Citation: *R.* v. *J.D.O.*, 2009 YKYC 5

Date: 20091119
Docket: 09-03528A
09-03527B
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

J.D.O.

Publication of identifying information is prohibited by s. 110(1) of the *Youth Criminal Justice Act*.

Appearances:
Judy Bielefeld — Appearing for the Crown
Karen Wenckebach — Appearing for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): J.O. was convicted after trial on a charge contrary to s. 348(1)(b) of the *Criminal Code* and s. 137 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, for failing to keep the peace and be of good behaviour in relation to the same incident. He has also entered guilty pleas to a s. 334(b) *Criminal Code* charge and a s. 137 *Youth Criminal Justice Act* offence.

[2] The circumstances of the offences are that on June 14, 2009, through video-imaging, J.O. was observed attempting to steal a television set with a co-accused who subsequently also pled guilty. J.O. was on a probation order at the time, imposed by

Justice of the Peace Cameron on January 22, 2009, requiring him to keep the peace and be of good behaviour. Through a review of the past few days' video, J.O. and his co-accused were observed unlawfully taking a home theatre system and television out the back of Canadian Tire. These items were subsequently returned to Canadian Tire by the co-accused.

[3] On June 18, 2009, J.O., in company with the same co-accused and another individual, a Steven Jones, went to a residence where Mr. Jones formerly resided. At trial, I found that several attempts were made to determine whether anyone was inside by knocking at the door and ringing the doorbell. When there was no response, J.O., and perhaps one of the co-accuseds, entered the residence and stole a laptop. The female resident was in her bed and saw J.O. standing in the vicinity of the bedroom door. When she yelled, J.O. and the others fled the scene. The laptop was subsequently returned to the victim, with some files deleted. J.O. was on the same probation order, requiring him to keep the peace and be of good behaviour, at the time.

[4] Personal Circumstances: J.O. is a 15-and-a-half-year-old First Nation youth. He has a criminal record commencing in February 2008 consisting of two s. 334(b) offences, one s. 354, one s. 430(4), one 430(1)(a), one s. 270(1)(a), one s. 137 *YCJA* offence, one s. 139 *YCJA* offence, two 145(3) offences, a s. 135 and a s. 177 offence. He has received conditional discharges on three offences and reprimands on three others. The longest period of closed custody he has been sentenced to is 30 days time served. In April 2009 he was sentenced to 40 days open custody plus 20 days supervision for the s. 430(1)(a) and a s. 145(3) offence.

[5] He has been in custody for 154 days; however, 11 of those days were days that he was to be subject to another order. Crown has requested that I look at this as being 143 days, and I am prepared to do that.

[6] I have before me, and have reviewed, a pre-sentence report dated for a court appearance on February 28, 2008. I also have a pre-sentence report dated for a court appearance on August 6, 2009, plus an update to the report for a court appearance on October 8, 2009. The update is in regard to J.O.'s progress while in custody. I have a report dated for a court appearance on June 30, 2009, in respect to an application for judicial interim release. I also have a psychiatric report dated November 2, 2009, as a result of a s. 34 *Youth Criminal Justice Act* order. The s. 34 order was with J.O.'s consent.

[7] I do not propose to review in this decision these reports in any particular detail. J.O. and his twin brother have been raised almost exclusively by their mother, with a six-month period in the care of grandparents/family friends when they were three to four years of age, and J.O. for a period of time in Calgary in 2007. There has been government residential assistance in the past at times.

[8] In looking at the psychiatric assessment, I am just going to quote from a few of the paragraphs to provide a bit of a context of what much of J.O.'s background seems to be characterized by. Page 3:

> However, [J.] does have a very long history of destructive and criminal behaviours dating back a number of years. It is reported that [J.] has not infrequently been oppositional, defiant, and aggressive. He has engaged in various types of vandalism, theft, drug and alcohol use, and aggressive

> outbursts. [J.] has demonstrated these types of problematic behaviours for the majority of his life.

