for the charge of use of a firearm, contrary to s. 85.

[19] In support of his client's position, Mr. Campbell relies on the following cases:

- *R. v. Bajwa*, 2016 BCPC 445
- *R. v. Marks*, 2016 BCCA 480
- *R. v. Koop*; *R. v. Stoneman*, 2008 BCCA 140

[20] In *Bajwa*, Arthur-Leung J. imposed a sentence of six months in jail followed by probation for 12 months for a 22-year-old man who pleaded guilty to committing a robbery with a steak knife and making off with \$1,462. The robbery was an act of revenge against his employer and involved some planning. It is important to note that he had no prior record.

[21] In *Marks*, Mr. Campbell relied heavily in his submissions on the dissenting opinion of Madam Justice Newbury. Mr. Marks was 18 years of age and pleaded guilty to one count of robbery using an imitation firearm. He had no prior criminal record. His position was that he committed the robbery to satisfy drug dealers who were harassing him after he left the business of selling drugs himself. He had completed his high school education and had received counselling since the commission of the offence.

The trial judge imposed a sentence of 12 months in jail, followed by probation for two years.

[22] On appeal, Madam Justice Stromberg-Stein, for the majority, had this to say at para. 38 of the judgment:

This sentence was less than the lower end of the range of sentences for robbery set out in *Brogan*. I agree with the Crown that the fact that the appellant was young, had no criminal record, entered a guilty plea and took the steps he did to rehabilitate himself since the offence provides explanation for why the sentence was not longer for such a serious, violent offence. While sentencing ranges offer guidance, but are not determinative, I cannot say that in these circumstances the one year custodial sentence was demonstrably unfit. I do not agree that *Stoneman* is instructive in this case. A conditional sentence order is not an available option in this case. Further, in *Stoneman*, the Crown had conceded that the sentencing judge erred in failing to give sufficient weight to rehabilitation (para. 13), thereby inviting appellate intervention. That is not the case here. The judge weighed the relevant sentencing factors, including rehabilitation, and did not err in his exercise of discretion.

[23] In dissent, Madam Justice Newbury indicated that this was a truly exceptional case and she would have suspended the sentence and placed the young man on probation. For that proposition, she relied on *Koop* and *Stoneman*, where the Court imposed a conditional sentence of imprisonment of two years less one day on two young men who had pleaded guilty to two robberies within a relatively short period of time. At first instance, the judge had imposed a sentence of two years less one day.

[24] Obviously, because of changes to the *Code* since, a conditional sentence of imprisonment is no longer available for this type of an offence. Having said that, courts have long-insisted, rightfully so, that a conditional sentence of imprisonment is indeed a

period of incarceration, albeit served in the community. It is not merely a probation order. In any event, I stress that Madam Justice Newbury's opinion is a dissenting one and I must be guided by the majority opinion.

[25] I will now turn to this offence and this offender.

[26] Mr. Harvey committed the offence exactly one month after he turned 18 years of age. The psychological assessment prepared by Nicole Bringsli, though dated, as it was prepared in October 2016, provides highly relevant information about him. He has been in the care of Family and Children's Services since he was 16 years of age and he is now residing in a group home. There is no doubt that he has had a difficult upbringing, finding himself, for the first time, in foster care at one month of age and then having been subjected to chaotic and inconsistent parenting from his mother, who was facing her own struggles. His father, who had mental health issues, was basically absent from his life.

[27] The psychologist opines that as a result of the difficult upbringing and trauma which he suffered growing up, he suffers from post-traumatic stress disorder (PTSD) with bouts of depression as well. It is important to note that this diagnosis is made by a psychologist and not a psychiatrist. Nevertheless, I have no difficulty in concluding that Mr. Harvey suffers from the sequelae of a very difficult upbringing.

[28] What is clear from the report is that Mr. Harvey is very intelligent. He is a very industrious young man who is struggling to be in a better place. He has shown some reluctance in having others guide him through these difficult years no doubt because, to use the vernacular, he has been "burnt" by other adults in his life in the past.

[29] Although he has admitted to consuming alcohol and drugs at a young age — even selling drugs at one point in time — that does not appear to be a current issue.

[30] He has now obtained his Grade 12 diploma and would like to attend college for upgrading and eventually make a career in the music industry, where he is said to have some talents.

[31] It is regrettable that the Court did not have the benefit of a pre-sentence report or more detailed information about his current circumstances. All I know is that he will no longer be in care as of October of this year, due to his age, and that his general plans are to attend college in the fall for upgrading with the long-term goal of attending Seneca College in Toronto for music engineering.

[32] The email from Mary Ellen O'Brien, who has been his social worker since April 2016, indicates that he has struggled more with mental health since the date of the offence and he is now getting some help in that regard. She also states that Gage often wants to do everything himself but is slowly realizing that support is the key step to moving forward in his life.

[33] I have no doubt that if Gage opens up to those who are there to help him and cooperates with them, he can do great things. He has the intelligence and the drive to succeed but he must let go of the past to the extent that that is possible.

[34] The mitigating factors here are obvious. Mr. Harvey is 18 years of age. He has no record. He has pleaded guilty to this offence, which I accept as an indication of

remorse on his part. He has completed his Grade 12 diploma. He is very intelligent and seems to have a very good work ethic.

