

In the Provincial Court of Alberta

Citation: R. v. Huston, 2021 ABPC 108

Date: 20210325
Docket: 190890004P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Wayne Huston

Reasons for Sentence of the Honourable Judge A. J. Brown

Sentence

[1] For the offence of causing unnecessary pain and suffering to his pet cat, Mr. Huston is sentenced to a 12-month conditional sentence (a jail sentence served in the community), followed by 18 months of probation.

[2] He is also prohibited for 3 years from owning, having custody or control of, or living with, an animal.

Issue

[3] At the heart of determining a fit and proper sentence for Mr. Huston's animal cruelty case is the question of whether a conditional sentence is proportional to the gravity of his offence and his degree of responsibility.

[4] The position of the Crown is that the many aggravating features of Mr. Huston's offence and the paramountcy of denunciation and deterrence in cases of animal abuse or cruelty require a 12-month sentence of imprisonment.

[5] Defence Counsel argues that a suspended sentence and lengthy probation or a conditional sentence would address the principles of sentencing.

Authorities Considered

[6] In reaching my decision, I have considered the following authorities: *R v Ainsworth* 2010 ABPC 205; *R v Alcorn* 2015 ABCA 182; *R v Camardi* 2015 ABPC 65; *R v Campbell Brown* 2004 ABPC 17; *R v Chen* 2020 ABPC 35; *R v Chen* 2020 ABQB 734, leave to appeal granted 2021 ABCA 74; *R v Connors* 2011 BCPC 24; *R v Cupido* 2020 ABPC 155; *R v Danfousse* 2013 ABPC 346; *R v Dugalic* [2018] OJ No 5590(CJ); *R v Elder*, unreported, CCP19ELDERA, August 23, 2019 (APC); *R v Habermehl* 2013 ABPC 192; *R v Irving* 2019 ABPC 307; *R v Kennedy* 2017 ONSC 817; *R v Miller* 2020 ABPC 92; *R v Morgan*, unreported, CCP19MORGANK, July 2, 2019 (APC); *R v Munroe* 2012 ONSC 4768; *R v Paul* [1997] BCJ No 808; *R v Price*, unreported, ECP19PRICEA, April 9, 2019 (APC); *R v Rabeau* 2010 ABPC 159; *R v Rodgers* 2012 ONCJ 808; *R v Seidel* 2014 BCPC 230; and, *R v Tremblay* 2012 BCPC 410.

Facts

[7] Mr. Huston was on the balcony of his second-floor condominium around 7:40 in the evening. Several neighbours were on their respective balconies at the same time. In response to Mr. Huston's enquiry into the whereabouts of his cat, one of the neighbours pointed behind a chair on the balcony.

[8] Mr. Huston went back into his condo, retrieved a baseball bat, returned to the balcony and struck the cat three times with the bat. The neighbours yelled at Mr. Huston to stop, to which he replied, "He's dying anyways."

[9] The neighbours 'phoned the police. Mr. Huston put the dead cat into a black garbage bag, mopped the balcony and went back inside.

[10] Mr. Huston was cooperative with the police officers who soon showed up at his door. He told the police that: he owned the cat; it was feral and he had been unsuccessful in domesticating it; he believed it had again eaten a piece of a Swiffer mop and was worried it would become ill or die as a result; he had tried to get the cat into a cat carrier to take it to an emergency veterinarian but it would not cooperate; and he didn't want to see the cat die a slow death.

[11] Numerous firearms were seized from the apartment. All were lawfully owned and securely stored.

[12] The cat's body was in a black garbage bag with loose kitty litter.

[13] The veterinarian's findings from the necropsy conducted included:

Injuries "including [a] depressed skull fracture with disruption of cerebellar tissue, multiple rib fractures and extensive soft tissue injuries over the skull, dorsal thorax and forelimbs."

"... a BB pellet in the left side of the cat's face."

"... the cat died subsequent to head trauma caused by blunt force trauma to the skull, thorax and forelimbs in addition to a gun shot wound. The extent of damage to the skull precluded a definitive timeline for the gun shot wound in comparison to the blunt force trauma, but ... both injuries were definitely acute."

“ . . . no foreign material was consumed prior to death.”

And, “ . . . Swiffer Sweeper mop pads contain nothing that is poisonous to cats.”

[14] After a *Gardiner (R v Gardiner)* [1982] 2SCR 368) hearing into alleged mitigating facts, I found as follows:

The cat had not displayed any of the symptoms reported by Mr. Huston on two previous occasions when it had allegedly consumed morsels of Swiffer pad, and was not giving any indications of being in distress;

Mr. Huston had not made any effort to take the cat to an emergency veterinarian. In fact, he had never taken the cat to a veterinarian for shots or any other treatment or evaluation in the entire time he had owned it. On this occasion, he had not even telephoned a veterinary clinic, and, in fact, told the police that he could not afford treatment for the cat.