Page 8:

> It is also important to note that in the past [J.] has showed absolutely no interest in attempting to follow his various orders of remand or of probation. There are recurrent documentations of [J.] breaching his orders within days or even hours of being released or warned.

And page 12:

> *[J.] completed the Minnesota Multiphasic Personality Inventory …. These self-report measures of personality and psychopathology are designed for use in the psychological evaluation of adolescents. Individuals who answer the MMPI-A in a similar manner are described as resenting authority, rebellious, self-centered, and engaging in acting out behaviours. They feel comfortable in social situations, are interested in social status, take advantage of others, and are opportunistic. Problems with school conduct, family functioning, abusing substances, stealing, lying, swearing, impulsivity, and aggression, are common. They identify with traditionally masculine interests such as toughness and strength and associate with antisocial peers. They deny experiencing marked psychological problems related to anxiety, depression, and disturbed thought processes. Treatments typically emphasize consistent and clear responses to misbehaviours, setting appropriate limits, and learning strategies to reduce impulsivity. Individuals who answer the MACI in a similar manner are described as having a rebellious attitude. They act out in an antisocial manner, violate rights of others, and often get into conflict with parents, school, and the law.*

[9] When I spoke to J.O. about this during the sentencing hearing, he basically

concurred that that is a fairly accurate description of what his past life has been. There is reference that he has been involved in over 60 police files in Whitehorse. He has had mixed results while in custody. Although currently he is at a level four out of seven, he was as high as level five and, historically, not that he has been in custody a long period of time in the past, he tends to operate at a one or two. So there have been some indications of improvements.

[10] He is of average intelligence, being higher and lower on different phases of the testing that are taken. It is clear he needs structure and that he has, at past, responded well to tight structure. The majority of his current friends, prior to coming into custody, were involved with drugs and alcohol, and some had criminal behaviour.

[11] There are indications that he would have difficulty succeeding in a traditional school system, based on past performance. There is a diagnosis of conduct disorder with childhood onset and a possibility of the existence of attention deficit hyperactivity disorder, although J.O.'s behaviours are not necessarily consistent with that. There are indications that he may receive some benefit from medication with respect to this possible issue, and any others, but it is also unclear whether he would. The end of the psychiatric report makes recommendations involving family therapy and attendance at violent offender treatment programs. This is based primarily on the clear indicators of anger and aggression, not that his criminal record has been marked by this other than the one s. 270 charge. He requires structure and support in the community. Employment would be good for him.

[12] Education is essential; however, there is an indication that he requires further

psychological educational assessment to develop an individual academic plan that would be successful. And on the education issue, clearly there are difficulties. The traditional system does not hold out a lot of hope, based, as I said, on past indicators. The Riverfront School, which he has indicated he does not like, provides some measure of accountability; however, it also provides a lot of contact with the peer group that he is particularly not best-suited to spend time with, and programming such as individual learning often is very unstructured, which is really counter-intuitive to what he needs. So that is an issue that clearly is going to take some work, and it may be of assistance to have a psychological educational assessment in doing that.

[13] There is also the recommendation that medication is a consideration, but the caveat on that is that it is really uncertain as to whether it will or will not provide him any benefit. And then the recommendations that probation orders need to be there; there needs to be restrictions and restraints that provide some form of structure to his life, but how those are in fact enforced, to a large extent, requires taking a look at how his overall progress has been. Mr. de Koning spoke on that, and that is how youth probation in Whitehorse tends to operate, in any event.

[14] The Crown is suggesting that a period of eight to ten months custody, globally, plus probation, is appropriate. Defence counsel is suggesting six to nine would be the range; however, in this case, six months would be appropriate.

[15] Three cases were filed by defence counsel. In *R.* v. *R.W.L.*, 2000 YTYC 5, Justice of the Peace Cameron imposed a ten-month sentence on a 17-year-old youth for three s. 354 offences, three s. 145s, three s. 334s, one s. 348 and one s. 430.

