

Citation: *R. v. VanBibber*, 2009 YKTC 101

Date: 20090828
Docket: 08-11020
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Chief Judge Ruddy

REGINA

v.

ADAM ALEXANDER VANBIBBER

Appearances:
Kevin Komosky
Emily Hill

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Adam Alexander VanBibber is before me having entered a plea of guilty to a single count of possession for the purpose of trafficking. The drug involved is MDMA, which is commonly known as ecstasy.

[2] The facts arise in Dawson City in early August of last year. At that time information was provided to the police in relation to possible drug trafficking. A search warrant was sought and obtained for a room in the Downtown Hotel which was registered to Mr. VanBibber. A search warrant was executed on the 3rd of August, 2008, at which point the RCMP located Mr. VanBibber, along with three other male individuals, in the room. Mr. VanBibber was searched incidental to arrest and it was

determined that he had on his person eight ecstasy pills. The search of the room also located additional ecstasy pills, and it is my understanding that in addition to those - including those eight that were found on his person - there was a total of 108 ecstasy pills that were located. There was also indicia of trafficking located in the room, including money and scales, and there appeared to have been some white powdered substance that was found. Apparently, the Crown obtained an expert report indicating that the amount of ecstasy was such that one could only conclude it was for trafficking as opposed to for personal use, and Mr. VanBibber has admitted that he was effectively in possession of the drugs for the purposes of trafficking. By trafficking, I understand, through his counsel, that his plan involved distribution of the drugs at a large party as opposed to this having been a commercial operation.

[3] This is one of those cases in which I have, essentially, an offender and an offence which do not appear to match. There is no doubt that Mr. VanBibber committed the offence. He has accepted responsibility for the offence and entered a plea of guilty. But I have before me a pre-sentence report, as well as a number of letters of support, that make it somewhat difficult to understand why a young man like Mr. VanBibber, who otherwise has made all the right choices in his life, would, as his employer said, do something this stupid and risk not just his own life and livelihood but that of his son, not to mention the potential repercussions on his family as a whole.

[4] Mr. VanBibber is currently 27 years of age. It appears that he comes from a very close and supportive family. All of his siblings have been incredibly successful. Most of them are professionals. He remains close to them all and they to him. They are aware of what is going on and his parents and one sister have provided letters of support. I

also have information from two of his employers which indicate that he is very well regarded in employment. All of the information before me suggests that he is a very committed and conscientious and caring parent to his five-year-old son, for whom he is essentially the primary caregiver, but he does share custody, I believe at this point in time, with the child's mother.

[5] So I accept, on the face of all of the information before me, that this incident which has occurred is one which can only be described as out of character for Mr. VanBibber. Unfortunately, given the nature of the offence, there is going to be some pretty significant consequences as a result, Mr. VanBibber, of your behaviour. It may be the type of thing that you do not normally do and that you may never do again but it is the type of offence for which all of the case law very clearly stresses that the primary sentencing principles must be denunciation and deterrence. There are, as a result, unfortunately, going to be some significant repercussions, and that cannot be avoided at this point. An offence like this, once committed, cannot be undone.

[6] The Crown has suggested that, notwithstanding the fact that it is exceptional in drug trafficking cases, including possession for the purposes of trafficking, even though it is unusual for there to be anything other than a straight jail term, that this is the type of case in which it would be appropriate for there to be a conditional sentence. Crown is suggesting that the length of that conditional sentence ought to be six months, and that the conditions for that conditional sentence ought to be restrictive enough to send the necessary deterrent and denunciatory messages.

[7] Defence is not taking issue with the fact that, given the nature of the offence, there ought to be a term of imprisonment, albeit served conditionally within the community in light of Mr. VanBibber's circumstances. However, defence is suggesting that a conditional sentence of three months to be followed by a probationary term of three months would be appropriate.

[8] My particular view, as it relates to the length of the appropriate conditional sentence, is as follows: Were I to do a sentence of straight jail time I would be of the view that six months would be somewhat too long on the circumstances of this particular offender. However, when I consider that the sentence is to be served conditionally within the community, as opposed to in actual custody, I must say, and bearing in mind all of the cases that say that it is appropriate for a conditional sentence to be somewhat longer than one might order for a straight jail term, I am of the few that the six months suggested by the Crown is appropriate in this particular case, given the serious nature of the offence. Again, as positive as circumstances are, with respect to the offender in this case, it is insufficient, given all the precedents out there relating to drug trafficking, for there to be other than a significant response in terms of a conditional sentence. Quite frankly, if it is not already abundantly clear, his being allowed to serve it conditionally is, in and of itself, outside of the norm. But I am satisfied, as clearly was the Crown, that the circumstances of this particular offender are somewhat exceptional, and serving the sentence conditionally within the community would be appropriate.

