2019 CarswellAlta 3000
Alberta Provincial Court

R. v. Elder

2019 CarswellAlta 3000

HER MAJESTY THE QUEEN v. ANTHONY ROBERT ELDER (Accused)

McLeod Prov. J.

Heard: August 23, 2019
Judgment: August 23, 2019
Docket: Calgary 160440137P1, 160481867P1, 170523864P1, 180268005P1

Counsel: R. Greenwood, for Crown
K. Przepiorka, for Accused

Subject: Criminal; Property
Related Abridgment Classifications
Criminal law
XXIII Sentencing by offence
XXIII.9 Offences against the person and reputation
XXIII.9.d Assault
XXIII.9.d.v Common assault
XXIII.9.d.v.A Adult offenders
Criminal law
XXIII Sentencing by offence
XXIII.12 Wilful and forbidden acts in respect of certain property
XXIII.12.b Cruelty to animals
Headnote
Criminal law --- Sentencing by offence — Offences against the person and reputation — Assault — Common assault — Adult offenders
Criminal law --- Sentencing by offence — Wilful and forbidden acts in respect of certain property — Cruelty to animals
Table of Authorities
Cases considered by *McLeod Prov. J.*:
R. v. Ainsworth (2010), 2010 ABPC 205, 2010 CarswellAlta 1387, 500 A.R. 269 (Alta. Prov. Ct.) — referred to
R. v. Habermehl (2013), 2013 ABPC 192, 2013 CarswellAlta 1435, 567 A.R. 373 (Alta. Prov. Ct.) — referred to
Statutes considered:
Animal Protection Act, R.S.A. 2000, c. A-41
Generally — referred to
Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 110 — referred to

s. 445.1(1)(a) [en. 2008, c. 12, s. 1] — referred to

s. 447.1 [en. 2008, c. 12, s. 1] — referred to

s. 718.2(a)(iii) [en. 1995, c. 22, s. 6] — referred to

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s. 718.2(c) [en. 1995, c. 22, s. 6] — referred to

SENTENCING HEARING of accused convicted of animal cruelty.

***McLeod Prov. J.*:**

1 THE COURT CLERK: Calling Anthony Elder.

Discussion

2 MS. PRZEPIORKA: Good afternoon, Sir. For the record, Kristin Przepiorka, I am counsel for Mr. Elder. I understand Mr. Sheriff is just bringing him out right now.

3 THE COURT: Thank you, Ms. Przepiorka.

4 MS. PRZEPIORKA: Sir, while we wait for Mr. Elder, I — if I may confirm that this Court received a copy of the probation order from Ontario?

5 THE COURT: Yes.

6 MS. PRZEPIORKA: Thank you, Sir. Mr. Elder is before you now.

7 THE COURT: Very good.

8 MS. PRZEPIORKA: Sir, did you also receive a copy of a letter from Dr. Baker? The date on that letter is February 25th, 2019.

9 THE COURT: Yes, that was basically a one line letter?

10 MS. PRZEPIORKA: It was, Sir. I confirmed all of that is still available to Mr. Elder when he's released from custody. And Sir, did you receive —

11 THE COURT: All of that meaning —

12 MS. PRZEPIORKA: Sorry.

13 THE COURT: — the completion of an FASD assessment that she refers to?

14 MS. PRZEPIORKA: That's correct. And she's —

15 THE COURT: Right.

16 MS. PRZEPIORKA: — able to work with him on an ongoing basis, Sir, it's not just a one singular transaction.

17 THE COURT: Very good.

18 MS. PRZEPIORKA: Sir, did you also receive the support letter from Bob (phonetic) Elder and Chris (phonetic) Elder?

19 THE COURT: I did.

20 MS. PRZEPIORKA: Thank you. And Sir, one last letter from Shay Petite Dan (phonetic)?

21 THE COURT: I did that as well.

22 MS. PRZEPIORKA: Thank you.

23 THE COURT: So that would cover all the materials (INDISCERNIBLE) Ms. Przepiorka?

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24 MS. PRZEPIORKA: That is, Sir.