Crown was asking six to nine months in that case. R.W.L.'s criminal history showed four prior break and enter offences, three s. 145s and one s. 354. The pre-sentence report was both positive and negative.

[16] In *R.* v. *S.F.S.*, 2003 YKYC 2, Judge Faulkner imposed a sentence of six months closed custody and three months supervision plus probation on a s. 348 charge and a charge of escaping lawful custody. There was serious impact on the victims of the break and enter in that case, and this case was aggravated by the fact that a poker was taken into the house by S.F.S., in the event that there was a physical confrontation with the occupants. S.F.S.'s prior criminal record, including two possessions of stolen property, dangerous driving, robbery, two obstructions of a peace officer, an escape lawful custody and a breach of a *Youth Justice* court order, and this had all taken place within about a one-year period. The psychological assessment in that case shows that the offender had no concern about his offending behaviour and no inclination to change it. Judge Faulkner said:

> In my view, this case goes beyond high risk and there is, in fact, an absolutely certainty that the accused will re-offend if he were to be immediately released.

[17] A third case was *R.* v. *D.A.G.,* 2008 YKYC 11, in which an 18-year-old youth, at the time of sentencing, was convicted after trial on a robbery charge. He had also pled guilty to a s. 334(b), two s. 348(1)(b)s and a s. 430(4). He was sentenced to an additional four months custody, after consideration was given to the appropriate eight months credit he had for time in custody. He had an extensive criminal record, with repeated offences for violence and break and enters. Psychological assessments were

available in that case as well.

[18] In this case, Mr. J.O.'s offences are serious, in particular the s. 348(1)(b). While the impact on the victim is considerable, as is apparent from the victim impact statement that was filed, it is also apparent that the reasonable expectation of J.O. was that the house was unoccupied. This distinguishes this case markedly from *S.F.S.* To some extent, the aggravating factor of the victim being present is somewhat lessened. That said, it is still an aggravating factor.

[19] J.O.'s personal circumstances clearly indicate a pattern of disruptive and dangerous behaviour, as well as an increasing tendency to involve himself in criminal behaviour. There are many aspects of J.O.'s circumstances, as highlighted in the pre-sentence reports and the psychological assessment report, that cause concern for future re-offending and point to a risk of escalation in his offending behaviour.

[20] There are, however, also clear indicators that J.O. is capable, and perhaps even willing, to address his socially unacceptable and criminal behaviour. His conduct while in custody has shown signs of improvement. He has indicated his willingness to participate in counselling, programming, employment, physical and educational activities that are designed to address some of his underlying issues and to provide him supports towards future positive behaviours. To some extent, he appears to have begun to act in accordance with his indicated intentions. Certainly his mother, who spoke after having reviewed the report, sees that there has been some progress in J. O.'s attitude.

[21] Mr. de Koning also spoke, and he has been dealing with J.O. for a while, and had

positive things to say about his potential, his personability, and was, of course, quite candid, as the report is, that it is really hard to assess how much J.O. actually means about what he says. That does not mean that it should be disregarded. It simply means, at the end of the day, J.O. will either live out the positive things that he has said or he will not, and no one can really predict that. It is true that quite often, as Mr. de Koning has stated, the best indicators of future behaviour are past behaviour, but his reluctance to apply that to a youth is well-put because that is the whole principle behind youth dispositions, in that youth are at the beginning parts of their lives and have, perhaps, a greater potential for change from past behaviours because of their youth and the maturity that comes with the process. So clearly, yes, in adult cases, there may be more cause for concern. With youth, the Court can always be more hopeful that positive change can follow words that express a positive change.

[22] J.O. is a young man at a critical point in his life. He has the capacity to behave better in the future than he has in the past through accessing the supports that are available to him. Whether he has the will to do so is really a question of choice and actions based on those choices, and time will tell.

