SUPREME COURT OF YUKON

Citation: *R. v. Gaber,* 2016 YKSC 50

Date: 20160928
S.C. No. 14-01508
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

MICHAEL GABER

Before Mr. Justice R.S. Veale

Appearances:
Eric Marcoux — Counsel for the Crown
Vincent Larochelle — Counsel for Michael Gaber

REASONS FOR JUDGMENT

INTRODUCTION

[1] VEALE J. (Oral): Mr. Gaber was found guilty of possessing 59 pills of methylphenidate ("Ritalin") for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, S. C. 1996, c. 19 ("CSDA").

[2] The offence took place on December 26, 2013. Mr. Gaber was a correctional officer at the time and attempted to take the Ritalin pills into the Whitehorse Correctional Centre ("the WCC"). He was searched and arrested before he entered the part of the facility housing the inmates.

[3] There are two previous decisions in the matter. My Reasons for Judgment in *R. v. Gaber*, 2015 YKSC 38, addresses the detention and search issue at the WCC. My

Reasons for Judgment in *R. v. Gaber*, 2016 YKSC 26, addresses the Certificate of Analyst and my ruling that the 59 pills contained Ritalin.

THE FACTS

[4] On December 26, 2013, Mr. Gaber was starting his shift at the WCC when he was stopped by the Deputy Superintendent who was acting on information that Mr. Gaber was involved in providing contraband to inmates. He was searched and found to be in possession of 59 pills containing Ritalin wrapped in a condom.

CIRCUMSTANCES OF THE OFFENDER

[5] Mr. Gaber is 48 years old and has resided in the Yukon for 25 years. He has a wife and two daughters. He and his wife are now separated. He is currently residing with his mother in British Columbia. His wife and daughters reside in Whitehorse.

[6] Mr. Gaber began working at the WCC as an on-call correctional officer in 2008, and worked on that basis for approximately five years until he became a permanent correctional officer in 2013.

[7] After the new WCC facility was built in 2012, Mr. Gaber began to find the job more stressful, and he described the new facility as using a supervision model that involved greater contact between the guards and the inmates. In his statement to the RCMP, which was filed in the trial, he explained his conduct by saying that you "say no a million times" (referring to requests to bring in contraband) and then you lose your resistance. He admitted in the same statement that he had been bringing contraband into the WCC for a year before he was arrested. He started with tobacco and progressed to marijuana because he was paid double the money. He would ordinarily

be paid a few hundred dollars per delivery by friends or family of inmates outside the WCC.

[8] I interject at this point to state that the aforementioned statements by Mr. Gaber have been provided to me under s. 725(1)(c) of the *Criminal Code.* They are facts forming part of the circumstances of the offence that could constitute the basis for a separate charge and are only admissible for showing the offender's background and character. See e.g. *R. v. Edwards* (2001), 54 O.R. (3d) 737 (C.A.) at paras. 61 through 65. Counsel for Mr. Gaber did not object to the reference to these untried and uncharged offences. I note that this evidence cannot be used to increase punishment for Mr. Gaber as he is being sentenced just for the one transaction on December 26, 2013 that was proven.

[9] Mr. Gaber explained that, at the time of his arrest, he and his family were overextended financially and he needed more money to meet his financial obligations.

[10] Mr. Gaber has suffered a significant impact on his life as a result of the offence he committed on December 26, 2013. He has lost his job and in July 2015, he says he had to declare bankruptcy. He has cashed in his RRSPs and had to borrow from his parents to pay legal bills. As Whitehorse is a small town, he has been unable to obtain a suitable job (except for car washing) and has moved to British Columbia to live with his mother. His father has passed away and he has been assisting his mother who had a stroke a few years ago. Not surprisingly, he has been experiencing anxiety and depression. He has had a hard time sleeping and has experienced suicidal thoughts.

AGGRAVATING FACTORS

[11] The significant aggravating circumstance in this offence is the breach of trust, as a correctional officer is in a position of authority. See s. 718.2(iii) of the *Criminal Code*. In the Pre-Sentence Report, Mr. Gaber recognized the harm caused when a correctional officer brings any contraband into a jail:

> … He was able to articulate to the writer that bringing any form of contraband into a Correctional setting creates problems in the environment and where it can cause harm with people who are battling addiction. He said that it creates problems in the hierarchy and imbalances the power and control between the correctional officer and the inmate. He explained that it also jeopardized his co-workers because if an inmate knows they can get something from one officer but not another the inmates treatment of the officers could turn violent towards someone adhering to the rules and regulations. He shared that he knew it was wrong in the beginning but he became desensitized to the internal conflict within himself as the pressures from the outside increased.