25 THE COURT: I — I've received those, and I thank you very much and I did have a chance to review all of that.

26 MS. PRZEPIORKA: Perfect. Then I will leave it at that, Sir. I wonder because we are going to be referring to them, if I should hand madam clerk a copy of each.

27 THE COURT: I think it would be a good idea. Ms. Greenwood, any difficulty with any or all of those documents —

28 MS. GREENWOOD: No, Sir.

29 THE COURT: — being marked as exhibits?

30 MS. GREENWOOD: No, Sir.

31 THE COURT: All right, thank you.

32 MS. PRZEPIORKA: Sir, would the Court — I can put them together in one paperclip to — if the Court has any concerns, to be marked as one exhibit?

33 THE COURT: That's fine, unless counsel see a reason to mark them separately. I think for the purpose of today's proceeding, we're not likely to be engaged in any lengthy discussion about them individually apart from what I've just heard.

34 MS. PRZEPIORKA: Thank you, Sir.

35 THE COURT: So that would be the next exhibit. Actually can we mark the probation order as a separate exhibit please? So the support letters and the letters from — or the notes from — or — or the short letter from Dr. Baker, and two support letters, the next exhibit. So that would be, madam clerk?

36 THE COURT CLERK: Thank you, Sir.

37 THE COURT: Exhibit?

38 THE COURT CLERK: 1 and 2.

39 THE COURT: We've had a number of exhibits marked I believe.

40 MS. PRZEPIORKA: If it assists, madam clerk, the pre-sentence report was Exhibit 3. The case review C-H-S file is Exhibit 5. There were — and there were additional reports, madam clerk.

41 THE COURT: I think we can probably determine where we're at on that. The last exhibit I have would be the criminal record, Exhibit 7. So Exhibit 8 I would expect, madam clerk. And I would — it wouldn't surprise me if all of the exhibits would have been entered on docket 1-3-7, madam clerk.

42 THE COURT CLERK: 1-3-7?

43 THE COURT CLERK: Yes, Sir, thank you.

44 THE COURT: So Exhibit 7 was the last one?

45 THE COURT CLERK: Yes, Sir.

46 THE COURT: Thank you. So Exhibit 8 will be the three letters, and Exhibit 9 will be the Ontario Court of Justice probation order.

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EXHIBIT 8 - Letters

EXHIBIT 9 - Probation Order

47 THE COURT CLERK: Thank you, Sir.

48 THE COURT: Ms. Greenwood, that's obviously agreeable?

49 MS. GREENWOOD: Yes, Sir.

50 THE COURT: All right. And as well, Ms. Greenwood, I received from you, a copy of Judge Brown's decision in Morgan (phonetic), that is the transcript for decision in Morgan from July of this year. As well as the Agreed Statement of Fact from that case.

51 MS. GREENWOOD: Thank you.

52 THE COURT: All right. Okay so that then completes the record in that sense. Did either counsel have any more submissions with respect to any of those materials or anything else?

53 MS. GREENWOOD: Not from the Crown.

54 MS. PRZEPIORKA: Not from the defence, Sir.

Sentence

55 THE COURT: Very good, thank you. Unfortunately I'm going to have to take a few minutes to read my decision, I didn't — wasn't able to complete it in a form to circulate it on paper. I suppose it's a situation where if I had a bit more time, I might have been able to shorten it.

56 In any event, Mr. Elder is here for sentencing on five charges arising out of what are in effect, three sets of events. A first charge, Information 1-3-7, is in relation to the offence of causing unnecessary pain, suffering or injury to a dog at Calgary, between February the 18th, 2016 and the 1st of April, 2016. And that is contrary to 445.1(1)(a) of the *Criminal Code*.

57 The second set relates to three offences occurring on May the 11th, 2016. The first, an assault of a person named Burke Felts and then two breaches of recognizance arising out of the same event, consuming intoxicating substances, that is alcohol, and possession of a weapon; both contrary to a recognizance and the latter relating to a pocketknife with a 4 inch serrated blade.

58 And then finally there was a charge of failing to appear. I don't have the exact date that I believe was more or less — March 7th, 2018, and that was on a date for sentencing before me on the animal cruelty offence.

