

2010 ONCJ 447
Ontario Court of Justice

R. v. C. (R.)

2010 CarswellOnt 7490, 2010 ONCJ 447, 90 W.C.B. (2d) 355

**Ontario Court of Justice sitting under the provisions
of the Youth Criminal Justice Act, S.C. 2002, c. 1**

Her Majesty the Queen and R.C., a young person (or "young persons")

D.M. Nicholas J.

Heard: July 20 - September 17, 2010

Judgment: September 30, 2010

Docket: None given

Counsel: M. Boyce, M. Geigen-Miller for Crown

P. Giancaterino for Accused, R.C.

Subject: Criminal; Property

Related Abridgment Classifications

Criminal law

[XXIII](#) Sentencing by offence

[XXIII.10](#) Offences against rights of property

[XXIII.10.a](#) Breaking and entering and related offences

[XXIII.10.a.ii](#) Breaking and entering and committing indictable offence

[XXIII.10.a.ii.B](#) Youth offenders

Headnote

Criminal law — Offences — Breaking and entering and related offences — Breaking and entering and committing indictable offence — Sentencing — Youth offenders

Accused engaged in series of break and enters, stole items, desecrated homes and microwaved pet gecko — Accused pleaded guilty to various offences, including charges of break and enter and committing theft and breaching probation orders — Accused sentenced to 14 months custody and community supervision, less 255 days credit for 169 days in pre-trial custody — Accused had extensive youth record including convictions for robbery, assault, drugs and breaching release conditions — Supervision in community and jail sentences had failed to rehabilitate and accused was at high risk of re-offending — In mitigation, accused had pleaded guilty, had made frank admissions to psychologist and had made considerable progress while in jail — As youth offender, accused was entitled to 1.5 times credit for pre-trial custody — Global sentence of 14 months was appropriate.

Table of Authorities

Cases considered by D.M. Nicholas J.:

R. v. O. (A.) (2007), 2007 ONCA 144, 218 C.C.C. (3d) 409, 222 O.A.C. 38, 84 O.R. (3d) 561, 2007 CarswellOnt 1181 (Ont. C.A.) — considered

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 348 — referred to

Youth Criminal Justice Act, S.C. 2002, c. 1

Generally — referred to

s. 19 — referred to

- s. 34 — referred to
- s. 38(2) — considered
- s. 38(2)(a) — considered
- s. 38(2)(e)(iii) — considered
- s. 39(1)(b) — referred to
- s. 39(1)(c) — referred to
- s. 51(1) — referred to
- s. 137 — referred to

SENTENCING of youth offender convicted of multiple offences.

WARNING

The court hearing this matter directs that the following notice should be attached to the file:

This is a case under the [Youth Criminal Justice Act](#) and is subject to subsections 110(1) and 111(1) and section 129 of the Act. These provisions read as follows:

110. Identity of offender not to be published. — (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

...

111. Identity of victim or witness not to be published. — (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

...

129. No subsequent disclosure. — No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any person unless the disclosure is authorized under this Act.

Subsection 138(1) of the [Youth Criminal Justice Act](#), which deals with the consequences of failure to comply with these provisions, states as follows:

138. Offences. — (1) Every person who contravenes [subsection 110\(1\)](#) (identity of offender not to be published), [111\(1\)](#) (identity of victim or witness not to be published) . . . or [section 129](#) (no subsequent disclosure) . . .

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) is guilty of an offence punishable on summary conviction.

D.M. Nicholas J.:

Reasons for Judgment

1 This youth pled guilty on July 20, 2010 to the following charges:

- breaching a probation order imposed by me on April 15, 2009 by failing to reside with his family and comply with the routine of the residence contrary to [s. 137 of the Y.C.J.A.](#)
- break and entering a residence at 23 Chris Lund private and committing thefts (s. 348)
- break and entering a residence at 2 Jessica Private and committing theft (S. 348)
- breaching a probation order made by Wake J. on November 26, 2009 which required him to keep the peace and be of good behaviour ([s. 137 Y.C.J.A.](#))
- break and entering a residence at 20 Jessica Private and committing theft (s. 348)
- Break and entering a residence at 50 Jessica Private and committing theft (s. 348)
- break and entering a residence at 14 Jessica private and committing theft ([s. 34](#))