[23] I find that the circumstances of these offences and this offender are somewhat less aggravated than in the cases before me. The sentence will be as follows. Recognizing the 143 days in custody, which is a substantial period of time for a young man, as amounting to the equivalent custodial portion only of a 190 day sentence, and I am recognizing that, on the s. 348(1)(b) charge the sentence will be 143 days time served in custody. The s. 137 charge from June the 18th will be 30 days concurrent time served. The s. 334(b) charge will be 30 days consecutive, with 20 days closed

custody and ten days community supervision, and the s. 137 charge will be 30 days concurrent to that.

[24] That means that there will be another 20 days in custody and then there will be ten days supervision that follows that. That is somewhat less than what the Crown is asking and certainly at the lower end of the range of what defence is suggesting, but there are some positive factors that can take place in this next period of time with respect to sorting out definitively some of the educational factors that will await you, Mr. O., sorting out what school you will be going to, sorting out what positive developments will take place.

[25] I will add a period of probation of one year to this. The terms of that probation order will be:

1. To keep the peace and be of good behaviour;
2. To appear before the Youth Justice Court when required by the Court to do so;
3. To report and be supervised by the Youth Justice Worker;
4. To notify the Youth Justice Worker of any change of name or address, or any change in employment, education or training;
5. To make reasonable efforts to obtain and maintain suitable employment as directed by your Youth Worker;
6. To attend a school or any other place of learning, training or recreation that is appropriate as directed by the Youth Worker;
7. To take such assessment, counselling and programming as directed by

your Youth Worker;

8. To take such psychological assessment, counselling and programming as directed by your Youth Worker;
9. To not possess or consume alcohol or non-prescription drugs;
10. To take such alcohol, drug or substance abuse assessment as directed by your Youth Worker;
11. To provide your Youth Worker with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this probation order;
12. For the first three months of this order, to abide by a curfew by remaining within your place of residence between the hours of 9:00 p.m. and 6:00 a.m. except with the prior written permission of your Youth Worker;
13. To have no contact or communication, directly or indirectly, with Asther Gayangos;
14. To not attend at the residence or place of employment of Asther Gayangos;

[26] I believe those are all the terms of the probation order that were discussed?

[27] MS. BIELEFELD: Yes. I was going to make another suggestion of a non-communication with respect to the other individuals involved in the two offences, the co-accused and then the one adult offender.

[28] THE COURT:

15. To have no contact or communication, directly or indirectly, with B.W. and Steven Jones except with the prior written permission of your Youth Worker;

Because I do not know what educational opportunities are going to be out there, or work opportunities. Any issue with that, Mr. de Koning?

[29] MIKE de KONING: No. And generally, for the no-contacts, recognizing the size of the jurisdiction and the right to education, we weigh that out and we've never mis-processed. They can be around each other if they happen to be in school together.

[30] THE COURT: You take a practical approach.

[31] MIKE de KONING: Oh, I'm sorry, Your Honour. I was asking, perhaps, on the curfew, maybe to add a stipulation that he can be out with his mother? We've got prior written permission, but, as well, if he is supervised by his mother.

[32] THE COURT: Okay. Well, actually I am going to add two things to that:

12. … except in the actual presence of your mother or another responsible adult approved in advance by your Youth Worker. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks and failure to do so will be a presumptive breach of this condition;

I am going to put:

16. To not attend at the Canadian Tire store in Whitehorse;

If, for some reason, something arises in future that makes that a problematic term that can be brought forward on a review.

[33] I am not going to impose a firearms prohibition in these circumstances, nor am I going to impose the DNA order, noting my concerns about the apparent absence of that under either designated offence in the *Criminal Code*. But, regardless, as a young person of his age, with the record that he has, I would not be inclined to impose that in any event, not in these circumstances.

[34] Is there anything that I missed, that needs to be changed, that should be different? Mr. O.?

