IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v*. Eriksen*, 2005 YKSC 26

Date: 20050218
Docket: S.C. No. 04-01541
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

JOHN ABRAHAM ERIKSEN

Before: Mr. Justice L.F. Gower

Appearances:

Edith Campbell	For the Crown
Malcolm Campbell	For the Defence

MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral):

INTRODUCTION

[2] John Eriksen plead guilty to one count of possessing a firearm while prohibited, in Ross River, between October 6, 2004 and November 2, 2004, contrary to s. 117.01(1) of the *Criminal Code.* He also plead guilty to a second count, at the same place and over the same time period, of storing a firearm, specifically a .22 calibre rifle and ammunition, in a careless manner, contrary to s. 86(1) of the *Criminal Code.* Those guilty pleas were entered on the day the accused was set to go to trial in that community.

[3] It was admitted by the offender that he was under a lifetime firearms prohibition order pursuant to s. 100(1) of the *Criminal Code* made May 24, 2000. It was also admitted that he was under a nine-month probation order at the time of these offences, which was imposed May 7, 2004. Finally, it was admitted that he was on a recognizance at the time of these offences.

FACTS

[4] The offender is a nephew of one Irene Olli and was residing at her residence in Ross River. He had been there for about a month when she found two rifles under his bed. One was the .22 calibre rifle I have mentioned, which had a loaded magazine under the barrel, and the second was an M77 Rueger Remington Magnum complete with a strap and scope.

[5] The offender had shown these rifles to Ms. Olli earlier and apparently told her that he was using them for hunting. She notified another occupant of the house, who investigated the bedroom of the offender and found the ammunition in the magazine of the .22 rifle, but no ammunition for the M77 Rueger. Ms. Olli asked the RCMP to seize the rifles, which they did, and they were subsequently tested and both found to be in working order.

CIRCUMSTANCES

[6] The circumstances of the offender are that he is 30 years of age; single with no dependants; and a member of the Ross River First Nation, although he has not been living in Ross River for much of his life. He recently moved back to Ross River in the late summer of 2004. The *curriculum vitae* of the offender, as I recall, indicated that

Mr. Eriksen has spent a significant period of his life in the United States where he attended and completed high school. He also obtained certification as a gunsmith and attended for various periods in courses in auto mechanics and auto body, as well as more recently in carpentry at the Yukon College.

[7] He has spent, as I calculated, a total of 105 days in pre-sentence custody to date, which is the equivalent of three and a half months. While in pre-sentence custody he completed a welding course, which was a 50-hour course for which he obtained a certificate.

[8] He moved to Ross River to try and put his criminal past behind him and build a new life (I will refer to his criminal record shortly). He intended to restore contact with some family members in Ross River. I am advised that he was able to remain sober from the time that he moved there and he also obtained employment with a construction company in Ross River.

[9] He regrets the circumstances of the offence. He says it has had significant consequences for him. Specifically, he lost his construction job; he lost $1,000 of bail money; he lost the value of his firearms and ammunition, which he estimates at about $2,000, and he has suffered embarrassment within the community in which he intended to reside.

[10] Mr. Eriksen, unfortunately, has a lengthy criminal record, which spans from 1996 through to 2004, including some 37 convictions. Of those I count six related to firearms or weapons offences, 15 are related to breaches of court orders or failures to obey process, and one prior specifically related conviction under s. 117.01 in 2000, for which

he received a 30-day sentence, together with a conviction for pointing a firearm at the same time, for which he received a four-month sentence. There was also one other prior conviction for careless use of a firearm in 2001 for which he received a sentence of 15 days.

[11] The Crown's position on sentence is derived from the case law which the Crown filed. In the case of *R.* v. *Cole,* [1997] B.C.J. No. 2252 (QL), in the British Columbia Court of Appeal, the Court was sentencing an offender for possessing a firearm when prohibited. That firearm is arguably distinguishable from the ones in the case at bar, as it was a semi-automatic handgun, which was fully loaded with a bullet in the breach. It was in the offender's apartment. The offender there had a considerable criminal record and he had served between five and six months in pre-sentence custody. The Court of Appeal declined to interfere with the 18-month sentence imposed by the trial judge. Therefore, as I calculate it, the effective sentence, including the usual credit for pre-sentence custody, would have been about 28 to 30 months.

