Citation: *R.* v. *Nicloux*, 2009 YKTC 75

Date: 20090625
Docket: 09-00012
09-00040
Registry: Whitehorse

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

REGINA

v.

KAREN LINDA NICLOUX

Appearances:
Noel Sinclair — Counsel for Crown (A.M.)
David McWhinnie — Counsel for Crown (P.M.)
Fia Jampolsky — Counsel for Defence

REASONS FOR SENTENCING

[1] ROY T.C.J. (Oral): I understand the accused is a woman of 43 years of age. She is a First Nations person. She is having a hard time since she was born, so to speak. She has been molested. She has been abused. She has two children, one who is 19 years of age and has obtained good result in school; it is kind of a precedent in the family. The other one is seven years of age and the mother has lost custody of this child. The accused has obtained a degree in criminology, so she knows what are the consequences of offences and what is the way to try to work for rehabilitation.

[2] She recognized that she has got a drinking problem and she did abuse drugs. On one hand, her lawyer mentioned that she is trafficking drugs to get money for her

own use. On the other hand, she has, on April the 7th, an important quantity of drugs, for which she has pleaded guilty, with the consent of the Crown, on simple possession.

[3] She has pled guilty on two different Informations. First, April the 7th, to have possessed cocaine for simple possession; but again, it was an important quantity of drugs but the Crown has accepted to change this offence of trafficking into simple possession.

[4] The accused signed an undertaking on the 7th or 8th of April not to possess any cell phone. Ten days later, on or about the 17th of April, she was found in the possession of a cell phone and she was on the premises of the Canada Games building, and she recognized today that she was there to commit an offence, namely for possession for the purpose of trafficking drugs.

[5] Just to mention that being responsible means able to respond, to answer, regarding our behaviour, our acting. Through her counsel, the accused is mentioning many times an explanation about what happened at the Canada Games building. She did not flee. It was because of panic. It was kind of a necessity for her to have a phone, to get in touch with her family, because she does not have a phone at home. So after being ordered not to have a phone, ten days later she still had a phone, and we have seen on this phone, on the other time, texting, referring to a kind of exchange.

[6] I understand that life, again, was not easy for you, madam. I understand that. I understand that you went through different programs but you had problems with relapse with alcohol and drugs. I understand that you are a First Nations person. I understand that you said that there are not many people able to help and to be present for you.

There was a mention regarding your daughter. This is a good step. We have got to break the infernal circle of parents abusing their children and these children becoming parents abusing their children because of alcohol and drugs. So we have got to do somewhere something to break this infernal circle, and I think that your daughter is doing that thing. She is 19 years of age and she went to college. You went to college, yourself, madam. This is a good step, when you went to criminology, where you went to business, this is good.

[7] But we have to do something to break this infernal fléau - I do not know how to say that in English - of drugs. It destroys the soul and the brain of our communities, of our youth, of our future. And there is no future for a society if we do not protect youth and children and adolescents, because of drugs, because children are the most important natural resources for a society. So we have got to be quite deterrent regarding this drug trafficking.

[8] Consequently, I have heard two representations, by the Crown and by the defence. I have taken note of the different decisions offered, and I note that the defence is suggesting something between four and seven; the Crown is suggesting 12 months. I came to the conclusion that a jail sentence is necessary in this case for deterrence and denunciation, and I take into account the important factor of rehabilitation as well. Because of your studies, because of what you went through, you can become an important person for your family, because you will be a grandmother one of these days; for your community, because of your studies, because of what you went through. So rehabilitation is important where there is probation to be ordered.

[9] So there will be an eight-month jail sentence. We will deduct four months for time spent before this sentence, so it will come to the conclusion of four months detention from now. There will be a DNA. There will be a s. 109 application for a period of ten years. And there will be probation of 12 months, because I want that you follow, so to speak, madam, the path of your daughter who is 19, that you become an important factor for your family, for your community, so that these 12 months will be quite important.

[10] The conditions will be the ones that you have mentioned, but I will mention them, going to page 5 of the decision the defendant has suggested; page 5 of the third decision suggested:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify your probation officer in advance of any change of name or address, and promptly notify your probation officer of any change of employment or occupation;
4. Take such alcohol and drug assessment, counselling, programming, treatment, including attending a residential treatment program, as and when directed by your probation officer, and abide by the rules of that residence;
5. Abstain absolutely from the possession, consumption or purchase of alcohol, not-prescribed drugs and other intoxicating substances, and submit to a breathalyzer upon demand by a peace officer or probation officer who has reason to believe that you are failing to comply with this

condition;

6. No cell phone.

[11] These would be the conditions. Any question, any point to clarify?

[12] MR. SINCLAIR: On the conditions was there a reporting clause; report to probation?

[13] THE COURT: Yes, within the -- yes.

[14] MR. SINCLAIR: Yes, okay.

[15] THE COURT: Any other observation now?

[16] MS. JAMPOLSKY: Nothing further.

[17] MR. SINCLAIR: And just with respect to the eight-month sentence, do you want -- is that a global sentence?

[18] THE COURT: Yes, it is.

[19] MR. SINCLAIR: Do you want to divide it between --

[20] THE COURT: Yes, it is going to be a global sentence. Any other point?

[21] MR. SINCLAIR: No.

[22] MS. JAMPOLSKY: Thank you.

[23] THE COURT: Good luck, madam.

[24] THE ACCUSED: Thank you.

[25] THE COURT: Take care. Thank you very much.