59 The sole issue of course, that's before me now, is to determine a fit and proportionate sentence. There is a little bit of a procedural history that might have some slight relevance. The charge, that is the first charge, the animal cruelty charge, arose — or the Information was sworn on April 14th, 2016. A guilty plea to that charge was entered on May the 3rd, 2017, a little more than a year after the charge was laid. A pre-sentence report and FAOS report were ordered at that time. There were a number of interim appearances. Ultimately, FAOS report could not be initially prepared in the ordinary timeframe because the accused did not attend or confirm his appointments. So the matter was adjourned again in order that that FAOS report be re-ordered and that happened in October 2017. And we returned in March 2018 for sentencing. A warrant issued then for Mr. Elder's arrest, it seems, based on what I gather from what's before me, that Mr. Elder was aware of the date and simply chose not to attend.

60 That warrant was executed and it's difficult to say exactly when, sometime roughly in the spring of 2018, when Mr. Elder was in Ontario, where he had gone and where he was originally from and where he had family, other connections. He also ran into some criminal trouble there and was sentenced in June of 2019 in Ontario. He was returned to Alberta on an in-custody basis and then sentencing continued on the animal cruelty charge on August the 13th, and guilty pleas were entered to

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the other charges at that point. At least the assault charge, it seems, had been set for trial at some time in 2017, it was adjourned once because Mr. Elder was apparently ill. It was to be spoken to in March of 2018, and an arrest warrant issued then when Mr. Elder did not appear on that as well.

61 With respect to sentencing, the positions of the parties are as follows; the Crown submitted that the appropriate total sentence for these offences would be more or less 12 months in gaol, though initially suggesting that — that sentence could be as high as 15 months in total with 12 months on the animal cruelty charge alone. It seems that through an assessment of the — or application of the totality principle, the Crown would ultimately suggest that a total sentence of 12 months should be imposed. That — the composition of that sentence in the Crown's view, evolved and in fairness to Ms. Greenwood, that was largely in response during the submissions to questions I had about how a sentence might be constructed here.

62 But as I appreciate it, there were two potential approaches suggested that would be 12 months on the animal cruelty charge in gaol, as — and then the other sentences to be concurrent based on — or to reflect the totality principle, or perhaps ten months on the animal cruelty charge more or less and other shorter consecutive sentences on the other charges.

63 Obviously, I think both counsel have recognized this and I accept this, that the most serious charge here is the animal cruelty offence. And the Crown emphasized in that respect, the principles of deterrence and denunciation as well as the, what might be described as fiduciary or trust relationship that is at work in situations where a person is, what could be characterized as a custodian of a domestic animal like Kato, the dog here.

64 With respect to the defence position, Ms. Przepiorka on behalf of Mr. Elder, submitted that a total sentence of somewhere in the vicinity of eight months in gaol would be appropriate. And again, this is, in a sense, is part of the discussion between counsel and the Court. There was a suggestion that that sentence could be broken up in certain ways, depending on how one applied the principles of concurrency and consecutiveness, but one approach would be to impose a sentence of about five and a half or six months on the animal cruelty offence, with shorter terms consecutive if that were required, on the assault charge that — in the area of 45 to 60 days and perhaps one day concurrent on the failure to appear. I should note that it seems that Ms. Greenwood and Ms. Przepiorka were ad idem as to an appropriate range of sentence on that assault charge of 45 to 60 days as I appreciated their submissions. Now Ms. Przepiorka had contended that that sentence would properly reflect not only the concerns about deterrence, but also the principle of totality and would represent a proper global sentence.

65 In part, that shorter sentence than what the Crown submitted would be appropriate because Mr. Elder has set up, and indeed has supports for appropriate counseling and treatment and in effect, a plan for whenever his release on whatever term of imprisonment might be ultimately imposed. As well, it's been pointed out and now I have a copy of this order that he's on probation as a result of the recent Ontario convictions, until June of 2021. And in that respect, taking all of those factors together, this Court could be confident that whatever plan is in place, could be properly and would be properly supervised and implemented. And that sentence proposed by Mr. Elder's counsel also reflects what was characterized before me as an early guilty plea.

