

COURT OF APPEAL FOR YUKON TERRITORY

Citation: *R. v. Flahr*,
2009 YKCA 13

Date: 20091016
Docket: YU637

Between:

Regina

Respondent

And

Curtis Slade Flahr

Appellant

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Groberman

On appeal from: Territorial Court of Yukon, June 2, 2009
(*R. v. Flahr*, 2009 YKTC 56)

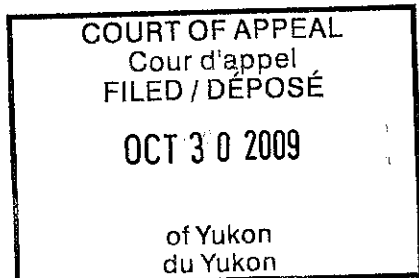
Oral Reasons for Judgment

Counsel for the Appellant: J. Van Wart

Counsel for the Respondent: D. McWhinnie

Place and Date of Hearing: Vancouver, British Columbia
October 16, 2009

Place and Date of Judgment: Vancouver, British Columbia
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[1] **GROBERMAN J.A.:** Mr. Flahr appeals sentences imposed on him following guilty pleas on one count of cultivation of marihuana (s. 7 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19) and one count of breach of a bail condition (s. 145(5.1) of the *Criminal Code*, R.S. 1985, c G-46). He was sentenced to 6 months on the cultivation charge, and 30 days concurrent on the breach. Ancillary provisions of the sentence for cultivation included a weapons prohibition under s. 109(1) of the *Criminal Code* and a Victim Fine Surcharge of \$50. A further Victim Fine Surcharge of \$50 was imposed in respect of the breach charge. Apparently, it was anticipated that Mr. Flahr would be unable to pay the surcharges; rather than waive them, however, the trial judge required that they be paid forthwith, and provided that if they were not paid, the accused would be imprisoned for 1 day concurrent to his other sentences.

[2] Mr. Flahr has now served 32 days of his sentence. He seeks to have the sentence varied to a six month conditional sentence, reduced, of course, by the time already spent in custody. The Crown does not oppose such a disposition, though Crown and Defence do have some difference of opinion as to the credit that ought to be granted for time spent in custody.

[3] The cultivation offence involved a grow operation in which 40 plants in varying stages of maturity and 41 clones were found. In addition, approximately 400 grams of "shake" or low-end quality marihuana were found. Some equipment associated with a grow operation was also found, including lighting and fans. Mr. Flahr stated that the marihuana was grown for his own use. He claimed that the size of the operation was due to the fact that he used the marihuana for pain control, and suffered severe pain from a leg amputation that was not resolving well. He said that he kept the plants in varying stages of maturity to ensure a constant supply of the drug. The Crown suggested that the size of the operation indicated that more than personal use was likely involved.

[4] The breach of bail conditions consisted of a failure to report to a bail supervisor while the accused was on bail in respect of an assault charge. When the

accused was granted bail, a bail supervisor who was in the courtroom attempted to book an appointment with him, but the accused refused. He did not subsequently report.

[5] The accused had an extensive criminal record including 24 convictions: 10 for theft or attempted theft, 3 for possession of stolen property, 3 for mischief, 2 for break and enter, 2 for possession of a weapon, and one each for failing to comply with a probation order, assault causing bodily harm, dangerous driving, and driving with over 80 milligrams of alcohol in 100 millilitres of blood. Significantly, all but the last-mentioned conviction (which occurred in 1997) occurred between 1986 and 1996, and related to pre-1995 crimes. In 1995, Mr. Flahr suffered serious injuries in a motor vehicle accident, resulting in the amputation of one leg below the knee. This appears to have ended his criminal lifestyle.

[6] Mr. Flahr was 40 years of age at the time of the initial sentencing hearing, had employment and a good work history. His amputation was causing him severe pain; the attempt to conserve the knee joint had not worked well, and at the time he came before the court for sentencing, he was scheduled to have a second amputation operation, to shorten the stump to a point above the knee joint. His doctor indicated that Mr. Flahr was on high doses of narcotics to control the pain, to the point where he was "necessarily addicted" to them. He supplemented his narcotic use with marijuana, which he found allowed him to reduce his narcotic intake.

[7] The Crown sought a total sentence of 3-4 months, plus a weapons prohibition. The accused argued that the appropriate disposition was a fine in the range of \$2,000 to \$2,500. In the alternative, he sought a conditional sentence of imprisonment.

[8] The judge adjourned sentencing for several months, without objection, to allow Mr. Flahr to proceed with his operation and a period of recovery prior to the imposition of sentence. When sentence was imposed, Mr. Flahr had undergone the second operation, which had been a success. His counsel indicated that his pain from his leg was substantially reduced.

[9] The judge's reasons for sentence were very brief. Aside from a brief discussion of the ancillary terms, the reasons are as follows:

[1] This matter was first dealt with some time ago. There were guilty pleas to charges of cultivation of marijuana and a breach of undertaking.

[2] At the time the matter was originally before the Court, a custodial sentence was clearly warranted based upon the prior record of the accused and the nature of the offences, particularly the cultivation offence. It also appeared that an actual custodial sentence was, to use the vernacular, "in the cards", given the decision of the British Columbia Court of Appeal in *R. v. Van Santvoord*, [2007] B.C.J. No. 404.

[3] At that particular time, Mr. Flahr was scheduled for major surgery and, in consequence, I adjourned sentence so that it could be carried out without delay or problem. That has now been done but it is now time, Mr. Flahr, to face the music on this matter.

[4] I take account of your continuing, ongoing medical concerns but, in my view, a custodial sentence is still warranted.

[5] With respect to the cultivation charge, I sentence you to a period of imprisonment of six months. On the failing to report charge, 30 days, to be served concurrently.

