

Citation: *R. v. Moss*, 2009 YKTC 33

Date: 20090330

Docket: 08-00168A

08-00168B

Registry: Whitehorse

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

REGINA

v.

DAVID JOHN MOSS

Appearances:

Jennifer Grandy

Malcolm Campbell

Counsel for Crown

Counsel for Defence

REASONS FOR SENTENCING

[1] FOISY T.C.J. (Oral): Mr. Moss was convicted after a trial of possession of crack cocaine for the purpose of trafficking.

[2] He is a relatively young man, First Nations, who has had a troubled young life, in that he was adopted out from his parents. I agree with submissions by defence counsel that his life has not been an easy one, although I have to underline that a lot of the problems that he has had are self-inflicted in that he has been the author of his own misfortune. I am not saying in every case, but in many instances.

[3] The pre-sentence report filed here is extremely detailed and very well-prepared. It tries, and I think succeeds, in giving Mr. Moss credit where the probation officer could,

but also dealing with his problems in a very frank and forward manner. At the end of the day, the probation report is certainly not very positive.

[4] It indicates that Mr. Moss is not entirely candid. I understand today he has told me he is embarrassed and that he is sorry for this. That will remain to be seen.

[5] He does not follow through with some of the matters that he should have followed through with. One was counselling, where he attended one session and then did not attend at all, and made excuses for not showing up.

[6] He does not accept responsibility for his own actions, and he seems to have a reason or an excuse for not doing what he should.

[7] On the other hand, I also take into account the fact that he is a young, First Nations individual, who at the time of this conviction had no criminal record.

[8] I suspect that, after finishing his term of imprisonment, he will have attempted, while in prison and afterwards, to make some purposeful efforts at rehabilitation. I get this impression simply because he has been skirting jail for a long time and now he cannot avoid it anymore, and from what he tells me, I suspect that he will come to terms with this and change his life. Of that, of course, there is no guarantee, but it is the impression I get from all of the material that I had before me, as well as what he said to me.

[9] Certainly, at the end of the report, the probation officer does not recommend a disposition in the community, and nor is one being asked for in this case.

[10] Whether or not Whitehorse should be singled out as a problem community, with respect to the sale of crack cocaine, is not something that I am going to attempt to decide today. What I will say, however, as I mentioned to Mr. Campbell, crack cocaine, in itself, is a highly problematic drug, no matter which community in which it is found, and certainly there has to be an element of deterrence and denunciation in the sentence which I am going to impose.

[11] I agree with defence counsel that rehabilitation is also a concern of the Court. This young man is much too young, and his past indicates that we are not here to lock him up and throw away the key. In fairness, Crown counsel has mentioned the same thing.

[12] Taking into account the cases that were submitted to me, as well as the report and the other material, and submissions of counsel, on the charge of possession for the purpose of trafficking in crack cocaine, I am going to impose a period of incarceration of eight months.

[13] To that will be added, on the first count of breach, one month to be served consecutively, and the second breach will be one month to be served concurrently. So the total here is nine months.

[14] Afterwards, there will be a period of probation for 12 months. The statutory provisions, of course, will be read by the clerk and will apply. Mr. Moss will report to a probation officer here at Whitehorse within five days of his release, and thereafter will report as directed. He will take such counselling as directed by the probation officer, and will consent to such treatment as may be directed by the probation officer. There is

no point in saying that you cannot have drugs. That is against the law, so it goes without saying.

[15] THE ACCUSED: Yeah.

[16] THE COURT: Anything else should be in the probation report, counsel?

[17] THE ACCUSED: Your Honour, I'd like -- I would like to say one more thing, please. Okay, I -- yeah, I'm living in Whitehorse right now, because I'm forced to. My family is from Atlin, B.C., which is 30 kilometres south of the border. I haven't been able to see them in eight months, nine months. I go there once every -- every other month, you know. I've been -- I've been trying to be as, like, as good --

[18] THE COURT: What are you suggesting?

[19] THE ACCUSED: I'm just saying, like you know, can it be possible to go home? After I get out?

[20] THE COURT: I would suspect that there is a probation officer in Atlin, and I suspect that your probation can be transferred there, but that will be something you will have to take up with the probation officer.

[21] THE ACCUSED: Okay.

[22] THE COURT: I was asking if there was anything else in the probation order that could be --

[23] MR. CAMPBELL: No. I think reporting and counselling covers it.

[24] THE COURT: All right, Mr. Moss. I just want to tell you that you are going to jail for a while. It is not going to be any fun. You know that. But there are two reactions you can have to that. You can sit in jail and do nothing and feel sorry for yourself and then come back out and keep doing what you are doing now, which means you will go back to jail. Alcohol is a big problem with you; you know that. Drugs are now a problem with you. Or, in jail, you can seek out and try and take every course, every counselling session that you possibly can, including AA. You know you have, as I said, a problem with liquor.

[25] THE ACCUSED: Your Honour, I -- like I will go to any course I can.

[26] THE COURT: Afterwards, you will be asked to maybe take treatment and to go to counselling. If you do what you did before, when you started some other program and went once and that was the end of it, then that is not going to work.

[27] THE ACCUSED: I actually attended three courses with Kate Hart, three -- three counselling sessions.

[28] THE COURT: Well, regardless, it was not very successful.

[29] THE ACCUSED: Plus -- plus, prior to that, I had actually done a couple other courses with her, at this -- but she had gone from Atlin to Whitehorse. And so I had worked with her in Atlin, and then she came to Whitehorse, and I worked with her here.

[30] THE COURT: Well, it is going to be up to you.

[31] THE ACCUSED: I know, I know, Your Honour.

[32] THE COURT: I mean I cannot force you.

[33] THE ACCUSED: I know, I know, and I'm going to do it.

[34] THE COURT: It is going to be up to you. If you want to change your life around, and give up drugs, give up booze, you can. You know, you are bright enough. You can do something good with your life. Or you can make this the first step towards a long period of jail in your life. It is up to you.

[35] THE ACCUSED: No, I know exactly what you mean.

[36] THE COURT: All right.

[37] THE ACCUSED: And I thank you.

[38] MS. GRANDY: There is just a couple of other issues. One is the s. 109 order.

[39] THE COURT: Yes. That is mandatory, for ten years.

[40] MS. GRANDY: Yes. And the other, I think just as a matter of form the Court should deem the warrant executed so that it's not still on the system, so Mr. Moss doesn't get troubled by it later.

[41] THE COURT: Yes.

[42] MS. GRANDY: And the other counts, if they haven't already been stayed, can be.

[43] THE COURT: Yes, the other counts will be stayed.

[44] MR. CAMPBELL: I'd ask that the victim fine surcharges be waived in the circumstances.

[45] THE COURT: Yes. I do not think he is going to be making any money, so, yes, that will be waived.

[46] MR. CAMPBELL: The remand time?

[47] THE COURT: Basically what I have done is I have, by making the one --

[48] MR. CAMPBELL: Concurrent?

[49] THE COURT: -- the one concurrent, is taking that into account.

[50] MR. CAMPBELL: Yes.

[51] THE COURT: All right. Good luck.

[52] THE ACCUSED: Thank you.

FOISY T.C.J.