The Offences

2 The facts are particularly shocking. R.C. and his co-accused engaged in extensive and senseless damage to a number of residences. In addition to the items stolen, these youth desecrated these homes for some senseless cheap thrill which has not, and probably cannot be explained. There is absolutely no motive for these crimes or any evidence of ill will towards any of these residents. The theft of TV equipment, jewellery and other items, which can easily be fenced, is not all that unusual as the purpose is usually to steal items that can be disposed of quickly. However, the acts committed inside these families' home have shocked the community. They include: spreading paint on the floors and over entire rooms including clothing, leaving feces on the floors, covering a family dog in paint, covering walls with painted words and numbers, spraying furniture with mustard and ketchup, ransacking drawers and closets and spreading debris throughout, smashing a 45 inch TV and a computer screen, emptying all of the contents of the basement boxes unto the floors. In many of the homes the contents of the house were completely ransacked with dressers emptied, beds taken apart. The photos tell the real story of what occurred in these homes. It is mind-blowing. There is evidence that R.C. and others partied inside these homes as liquor, cigarettes, marijuana were consumed and food was cooked. These youth were not satisfied with leaving a heartbreaking scene of destruction of property. The pet gecko of a nine year old was placed in the microwave and then destroyed when it was activated. This was discovered by one of the children. A responsible member of the public saw the youth with back packs running and carrying a large TV and alerted police.

The Offender

3 R.C. has a rather extensive youth record. At the time he committed these offences he was subject to three separate probation orders. He has previously been convicted on 3 occasions in 2009. His record includes robbery convictions on separate dates, assault, 2 breaches of release conditions, three breaches of his youth sentences, obstruct police, and possession of drugs. The matter was adjourned for the preparation of a pre-sentence report. I also ordered a [s. 34](#) assessment. Having dealt with R.C. in the past and participated in [s. 19](#) conferences with him and his family, I am familiar with his personal circumstances and behaviour patterns. On April 15, 2009 I imposed a period of three months deferred custody for robbery and breach charges. At that time I became aware that his family sought services from community agencies by the time he was 10. He was non compliant with rules, rude, had bad friends, was skipping school and disobeying his mother. The pre-sentence report made plain then that, in grade 8, he was seen as capable of "improvement should he make the required efforts" and was identified as "capable of influencing his peers in a positive way". He displayed a pattern of non compliance and incurred new charges while serving the period of deferred custody. As a result, he found himself in actual custody by June 30th, 2009. He was sentenced again in

November 2009 for a number of charges, including another robbery, and received a sentence of 76 days pre-trial custody plus a 45 day custody and community supervision order.

4 Unfortunately, the significant time and effort, as well as community youth services offered to him, have not rehabilitated him. He is custody eligible for these break & enter offences because he has a pattern of findings of guilt and has committed an indictable offence for which an adult could receive a sentence of ten years, pursuant to s. 39 (1) (c). He is equally custody eligible for his breach charges because he has two previous convictions for non compliance with his previous youth sentences pursuant to s. 39 (1)(b).

5 The clinical assessment of Dr. Motayne diagnoses R.C. with conduct disorder ADHD-Hyperactive-Impulsive type, parent-child relational problem, substance abuse disorder, and anti social personality traits. Despite his potential to succeed academically, and the stability and support of his mom and stepfather, he has made all the wrong choices in terms of school, counselling opportunities, work, peers, and abuse of drugs and alcohol. There is a pattern of defiance of authority, refusal to follow rules, disrespectfulness, stealing and skipping school for which his parents have sought help.

6 R.C. has known his co-accused D.L. since childhood and appears to have been living at his residence when these offences occurred. He is surprisingly candid and admits to Dr. Motayne that he and D.L., who hooked up again in grade 9, liked the same things namely "weed, partying" and doing things to get into trouble such as shoplifting, break & entering and selling drugs for which he was "infrequently" caught. This made him more confident. Money was used to buy drugs and alcohol and impress girls who 'liked bad guys'. After his first period of custody he "tried to go straight but got sucked in again .. by a friend". Despite serving a second stint in jail for a second robbery, he admits that "things did not really sink in" and he began a big downward spiral when he got out. He refused to go to school, was getting drunk and abusing alcohol on a daily basis and was breaking the law.

7 With respect to the offences before me, he and D.L. were low on money and decided to commit these break and enter offences because they were "professionals" at it. They hit the whole row of houses hoping to take articles discreetly, not get caught, and sell items for quick money. Because they were drunk, they "decided to have fun and trash the homes". Having sat in jail for several months now awaiting sentence, he advised Dr. Motayne that everyone is telling him he has to change and that "very strong guilt is motivating me to change".

