

In the Provincial Court of Alberta

Citation: R. v. Danfousse, 2013 ABPC 346

Date: 20131223
Docket: 110082096P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

John Wesley Danfousse

Reasons for Sentence of the Honourable Judge T.C. Semenuk

Introduction

[1] After trial, I found the accused guilty of two offences contrary to sections 445.1(1)(a) and 445(1)(a) of the *Criminal Code*.

[2] The matter is now before the Court for sentencing.

[3] For the reasons that follow, on the charge contrary to section 445.1(1)(a) of the *Criminal Code*, sentence is suspended and the accused is placed on probation for 15 months.

[4] On the charge contrary to section 445(1)(a) of the *Criminal Code*, having regard to the *Kienapple* principle, the Court enters a conditional stay of proceedings.

Facts

[5] The facts in this case are fully canvassed in my written reasons for judgment reported at 2013 ABPC 137.

[6] At paras. 133 - 136, I stated as follows:

[133] Defence Counsel conceded the credibility of Robert Cousins as a witness in argument. Prior to the incident he and the accused were on good terms. He had no motive to lie. I accept the evidence given by Robert Cousins as to what happened in the stairwell. The accused was standing at the top of the stairs behind the fire door. The cat was hissing at him. The accused said “Fucking cat” and, out of anger and frustration, he kicked the cat down the stairs. As described by Cousins, “It was a good swift kick.” The kick was wilful, not an accident. The cat went airborne and landed at the bottom of the stairs. The door leading to the outside was propped open at the time. The accused walked calmly down the stairs. The cat hissed at him again. The accused said, “Fucking cat” and kicked the cat a second time. The second kick was not as hard as the first kick, but was hard enough to propel the cat outside the door. The second kick was also wilful. At the time, the cat was wet from top to bottom, and the temperature was cold at minus 12 degrees. There was also snow on the ground. The cat was obviously injured and in distress. The injuries observed by Constable Down in the apartment, and later noted at the Clinic by Dr. German, another credible witness, were consistent with the cat being kicked down the stairs as described by Cousins.

[134] The actual injuries to the cat observed by Dr. German, (ie., the penetrating laceration to the lip, abrasions to the right hind leg, and the loss of the digit 3 nail on the paw) were serious injuries.

[135] These injuries were “*wilfully*” inflicted on the cat by the accused within the meaning of section 429 of the *Criminal Code*. These injuries also caused the cat unnecessary pain and suffering.

[136] I am satisfied beyond a reasonable doubt as to the guilt of the accused on both Counts 1 and 2 contained in the Information.

[7] A Pre-Sentence Report (PSR) and Forensic Assessment Outpatient Report (FAOS) were prepared and marked in evidence as Exhibits 1 and 2, respectively.

Issue

[8] The issue in this case is a fit sentence.

[9] Crown Counsel submits that incarceration for 3 - 4 months, followed by probation for

12 - 18 months, is a fit sentence. As well, pursuant to section 447.1(1)(a) of the *Criminal Code*, he submits the accused ought to be prohibited from possessing, having the custody or control of or residing in the same residence as an animal for 10 years.

[10] Defence Counsel submits that incarceration is not required in this case, and that sentence ought to be suspended and the accused placed on probation for a period of 12-18 months. In the alternative, he submits that, if incarceration is required, the Court ought to grant a Conditional Sentence Order (CSO), leaving the length of the sentence to the Court. As to the prohibition order, he submits 10 years is excessive, and that 5 years, in the circumstances of this case, is more appropriate.

Law and Analysis

Range of Sentence

[11] An offence contrary to section 445.1(1)(a) of the *Criminal Code* is a hybrid offence. In this case, the Crown elected to proceed by summary conviction. The maximum penalty is a fine not exceeding \$10,000.00 or imprisonment for 18 months, or both.

[12] To assist the Court in fixing a range of sentence in the circumstances of this case, Crown Counsel has provided the Court with a Book of Authorities including: *R v Connors*, 2011 BCPC 24; *R v Monroe*, 2012 ONSC 4768; *R v Tremblay*, 2012 BCPC 410; *R v Anderson* (November 29, 2012, Transcript of Proceedings in Provincial Court at Calgary, Alberta); *R v Dudar* (February 8, 2013, Transcript of Proceedings in Provincial Court at Edmonton, Alberta); *R v Chalmers* (April 23, 2013, Transcript of Proceedings in Provincial Court at Edmonton, Alberta); *R v Habermehl*, 2013 ABPC 192; and *R v Ambrose*, 2000 ABCA 264.

[13] In addition, Crown Counsel has provided the Court with a helpful **Synopsis Of All Edmonton Animal Cruelty Cases Pursuant to the *Criminal Code***, including *R v Cardinal*; *R v Dudar*; *R v Villebrun*; *R v Loyer*; *R v St.Lauren* ; *R v Bull*; and *R v Chalmers*.

[14] The Court has also reviewed and considered the following authorities: *R v Campbell Brown*, 2004 ABPC 17 and *R v Rabeau*, 2010 ABPC 159.