[12] *R.* v. *Nelson*, [1999] B.C.J. No. 2898 (QL), also from the British Columbia Court of Appeal, was unusual in that, although the offender was charged with possession of a firearm while prohibited, as well as possession of a prohibited device, namely a large capacity magazine and a third charge of improper storage, both Crown and defence on the appeal had made a joint submission that the sentence globally should be nine months incarceration with probation to follow. The unusual circumstances were that the offender was noted to suffer from a type of brain injury and there was strong support in the community for the treatment of such a malady.

[13] The case of *R.* v. *Johnnie,* [1998] Y.J. No. 142 (QL), from this Court, involved an offender, again with a substantial criminal record, but he had also uttered death threats to a female in her home and was subsequently found to be in possession of a loaded .22 calibre rifle while subject to a firearms prohibition. He had spent five and a half months in pre-sentence custody and received a global sentence of eight months on the charges, as well as probation for two years. Therefore, the effective global sentence, taking into account credit for pre-sentence custody would have been approximately 18 months for both of those charges.

[14] The Crown submits that therefore a sentence in the range of one year would be appropriate for Mr. Eriksen, less credit for his pre-sentence custody. However, the Crown argues there should be less than two-for-one credit for the pre-sentence custody because he has been in general population with access to programs.

[15] The defence submission is that these offences are essentially regulatory in nature, that they are victimless and not ones which are actively criminal. Defence counsel argues that the intent of the provisions at issue here is to curtail situations which may become actively criminal. He acknowledges that there are risks to public safety from firearms which are accessible to intruders or children and subject to easy discharge. However, defence counsel says that did not happen here and therefore the offender should not be punished for that risk. He says that the offender here is at the low end of the culpability scale because the firearms in his bedroom under his bed were not in public view and not readily accessible.

[16] Defence counsel relied on three cases. The first case he referred to was *R.* v. *Smith,* 1999 ABQB 928, from the Alberta Court of Queen's Bench. He said that Court recognized that the offence at issue, an improper storage of firearm charge, was regulatory in nature. However, he could not point to any passage in the case which suggests that conclusion. *Smith* was a situation where the offender was found to be in possession of a firearm unsecured in the back of his truck and the trial judge commented, at paragraph 21, that this was:

> " . . .a serious neglect of firearm safety for a person who calls himself a hunter . . . "

That comment was agreed with by the appeal judge on the summary conviction appeal. I would also conclude that the comment is appropriate here, as Mr. Eriksen was purporting to be in possession of these firearms for hunting purposes.

[17] The case of *R.* v. *Jackson,* [2000] B.C.J. No. 101 (QL), from the British Columbia Supreme Court, was a situation involving two counts of assault against his spouse and three counts of careless storage of firearms and ammunition and one count of uttering a threat to his spouse. The careless storage charges were reduced to a single count. The offender was a Victoria city police officer, apparently with no prior record and of previous good character.

[18] The *R.* v. *Henley* case, [1998] B.C.J. No. 349 (QL), from the British Columbia Supreme Court, involved a possession of a restricted weapon without a registration certificate and the sentence imposed was a $750 fine, as well as a firearms prohibition for five years. However, once again, *R.* v. *Henley* was a case where the offender did

not have a prior criminal record. At paragraph 6, the Court referred to the tragic incident which underlaid the offence and I quote:

> " . . .The incident occurred when the firearm was used by one of three youths who had come to the appellant's home in his absence in the company of his daughter, found the gun after ransacking the appellant's bedroom where it and ammunition for it had been stored by him between the mattress and box spring of his bed. They loaded the gun, were fooling around with it, it was discharged and one of the three youths, Jared Fraelic, was killed. . . ."

I mention that because I conclude that that is germane to the type of risk which was present in Mr. Eriksen's circumstances, even more so because the .22 was already loaded.

[19] All three of the defence cases imposed non-custodial dispositions and are put forward in support of the proposition that there is a wide range of sentences in these kinds of cases.