[15] I made no finding about an explanation for the presence of the BB pellet in the cat’s head. Nor did I conclude that Mr. Huston’s actions were borne of rage; although that seems plausible, I made no conclusive finding beyond rejecting his explanation, as frustration and panic were equally plausible drivers.

Mr. Huston’s Background

[16] Mr. Huston is 65 years old and has no criminal record. He is remorseful. Character references describe him as a kind person who has never harmed a person or an animal; accordingly, his actions were extremely out of character.

[17] He has long harboured feelings of guilt over the death of his four-year-old sister in a house fire when he was 16 and late collecting her after school from the babysitter’s house where she died.

[18] He was married for a short time but has lived on his own for many years.

[19] He suffers from Crohn’s Disease, high blood pressure and diabetes.

[20] After this incident, he underwent a series of counselling sessions and has done volunteer work in the community.

General Principles of Sentencing

[21] In 1996, Parliament crafted a mini-code of sentencing principles within the *Criminal Code*. The sentencing code built on a number of principles that had long been in place by virtue of the common law.

[22] First, punishment must fit the crime; this means that sentences must be proportional to the seriousness of the offence and the degree of responsibility of the offender. Next, the main principles of sentencing are denunciation, deterrence, both individual and general, rehabilitation, recognition of harm done to individuals and the community, and making amends or reparations for harm done to individuals and the community.

[23] Denunciation can also be described as society’s condemnation of the wrongful act. This lies at the heart of criminal law, society’s most important and fundamental law after the constitution; criminal law sets out the rules by which all are agreed we should live when we are

living as individuals in a community with others. When an offender breaks these most important and fundamental rules and values, there must be an element of societal condemnation.

[24] Deterrence has an individual and a general aspect: individual deterrence is to dissuade the individual from re-offending; and general deterrence is designed to send a message to others who might be observing and inclined to break the law.

[25] Those first two principles, along with the principle that calls for separation of the offender from the community in certain cases, are the ones that call for sterner sentencing, which is often equated with jail sentences. These are not the only principles of sentencing; the principles of rehabilitation, recognition of harm done and making amends generally favour less severe sentences, ones served in the community that provide an opportunity to give back.

[26] As well, there is the principle of restraint: to paraphrase, the use of jail as a last resort.

[27] The principle of parity of sentence dictates that like offences should be treated in similar fashion for similar offenders.

The Conditional Sentence

[28] The 1996 amendments to the *Criminal Code* sentencing provisions came out of a lengthy Parliamentary study that was commissioned out of a concern over the high rate of incarceration in this country, often for property crimes, and, notoriously, grossly over-incarcerating indigenous offenders. That was what drove the amendments. Part of the changes to the legislation was the creation of the conditional sentence, often referred to, colloquially, as “house arrest.” It is a jail sentence that is served in the community. And, yes, there is usually a large component, if not the entire sentence, to be served under house arrest conditions. But the benefit of a conditional sentence is that it can marry the principles of denunciation and deterrence, usually met with jail, with the more rehabilitative principles of sentencing.

[29] The Supreme Court of Canada undertook a review of the new sentencing provisions and, specifically, the conditional sentence, in *Proulx (R v Proulx)* 2000 SCC 5). In that decision, the Supreme Court is clear that denunciation and deterrence can be achieved in a properly crafted conditional sentence. While greater denunciation and deterrence is generally delivered by real jail sentences, a deterrent and denunciatory sentence can still be delivered in a conditional sentence.

Principles of Sentencing Animal Abuse or Cruelty Cases

[30] Our society strives to be fair, just, compassionate and caring. And the criminal justice system is designed to reflect those values. A vital part of being a caring and compassionate community is a commitment to support the vulnerable, be they infants, children, the infirm, the disadvantaged, the elderly, ill, injured or, yes, pet animals.

[31] The way we treat domesticated animals is a reliable barometer for how we treat one another. Through our elected representatives in Parliament and in the courts the community has recognized that fact by acknowledging the seriousness of animal cruelty offences and increasing the applicable penalties.

[32] I reviewed the cases to which I was referred to determine the appropriate sentence in this case. My review led me to conclude that the broad range is one of 3 to 12 months and the most comparable cases displayed a narrower range, within the broad range, of 6 to 9 months.