[6] The surcharge is \$50 on each count.

[7] COUNSEL FOR THE ACCUSED: As I've indicated, he's not employed at this time. I wonder if those surcharges could be waived.

[8] CROWN COUNSEL: I have no submissions.

[9] THE COURT: I will direct that they be paid forthwith and he can serve the default concurrently.

[10] While it is, perhaps, understandable that sentencing can become a routine process in a busy Territorial Court, I am of the view that the reasons given are inadequate given the circumstances of the accused and the submissions that were made to the court. A judge imposing sentence must always be cognizant of his or her duty to explain why a particular disposition is being made. While the reasons may sometimes be brief, some explanation is required.

[11] Reasons for sentence serve a variety of purposes: they ensure that the accused understands why a particular sentence is being imposed – this is essential to make the process a fair one, and may also be important to achieving goals of specific deterrence and rehabilitation. The public is also entitled to know why a particular disposition has been ordered. Public confidence in the judicial system

depends on the public being able to understand why particular sentences are imposed. Reasons for sentence also serve as guideposts for those who work within the judicial system and for the general public. The principle that similar sentences should be given for similar crimes can only function if courts are able to discern what factors make cases "similar" and "dissimilar". General deterrence also depends on public understanding of the sentencing process.

[12] In the present case, a number of factors meant that the reasons were particularly important: the difference between the submissions of the Crown and the Defence was the difference between the accused losing his liberty and simply paying a fine; the judge was minded to impose a penalty that was significantly more onerous than the Crown sought; the accused's circumstances were unusual; there was some question as to whether the size of the operation was such that it should be treated as a low-level commercial operation or whether it should be treated as non-commercial; finally, the main offence for which sentence was being imposed is one that may result in a wide range of sentences.

[13] In light of these various factors, the reasons that were given were, in my view, inadequate. They do not reflect any consideration of whether a conditional sentence was appropriate, nor do they explain what sentencing purposes were found to be most important by the trial judge. While I do not suggest that the judge failed to consider the case carefully, his reasons leave the unfortunate impression that he viewed the sentencing process as a mechanical one.

[14] Failure of the sentencing judge to demonstrate that he considered the possibility of a conditional sentence of imprisonment is, in my view, an error of principle in this case. The judge appears to have treated *R. v. Van Santvoord*, 2007 BCCA 23 as the authority guiding his sentencing discretion in this case. That case, however, was not similar to the case we are dealing with in material respects. The guidance provided by the British Columbia Court of Appeal in its decision in *R. v. Koenders*, 2007 BCCA 378 would have been more apt.

[15] In view of the agreement of the Crown and Defence as to the proper disposition of the appeal, I would allow the appeal on the sentence imposed on the cultivation offence. I would substitute for the 6 month sentence of imprisonment a 6 month conditional sentence, which commenced on the date of the sentencing, subject to the suspension during the bail period in accordance with s. 719 of the *Criminal Code*, on the following terms, which have been agreed to by the Crown and Defence:

1. Keep the peace and be of good behaviour;
2. Appear before the Territorial Court when required to do so by that court;
3. Report to a supervisor within seven working days after the making of this order and thereafter report in a manner and when required by the supervisor;
4. Remain within the jurisdiction of the Territorial Court unless written permission to go outside the jurisdiction is given by that court or by the supervisor;
5. Notify the court or supervisor in advance of any change in name or address and promptly notify the Territorial Court or supervisor of any change in employment;
6. Abide by a curfew within his place of residence between the hours of 4:00 p.m. and 10:00 a.m. daily except with the prior written permission of the conditional sentence supervisor, except for employment or work purposes, for educational purposes, for attendance at family or cultural events, for religious purposes, for emergency medical or dental treatments, and for any other purpose that the supervisor feels is rehabilitative. Mr. Flahr must present himself at the door or answer the telephone during reasonable hours for curfew checks.

7. Not consume or possess any controlled substance within the meaning of the *Controlled Drugs and Substances Act* except as prescribed by a qualified medical practitioner;
8. Abstain from the purchase, possession or consumption of alcohol or other intoxicating substances;
9. Not possess any fertilizer, hydroponic equipment or other equipment particularly suited for use in growing cannabis.

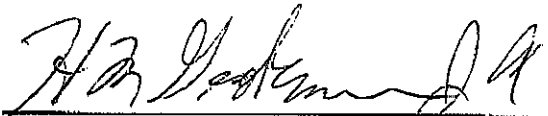
[16] I would maintain the firearms prohibitions imposed by the judge under s. 109(1) of the *Criminal Code*. In view of Mr. Flahr's financial circumstances at the time that sentence was imposed, it was proper to exempt him from the Victim Fine Surcharge under s. 737(5) of the *Criminal Code*. During the period he was recovering from his operation, being fitted for a prosthesis and restoring his ability to walk, it would have been a hardship for him to pay the fine. Exempting him from it would have been proper – in my view, the judge's imposition of a concurrent 1 day sentence for anticipated non-payment was a subterfuge. I would substitute an order under s. 737(5) of the *Criminal Code* exempting Mr. Flahr from the surcharge.

[17] The sentence on the breach of bail condition has already been served. No argument has been directed to it on this appeal, and no purpose would be served by modifying it on this appeal. I would not, in the circumstances, accede to any modification of it, nor would I give additional credit for the time served in respect of the conditional sentence beyond acknowledging that it commenced on the date of sentencing.

[18] **DONALD J.A.:** I am in agreement with Mr. Justice Groberman's reasons.

[19] **HUDDART J.A.:** I agree.

[20] **DONALD J.A.:** The appeal is allowed on the terms indicated by Mr. Justice Groberman. Thank you, counsel.


The Honourable Mr. Justice Groberman