[20] The Crown says in reply that the Court must consider both the circumstances of the offence and the circumstances of the offender and that would include this offender's lengthy criminal record and prior related offences. She also notes that the maximum sentence under s. 117.01 is 10 years in jail, which is significantly higher than the offences referred to by defence counsel as being analogous here - for example, a breach of recognizance or undertaking under s. 145(3) is punishable by a maximum of two years; a breach of probation under s. 733.1 is punishable by a maximum of two years; and a conviction for driving while disqualified under the *Criminal Code* s. 259(4) is punishable by a maximum of five years.

[21] Indeed, Crown counsel's point was recognized by the then Chief Justice of the British Columbia Court of Appeal in *Cole,* cited above, where, at paragraph 8, he noted that the increase in the maximum for the offence of possession of a firearm while prohibited, had recently been increased by Parliament from five years to ten years, which "makes it apparent that Parliament regarded this as a very serious offence as I do."

[22] Ultimately, I am not persuaded by defence arguments that these offences are merely regulatory in nature. I do accept that it is arguable that a mere innocent possession of a firearm while prohibited, absent prior related offences and absent any additional aggravating circumstances, such as careless storage, might be analogous to a driving while disqualified situation. However, even defence counsel conceded that the situation of the notional disqualified driver, when aggravated by the fact that that driver is also impaired, as was the case in *R. v. Donnessey,* [1990] Y.J. No.138 (Q.L.), creates a situation where the circumstances, and I am paraphrasing, are like the driver being in possession of a loaded gun. I take that comment from *Donnessey* to be a recognition of the risk of serious and lethal consequences in those circumstances, which increases the offender's moral culpability and his consequential criminal sanction.

[23] On the topic of the pre-sentence custody, defence counsel says that I should continue to apply the usual practice in this jurisdiction of two-for-one credit, even in circumstances where the offender spends his remand time in general population. He says that even if such offenders have access to some programs, they would not be eligible for such things as temporary absences. I note on a quick review of the *Corrections Act,* R.S.Y. 2002, c.46, s. 11, that the provisions relating to work release,

which include releases for such things as educational purposes, appear to only be available to "a person's sentence" and therefore would not, on the face of it, be available to remand prisoners.

[24] I gave the Crown an opportunity to argue this issue in greater detail, but that opportunity was declined. It is apparent that the Crown wishes to keep its powder dry for another day. I have indicated to both counsel that if this is going to continue to be an issue in future cases, then the Court would greatly appreciate receiving some additional evidence in support of the countervailing arguments, as well as case law.

[25] For the moment, I note in the case of *R.* v*. Mills,* [1999] B.C.J. No. 566 (QL), from the British Columbia Court of Appeal, the comments of Donald J. at paragraph 46 and I am quoting:

> "Time in custody after sentence counts towards parole eligibility after one-third of the sentence is served and towards statutory release after two-thirds. Giving credit for double the time in pre-disposition custody hits the mid-point in a range between earning the equivalent of three days for every day served for parole purposes and one and a half days in the case of statutory release."

[26] I have not lost sight here of the fact that the offender was also on a recognizance at the time of his arrest on the charges which we are dealing with now. However, in all of the circumstances, given the comments in *Mills*, cited above, and given the fact that there is apparently a lack of access by the offender to the full range of privileges that are available to general population inmates, I am going to exercise my discretion not to depart from the two-for-one guideline in this case.

CONCLUSION

[27] I am keeping in mind the jump or the step principle, as well as focusing on general deterrence, specific deterrence and denunciation. With respect to specific deterrence, I would like to return to the comments of Justice McIntyre in the *Johnnie* decision, cited above, where he said to the accused:

> ". . .I have to deter you. You have to get the message. I am concerned that you just do not get it."

[28] Mr. Eriksen, I would say exactly the same things to you. With your record, with your familiarity with guns and your certification as a gunsmith, with the directly related convictions that you have on your criminal record, sir, you must be specifically deterred. You simply must "get it" that you cannot be in possession of firearms. You are under a lifetime prohibition and that is it.

[29] On the other hand, having reviewed your CV, I take it that you have significant skills and intelligence and the ability to make a future for yourself if you apply yourself. Therefore, you are not without some prospect of rehabilitation, notwithstanding your lengthy record. The sentence that I am going to impose is designed to focus on all of these things.