The Effect of Intense Media Scrutiny

[33] In 2004, I decided an animal cruelty case called *Campbell-Brown*. That case, like many animal cruelty cases, had attracted intense media attention. I reviewed the law on intense media scrutiny at the time, as it had been advanced as a mitigating factor on sentence. I concluded that it does not fall into the category of generally accepted mitigating factors; however, it can certainly mitigate the need for specific deterrence, deterrence of the individual.

[34] My brother Judge Semenuk also considered the issue in *Miller* and he, too, concluded that intense media scrutiny could mitigate the need for specific deterrence.

[35] In the 17 years since *Campbell-Brown*, social media have vastly expanded historic notions of extensive media coverage and we now witness some very dangerous aspects of intense and widespread public scrutiny; that is to say, the cyber-world is easily capable of becoming a howling, vengeful mob.

[36] In Mr. Huston's case, some comments that appeared in the media coverage following his arrest serve as a cogent example of a mob reaction:

“I hope he doesn't come back. If he comes back, God help him.”

“ . . . the best step for all [would be] to have Wayne removed and banned from our apartment complex permanently as we do not want such a sick and vile monster living near us, and I fear for the emotional and mental well being of his neighbours and especially those that witnessed the crime.”

“Psycho!! Needs to be in jail.”

“Punish this human shit.”

[37] I take this vengeful shaming into account and, along with Mr. Huston's genuine remorse and the clear evidence that his actions were out of character, conclude that there is no need to include an element of individual deterrence in the sentence I impose.

Aggravating and Mitigating Factors

[38] The aggravating factors in the case are:

The abuse of the position of trust between a pet and its owner;

The use of a weapon;

The brutality of the attack;

The intense pain caused the cat, due to death not being immediate; and,

The callous disregard for the cat in the manner of its disposal, in a bag containing kitty litter and feces.

[39] The mitigating factors are:

The guilty plea;

The behaviour was out of character;

The pre-sentence report is positive;

Mr. Huston is remorseful;

He has undergone counselling sessions on his own accord, has given back to the community by doing volunteer work and has support in the community.

[40] Although tendered in the face of a strong Crown case, the guilty plea is still evidence of remorse, saves the state the time and expense of a trial and spares traumatized witnesses, of which there were a few in this case, the ordeal of testifying and reliving the events.

A Similar Sentence for a Similar Offence and Offender

[41] In reviewing the precedent cases to determine the appropriate range of sentence, I concluded that in most of those in which a conditional sentence was rejected, there were elements of protracted abuse or torture, remorselessness, domestic violence and other aggravating factors not present in Mr. Huston's case. Some examples follow:

[42] *Munroe* dealt with a sentence imposed after trial and reduced on appeal to 6 months' imprisonment (effectively, 7 months, when factoring in pre-sentence custody) and 3 years' probation. It involved lengthy, ongoing torture and imprisonment of two dogs, one of which died as a result of the abuse. Mr. Munroe was young, had no criminal record and was the beneficiary of a positive pre-sentence report. At paragraph 92 of the decision, the trial judge is quoted giving his reasons for not imposing a conditional sentence:

The sheer and persistent brutality of these offences, the inherent cruelty both to the dogs and to Ms. Cappella, Mr. Munroe's domestic partner, the lack of any remorse on Mr. Munroe's part, the absence of a rehabilitative plan and the defencelessness and vulnerability of Abby and Zoe convince me that a conditional sentence would not satisfy the principles of sentence set out in the *Criminal Code*.

[43] I distinguish the *Munroe* case from Mr. Huston's for several reasons:

It was a sentence imposed after trial;
It involved a lengthy period of abuse of two animals, one of which died;
And, there was an aura of domestic abuse in the mistreatment of the dogs, which belonged to Mr. Munroe's domestic partner.

[44] The *Kennedy* sentence was also one imposed after trial, and was a useful comparator case because of the facts: Mr. Kennedy dropped a pet rabbit off a balcony to its death, this, in front of an 8-year-old child who liked to visit and play with the rabbit. This man also had a dated and alcohol-related criminal record. The sentencing judge described Mr. Kennedy as having no insight and no interest in changing his behaviour; consequently, this was a case for which denunciation and deterrence should be the focus of the sentence, over rehabilitation. A 9-month sentence was imposed. The *Kennedy* case is highly distinguishable from Mr. Huston's, particularly for the naked cruelty of his actions in front of a young child.

[45] The *Connors* case was a guilty plea by a young man who, in an intoxicated rage, committed a prolonged, brutal assault on a puppy that continued despite an interruption by a concerned neighbour and resulted in the death of the animal. The dog's injuries included 10 broken ribs, a broken jaw, missing teeth and a lacerated liver. Mr. Connors had a criminal record of two drug offences and a firearms offence; he was on a release order that included an abstention condition. After spending the equivalent of 5 months in pre-sentence custody, he was

sentenced to another month, followed by a 2-year probation order. The sentencing judge rejected a conditional sentence, due not only to the seriousness of the offence but also out of concern that Mr. Connors would not comply with conditions.