66 Whatever occurs, Mr. Elder has served a period of pretrial custody and counsel agree, and I also accept, that that credit should be on the basis of one and a half days credit for each day served of pretrial custody. Now I had a calculation Ms. Przepiorka, that you provided to me, or perhaps Ms. Greenwood did the other day, I've added ten days to that calculation that have elapsed since April the 13th, or August 13th, and so though you're free to correct any arithmetic errors on my part, I make that now to be a total of 147 actual days of pretrial custody. And 137 as of the 13th, and now ten more for 147.

67 MS. PRZEPIORKA: I'm sorry, Sir, I had 142 days.

68 THE COURT: Okay.

69 MS. PRZEPIORKA: As of August the 12th, and then adding ten days would have put me at 152 days.

70 THE COURT: 152? All right.

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71 MS. PRZEPIORKA: That was my calculation. And I simply added ten days from the last —

72 THE COURT: Yes.

73 MS. PRZEPIORKA: — court date, Sir.

74 THE COURT: Ms. Greenwood, do you have any difficulty with those calculations?

75 MS. GREENWOOD: No issue, Sir, no.

76 THE COURT: All right, I'll accept that, that that's the actual time, you would know.

77 MS. PRZEPIORKA: Thank you, Sir.

78 THE COURT: So I appreciate that, Ms. Przepiorka. So then 152 days of actual pretrial custody would give rise to a further 76 days at the enhanced rate, meaning that Mr. Elder would be entitled, whatever sentence might be imposed, to a total credit of 228 days.

79 With respect to the facts, I'll start with the animal cruelty offence. There were three separate incidents, two of them relatively close in time, of Mr. Elder causing suffering, pain and injury to his dog Kato, a pit bull terrier. Those events are set out in detail in the Agreed Statement of Fact that has been filed. I will highlight some of the more notable features of the incidents of cruelty.

80 The first occurred on February the 24th, 2016, though I just observed a day or two ago that the Agreed Statement of Fact suggested 2015, I think that's just a typo. City Police on another matter, had observed the offender in his backyard kicking his dog, Kato. The initial kick caused Kato to run from Mr. Elder and lay in a corner of the yard. A few minutes later, the offender again, kicked Kato, this time with enough force to cause the gate against which Kato was lying down to open. The dog did not move again for about five minutes, when Mr. Elder called the dog into the house. During that time, Mr. Elder was speaking on a cellphone, he appeared to be angry and then he was confronted by police. He stated that he kicked his dog out of some frustration.

81 It wasn't evident to me whether - and not much turns on this, perhaps a little something - whether Mr. Elder was aware that the person he spoke to at that time was a police officer, given the nature of the duties apparently in the vicinity to execute a warrant of some kind, not in relation to Mr. Elder. It might not be unreasonable to assume that he would have been aware of this person being a police officer.

82 In any event, the next two incidents of cruelty to dog occurred in the early morning hours of March the 31st, 2016, so five weeks more or less, later. And — sorry the — actually, it would be the late evening hours of March 31st and early morning of April the 1st. The information about those parts of this crime came from Mr. Elder's roommate, a neighbor who lived on the main floor of the house. And the Calgary Humane Society officers who attended on April the 1st and then Dr. Margaret Doyle (phonetic) of the Humane Society, veterinarian who also came to the scene and later examined Kato after he was removed immediately from the home.

83 The first of the events involved Mr. Elder beating Kato mostly in the head for perhaps ten minutes or more, by the sounds of it, with a power drill. A second beating was administered some hours later. During both, the dog was yelping in pain, the roommate yelled at Mr. Elder to stop at one point. The neighbor banged on the floor in an effort to stop the beating. After the second part of that series of events, Mr. Elder asserted that Kato was beaten because he was defecating in the house.