[12] The Crown also submits that Mr. Gaber was motivated by profit and financial gain. Defence counsel takes issue with this and submits that the money was used to reduce financial debt and was thus for the benefit of his family. In my view, the way the money was spent, whether for selfish versus more selfless purposes, does not detract from the fact that profit or financial gain was at the heart of the transaction.

[13] The Crown also alleges there is a planned and deliberate aspect to the offence which is an aggravating factor in the sense that Mr. Gaber had to arrange the pickup of the contraband and when and how he brought it into the jail. As I understand the Crown's submission in this aspect, his point is that the offence was not an impulsive act.

[14] Defence counsel objects to this submission, as, in his view, the evidence is simply that there was a seizure of 59 pills containing Ritalin in a condom and no specific evidence of planning or deliberation.

MITIGATING FACTORS

[15] Crown and defence counsel agree that the most significant mitigating factor is that Mr. Gaber has no criminal record.

[16] Defence counsel submits that Mr. Gaber is a low-risk to re-offend as indicated in the Pre-Sentence Report. He also submits that Mr. Gaber is a good candidate for rehabilitation and he relies on a number of character letters indicating that he had a good reputation in the community. The Crown submits that this evidence must be balanced against the evidence of untried offences in Mr. Gaber's statement.

Defence counsel submits that Ritalin is a 'soft drug', unlike Schedule I drugs such as heroin and cocaine. Defence counsel also observes that Ritalin is a prescribed drug and probably lawfully in the WCC already, so it is unlike heroin and cocaine. The Crown disagrees and points out that the maximum sentence for this offence is 10 years as opposed to a 5 year maximum for marijuana.

THE IMPACT ON THE CORRECTIONAL INSTITUTION

[17] The Crown advised that officials at the WCC declined to provide any information on the impact that drug trafficking and drugs have on the WCC correctional officers and inmates.

[18] I note that in *R. v. Moore*, 2009 BCSC 1926, the British Columbia Corrections Branch had provided an extensive report on the North Fraser Pre-Trial Centre and to a limited extent that information is helpful. However, the North Fraser is a massive

institution, comparatively speaking, with approximately 2,500 adult inmates and 1,153 correctional officers. This must be contrasted to the WCC which has a maximum capacity of 190 inmates.

[19] However, the following from *R. v. Moore*, which really addressed the breach of trust factor, is helpful:

1. Correctional officers are the most important element in the approach to eliminating drugs in a custodial setting;
2. Correctional centres are known to house people with drug and substance abuse problems;
3. Correctional officers have knowledge of security and operational protocols and therefore have the capacity to defeat security measures;
4. Both correctional officers and inmates are exposed to the physical risks associated with trafficking, possession and disputes that arise;
5. The introduction of drugs by a correctional officer compromises the ability of that officer to do his or her job which affects the security of everyone in the institution;
6. The betrayal of a Correctional officer who brings drugs into an institution harms workplace relationships with fellow officers;
7. Programming to address drug addiction can be disrupted by the presence of drugs in a facility.

[20] I take judicial notice of these factors as they are also described in Mr. Gaber's pre-sentence report and are referred to in numerous case precedents on the subject.

THE LAW OF SENTENCING

[21] The Criminal Code sets out the purpose and principles of sentencing as follows:

> 718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[22] Section 718.1 contains the principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[23] Section 718.2(b) states that similar offenders should receive similar sentences.

[24] A sentence may be increased or reduced to account for relevant aggravating and mitigating circumstances.

[25] There is general agreement that denunciation and deterrence are the paramount considerations in this case, subject always to consideration of the rehabilitation of the offender.

[26] The Crown submits that a penitentiary sentence in the range of 3 ½ to 4 years is a fit sentence with a 10-year firearm prohibition (s. 109), an order to provide DNA samples (s. 487.051(3)) and forfeiture of all items and money seized.

[27] Defence submits that 18 months in a provincial/territorial institution is a fit sentence. Defence also submits that if a penitentiary sentence is imposed, that it be the minimum of 2 years. A conditional sentence is not available for this offence.

