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| File No: 4076-1 | | | |
| Registry: Clearwater | | | |
| In the Provincial Court of British Columbia | | | |
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| REGINA  v.  ROY JEREMY McKAY | | | |
| REASONS FOR SENTENCE  OF  THE HONOURABLE JUDGE DONEGAN  COPY | | | |
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| Crown Counsel: | | W. Burrows | |
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| Appearing on his own behalf: | | R. McKay | |
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| Place of Hearing: | | Kamloops, B.C. | |
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| Date of Judgment: | | January 27, 2012 | |

1. THE COURT: Roy Jeremy McKay entered a guilty plea to Count 1 of Information 4076-1 on June 21, 2011, the day of his trial. He is now before me for sentencing. The Crown proceeded by way of indictment in this matter.
2. On June 21st -- no, he can stay seated. It is a long -- it will take a while, and I should advise counsel that are sitting here, as well, I expect this will take probably half an hour, if not longer.
3. Sentencing was adjourned to August 23, 2011, and then from time to time after that. Once Mr. McKay did not attend court, then he had to consult with counsel, then he applied unsuccessfully to strike his plea, and then ultimately had a sentencing hearing in Clearwater before me day before yesterday, that is January 25th, 2012.
4. Mr. McKay admitted to causing or wilfully permitting to be caused pain and suffering to an animal, specifically his dog, during the dates alleged, but disagreed with some of the material facts alleged by the Crown.
5. At the sentencing hearing on this past Wednesday, the Crown called two witnesses. The former spouse of Mr. McKay, Trish Archibald, provided evidence was received by way of affidavit. The two witnesses that were called in person were the investigating officer who found the dog and the veterinarian, Dr. Matthews, who examined the deceased dog after it was located by the RCMP. Neither Crown witness was cross-examined by Mr. McKay.
6. Mr. McKay testified that when his spouse left him in January of 2009, he kept their dog who was an ordinarily fairly thin dog. He said the dog went missing for about three weeks or so and felt at the time that someone had taken his dog from its outdoor doghouse, off of its chain. He told his former spouse the dog went missing, but despite believing that the dog had been stolen, did not call authorities.
7. Mr. McKay testified that the dog was mysteriously returned to the doghouse and attached to its chain. He testified the dog was emaciated and perhaps sick when it was returned. He did not take the dog to the vet, call the authorities, tell his ex-spouse, or call anyone. He testified that he tried to feed the dog unsuccessfully for three or four days and it died. Mr. McKay indicated that he had been drinking heavily throughout this timeframe and did not know what to do.
8. A week passed until the police attended, responding to an anonymous tip and located the dog deceased in its doghouse outside in the cold weather. Under cross-examination, Mr. McKay could offer no explanation as to why he did not phone anyone for assistance, except he offered that he did not have a telephone with him at the time and had been drinking throughout that timeframe.
9. Mr. McKay contradicted himself when testifying about feeding the dog. Initially, he testified that he always fed the dog inside the house because he was afraid other animals would get at the food outside. However, under cross-examination, he said that he fed the dog outside occasionally.
10. Mr. McKay further admitted to testifying in a family proceeding that the dog had "escaped," and he used that word under oath in the family proceeding, from its collar. This is, I find, a direct contradiction to his evidence before me that he believed at the time the dog had been stolen.
11. I find the evidence of Mr. McKay to be unworthy of belief. He contradicted himself in front of this court and in a family case. He would have the court believe that an unknown person, perhaps, he speculated, his ex-spouse's new boyfriend, stole his dog off of its chain out of its kennel and out of his yard, kept the dog for a period of three weeks or so, starved it, and then mysteriously returned it, put it back in the doghouse and reattached it to its chain in a near-death state.
12. Mr. McKay provided a multitude of excuses for his illogical behaviour following what he claimed to be the return of the dog, none of which are, in my view, believable. He offered, as I have alluded to, he had no phone to call anyone, he had been drinking excessively, that he did not want to stress out his ex-spouse. In short, I do not believe Mr. McKay's version of events nor am I left in any reasonable doubt by it.