84 The humane officer — sorry, the Humane Society officers and Dr. Doyle observed blood spatters on the floors and the walls, the doors of the basement suite that Mr. Elder — Kato's muzzle and head were swollen, he had a laceration on the right side of his face, blood discharge from his nose and scarring on his body from what appeared to Dr. Doyle, to be previous injuries. By examination by Dr. Doyle, the dog had a number of injuries including a very recently fractured sinus or, I think what she

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also characterized as a skull fracture, consistent with a blow from a blunt object; bruising of his eyes; air under the skin on his head; multiple fractured teeth; and soft tissue injuries. The dog also seemed to have some healed rib fractures.

85 In the veterinarian's opinion, because the skulls of dogs like Kato — Kato's breed, are so, in her words "incredibly strong", a skull fracture is rare and require — require a great deal of force as well. Dr. Doyle observed that type of fracture would be very painful and results in more chronic pain and other types of fractures. It was likely that Kato's pain from the fracture would have persisted for, in her view, a minimum of six to eight weeks. So based on her observation of other wounds and scars and the fresh injuries, Dr. Doyle concluded, "That the skull fracture was merely the most recent in what appears to be a pattern of chronic physical abuse."

86 As I said, the — madam clerk, could — that's fine. I may have misstated the offence date for the assault and the breaches, that was May 2017. So a little more than a year after the animal cruelty offence. That assault on May the 11th, 2017 involved Burke Felts, Mr. Elder's then roommate, and Mr. Elder, while it seems intoxicated by alcohol, attacked Mr. Felts who was sleeping in his room, in an unprovoked fashion, and punched him in the face. There were two breaches of recognizance that arose at the same time by virtue of possession of that pocketknife and a consumption of a considerable amount of alcohol, about 20 beers that night he said. The failure to appear as I indicated earlier, relates to in March 2018, non-appearance at the sentencing earlier date, in the animal cruelty matter.

87 As for Mr. Elder's circumstances; they have been placed before the Court by way of a number of materials and in different ways through counsel's submissions. A pre-sentence report, now that was prepared in September of 2017 more or less for the earlier sentencing hearing, though I don't think there was any concern that any of the information in — in that report, though now almost two years old, was not accurate. And certainly I've relied on it and I have no reason not to rely on what's in that report.

88 A FAOS report that was from January 29th, 2018 prepared by Dr. Yaku (phonetic) at the Southern Alberta Forensic Centre here in Calgary, and that was prepared in order to provide an assessment of the risk of Mr. Elder's reoffending, particularly in connection with the animal cruelty charge. And again, though that is a little dated now, there was no suggestion before me that I shouldn't rely on that information.

89 There was a fitness report that was put before me by Ms. Przepiorka that was prepared by an Ontario psychiatrist for the purpose of the Ontario criminal charges that postdated these offenses and that led to convictions in Ontario in June of 2019. There was the probation order that was granted by the Ontario Court for a period of two years starting June 13th, 2019, and then Mr. Elder's criminal record and the materials that we've described at the beginning of today's proceedings, letters from his grandparents, his partner in Ontario, and a short letter from one of the physicians who has and will be treating Mr. Elder.

90 Mr. Elder is now 26; he was 23 at the time of the animal cruelty offence. He is a young man. He, by virtue of what's before me, seems very capable at times of holding down a job, though by account of his occasional outbursts, has had some challenges at times holding onto jobs for lengthy periods, but he's certainly capable of working and indeed has worked relatively consistently over the years despite his troubles. And has at least to that extent, shown the ability to lead a prosocial lifestyle.

91 However, he does suffer from certain mental health challenges, he's demonstrated some — an inability to control his anger and his impulses over the years. That has sometimes — and coupled with alcohol and drug abuse and all of those things put together, have contributed to a criminal record. And, well in a sense, where Mr. Elder finds himself today.

92 Now some of those challenges flow from difficulties and disadvantages arising in Mr. Elder's childhood. Though for some meaningful periods of his youth, he had and he continues to have, the care and support of his maternal grandparents. And they want to continue and as I appreciate it, will continue to take an active role in supporting Mr. Elder going forward.