ANALYSIS

[28] The Crown and Defence have submitted some 20 cases that seem to cover the field in sentencing for drug offences by correctional officers in Canada. There is no precedent that I am aware of from the Yukon Court of Appeal, as it appears that this is the first case of its kind in Yukon.

[29] I will highlight two cases that the Crown and defence especially rely on.

[30] The Crown relies on *R. v. Moore* because it was appealed and the sentence was considered to be fit and proper by the British Columbia Court of Appeal at 2011 BCCA 36. As the Yukon Court of Appeal is comprised of members of the British Columbia Court of Appeal in addition to the northern superior court judges, the British Columbia Court of Appeal decisions carry great weight.

[31] In *R. v. Moore*, Mr. Moore was convicted of four counts of trafficking; one count for trafficking in cannabis (98.42 grams), one count for trafficking in ecstasy (196 pills), and two counts of trafficking in anabolic steroids (approximately 15 grams in total). The prison value in total was $20,000 for the drugs and there was an additional $10,000 for other contraband including tobacco.

[32] Mr. Moore actually trafficked the drugs to a particular cell and inmate. When the drugs were discovered by other guards, Mr. Moore attempted to create a diversion by releasing prisoners in the next tier of cells, which could have compromised the investigation into his offence and the security of both correctional officers and inmates.

[33] Mr. Moore did not have a good work record. However, he had no criminal record and was relatively young. He earned $3,000 for the trafficking and there was video evidence to support that his offences were planned and deliberate. The drugs were not considered to be hard drugs. He received a sentence of 4 years for trafficking cannabis, 4 years concurrent for trafficking ecstasy and 30 months concurrent for trafficking anabolic steroids, all of which were confirmed on appeal.

[34] Other Courts of Appeal have addressed the appropriate sentence, subject to exceptional circumstances, for correctional officers trafficking drugs into correctional facilities. In *R. v. Taylor*, 2013 SKCA 33, the offender was a prison guard convicted of 15 offences associated with the distribution of narcotics within a correctional facility. Although the facts are certainly more egregious than the case at bar, the Saskatchewan Court of Appeal said:

> 15 While we entirely agree that trafficking in a facility like the Correctional Centre is a significant aggravating circumstance, we also note, as indicated above, that the trial judge was fully aware of this. He concluded that, bearing this factor in mind, a sentence of four years was warranted. While we believe a somewhat heavier sentence would not have been inappropriate, we are not persuaded that the four years imposed by the trial judge was demonstrably unfit. In this regard, we also note that the fact Mr. Taylor trafficked in a jail is, to some extent, addressed by his one year consecutive sentence for breach of trust.
>
> 16 Every sentence for trafficking in a correctional facility must, of course, be fashioned with reference to the particular

> facts at play in that case. However, that said, we note too that the sentence imposed by the trial judge fits generally within the broad range of sentences imposed by other courts for offences of this kind. [citations omitted]

[35] In the case of *R. v. Taylor*, 2013 NLCA 42, the accused was convicted on 5 counts of possession for the purpose of trafficking small amounts of various drugs including ecstasy, marijuana, oxycodone, morphine and clonazepam. At the time of his arrest he was in breach of a probation order. The trial judge sentenced him to 16 months for possession for the purpose followed by 18 months' probation, taking into account the accused's mental health and addiction issues. The Court of Appeal indicated that the appropriate sentencing range was two and one-half to five years. As to the particular individual, the Court said:

> 48 I have already concluded that an appropriate sentence would be 36 months incarceration recognizing that such a significant breach of trust calls for a strong penalty directed at both deterrence and denunciation. A similar offender in similar circumstances should expect a period of incarceration within that range.

[36] Defence counsel relies primarily on the case of *R. v. Bertoli*, 2013 ONCJ 763. Mr. Bertoli, who was 34 years of age, was a correctional officer at the Toronto West Detention Centre. He was arrested for bringing the following into the Centre: 149.03 grams of marijuana, a lighter and cigarette papers; a 750 milliliter water bottle containing alcohol and five oxycodone pills weighing 1.71 grams. The alcohol and oxycodone were apparently for his own personal use. Police also seized .84 grams of cocaine at his residence, also for personal use, 9.68 grams of marijuana and $725. He pled guilty to breach of trust, possession of marijuana for the purpose of trafficking and simple possession of oxycodone and cocaine.

[37] The Crown's position was for a jail sentence of two years less a day and defence's position was for a jail sentence of 12 months.

[38] The major aggravating factor was the breach of trust and the potential harm of introducing drugs into jails.