13. I find the Crown has proven beyond a reasonable doubt the following facts. Trish Archibald began living with Mr. McKay in 2001 and they separated permanently in January 2009. At the time of their separation in January of 2009, Mr. McKay was living at 536 Clearwater Village Road in Clearwater, British Columbia, where they had been living together as a couple and he continued to live there until March 14, 2009, when the dog was found deceased.
14. When Ms. Archibald left Mr. McKay in January of 2009, the family dog, Sasha, which is a lab-pit bull cross, had to stay at the family home with Mr. McKay because the residence that Ms. Archibald moved out to did not allow dogs. When Ms. Archibald last saw Sasha in early January of 2009, she was healthy and well nourished.
15. While the dog, Sasha, was in the sole care and custody of Mr. McKay, it slowly and painfully starved to death. When found frozen in its doghouse a week after its death, the dog weighed approximately one-half of its normal weight. There was no fat whatsoever left in the body of the dog, suggesting to the expert that was called by the Crown, veterinarian Dr. Matthews, that the pet had starved to death over a period of some four to six weeks.
16. Dr. Matthews could not be more precise about this timeframe without knowing certain things such as the fitness of the dog prior to its death, the length of the hair coat of the dog prior to its death, and the kind of outside protection that it had while it starved.
17. What struck Dr. Matthews was that in all of his experience, which was extensive and included dealing with a multitude of starving dogs in the aftermath of Hurricane Katrina, was that this was the most serious case of starvation that he had ever come across in all of his years.
18. Severe muscle wasting was present. Muscle mass, he noted, was greatly reduced everywhere and, most notably, over the shoulders, back, and pelvis. There was no sign of any food whatsoever in his examination of the internal contents of the dog's digestive system and, as I say, he found that no body fat was found anywhere in the animal. No body fat was found on any of the internal organs or even retrobulbar fat in the eyeballs.
19. In short, Mr. McKay, I find, left this family pet over a period of four to eight weeks to starve to death. Whether he did this as a result of spite toward his ex-spouse or whether he did this as a result of neglect and uncaring is unknown to me, but what is known to me is that this dog must have suffered a horribly slow and painful death.
20. Crown seeks a sentence of 90 days in jail and a 10-year prohibition from owning or possessing animals pursuant to s. 447.1 of the *Criminal Code*. Mr. McKay, acting on his own behalf, submits that a fine and some community work service hours would be appropriate. He agrees to a 10-year prohibition regarding possessing or owning animals.
21. Mr. McKay is 32 years of age. He currently works full-time at Wells Gray Service Centre in Clearwater, British Columbia, and does some carpentry work in the community on the side. He plans to complete his carpentry apprenticeship, hoping to attend school for that shortly. He has a construction job lined up this spring and hopes to go up north to work in camp to earn a great deal of money.
22. He is currently in a relationship that is suffering its own strains. The woman with whom he is believed to have had a one year old child, is currently in Family Court. Mr. McKay is contesting or, at least, questioning the child's paternity.
23. Mr. McKay does have a criminal record. It is dated. He was convicted of assault causing bodily harm in 2000 and also convicted of theft-under. The passing of sentence was suspended at that time and he was placed on probation for a period of 18 months.
24. I have been provided by the Crown with two cases in support of its position. The first is R*. v. Gordon Wayne Powell*, a decision from the Kootenays, I believe, yes, Nelson, by the Honourable Judge Mrozinski. It is dated January 24, 2011. I have also been provided with *R. v. Connors*, a decision of the Honourable Judge Quantz, dated February 2nd, 2011.
25. The *Powell* decision, although it involves a different animal, a horse, is relatively similar to the case at bar in that the horse starved to death while in the care of Mr. Powell. In that case, after considering the principles of sentencing, Judge Mrozinski imposed a two-year prohibition banning the offender from owning or possessing animals and three months in jail.
26. The *Connors* decision was provided not for its factual similarity but for Judge Quantz's careful and extensive review of the case law -- relevant case law in this area. I do refer to this decision quite extensively.
27. Turning now to the purpose and objectives of sentencing. I rely on Judge Quantz here, where at paragraphs 17 to 20 in his decision, he writes:

[17] The *Criminal Code* establishes that “the fundamental purpose of sentencing is 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 objectives.”