[15] I recognize that in 2008 Parliament increased the penalties for this type of offence. As stated by my Learned Colleague Fraser PCJ., at para. 2 in *Habermehl*,

“It is said in doing so, Parliament gave effect to the widespread concern that the Criminal Code provisions concerning cruelty to animals had fallen drastically out of step with current and social values and thus restructured the sentences available. The amendments represent a fundamental shift in Parliament’s approach to these crimes.”

[16] In *Rabeau*, in dealing with the range of sentence in animal cruelty cases, this Court at paras. 13 - 17 stated as follows:

13 In these types of cases, denunciation and deterrence are primary considerations in the sentencing process, and a short sharp period of imprisonment is usually imposed, even on an offender with no prior criminal record.

14 The reason for this was succinctly stated in *Campbell Brown*, *supra*, by my Learned Colleague, Brown, PCJ, at para. 31 as follows:

Protection of animals is part of our criminal law because a person's treatment of animals, like the treatment of children, the infirm or other vulnerable parties, is viewed as a barometer of that person's treatment of people. As with all other criminal offences, harming animals amounts to harming everyone.

15 The range of sentence for these types of cases is somewhere between 2 and 4 months' imprisonment. In some cases, a Conditional Sentence Order (CSO) may be granted. In some cases, if the sentence does not exceed 90 days, an intermittent sentence may be imposed. Depending on the circumstances of the offence and the offender, probation for 12 - 24 months may follow a period of imprisonment.

16 That being said, there is a third category of case where the offender has a *bona fide* fear of an animal, either personally, or in relation to someone else, or some other animal, and overreacts by killing the animal.

17 In this type of case, and depending on the circumstances of the offence and the offender, rather than imprisonment, a suspended sentence and probation or conditional discharge may be granted. See: *Campbell Brown* and *Gamble*, *supra*.

Circumstances of the Accused

[17] Briefly, the accused is 56 years of age. He is not a first offender. He has a conviction for theft over \$200, back in 1983, and was sentenced to a suspended sentence and probation. He currently resides alone in Calgary in an apartment supported by Calgary Housing.

[18] The accused was born in Ottawa, Ontario. He has one older brother. His father committed suicide in 1975, and his mother passed away in February, 2013. The recent passing of his mother was very emotional for him.

[19] The only memories the accused has of his childhood was that his father was an “alcoholic bastard” and that he was both physically and sexually abused by his father from age 7 to age 15 years. Neither his mother or brother were aware of the sexual abuse because his father told him “if you tell your mother or brother, I will kill you.”

[20] The accused was kicked out of the family home at age 15 years. From age 15 - 18 years, he hitch-hiked across Canada living a transient lifestyle. He returned to the family home at age 18 years with the idea that he was going to kill his father. He admits having so much anger and resentment for his father over the years of abuse. He remembers that his mother had decided to leave his father at the time, and that he was in the family home when his father shot himself dead in the living room while he was in the bathroom.

[21] After his father’s suicide, the accused was unable to function and required psychiatric care and was admitted to hospital for 3 months. After being released from hospital he stayed at the Salvation Army and was relying on Welfare for financial stability. He did not live at home with his mother because she had re-married and he didn’t get along with her new husband.

[22] Feeling disconnected in Ottawa, in 1980 the accused moved to Calgary. At age 25, the accused started to frequent the Lito’s Café in Calgary that was a “hang out” for the Grim Reapers motorcycle gang. He began to socialize with these individuals by drinking and doing drugs.

[23] During this period of time, the accused met a female named Francis. She was deeply religious. They started a relationship, he became a born again Christian and they were married in 1982. Their marriage ended in divorce in 1984.

[24] The accused quickly moved into another relationship with a female named Paulette, and after 2 years was married again. This marriage lasted for 10 years before another divorce.

[25] Eventually the accused met and married another female named Dixie. That marriage was marred by a pregnancy resulting in a miscarriage at 3 months. This was followed by a second pregnancy resulting in twin daughters being stillborn at 5 - 7 months. Following the passing of his twin daughters the accused began abusing both alcohol and drugs. He moved out of the family home and began living a transient lifestyle in Calgary.

[26] In 2009 the accused met another female named Louise. Although suffering from Schizophrenia, the accused wanted to marry her, but she broke the relationship off. This caused the accused great emotional turmoil and was one of the stressors weighing on the accused at the time of the commission of the offence in this case.

[27] In terms of education, the accused only has a grade 8 education.

[28] In terms of employment the accused has never had stable employment. He was last employed in his 30's.

[29] The accused is currently receiving Assured Income for the Severely Handicapped (AISH).

[30] The accused has suffered from alcoholism since being introduced to alcohol by his father at age 13 years. As well, from age 15 - 18 the accused began to use illicit drugs, including crack cocaine. He has continued to abuse both alcohol and drugs for his entire adult life. Alcohol was another factor weighing on the accused at the time of the commission of the offence in this case.

[31] In terms of the accused's physical health the accused suffers from hepatitis C, hiatus hernia, ulcerated esophagus, angina, irritable bowel syndrome, osteoarthritis in his spine, and hypoglycemia. He is on numerous medications, including nitroglycerin.

