

ONTARIO COURT OF JUSTICE

CITATION: DATE: 2015-10-27
COURT FILE No.: Toronto 15-15017887
Citation: *R. v. Rowe*, 2015 ONCJ 596

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

JOAQUIN ALEXANDER ROWE

Before Justice K. Caldwell

Reasons for Judgment released on October 27, 2015

Ms. Erin Winocur counsel for the Crown
Ms. Kim Schofield counsel for the defendant Mr. Joaquin Rowe

K. CALDWELL J.:

[1] Mr. Rowe pleaded guilty to wilfully and without lawful excuse injuring a dog contrary to section 445(1)(a) of the Criminal Code and failing to comply with the house arrest condition of his recognizance. These are my sentencing reasons.

THE FACTS

[2] Fendi is Mr. Rowe's girlfriend's dog, a tiny white Yorkshire terrier. The incident is largely captured on surveillance video footage of the building lobby and elevator.

[3] Mr. Rowe is seen entering the building and throwing Fendi violently up a flight of six stairs. Fendi slid across the floor and hit a wall. She can be seen darting around at Mr. Rowe's feet once Mr. Rowe comes up the stairs. He then picked Fendi up by the scruff of the neck and took her onto the elevator. The

surveillance footage from the elevator shows Mr. Rowe turning Fendi's head, apparently to look at her face, while holding Fendi in the palm of his hand. I found as a fact after a Gardiner hearing that the head turning was not violent. Fendi cried loudly while in the elevator¹.

[4] The police and Toronto Animal Services arrived the next day in response to a call or calls from others in the building concerning sounds of an animal apparently in distress. Fendi was diagnosed with a bilateral scleral hemorrhage which is two points of hemorrhage to one eye and is caused by trauma. It can't be seen by the naked eye but can be seen in a medical examination. Fortunately, Fendi is substantially healed.

[5] Toronto Animal Services seized Fendi but later returned her to Mr. Rowe's girlfriend. I am told that she is currently in the care of a friend of the girlfriend as the bail I ordered prevents Mr. Rowe from having contact with Fendi and, as his girlfriend wishes to have contact with Mr. Rowe, she had to make other arrangements for Fendi's care.

[6] Mr. Rowe said he threw Fendi because he had been confined with her all day given his house arrest on outstanding charges, she was not spayed but in heat thus she had been agitated and barking, plus she tried to run across the street when he took her outside to relieve herself.

RESPECTIVE POSITIONS OF THE PARTIES ON SENTENCE

Custody

[7] Both parties are in agreement that Mr. Rowe has done sufficient time in pre-trial custody to satisfy any incarceration component of the sentence. Specifically, they are agreed that the equivalent of 60 days is appropriate.

[8] He has served 40 days which is the equivalent of 60 days on a 1:1.5 basis.

[9] I am prepared to accede to the joint submission with respect to this aspect of the sentence. Frankly, given Mr. Rowe's horrendous record, I find that the 60 days is on the lower end of the acceptable range. I do not find, however, that it is plainly wrong nor do I find that it is contrary to the public interest and thus I find that Mr. Rowe has spent a sufficient length of time in custody.²

Probation and Section 447.1 Order

[10] The Crown and defense part company regarding the length of probation, the terms of probation and the ancillary order requested by the Crown.

¹ Uncontested testimony of Ms. Vanja Tot, building security guard

² *R v Artinian*, [1995] O.J. No. 4107 and *R. v Downey*, endorsement, April 5, 2006, Ont. C.A.

[11] Specifically, Ms. Schofield argues that the probation should be for one year. Ms. Winocur for the Crown argues for a lengthy period of probation though she does not specify a number.

[12] Further, Ms. Winocur contends that there should be a term that he not possess or be in the company of animals, and that there should be a section 447.1 order for three to four years. Section 447.1 of the Code is discretionary and allows the Court to “make an order prohibiting the accused from owning, having the custody or control of or residing in the same premises as an animal or a bird during any period that the court considers appropriate but, in the case of a second or subsequent offence, for a minimum of five years”.

[13] Ms. Schofield is adamantly opposed to any orders prohibiting Mr. Rowe from possessing any animals. Further, she argues that any such order in essence only punishes Fendi as Fendi will have to be placed in a new permanent home. I am told that Fendi’s current arrangements are temporary.

FINDING

[14] I find that a three year probationary term is appropriate with a condition preventing Mr. Rowe from owning and possessing animals – essentially a term that mirrors the wording of section 447.1. Further, I am adding a broader term that prevents Mr. Rowe from being in the presence of Fendi.