[39] The mitigating factors were that Mr. Bertoli had no criminal record, and his criminal conduct was out of character. He began by providing cigarettes to the inmates and moved to selling drugs when he was threatened with exposure. He received $700 for the package. His crime was diminished somewhat by his attempt to extricate himself by switching units when he was threatened with exposure for the cigarettes and prior to bringing drugs into the facility.

[40] Mr. Bertoli pled guilty at an early date before any time was set aside for a preliminary inquiry or trial. He apologized in court. There were 29 letters of support including a letter from a police officer, a correctional officer, a professional hockey player, business owners, educators, executives, volunteers, a retired banker, a company president, a prior employer, a camp supervisor, a retired medical assistant and his family doctor. They described him with a long list of good character words like 'integrity', 'honesty', 'community minded' and 'helpful to all'. He lost his well-paying job and pension.

[41] Prior to being sentenced, Mr. Bertoli put in 1,113 hours volunteering for the Salvation Army which the trial judge considered to be "without precedent and a strong mitigating factor."

[42] The judge indicated the precedent sentences ranged from 16 months in jail with 18 months' probation to five years and six months in jail. Hryn J. sentenced Bertoli to 18

months for the breach of trust, nine months concurrent for possession for the purpose of trafficking marijuana and seven days concurrent for each of possession of oxycodone and cocaine. He stated the following at para. 26:

> The most important principles of sentencing in the case of a corrections officers bringing drugs into jail is denunciation and deterrence. There is no need for specific deterrence in this case but there is the need for general deterrence. The accused appears to be largely rehabilitated. He is committed to deal with his cocaine and marijuana abuse. As requested I will recommend OCI where there are drug programs. The principle of restraint in section [718.2] (d) and (e) is applicable. I will sentence the accused to the least term of imprisonment appropriate in the circumstances.

[43] In terms of the facts in this case, Mr. Gaber's circumstances are clearly distinguishable from Mr. Moore's. Mr. Moore was convicted on 4 counts involving several drugs at much greater quantities and values. There is no evidence before me of the jail value of Ritalin and Mr. Gaber earned a small amount in comparison. Mr. Moore's activities were planned and deliberate to an extent well beyond Mr. Gaber's offence. Mr. Moore also had a poor work record and it was a seriously aggravating factor that, when confronted, he released the prisoners in another tier, jeopardizing the safety of his coworkers and the inmates at the facility.

[44] On the other hand, Mr. Gaber's conduct is also distinguishable from that of Bertoli. There is similarity in the sense that the criminal act was out of character. But here, Mr. Gaber's lacks the mitigating factor of an early guilty plea as well as many of the other exceptional features identified by Hryn J. in *Bertoli*.

[45] An early guilty plea will often result in a discount in a sentence because it indicates the offender is taking responsibility and acknowledging harm done to the community. It also saves the community the expense of a trial.

[46] In my view, the lack of a guilty plea in this case is understandable given the numerous Charter and technical issues raised by Mr. Gaber. However, the early guilty plea was an important factor in the *Bertoli* case as it was coupled with remorse, an apology and significant community support. Mr. Gaber is in a different circumstance.

[47] Mr. Gaber was, however, very co-operative with the WCC staff and the police. He has a lesser degree of community support indicated in the letters filed, but nevertheless he had some close friends who were quite surprised by his conduct at the WCC. He is described as a devoted father.

[48] Mr. Gaber gave a heartfelt apology to his family, friends and community in court.

[49] Mr. Gaber, like Mr. Bertoli, has no criminal record. He does not have the addiction issue that contributed to Mr. Bertoli's conduct.

DISPOSITION

[50] The primary focus of sentencing in this case remains that of denunciation and deterrence. Mr. Gaber does not have the benefit of an early guilty plea but he has no criminal record and is a good candidate for rehabilitation. He does not have the exceptional character and circumstances of Mr. Bertoli but he is also not similar to Mr. Moore, who had far more serious drugs, higher quantities and values, and whose offence contained the serious aggravating factor of releasing prisoners to detract from his crime.

[51] In my view, a fit and proper sentence for this serious offence is 2 years in penitentiary. There will be a 10-year firearm prohibition and an order to provide a secondary DNA samples pursuant to s. 487.05 of the *Criminal Code.* I order a

mandatory Victim Surcharge of $200 payable forthwith. All items seized shall be forfeited.

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VEALE J.