[18] These objectives include: denunciation; deterrence of this offender and others; separating the offender from society where necessary; rehabilitation; repairing harm; promoting a sense of responsibility in the offender; and acknowledging the harm caused to the victim and the community.

[19] In determining a fit sentence the court must consider the aggravating and mitigating circumstances, "all available sanctions other than imprisonment that are reasonable in the circumstances," and the least restrictive sanction that is appropriate. Additionally, "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

[20] As stated by the Supreme Court of Canada in *R. v C.A.M.*, [1996] 1 SCR 500 at page 559 "in the final analysis, the overarching duty of a sentencing judge is to draw upon all legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender."

1. Turning now to the aggravating and mitigating circumstances in this case. The mitigating circumstances are Mr. McKay's relatively young age. He is in his early 30s. He is currently employed and has good prospects for future employment, which bodes well for his future and his ability to support his child who he believes, at least at this stage, is his child. He has a minimal, dated criminal history.
2. I give Mr. McKay's guilty plea very little weight as a mitigating factor in this case. It came on the day of trial with all Crown witnesses in attendance, two of whom ultimately had to attend again for the sentencing hearing several months later.
3. The aggravating circumstances include the extreme callous disregard Mr. McKay showed for the health and well-being of this young dog. The protracted nature of the suffering, day after day for weeks on end shows a level, in my view, of callousness not often seen.
4. Judge Quantz, in *Connors*, reviewed the relevant case law, as I have indicated, extensively at paragraphs 22 through 36. I do not propose, in this context, to quote all of the case law that he does, but there are a few cases that I would like to mention for their similarity which give a good sense of the range of sentences.
5. At paragraph 23, Judge Quantz references the *Jones* decision from the Ontario Court of Justice. In that case, the offender received a 45-day sentence followed by 12 months' probation. In that case, he was a youthful offender with no criminal record who choked, kicked, dragged, punched, and threw a dog causing it to suffer a broken leg. It remained in a cast for several weeks. That offender did not accept responsibility and, as I say, received the 45-day jail sentence and 12 months' probation.
6. I also reference paragraph 27 of Judge Quantz’s decision. The *Wicker* decision from the Alberta Provincial Court, involved a cat. The offender entered a timely guilty plea, had no prior criminal record, and received a 90-day sentence to be served intermittently.
7. In *Stuart*, this is at paragraph 32, a decision of the British Columbia Provincial Court, the offender pled guilty to killing a 15-week-old pit bull that was experiencing behavioural problems. Mr. Stuart was under the influence of medication which affected his judgment. The dog bit him and he responded by killing the dog by striking it with a hammer. He had a dated conviction for assault and was sentenced to roughly two months in custody and $1,000 fine.
8. At paragraph 33, Judge Quantz cites the *Bastarache* decision from this registry. The offence there involved the abuse of a dog over approximately a half an hour. The dog did not suffer serious injury, but the court imposed a 30-day jail sentence.
9. Those decisions all predate the changes to the legislation in this area, where the maximum penalties were increased, Judge Quantz notes at paragraph 35 there is a fairly extensive decision called *Munroe* from the Ontario Court of Justice where the offender, with no prior criminal record, received a 12-month jail sentence. That was a decision that followed the changes in the legislation.
10. Turning to my decision. First, the Crown seeks an order of prohibition pursuant to s. 447.11 of the *Criminal Code* for a period of 10 years. Mr. McKay does not oppose this. Given the level of prolonged suffering of this dog due to the wilful neglect of Mr. McKay, I am satisfied he should be prohibited from owning, having the custody of, or control of, or from residing in the same premises as an animal or bird for a period of 10 years and I make that order.
11. This brings me to whether a jail sentence or fine with probation and community work service hours or some other sentence is appropriate in these circumstances. I turn again to the comments of Judge Quantz in the *Connors* decision starting at paragraph 40, where he makes the following comments which are applicable to this case:

[40] The *Criminal Code* makes it clear that the wilful infliction of unnecessary pain and suffering on animals violates one of the basic tenants of our society and is deserving of punishment. It is also conduct which most members of our society find repugnant and morally reprehensible.