[15] Further, I am imposing a four year 447.1 order.

REASONS FOR MY FINDING

[16] In assessing the length of probation and the probationary terms I note in particular the sentencing principles of denunciation and specific deterrence. Further, the overall sentence must be proportional to the crime.

[17] In mitigation, Mr. Rowe entered a plea of guilt which is a sign of remorse. Mr. Rowe’s mother told Ms. Schofield and the probation officer of Mr. Rowe’s love of animals, previous dog ownership and lack of any history of violence towards animals. Further, I accept that he took concrete steps to care for Fendi in the past, taking her to the vet on prior occasions and buying her items such as a new collar. Finally, the pre-sentence report is very positive and was written by a probation officer who has known Mr. Rowe for some time.

[18] On the other hand, it is aggravating that Mr. Rowe had been released just 12 days earlier on an assault charge. That matter is still before the courts and Mr. Rowe is, of course, innocent until proven guilty on that matter; however, the fact remains that it is an aggravating factor on sentence if the offence is committed while on release for other offences³.

³ R v Steinberg, [1981] S.J. No. 1023 and R v B.(L.M.), [1996] S.J. No. 101 (Sask. CA) – see

[19] The primary and very significant aggravating factor in this case is Mr. Rowe's record. Prior records are very commonly put forth for consideration on sentencing. Lengthy records are common as is a history of violence. Occasionally, however, a record is presented that really stands out either for the sheer quantity of the prior offences or for the quality of such offences. Mr. Rowe's record falls into the latter camp.

[20] Mr. Rowe's record begins at the age of thirteen with a Youth Court assault finding of guilt. Thirteen findings of guilt or convictions followed. Six are for failing to comply with recognizances. What is most striking, however, are the three prior aggravated assault convictions and the robbery with a firearm conviction, constituting 25% of his record. Mr. Rowe is a thirty year old man with a history of extreme violence for which he has served very significant time in custody.

[21] Further, it is disturbing that no real explanation for this violence is put forth. He has no history of alcohol or drug abuse. The individuals contacted by the writer of the probation report were quite limited – his mother, his cousin, and a business associate⁴. They speak highly of him. His girlfriend, the owner of the dog, was not contacted. There were other family members mentioned but Mr. Rowe asked that probation not contact them.

[22] Mr. Rowe informed me that the writer of the pre-sentence report had been Mr. Rowe's probation officer in the past and thus has prior knowledge of Mr. Rowe. The probation officer emphasized that Mr. Rowe reflected on previous discussions between them and had showed "initiative and willingness" to implement the probation officer's prior suggestions "in an appropriate manner".

[23] The probation officer also noted that Mr. Rowe did not have a history of non-compliance with prior probation conditions though he did have a history of prior non-compliance with bail orders and did continue to incur further charges while on probation.

[24] Finally, it is noted that "prior reports have provided recommendations, such as attending counselling programs as available and upgrading his education, and Mr. Rowe has taken these recommendations to heart and followed through with the suggestions presented to him in the past".

[25] Mr. Rowe presents as a very intelligent, articulate man. According to the report, he completed some college courses in 2010 and subsequently achieved his Ontario Secondary School Diploma in 2011.

[26] I am told that he has received counselling in the past and continues to make efforts. The pre-sentence report speaks of his "long standing personal is-

Ruby, *Sentencing*, 8th ed. (2012), at p. 253.

⁴ Mr. Rowe's business is somewhat vague – according to the pre-sentence report, he is self-employed "working to improve the quality of life for young people".

sues” and a letter from Ms. Julie Albert spoke positively of their four sessions involving a discussion about the reasons he threw Fendi and what he could do differently in the future.

[27] There appears to be a disturbing disconnect, however, between Mr. Rowe’s counselling efforts and supportive social circle on the one hand, and his previous and continuing violent criminal behaviour on the other. Despite his history of counselling he still continued to commit very violent offences and this violence has continued as shown by the current offence. No real explanation is provided.

[28] The only issue that was put before me was Mr. Rowe’s lack of paternal connection. The pre-sentence report speaks of this issue, Ms. Schofield spoke of it in her submissions, and Mr. Rowe himself raised it in his final comments during the sentencing hearing. I am told and accept that Mr. Rowe had no contact with his father in his early years as his father abandoned the family and that he finds this absence very difficult. The pre-sentence report states that his “frustration and sense of isolation from his father presented as a key recurrent theme. Mr. Rowe was moved by the fact that he was unable to do “typical” things that Mr. Rowe imagined one would do with one’s father”.