8 Since his detention, reports indicate "significant progress behaviourally and academically". His general behaviour and interactions with staff have been positive and generally respectful. He has participated well in groups such as life skills, problem solving and thinking, and in the classroom. He is at the highest privilege level at the jail and there have been no behavioural reports. He states that he is sorry for what he did, wouldn't do it again, acknowledges that "there are no more slaps on the wrist for me" that he is 'really trying to change my attitude and behaviours now .. want to do something good'. He wants the Court to know that he plans to start fresh and complete high school, attend college and become a youth worker. I attribute this to the excellent role models at the William Hay Centre. He has benefited from the excellent guidance of Gord Macdonald a most remarkable man who has changed many lives at the youth jail. The behaviour summary of September 14th from the jail is very positive. R.C. participates fully in all programs, daily chores, life skills and school. He has obtained many credits. He voluntarily participates in Alcoholics Anonymous, one on one counselling with Gord Macdonald, the "Work Program" at the jail which involves doing additional chores at the facility. He has shown that "he is more than capable of succeeding if he can resist the negative influences of his peers and continues to make positive choices upon his release". These efforts must be acknowledged and credit given to the programs and workers at the William Hay Detention, who seem to accomplish on the inside what many families, service providers, & schools are unable to do on the outside, namely a structured and safe environment that provides guidance, support, education, counselling, treatment and life skills.

9 Dr. Motayne, in his detailed report, describes him as defiant, oppositional, and prone to adventure seeking but also insecure, frustrated, rebellious and directionless. There is some indication that his father, presently incarcerated and with whom he has had little contact, has similar anti-social and acting out behaviours and criminal tendencies, particularly under the influence of stimulants. Unfortunately, Dr. Motayne reports that a father to son inheritance of such anti social traits is well supported in the literature. The report concludes that R.C. views himself as well adjusted with a strong need to appear well adjusted and

stable. However there is a history of aggressivity, risk taking and reactivity, inappropriate peers, alcohol and drug abuse, and peer intimidation to gain social approval and acceptance. He lacks insight into his psychological problems and severe alcohol abuse. He requires formal residential or structured treatment for this condition, particularly given the paternal history. At present he lacks the internal controls to manage his behaviours. Dr. Motayne concludes that, because he lacks the internal controls to manage his behaviours, a "continuing structure and supervision" is required until "his gains and pro-social accomplishments become firmly established".

The Victim Impact Statements

10 In this case some but not all of the victims have provided statement to the Court which are always appreciated and useful in determining an appropriate sentence. Of course, for each of them the loss of their sense of security in their own home cannot be replaced. One resident was asleep in his home when his house was entered and the brand new TV was stolen. This was the second time his home was broken into. He and his family no longer feel safe in their home and his wife is afraid to be alone. He is concerned for the safety of his children. Another victim describes his son following him around the house for weeks, frightened of every little noise, afraid to go upstairs by himself, and sleeping with the lights on. Dad has had to take time off work to be with his son who no longer wants to have any animals in the house since his pet was micro waved. One child left to live with his father, for the first time in years, because he was no longer comfortable in the house with his mother. One victim had to install an alarm to be able to sleep at night. He fears being targeted again. He lost items left to him by his deceased father and given to him as a child. This is the loss of a priceless memory, a dollar value cannot be placed on that. His younger child could not understand why they took his things and why his dad did not just have the money to replace them right away. One mother truly felt the effect when forced to move out while repairs were done. She found herself living in a hotel room for over a month with her children. Having worked hard despite chronic illnesses, and living on one salary, she is discouraged, sad, angry and no longer trusts people. They destroyed everything in her home that she worked so hard for, and many of her memory items are gone. Her insurance covered only a small portion of her losses. She cannot sleep anymore and cannot stay in the house for too long since the break-in.