[35] THE ACCUSED: I was just wondering, I have curfew for, like, three months? And I was also wondering is the time in custody going to be in open or in closed?

[36] THE COURT: Well, it is 20 days of -- I said custody. It was closed custody, because 20 days more of closed custody and then ten days supervision in the community. And that will allow, frankly, a plan to be put into place and for you to really -- now you actually know what is happening, you can make some plans, right?

[37] Mr. de Koning, from your point of view, given what needs to be set up with his education and that, is that the best approach, between open and closed?

[38] MIKE de KONING: Well, I guess if I go back to the -- looking at the principles of the *Act* as well, the reintegration principles --

[39] THE COURT: Right.

[40] MIKE de KONING: -- I have to admit, I have to think, now he's been in a secure custody setting for quite some time. As far as a re-integrative approach, it might not be a bad idea to consider open custody followed by the community supervision portion. And I'm only raising that as something to consider.

[41] THE COURT: Well, frankly, when we are dealing with the youth, you work with him a lot more. You know what options are available. You know what rehabilitative process is most likely to work for Mr. O. And, frankly, if it works better for him, it works better for all of us.

[42] MIKE de KONING: Well, I got -- now, I'm weighing it out, because I also have to look back at the last time he was on the community supervision portion of custody.

[43] THE COURT: Did not go so well?

[44] MIKE de KONING: No. He committed substantive offences during that time. So I do have some fear. As well as, the last time he was in an open custody situation, there was some -- he had to be assigned a one-to-one worker from the facility to actually go with him and be with him at the school setting. And yet he still did -- I mean he was smoking marihuana in the bathroom while the worker was waiting outside. So, you know, the -- and I'm sorry that I'm --

[45] THE COURT: No, that's --

[46] MIKE de KONING: -- I wish I could give you something decisive at this moment, but I'm sort of brainstorming out loud here. It's something to weigh out. So on the one hand, I think, integrative-wise, integrating back, or integrative-wise, the open custody does sound like an avenue for that, that meets those principles. On the other hand, what are the risks, and are we inviting a repeat, of which case I would hate to see what would happen if he did it a second time on the same kind of order.

[47] THE COURT: I guess the way I look at it is: six weeks from now, he is going to be on probation. Regardless of what I do here, he is going to be on probation. What, in your opinion, gives us the best likelihood of a successful entry into probation?

[48] MIKE de KONING: Well, my instincts are going to say the re-integrative approach, and also because the *YCJA* explicitly states, to be construed liberally, which would mean if I'm sitting on the fence I would have to consider more liberally than conservatively. And with that in mind, my opinion would be to go towards the open custody.

[49] THE COURT: Where would he be if he was released on open custody?

[50] MIKE de KONING: It's the same facility. The young offender's facility is divided into two portions; one portion being secure custody and one portion being open custody. Open custody, they're still supervised when they're there; however, they have access to outside programming, whereas in secure custody they don't. Programming would have to be within the facility. And then once we hit the community supervision

portion, they're essentially the same.

[51] THE COURT: Okay, thank you. It will be open custody. Take advantage of it, or it will be closed real fast again.

[52] Did I have a reside as directed clause on the probation order? There will be:

> 17. To reside as directed by your Youth Worker and not change that residence without the prior written permission of your Youth Worker;

[53] Did I have a report to a Youth Worker clause there? Yes. All right, I believe that concludes everything.

[54] MIKE de KONING: Just for the record, Your Honour, just for information for the Court as well, that when a youth is in the open custody portion, there is a provision for what they call an administrative transfer. So there is, somewhat, of a safety net there, that if --

[55] THE COURT: Right.

[56] MIKE de KONING: -- it's under control, he can be transferred.

[57] THE COURT: I have some confidence that it is not going to get out of control, some measure of confidence.

[58] Thank you, everyone, for their input today, and their work.

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COZENS T.C.J.