93 There is a suggestion in the materials of a potential FASD for Mr. Elder, though that has never been confirmed by a full diagnosis, and that may happen, that diagnosis or attempt may occur not too far down the road. From a psychiatric perspective, there are — have been and there seems to be some reasonable consistency between Dr. Yaku's report and the report we received from Ontario, that Mr. Elder suffers from substance abuse disorder, and a conduct disorder and antisocial personality disorder. So those various disorders have manifested themselves in what has been demonstrated, inability on Mr. Elder's part and perhaps

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to a certain extent, in the offences before the Court, but often historically in other settings, criminal and non-criminal. And that's been outlined in some of the reports, to control his anger, to restrain from physically harming others, persons and in this case, his dog.

94 As I said, while Mr. Elder's ability to obtain employment is positive, as is the support offered by others, his grandparents and his partner, I have some grave concerns about the offending behaviour here, and the future risk to others. Mr. Elder's plan, which is a good one, that is to be picked up here in Alberta when he's finished whatever sentence might be imposed, by his grandfather and to travel back to Ontario with his grandfather where he has options and apparently these are these — appear to me, to be real options of, we'll call it stable and perhaps safe places to reside when he gets back to Ontario, and options for work, coupled with supports. As I say, that is a good plan. And I'm satisfied that those supports are real. And I'm also satisfied that the Ontario probation order which included terms requiring counseling and treatment for mental health issues, coupled with now a connection with a psychiatrist in Owen Sound, all of that offers a reasonable prospect of Mr. Elder obtaining appropriate treatment.

95 My confidence though is weakened a bit in that by several factors. The record discloses a history of assault related convictions prior to 2016. Six by my count, and two for uttering threats, all between 2009 and 2012. And though there was a gab between the last conviction, four years from the sentencing to the commission of the animal cruelty offence, the record and the offences before the Court today, and the June 2019 convictions from Ontario, which would have arisen some time in 2018 or 2019, I didn't get an exact date on that, and the psychiatric pre-sentence report, cumulatively reflect a longstanding and continuing pattern of violent behaviour.

96 The reports also reflect some mild, maybe at best mild, attempts by Mr. Elder in the past to pursue anger management and substance abuse counseling or treatment. As reflected in those reports, Mr. Elder's commitment to that is — or at least has been in the past, best described as tenuous. He does however, have what I accept to be concrete plans as I say, and those concrete plans provide a framework and an opportunity to pursue those avenues going forward. And that is due in part to the family support and the connections to the agencies and doctors in Owen Sound where he plans to go.

97 Dr. Yaku and the pre-sentence report author both confirmed Mr. Elder's remorse, and recognition as I read it, of the seriousness of, in particular, the animal cruelty charge. Now Dr. Yaku's FAOS report also specifically addressed Mr. Elder's risk of reoffending, and he summarized that as follows at page 12 of his report, I quote, (as read);

> I formed the opinion that the risk of recidivism is of a moderate degree and the risk could increase substantially if he relapses on alcohol and using cocaine.

98 Against the backdrop, Dr. Yaku recommended if there was a non-custodial element to a sentence, that anger management and related counseling as well as addiction treatment be a part of that.

99 I now address the applicable principles of sentencing.

100 Of course the overriding framework in determining a fit and proportionate sentence here as in most every case, is to ascertain a total sentence that properly reflects the seriousness of the offences, and the degree of the offender's, in this case Mr. Elder's, moral blameworthiness.

101 Now as I've said, of the offences before the Court, the animal cruelty charge is the most serious. General deterrence and denunciation are in my view, the primary sentencing principles in cases involving the infliction of unnecessary pain or injury on animals. That is in part, because of the vulnerability of domestic animals in the care of their human custodians. I accept the Crown position that in a case of animal ownership or care like this one, the willful infliction of harm represents something like a breach of trust or duty by the offender to the animal. It's certainly arguable that Section 718.2(a)(3) of the *Criminal Code* applies in an analogous way to animal cruelty cases and — I'm sorry, I don't have my *Criminal Code* with me and there's not one up here. In any event, I won't even attempt to quote it from memory, but in effect, that section of the *Code* tells us that where there is a breach of a trust or fiduciary relationship, that that is generally going to be regarded as an aggravated factor. Thank you, Ms. Przepiorka, I think I've more or less covered the — the general sense of that subsection.