[29] On the basis of what has been put before me, however, I find it difficult to make a significant connection between his lack of contact with his father and the extreme nature of his history of violence. I have no doubt that Mr. Rowe finds the lack of paternal connection hard. I also find that I can take judicial notice of the fact that most if not all people would choose to have strong, positive connections to both parents. Unfortunately, though, Mr. Rowe’s situation is not unique. To repeat, what I find difficult is making the connection between the only issue that has been put before me and the degree of violence both past and present. I also find this connection difficult to draw given that it has been repeatedly emphasized to me that Mr. Rowe has very strong maternal and other familial connections.

[30] I have placed such emphasis on the issue of Mr. Rowe’s past criminal behaviour and the apparent lack of success of his prior counselling – as illustrated by the prior and continuing commission of violent offences despite such counselling – to explain why I find that Mr. Rowe’s contact with animals must be severely limited at least for the next few years.

[31] Mr. Rowe’s family, business associate, and probation officer all appear to be quite optimistic about Mr. Rowe’s future peaceful, pro-social prospects. I wish I could share in that enthusiasm. Obviously I encourage Mr. Rowe to continue with counselling and will include such a requirement in his probation order. I also encourage probation to facilitate any available psychological assessment options that they have at their disposal to shed more light on Mr. Rowe’s issues.

[32] I accept that Mr. Rowe has no prior history of violence against animals. As I have noted repeatedly, however, his history of violence against people is extreme. I find that his history of such violence is relevant to my consideration of the appropriateness of terms limiting his contact with animals as I do not find that much emphasis should be placed upon distinctions between forms of violence – the fact remains that his overall history is very violent.

[33] Animals, particularly very small animals such as Fendi, are extremely vulnerable creatures given in part their size, inability to articulate verbally, and the fact that they are totally subject to the control of their owners. There is no question that they experience both fear and pain.

[34] Further, Mr. Rowe tossed Fendi up the stairs as if she was an inanimate object. His behaviour towards her in the elevator, though not violent, was detached and clinical at best. She was making sounds of distress while in the elevator yet there was no footage illustrating him providing comfort to her. She suffered damage as a result of the trauma inflicted, regardless of whether it ultimately healed and was not visible to the naked eye.

[35] I find that Mr. Rowe should have no contact absolutely with Fendi over the term of his probation. I am told that it is Fendi that will be penalized as permanent alternative care arrangements will need to be found. I find it difficult, however, to see how it is in Fendi's interests to be returned to Mr. Rowe's care or for him to have contact with her given what occurred.

[36] Further, considering this occurrence in light of Mr. Rowe's prior history of violence, I find that Mr. Rowe should be prohibited from owning, having the custody or control of or residing in the same premises as an animal or a bird for the three year probationary period. In practical terms this aspect of the probation order extends four years given the four year 447.1 order. I also note that a four year order, as was requested in this case, is actually quite a short term given previous section 447.1 cases, examples footnoted below⁵. I also note, however, that the degree of violence in this case, though not minimal, was on the lower end of the spectrum.

[37] I encourage Mr. Rowe to continue to avail himself of all counselling options and to participate meaningfully in any future assessments. Until, however, more time has passed with Mr. Rowe engaging in society without violent behaviour, I find that the restrictions I have placed upon him are necessary both for the protection of animals and for the reasons of specific deterrence.

⁵ 5 year order – R v Abeywickrema, [2010] O.J. No. 5142, Ont. Ct. Jus.; R v Ainsworth, [2010] A.J. No. 810, AB Prov. Ct.; R. v. Seidel, [2014] B.C.J. No. 2570, B.C. Prov. Ct.
10 year order – R v Haaksman, [2013] O.J. No. 927, Ont. Ct. Jus.; R. v. Rodgers, [2012] O.J. No. 6287, Ont. Ct. Jus.; R. v. White, [2012] N.J. No. 263, NL Prov. Ct.
25 year order – R. v. Helfer, [2014] O.J. No. 2984, Ont. Ct. Jus.; R. v. Tremblay, [2012] B.C.J. No. 2398

[38] I appreciate that my reasons have been directed toward the animal injury offence. In my view, that is the more significant of the two offences, despite Mr. Rowe's prior fail to comply convictions. I make the sentence concurrent on both charges, however, and also find that the three year probationary period is appropriate to the fail to comply offence given his history of failing to comply with court orders.

[39] Finally, I have outlined the primary probationary terms in this judgment. There will be other terms imposed as well but those will be worked out after further consultation with counsel.

Released: October 27, 2015

Signed: "Justice K. Caldwell"