Conclusions

11 In this case, counsel are not jointly recommending a sentence. Each has made detailed and thoughtful submissions for which I am grateful. Defence concedes that the senseless destruction of property, and thefts of personal items in several houses is both aggravating and out of the ordinary. Despite the shocking nature of these crimes, the principles of sentencing of youth must be respected. There must be a meaningful consequence for these acts. Pursuant to [s. 38 \(2\) of the Y.C.J.A](#) the least restrictive sentence, that is appropriate in the circumstances, must be imposed in order to rehabilitate and reintegrate the youth into society. The plea and admission of guilt and time spent in custody are mitigating. Defence acknowledges that he reverts to negative behaviour when in a non structure environment, yet he has the ability to succeed in a structured environment. He is both a leader and a follower. His denial of the need to address his conduct disorder and ADHD and anti social personality traits ,when combined with significant substance abuse, "brews a perfect storm". It must be acknowledged that R.C. did not make any attempt to deceive Dr. Motayne. He expresses remorse and now realizes the harm inflicted. He now appears willing to attend counselling on an ongoing basis. R.C. has been in custody since April 15th, which is a total of 169 days. Youth pre trial custody is credited on a 1.5 to 1 basis. He will be credited with having served the equivalent of a 254 day sentence. Defence submits that a global sentence of 12 months is appropriate less pre-trial custody to be followed by lengthy probation.

12 Crown counsel seeks a sentence of 18 months less pre trial credit on the same 1.5 to 1 basis. He argues that R.C.'s youth record is more significant than his co-accused who had never previously served a period of custody. R. C. has two previous convictions for robbery but D.L, I note, had convictions for assault bodily harm, assault and a related prior conviction for break& enter. I have been unable to obtain a copy of that sentencing decision. I agree with the Crown that the utter and shocking destruction in the homes and the killing of a child's pet, take these crimes out of the ordinary sentence for residential break & enters. I agree that their acts were malicious and senseless. Crown submits and I agree that, in this case, a further period of incarceration is required to rehabilitate R.C. despite the considerable progress he is now showing. I also agree that , despite the services offered to him on probation in the past, he immediately fell back into his criminal life style as soon as he was released.

13 Crown relies on the decision of our Court of Appeal in *R. v. O. (A.)*, [2007] O.J. No. 800 (Ont. C.A.) which addresses the notion of retribution in determining what a meaningful consequence is. I am fully aware that principles of general and specific deterrence do not apply to youth sentences. However the Act does speak of accountability through the imposition of just sanctions that have meaningful consequences for the youth and promote his/her rehabilitation and reintegration. According to s. 38(2)(a) the punishment must not be greater than that imposed on an adult for the same offence; it must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for the offence. Section 38 (2) (e) (iii) mandates that the sentence promote a sense of responsibility in the youth and an acknowledgment of the harm done to the victims and the community. Accountability is an important factor in youth sentencing for serious crimes. In *O. (A.)* the Court of Appeal equates accountability with the adult equivalent of retribution which requires that a sentence reflect the moral blameworthiness of that particular offender and the consequential harm caused by the offender. This accountability factor does not offend the prohibition against youth sentences based on deterrence or denunciation.

14 In this case, the moral blameworthiness of R. C. is enormous. Supervision in the community and short jail sentences have failed to rehabilitate this youth, who is at very high risk to re-offend unless he receives significant medical help for his ADHD, psychological intervention for his anger management issues and conduct disorder, residential treatment for his substance abuse issues and significant life skills coaching with respect to anti social peers and behaviours. Although he has made significant changes while incarcerated, Dr. Motayne's report reveals a youth who has a completely distorted view of his life, and still lacks the internal controls to manage the number of problematic areas in his life. He has been remarkably frank in his discussions with Dr. Motayne and I appreciate that he did not attempt in any way to portray himself in a positive light. His co-accused was credited with six months pre-trial credit and received a further six month sentence. Crown feels that this youth should receive a longer sentence than D.L. who had never received a jail sentence before. It is aggravating that R. C. was the subject of 3 existing probation orders when this sentence was imposed. In addition R.C. pled to the animal cruelty charge

15 Having considered all of the submissions and materials available to me, I conclude that a global sentence of 14 months is appropriate given this youth's record, the conclusions of Dr. Motayne which are disturbing, and the fact that he has demonstrated nothing but contempt and disregard for the court orders imposed on him while in the community. The 18 month sentence sought by the Crown does not adequately reflect the mitigating plea, the frank admissions he has made, and the considerable progress he has made while in jail over five and half months as well as the mental health and addiction issues which have been untreated for many years and no doubt contributed to his anti social behaviour. This youth has served 169 actual days which I will credit at 255 days. A sentence of 14 months represents 426 days. R.C. will therefore serve a further sentence of 171 days of custody and community supervision to be served as 57 days of secure custody, 57 days of open custody and 57 days of community supervision. This is to be followed by 18 months probation. I will impose a 10 year weapons prohibition ban pursuant to s. 51(1) of the Y.C.J.A. and order R.C. to provide forthwith a sample of his blood for inclusion in the national DNA bank.

Order accordingly.