[30] I sentence you to a term of incarceration of seven months for the s. 117.01 Count, which you have served by your pre-sentence custody. I sentence you to a term of three and a half months for the s. 86(1) Count, to be served concurrently, which again has been served by your time in pre-sentence custody. I am also placing you on probation for a period of two years. You will be subject to the statutory conditions under

the *Criminal Code* and these will be explained to you in due course by the clerk and by your counsel.

(1) You are to keep the peace and be of good behaviour and appear before the Court when required to do so by the Court.

(2) You are to notify the Court or your probation officer in advance of any change of name or address and promptly notify the Court or your probation officer of any change of employment or occupation.

(3) You are to report to a probation officer within --

And I will take submissions from you, Mr. Campbell. I was going to say two working days; is that viable in the circumstances?

[31] MR. CAMPBELL: I'm not in a position to answer that right now.

[32] THE COURT: All right.

[33] MR. CAMPBELL: But it could be a telephone report for certain.

[34] THE COURT: All right.

(3) You are to report to a probation officer within two working days after the making of this order, which may be done by telephone, and thereafter when required by the probation officer and in the manner directed by the probation officer.

(4) You are to remain within the jurisdiction of the Court, unless written permission to go outside of this jurisdiction is obtained from the Court or a probation officer.

(5) You are to attend and complete the programs which your counsel has noted in his submissions. Specifically, a rigging and hoisting course, February 18th to 21st of this year; followed by a transportation of dangerous goods course, March 29th to 30th of this year; followed by a sour gas course, March 31st of this year; followed by a level three occupational safety and first aid course, April 4th to 15th of this year; followed by a basic home wiring course, April 22nd to 25th of this year. I repeat that you are to attend and complete all of those programs unless you have obtained prior written permission from your probation officer.

(6) You are also to take such further and other steps towards upgrading your education and lifeskills as are directed by your probation officer.

(7) To assist you in your efforts to remain sober I am going to place you on a condition that requires you to abstain absolutely from the possession, consumption or purchase of alcohol, non-prescription drugs or other intoxicating substances, as outlined in the *Controlled Drugs and Substances Act,* and submit to a breathalyzer, urinalysis, bodily fluids tests or blood tests upon demand by a peace officer or probation officer who has reason to believe that you have failed to comply with this condition.

(8) You are to make reasonable efforts to find and maintain suitable employment and to provide your probation officer with all necessary details concerning your efforts.

(9) And lastly, and I think most significantly, I am going to place you on a condition which was imposed on the *Nelson* case, cited above, which was implicitly approved by the Court of Appeal, that with advance notice, you permit and facilitate any reasonable search by a peace officer of any place that you control for the purpose of locating any firearm, ammunition, or explosive substance, designed or intended to be used as a weapon, that is reasonably suspected to be in such a place.

[35] So for two years the police are going to be able to inspect your premises providing they give you advance notice, and that is designed to make sure that you do not have guns under your bed or anywhere else in the places where you are residing or have access to.

[36] Under the circumstances, I will waive the victim of crime surcharge and I will ask counsel if there is anything else that I have omitted to deal with.

[37] MS. CAMPBELL: Crown asks to have an application under s. 491 with regards to the firearms, but nothing else on the sentencing.

[38] THE COURT: I assume from your submissions you are not opposed?

[39] MR. CAMPBELL: Correct, yes.

[40] THE COURT: The order will be granted.

[41] MS. CAMPBELL: I have to say, My Lord, that pursuant to s. 491(2), I do not know how Mr. Eriksen got the Rueger 7 millimetre rifle, but I do know that that rifle was stolen in 2002 and I would ask that the Court make an order that the rifle be returned to the lawful owner, which would be Mr. Dean McGuire. I do have a copy of an affidavit of value and ownership. The rifle was stolen more than three years ago, but the owner is still interested in getting back his rifle.

[42] THE COURT: Again, on the basis that none of this is in dispute, you may take your order on that.

[43] MS. CAMPBELL: All right. Thank you.

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GOWER J.