[9] So there will be a sentence of six months but Mr. VanBibber will be allowed to serve that sentence conditionally within the community.

[10] This brings us to the terms and conditions. The primary purpose of the terms and conditions, quite frankly, are punitive in nature, intended to send the necessary deterrent and denunciatory messages. The pre-sentence report is clear to me that, in terms of risk-managing Mr. VanBibber within the community, it does not appear, from what the author of the report has to say, that there are any particular conditions required for risk management, but the conditions are required for both specific and general deterrence.

[11] The conditions will be as follows for that period of six months, Mr. VanBibber.

That you:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when you are required to do so by the Court;
3. Report to a supervisor within two working days, and thereafter when required by the supervisor and in the manner directed by the supervisor.

I imagine if there are plans for him to go on this trip he will need to make arrangements for that today.

4. You are also required to remain within the Yukon Territory unless you have written permission from you supervisor;
5. Notify the supervisor in advance of any change of name or address;
6. Promptly notify the supervisor of any change of employment or occupation;
7. You will be required to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in

accordance with a prescription given to you by a qualified medical practitioner;

[12] I am not of the view, based on the information that I have before me, that the cell phone condition is required, as suggested by the Crown, so I would decline to include that. There will, however, be a house arrest condition for the period of that six months. I appreciate it is, for someone of Mr. VanBibber's circumstances, a harsh sentence, but, again, I come back to the fact that this is an offence that warrants a harsh response.

8. At all times, Mr. VanBibber, you are going to be required to remain within your place of residence except with the prior written permission of your supervisor or except for the purposes of employment, including travel directly to and directly from your employment.

[13] I know that the Crown had some issues with enforcement. I am satisfied that with his employment situation, where he is working directly for someone, Crown is in a position - or the police are - to investigate any assertions that he is out for employment purposes through his employer, and if the employer does not confirm that he is doing something legitimate for his employment, then the onus, obviously, is going to shift to him to explain that apparent disparity.

[14] So I am satisfied that is the appropriate wording of the condition, but I am going to add the requirement that you present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition.

[15] Now that leaves us with -- I think that condition accommodates the call-out issue. I am somewhat more concerned about how we manage the upcoming outfitting issue. It may be that the simplest way to do it is simply have him get the permission of the supervisor to go.

[Discussion with counsel]

[16] THE COURT: I should have stated earlier that I think the Crown has a valid point in that if Mr. VanBibber is going to be spending part of his sentence out at the camp, and I do not object, as part of the sentence, to him going, but again, in determining the appropriate length of the disposition, I think the Crown did have a valid point that if he is going to spend a month of that out working in a camp and not be subject to the house arrest condition that reinforces the appropriateness of a somewhat longer conditional sentence. In any event, how about if we have the condition read as follows:

8. You are to remain within your place of residence at all times, except with the prior written permission of your supervisor, except for the purposes of employment, including travel directly to and directly from your employment, and except between the dates of August 30th and October 7th, provided you are residing at the camp of your employer, Widrig Outfitters 97 Limited.

Does that cover it? As far as counsel is concerned?

[17] MS. HILL: The only issue is just with today whether he should report immediately and there is not -- I suppose he will have travel time to get back to his residence today; that is the only concern, whether that needs to be spelled out.

[18] THE COURT: Okay. Because he has got to get back up to Pelly.

[19] MS. HILL: He has got to get to Pelly.

[20] MR. KOMOSKY: I do not think that needs to be spelled out.

[21] THE COURT: No.

[22] MS. HILL: So I put that on the record that that is his intention and that is the case, and I imagine it would be interpreted as such.

[23] THE COURT: Okay. I mean he can confirm with the supervisor when he speaks to her this afternoon that that is his intention, and he can advise them that there was no one in the courtroom, including myself, that had a concern about that. He is going to need to make his way back home and that is implicit, on all of the circumstances, implicitly necessary. Okay. But other than that, is the wording agreeable?

[24] MS. HILL: Yes.

[25] THE COURT: To cover that period of time, Mr. Komosky?

[26] MR. KOMOSKY: Yes, that is fine.