[46] The *Tremblay* case was again a guilty plea by a young man, this time, a young man addicted to heroin. While looking after his girlfriend's dog, Mr. Tremblay committed "a protracted, savage and excruciating assault" (at para 6) on the animal, using his hand, a dish and a hammer. Again, a neighbour intervened but the assault continued. Rejecting a conditional sentence as inadequate to address denunciation and finding that Mr. Tremblay presented a danger to the community, the sentencing judge imposed 6 months, followed by 3 months' probation.

[47] Referring to "the sheer brutality of the abuse" and the "high degree of moral blameworthiness" (at para 107), Judge Dinkel rejected a conditional sentence in *Cupido*, a case of an assault on a dog that left the animal in distress for almost 24 hours. In light of the many mitigating factors, including a positive pre-sentence report, guilty plea, youthful offender, remorse, out of character behaviour and cooperation with the police, the sentence imposed was one of 90 days and 2 years' probation.

[48] A sentence of 8½ months and 2 years' probation was imposed on Mr. Dugalic (*Dugalic*), a 32-year-old former military man with PTSD and no criminal record, for tormenting his girlfriend's dog and videotaping the abuse. The assault had sexual overtones and Mr. Dugalic, although remorseful, minimized his behaviour and was rated a moderate risk to re-offend violently.

[49] A guilty plea by a young man with a criminal record that included convictions for assault and threats resulted in an 8-month sentence, followed by 2 years of probation, in *Rodgers*. Mr. Rodgers committed a brutal assault on a young puppy that died as a result, in the context of a domestic assault; and, he was on probation at the time.

[50] Other cases that led me to the range I have concluded is appropriate were: *Elder*, 8 months; *Price*, 9 months; and, *Miller*, 12 months. Mr. Price had serious mental health issues; he killed a cat while under the delusion that he was the Norse god, Thor, and the cat was Thor's mortal enemy. While there was significant mitigation due to Mr. Price's mental state, there were also serious aggravating factors, including: the offence was committed in the context of a domestic dispute; the abuse was prolonged, cruel, caused extreme suffering and caused the death the cat; and the offence took place at least partially in public view and caused trauma to some witnesses. The *Miller* case involved the intentional killing of the offender's girlfriend's kitten, the motive for the crime being, in Judge Semenuk's words, "revenge, spite and vindictiveness." Mr. Miller was rated a moderate risk to re-offend and had a youth criminal record.

[51] More recently, there is the case of *Chen*: the sentence imposed in Provincial Court was one of 90 days intermittent, followed by 2 years' probation; Justice Macleod allowed the summary conviction appeal and substituted a one-year conditional sentence for the 90 days and left the probation order in place; on February 26, 2021, the Court of Appeal granted the Crown leave to appeal the conditional sentence. I do not consider it necessary to await the Court of Appeal's direction on animal cruelty sentencing, as I have concluded that the distinguishing features of Mr. Huston's case make a conditional sentence fit and proper.

[52] One of the chief distinguishing features is Mr. Huston's age, 65. We often speak of leniency extended to youthful first offenders. By the same token, a person who has lived his

entire life without coming into conflict with the law should be recognized for that in significant mitigation of sentence.

[53] I also consider in mitigation that:

Mr. Huston is remorseful;

He has undergone counselling and is willing to continue;

He has performed volunteer work in the community; and,

His references all speak of his kind nature, never having harmed a person or animal in the past; therefore, his conduct was entirely out of character.

[54] The question then boils down to: whether a conditional sentence in this case is in harmony with the fundamental purpose and principles of sentencing; and, is a sufficiently denunciatory and deterrent message sent by allowing Mr. Huston to serve his sentence in the community?

[55] Because I found that the appropriate sentencing range in this case was 6 to 9 months actual jail, I conclude that a conditional sentence of double the lower end of that range, in recognition of the mitigating factors present and Mr. Huston posing no risk to the community, is a fit and proper sentence. To bolster the rehabilitative aspects of the sentence, I add an 18-month probation order.

[56] There is also an order under s. 447.1 of the *Criminal Code* prohibiting Mr. Huston from owning, caring for, or living with, an animal for 3 years.

Heard on the 27th day of July, 2020, the 11th day of December, 2020, and the 15th day of March, 2021.

Dated at the City of Calgary, Alberta this 25rd day of March, 2021.

A. J. Brown

A Judge of the Provincial Court of Alberta

Appearances:

M. Dalidowicz
for the Crown

J. Williamson
for the Accused