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102 As well, again the circumstances before me because of what I've described there, there should be an aspect of rehabilitation either in the actual sentence imposed today, or in some fashion, supported by whatever sentence that is imposed. Mr. Elder clearly suffers from mental health and addiction issues that have been related to his historical offending, and to some extent, the extent maybe uncertain, to some extent though, to the offences before the Court today. If a degree of rehabilitation is achieved, that in turn, has of course, the benefit of protecting the public, human and non-human, in the future.

103 I observe that here, where the Crown has elected to proceed by way of summary conviction, the maximum penalty is a fine of $10,000 or 18 months imprisonment or both.

104 Now that flows from amendments made in 2008 to the *Criminal Code* where sentences for animal cruelty and related offences, were increased, that in part, reflecting a growing recognition that domesticated animals particularly, are sentient beings, and in a sense, deserving of more expansive protection of the criminal law than historically has been the case.

105 The question of whether the sentences should be consecutive or concurrent, arises here. These — there are offences here arising out of three separate events or sequences of events. I've described them and when they occurred. Because those offences are separate in kind, and in time, separate sentences would ordinarily be imposed and consecutive sentences would ordinarily be warranted. As a result, my view is that once the individual sentences for each of those sets of offences is arrived at, the total of those sentences should be assessed from the perspective of totality and Section 718.2(c) of the *Criminal Code* to ensure that the combined sentence is not unduly long or harsh. And if that is the case, then a downward adjustment in the sentence would be properly made to alleviate any of that undue harshness or length.

106 As for the relevant case law, both counsel have provided a number of sentencing decision in animal cruelty cases which I have reviewed. It's fair to say that our Court of Appeal has not identified a precise precedential range or starting point for sentencing in animal cruelty cases. That in effect, leaves us to apply the appropriate sentencing principles to the individual's circumstances as the case presents itself, in an effort to achieve the appropriate proportionate sentencing response. Other decisions from Alberta Courts and other jurisdictions can assist in assessing a proportionate sentence, it can help in a certain comparative way, and ensure that someone like Mr. Elder, receives a sentence that is at least similar to sentences imposed on similar offenders in similar circumstances for the same kinds of offences.

107 I don't propose to go through all of those other decisions. There were between eight and ten decisions in total, I think as between counsel, about half from each Crown and defence. And I did review all of them; as I say, some are clearly more factually applicable than others. One of the cases, *Habermehl* from Judge Fraser of this Court, set out a number of decisions as did his decision in *Ainsworth*, in the area of animal cruelty sentencing, and that as I say, can be helpful to ensure that the sentence here is similar to others in similar circumstances.

108 Some of the cases, like the Morgan case from Judge Brown in July of this year, reflect circumstances of — well in that case, I think what Judge Brown, or perhaps the expert described as immense suffering, very significant cruelty leading to the death of, in that case, a cat. Similarly there was a case from Ontario, the Helfer (phonetic) case, that generate a sentence of two years in gaol. And in Morgan, Judge Brown imposed a sentence of two years. Now that was in combination with a number of other convictions, but it's clear that in both Helfer and Morgan, the Court regarded what was before them as cruelty at the higher end of the scale. And the sentences imposed were in effect, reflective of that high level of cruelty or brutality.

109 I don't regard the circumstances here as being in that same category. And I didn't take either counsel, particularly Ms. Greenwood for the Crown, as suggesting that factually it was the same kind of case as for example, Morgan. But it helps though, understand where other Courts might have gone in terms of particular circumstances.

110 Many of the other cases that were cited either — either provided individually to me, or cited by other judges in their decisions, fell within a certain rough range, and I use that term very loosely. Perhaps in the — from the intermittent time up to eight or nine months imprisonment. And those sentences reflected a variety of circumstances, both in terms of the nature of the cruelty and in terms of the circumstances of the individual offenders. No one of those cases reflected exactly what is before

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me. It's — if any of them was in my view, the closest factually, it might be the Dagalek (phonetic) case from 2018 in Ontario where an eight and a half month sentence was imposed.