[41] The objectives of sentence to be emphasized in this case are denunciation and deterrence without losing sight of the offender's prospects for rehabilitation.

[42] As emphasized by our Court of Appeal in *R. v. Bhalru* ... "Denunciation has both punitive and exhortative elements. It satisfies a community's desire and need to condemn certain conduct, and also plays a more positive role in communicating and reinforcing society’s shared set of values as described in the *Criminal Code*."

1. In my view, the gravity of this offence committed by Mr. McKay and his level of moral blameworthiness requires that he receive a custodial sentence. Given this decision, I must determine whether or not a conditional sentence order is appropriate or, in other words, whether the sentence can be served in the community.
2. I have given careful consideration to this, Mr. McKay. and I have concluded that given the gravity of the offence, the level and duration of the suffering of this young animal, and your high degree of moral blameworthiness, a conditional sentence order would not meet the objectives of denunciation and deterrence.
3. The Crown seeks 90 days' incarceration. In the circumstances of this case, the least restrictive sentence which reflects the purpose and objectives of sentencing is 90 days' imprisonment, and that is what I order.
4. Now, Mr. McKay, the Crown in its submissions, indicated that it would not be opposed to your serving a custodial sentence that would be imposed on an intermittent basis, which means on weekends. You did not make any submissions about that, but I will allow you to do that now. Is that something that you would like me to consider or would you prefer to serve your sentence fully at this time?
5. THE ACCUSED: I would prefer to do it intermittent. I did not realize that was an option, Your Honour.
6. THE COURT: It is and, in fact, that is what the judge in *Powell* ordered, was that the offender could serve that sentence on an intermittent basis. When I look at whether or not that is appropriate, I consider the fact that you are employed, that you are working full-time during the week at a stable job, that you are currently, at least, supporting a child and perhaps a spouse, as well, although that may be a little bit uncertain about the spouse.
7. I will allow you to serve that sentence intermittently either at the Clearwater RCMP detachment on weekends or at Kamloops Regional Correctional Centre which may be a little bit tougher for you to get to. Do you have a preference?
8. THE ACCUSED: I would prefer to do it in Clearwater. It is at home.
9. THE COURT: All right, sir.
10. 401, Madam Clerk.
11. You are to serve 90 days' jail intermittently at the RCMP lockup cells at Clearwater, British Columbia, on consecutive three-day weekends commencing at 6:00 p.m. on Friday, February the 3rd, so next Friday, 2012, through to 4:00 p.m. on Sunday, February 5, 2012, and each weekend thereafter until your sentence is served in full.
12. While you are serving your intermittent jail sentence, you will be bound by a probation order and there are certain mandatory conditions associated with that order.
13. You shall keep the peace and be of good behaviour.
14. You shall appear before the court when required to do so by the court.
15. You shall notify the court in advance of any change of name or address and promptly notify the court or probation -- notify the court of any change of employment or occupation.
16. On each occasion, when a part of the intermittent jail sentence is to be served, you shall arrive at the Clearwater RCMP detachment on time and in an entirely sober condition.
17. Do you understand those conditions?
18. THE ACCUSED: Yes, Your Honour.
19. THE COURT: All right. There will be a victim fine surcharge that you will have to pay, as well. How much time would you need to pay that surcharge?
20. THE ACCUSED: Depends on how much it is, Your Honour.
21. THE COURT: I think it is either $50 or $75. I cannot recall.
22. THE ACCUSED: Two months.
23. THE COURT: All right, I will give you two months to pay the victim fine surcharge, then.
24. Anything that I have overlooked?
25. MR. BURROWS: No, I do not think so. I am directing a stay of proceedings on Count 2 if that has not already been done --
26. THE COURT: All right.
27. MR. BURROWS: -- and Mr. McKay should be directed to the registry to sign the order.
28. THE COURT: The prohibition order, you will have to sign that before you go today.

[REASONS FOR SENTENCE CONCLUDED]