[35] On the other hand, this is a very serious offence which involved some planning and gaining access codes from other employees. He returned to the cash room at Save-On-Foods on three occasions: once to plant the camera to surreptitiously record the combination for the safe, a second time to retrieve the camera and a third time to commit the actual robbery. The fact that this was a theft gone wrong because he went into an empty room to steal the money is juxtaposed with the fact that he was in possession of a weapon (the pellet gun) which he, in fact, discharged into the wall in the presence of Ms. Blake. As was evident from the Victim Impact Statement of Ms. Blake, this incident has had a great impact on her, which continues to this day. Mr. Harvey also wore a disguise to avoid detection.

[36] It should also be stressed that this was a breach of trust, as Mr. Harvey was employed by Save-On-Foods. The robbery netted him \$7,059 of which \$4,995 remains outstanding. At the time of his arrest, \$2,705 was recovered.

[37] The Crown has characterized this as a crime of greed, as Mr. Harvey was otherwise employed.

[38] For the first time during the submissions of counsel, Mr. Harvey indicates that he was under some form of duress, though not enough to afford him a defence, because he had been threatened by a former stepfather to give him some money. This person, who Mr. Harvey had not seen for many years, confronted him here in Whitehorse by pointing a gun at his head just before the offence was committed and asking him for

money. At that time, Mr. Harvey gave him \$60, which was all he had. The former stepfather, a Mr. Newcomb (phonetic), told him that he wanted a lot more than that or else. He had been an extremely abusive stepfather to him and his mother. Mr. Harvey says through his counsel that, following the robbery, he gave Mr. Newcomb a substantial amount of money and that he has not seen him since.

[39] I do not put much credence into that story, as it was never disclosed until the sentencing hearing, such that it could have been explored properly by the Crown. It may be that Mr. Harvey would have chosen not to report this at the time it occurred for fear of retribution, but the fact that he has not seen this person since and the fact that he never disclosed this at the time of his arrest or during the time leading to this sentencing hearing weigh heavily in my not putting much credence into the story.

[40] Mr. Harvey has had some part-time employment since the commission of the offence and hopes to find employment which would help him to pay the restitution order, which would form part of the probation order.

[41] The only family support that he can count on at this time is from his sister, Paris, with whom he has resided on occasion here in Whitehorse. She is still living in this community.

[42] I hearken back to say what I said at the outset. Sentencing is an art which involves the consideration of many factors.

[43] I accept that when dealing with first offenders, rehabilitation must be at the forefront of the Court's considerations, but not to the exclusion of all other principles of sentencing. I also accept that restraint is most important for first-time offenders.

[44] The sentence proposed by the defence, if accepted, would mean that I have paid no attention at all to the proportionality principle, as set out in s. 718.1, and to the principles of general and specific deterrence.

[45] On the other hand, if accepted, the sentence proposed by the Crown would mean that I have completely ignored or disregarded the prospect of rehabilitation and the principle of restraint. It would give no credit at all to Mr. Harvey for pleading guilty to these charges.

[46] Having considered all of the mitigating and aggravating factors already referred to, I am of the view that a sentence of one year in jail for the charge of robbery would be an appropriate sentence in this case.

[47] On the charge of breach of recognizance, it will be one month concurrent to the charge of robbery. This will be in addition to any pre-sentence custody that Mr. Harvey has served.

[48] Mr. Harvey will need some support following his release from custody. For that reason and for the purpose of payment of restitution, I will also place him on probation for three years, once he is released from custody, on the following conditions:

1. Keep the peace and be of good behaviour;

2. Report to a Probation Officer within two (2) working days immediately upon your release from custody, and thereafter, when and in the manner directed by the Probation Officer;
3. Make restitution by paying into the Territorial Court the amount, that is, the \$7,059 less the \$2,705, which was recovered from him, in trust for Save-On-Foods at the rate of \$200 per month starting on the first day of the month following 60 days from his release from custody — so that he get back on his feet — and to continue on the first day of each and every month thereafter until fully repaid;

[49] Save-On-Foods has requested restitution of \$33,370.02, which includes what I would qualify as "soft costs", which are not fully explained. The restitution order should reflect what was stolen and not recovered. In addition to that, the restitution order should not be so crushing to detrimentally affect the prospect of rehabilitation of a young person. It is for that reason that the restitution order will be limited to the monies that have not been recovered.

4. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;
5. Not to attend Save-On-Foods or Mark's Work Wearhouse; and

6. Have no contact directly or indirectly or communication in any way with Vanessa Blake.

[50] There will be a mandatory s. 109 order. Mr. Harvey will be prohibited from having in his possession any firearms, ammunition, explosive substances, or any weapons as defined by the *Criminal Code*, for a period of 10 years.

[51] On the charge of robbery, DNA will be ordered. This is a primary designated offence.

[52] Orders made on the charge of breach of recognizance as well, as it is a secondary designated offence.

[53] On the charge of robbery, the victim surcharge of \$200 must be imposed. On the breach of recognizance, a fine of \$100 will be imposed. Total fines payable amount to \$300. Given the period of custody and given the restitution, Mr. Harvey will be given two years to pay the victim surcharges.

[54] Finally, there will be an order under s. 491, a forfeiture order, of the pellet gun and ammunition for disposition by the Crown.

[55] Crown has directed a stay of proceedings on Count 2, the remaining charge of disguise with intent, contrary to s. 351(2) of the *Criminal Code*.

LAMBERT T.C.J.