[27] THE COURT: Okay. Subject, of course to the fact that I appreciate you do not like my wording on the employment condition.

[28] MR. KOMOSKY: I do not, Your Honour.

[29] THE COURT: I fully understood that. Okay. It will include, as well, of course, the condition that he must present himself at the door and answer the telephone during reasonable hours for curfew checks and that failure to do so will be a presumptive breach. Any other conditions as it relates to the conditional sentence? I mean, it is really the abstain and house arrest that are the core of it in these circumstances. I did not see anything to indicate that treatment conditions were warranted.

[30] MR. KOMOSKY: Your Honour, I think there ought to be an exception on the house arrest for shopping for the necessities of life, and I would strongly prefer a specified set of time for that rather than except to allow shopping.

[31] THE COURT: I normally tell people they have got to sort that out with their supervisor and get their permission as to when they can do that.

[32] MS. KOMOSKY: Then that is fine.

[33] THE COURT: So I think that provides -- the supervisor is often in a better position to judge what is appropriate timing to do those things. So that is my preference.

[34] MS. HILL: That's fine.

[35] THE COURT: That leaves us with the remaining issues, which are the DNA order. It is a secondary designated offence. Defence is suggesting that perhaps it may not be necessary given his antecedents. However, given both the public interests and the fact that it is not an unduly intrusive procedure, I am satisfied that the order ought to be made. So I will make the order that he provide such samples of his blood as are necessary for DNA testing and banking.

[36] This leaves us with what is in my mind in some ways the most problematic issue with respect to this particular case, that being the fact that the offence to which Mr. VanBibber has plead is one which results in the mandatory firearms prohibition provision under s. 109. The difficulty arises because Mr. VanBibber, who is a member, I take it, of the Selkirk First Nation, does hunt with his community and for his family, and he does also engage in employment in the outfitting and guiding business, which requires him to carry a firearm. The difficulty in this particular case, as the Crown has pointed out, is that he does not necessarily fall squarely within the exceptions set out in s. 113, where it is possible to make an exception for sustenance or employment purposes, where a person needs a firearm or a restricted weapon to hunt or trap in order to sustain the person or the person's family or where a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person. He clearly does not fall under (b). He does have full-time gainful employment with the First Nation. He does have secondary employment that involves a firearm, but there is nothing before me to suggest that that is his only employment or the only employment that he can obtain.

[37] Defence has argued that there is some room under subsection (a), dependant on how I interpret the phrase "sustain". I think Crown's position is sustenance means that the hunting is necessary for survival. Defence is suggesting that the fact that he does enjoy full-time employment does not mean that he does not also need to hunt, to some extent, I suppose, to sustain himself culturally. It is something that he does engage in with his community. It appears, from the letters before me, that he has significant skills in the area.

[38] This is a particularly difficult question because I do not have any cases before me in terms of how the word sustain has been interpreted.

[Submissions by counsel]

[39] There will be then the mandatory 10 year firearms prohibition that will be made today, and it will be stated on the record that we will return at a later date and I will leave it to you, Ms. Hill, to pick a date and time that is convenient for you.

[Discussion re scheduling]

[40] THE COURT: Then I will adjourn the issue of the s. 113 exception application to September 11th at 9:30 a.m. Mr. VanBibber need not return for that as he will obviously be out at the camp. I would feel much more comfortable if I had some authorities before making that particular decision so I appreciate counsel's patience.

[41] So we have dealt with the DNA order, we have dealt with -- the firearms order has been made today. The prohibition order has been made subject to the exception application. Does he own particular firearms because there will be automatic --

[42] MS. HILL: No.

[43] THE COURT: Okay. So he does not own any firearms himself, because those would automatically be forfeited if he did. Good. I wanted to make sure that we did not put him in a situation where that happens if there is going to be a subsequent exception application.

[44] I would order that he pay the victim fine surcharge. In this particular case, it is indictable. Accordingly, there will be a victim fine surcharge of \$100. How long does he need to pay that?

[45] MS. HILL: Forthwith.

[46] THE COURT: Okay, payable forthwith. Does that leave us anything outstanding today?

[47] MR. KOMOSKY: No, I do not believe so.

[48] MS. HILL: I do not believe so.

[49] THE COURT: Okay. Good. Thank you, and we will return on September 11th for those other matters. My thanks to those of you that have travelled down from Pelly to be here today.

RUDDY C.J.T.C.