(PROCEEDINGS CONCLUDED)
(PROCEEDINGS RECONVENED)

[26] MR. MCWHINNIE: Good afternoon, Your Honour. David McWhinnie appearing for the Crown. I understand that this matter was brought forward at the request of the Court to clarify a couple of loose ends from this morning's proceedings.

[27] THE COURT: Yes.

[28] MR. MCWHINNIE: Ms. Nicloux is present, and as is her counsel, Ms. Jampolsky. The clerk's office has provided us a list of things they wanted counsel to have addressed this afternoon, and I propose to do so.

[29] I understand that, although it appears that everybody, correctly or incorrectly, I don't know which, believed that the election of the accused had been recorded on some previous occasion, there appears to be some doubt about that. I understand Ms. Jampolsky is prepared to confirm that the accused's election was, or was intended to be, Territorial Court all the way through.

[30] THE COURT: That is your understanding?

[31] MS. JAMPOLSKY: Yes, Your Honour. If it hadn't been done beforehand, then it was an oversight on my part and we would have elected to Territorial Court.

[32] THE COURT: Okay. That is the first point.

[33] MR. MCWHINNIE: The next issue, I understood, was that one or the other of the counsel, and I don't know which, referred to s. 4 of the *CDSA*, and to make it abundantly clear, I understand that it should be recorded particularly as s. 4(1) of the *CDSA* so that the record is properly recorded.

[34] MS. JAMPOLSKY: And, again, there's no issue.

[35] MR. MCWHINNIE: There is an issue, as I understand it, that it appears that counsel towards the end of this morning's proceedings may have left some ambiguity on the record. As I understand it, the Court's sentence was eight months imprisonment, was warranted, but taking into account, as I understand it, credit for four months, credit for time served, the actual amount of time to be shown on the committal warrant would be four months, giving allowance for four months time served. As I understand it, there may not have been any great amount of clarity as to whether this was to be apportioned out amongst the charges or a global sentence with some of the matters being concurrent and some being consecutive. I understand that Mr. Sinclair's understanding or anticipation was that the Court would impose eight months, giving credit then, less credit that is four months, on the s. 5(2) charge which was before you and that the other matters could as well be shorter periods of time concurrent to that.

[36] THE COURT: Yes. And fire --

[37] MS. JAMPOLSKY: I think we were all clear that it was a global sentence.

[38] THE COURT: Yes, it was.

[39] MS. JAMPOLSKY: I guess my only concern with that is showing each

sentence, each particular charge, as having an eight-month sentence attached to it. I don't know if that's the best way to reflect the global sentence.

[40] THE COURT: Well, I am ready to hear your observation and your suggestion regarding this.

[41] MR. MCWHINNIE: Sorry, I may have left a part out. I would have anticipated, but I wasn't here this morning, that if Your Honour was asked to make certain matters concurrent to the eight-month -- or, well, it's actually a four-month sentence, that they would be, because of their lesser gravity, lesser sentences.

[42] THE COURT: Yes, yes, exactly.

[43] MR. MCWHINNIE: So in a typical situation such as this, the Court would likely have considered, I would suppose, two or three months, at most, for the simple possession.

[44] THE COURT: Yes.

[45] MR. MCWHINNIE: And one or two months, at most, for the other matters that were before the Court.

[46] THE COURT: Yes.

[47] MR. MCWHINNIE: And I agree with my friend that we shouldn't have the record show the equivalent. So if that is the situation, Mr. Sinclair's understandings and anticipation was that the eight months maximum should attach to the most serious matter, which is the s. 5(2).

[48] THE COURT: Yes.

[49] MR. MCWHINNIE: And the other matters, if they are made concurrent, should show as lesser, reflecting their lesser gravity.

[50] THE COURT: For possession you are suggesting three months or two months?

[51] MR. MCWHINNIE: Between two and three months would seem to be appropriate. My friend may have a shorter period in mind.

[52] THE COURT: Please?

[53] MS. JAMPOLSKY: I hadn't prepared or planned to make submissions specifically. I think it would be appropriate, perhaps, to suggest two months on the possession charge. And I don't know my friend's position; my position before the sentence would have been that this was the first breach charge that existed and it would be appropriate to either show one day deemed served or something of a short duration. It is the first breach charge she's ever had.

[54] MR. MCWHINNIE: Agreed.

[55] THE COURT: No issue with that?

[56] MR. MCWHINNIE: No.

[57] THE COURT: So there is going to be two months for possession and one -- what was your suggestion, one day?

[58] MS. JAMPOLSKY: One day deemed served.

[59] THE COURT: One day already served for the breach. And were there other, firearms order?

[60] MR. MCWHINNIE: I understand there was a firearms order, which under s. 5(2) *CDSA* I think is mandatory, and should be -- the order should reference that conviction.

[61] THE COURT: With regards to what count?

[62] MR. MCWHINNIE: That would be the s. 5(2) *CDSA*. That's the one that engages the firearms prohibition, as I understand it.

[63] THE COURT: Yes.

[64] MS. JAMPOLSKY: And that was Count 1 on the 0040 Information.

[65] THE COURT: Count 1, okay.

[66] MR. MCWHINNIE: That's our understanding.

[67] THE COURT: And DNA order?

[68] MR. MCWHINNIE: The same, Count 1.

[69] THE COURT: The same, Count 1.

[70] MR. MCWHINNIE: Count 1 on 0040.

[71] THE COURT: Okay. Thank you. Everything is clear now, thank you.

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ROY T.C.J.