[32] In terms of his mental health, the accused has a long and significant psychiatric history. He has tried to commit suicide on several occasions starting at age 11. Since 1982 he has been in and out of hospital on several occasions in Ottawa, Vancouver and Calgary. He has an anger management problem. In 1993 and 1994 the accused was diagnosed with poor impulse control and Intermittent Explosive Disorder. He has a history of high anxiety. He has never dealt properly with his past history of sexual abuse at the hands of his father. In 1995 he was diagnosed with Major Depression and Personality Disorder with infantile/narcissistic features and suicidal gestures. He was also admitted to the Foothills Medical Centre in Calgary and diagnosed with Mixed Personality Disorder, Post Traumatic Stress Disorder and Substance Abuse. In 2004 the accused was seen by the Mobile Response Team and diagnosed with Cluster B Personality Traits. In 2010 the accused was assessed at the Rockyview Hospital and diagnosed with Partner Relational Problems. That being said, at the present time there is no evidence to suggest that the accused is suffering from any Major Depressive Disorder, Schizophrenia or Bi-Polar Disorder. He has underlying Cluster B Personality Traits such as impulsivity, poor coping with stress, feelings of abandonment, low self-esteem at times and a history of violence in relationships.

Sentencing Principles

[33] In all sentencing cases, the ultimate disposition for an offender must reflect the fundamental purpose and all the principles of sentencing provided for in section 718 of the *Criminal Code*. The sentence must be in accordance with the fundamental principle of proportionality found in section 718.1 of the *Code*. As well, the sentence, in accordance with section 718.2 of the *Code*, must account for any relevant aggravating and mitigating circumstances and be tailored to fit the accused before the Court. "Individualized" as opposed to "tariff" sentencing has been endorsed by the SCC in *R v McDonnell* (1997), 1 SCR 948 and *R v*

Proulx (2000), 140 CCC (3d) 449. Finally, in accordance with sections 718.2(b) (c) (d) and (e) of the *Code*, there should be parity in sentencing similar offenders for similar offences; a global sentence should not be excessive, the least restrictive sentence should be imposed, and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

[34] What are the aggravating and mitigating circumstances in this case?

Aggravating

1. The nature of the offence in this case is serious because the cat was vulnerable, and the accused kicked the cat twice.
2. The injuries sustained were serious in the sense that they were not trivial or transitory in nature, and the cat required emergency medical care, sedation and minor surgery, by a veterinarian.
3. According to the writer of the PSR, the accused “*does not accept responsibility for his actions and often tries to justify why the witnesses to the alleged offence made the accusations against him.*”
4. The accused is not a first offender.
5. According to the writer of the FAOS Report, the accused has anger issues and a history of violence in relationships in the past.
6. The consumption of alcohol by the accused on the date in question was a contributing factor in the commission of the offence.

Mitigating

1. It is evident, having regard to the circumstances of the accused stated above, that he is a damaged person, both physically and mentally. He takes a number of different prescription medications. He is a lonely person, has no friends or family support in the community, and lives on AISH.
2. According to the writer of the FAOS Report “*the combination of insomnia, drinking alcohol on that day, feeling rejected by his girlfriend who believed that the cat was conspiring against them, possibly nicotine withdrawal and his underlying Personality traits had increased his vulnerability to become irritable, agitated, and aggressive on that night. He denied that he had any intention to harm the cat. He denied any history of cruelty to animals. It seems to me that this was an isolated incident and the risk of recidivism is of a low degree.*”

3. The accused abided by the conditions of his order for judicial interim release pending trial and according to the writer of the PSR, he appears to be a suitable candidate for community supervision.
4. Although the accused is not a first offender, his criminal record is dated and unrelated.

Disposition

[35] Appreciating that denunciation and deterrence are primary considerations in the sentencing process for this type of offence, I note that most of the cases referred to the Court by Crown Counsel where incarceration was imposed involved injuries to the animal far more severe than the injuries sustained by the cat in this case, and the criminal behaviour of the accused in causing those injuries was far more egregious than that of the accused in this case.

[36] In my view, the criminal behaviour engaged in by the accused in this case was impulsive. Having regard to his numerous physical and mental health issues, and his resulting vulnerability as a person, his moral blameworthiness is somewhat diminished.

[37] The offence being an isolated incident and the accused being a low risk to re-offend, I do not feel that imprisonment is warranted in this case.

[38] In my view, a fit sentence is a suspended sentence and probation for 15 months on conditions prescribed in the attached order.

[39] As well, pursuant to section 447.1(1)(a) of the *Criminal Code*, the accused is prohibited from possessing, having the custody or control of, or residing in the same residence as any animal for a period of 5 years.

[40] There will be no victim fine surcharge in this case.

Dated at the City of Calgary, Alberta this 23rd day of December, 2013.

T.C. Semenuk
A Judge of the Provincial Court of Alberta

Appearances:

G. Haight
for the Crown

D. Hadley
for the Accused