111 It's clear though, that the Courts consider a number of factors in trying to place or identify the appropriate length of imprisonment where imprisonment is required; it's not always required. Clearly in this case it is for Mr. Elder given the nature of what happened.

112 Circumstances that leads to sentences at what I would call, as I say very loosely, the lower end of the range that I see in the cases out there, might be, if it's a single event, if it's a short-term event, if the degree of harm is smaller — low — lesser than other cases. Where there are multiple events, then of course that's going to tend to result in sentences that are much longer. If it appears over a period of time that this abuse has occurred, that is aggravating.

113 There's also of course, the circumstances of the accused, the guilty plea in these cases if of some consequence. And indeed, most of the cases that I reviewed I think that counsel provided, involved guilty pleas. Record, many — many of the offenders in other cases were first offenders or had very little in the way of records. That's not the situation here for Mr. Elder, and that is going to be a factor.

114 Ultimately, as I say, the events here did not, in my view, reach the level of brutality that the most — the longest of those sentences reflected, but it is more serious than many of the other cases that were presented. Ultimately, the sentencing of Mr. Elder, like that of anyone else, will be an individualized process. It will be carried out within the framework built by the applicable sentencing principles with some regard to other sentences to ensure, as I say, similarity of approach and in a sense, result.

115 As for the aggravating and mitigating factors, I've discussed this at least implicitly.

116 There are a number of aggravating factors, particularly with respect to the animal cruelty offence. And those would include the repeated nature of the cruelty; there were three separate occasions of the deliberate infliction of harm on Kato. This is — makes it more serious obviously, than a single isolated event.

117 The second would be that the blows struck and the harm inflicted here were significant. Great force was applied, particularly in the striking of Kato in the head with the drill. In effect, the drill became a weapon.

118 Not surprisingly, the injuries Kato suffered were very serious, and that is aggravating.

119 A third factor in this category is in a sense, the, what I might describe as the disregard that Mr. Elder had for the welfare of the dog. That was evidenced in two ways. Now of course, the commission of an offence of this kind, is by its very nature, a disregard for the welfare of the animal in question. So (INDISCERNIBLE) because there is that disregard, it's not aggravating. However what happened here, there were other — a couple of things that happened here that took it beyond that.

120 The first is that with respect to the February the 24th incident, Mr. Elder was confronted by a person who observed at least some of the harm that was done, some of the striking of the dog. It was a police officer, and as I say, I — it's not perfectly clear to me whether Mr. Elder would have been aware that person was a police officer, I suspect so, but that may not be the central point. The fact is, is that he was confronted about that abuse, about his kicking of the dog and despite that, that did not cause him to — or that did not deter the later cruelty that occurred.

121 Second, after inflicting the significant injuries on Kato on March the 31st and April the 1st, Mr. Elder simply went to work. He left the dog to suffering pain without taking any steps to seek treatment for the dog — dog's injuries, and based on what was described to me, it would or should have been reasonably apparent to anyone at that time, that Kato was in need of some care, some treatment. So those two things add something more to the disregard for the welfare or the well-being of the animal here.

122 The criminal record is also aggravating, that includes a number of convictions for crimes of violence, for mostly assaults, common assaults, but there are two convictions for assaults with a weapon.

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123 As for the assault offence, again, the record is aggravating in the same way. There have been previous sentences of some consequence for a common assault imposed. One, at least by my reading of the record in 2012, seemed to be more or less four months in gaol. So those sentences didn't seem to have whatever they were comprised of, gaol or otherwise, a deterrent effect on Mr. Elder. This assault was unprovoked and committed on someone who was vulnerable, who was sleeping at the time.

124 The breaches and the failure to appear, there's not much aggravating about those except in a limited way. There are a couple of prior breaches or where at the time that they were committed, the failure to appear was a bit more serious than a docket appearance because it was a sentencing day.

125 There are a number of mitigating factors, and significantly mitigating in my view are the guilty pleas. The animal cruelty guilty plea, though it wasn't early, it came about a year after the charge was laid, was entered before a trial date was set. And Mr. Elder is entitled to credit for that. The other guilty pleas were entered after a trial was set, but remain important mitigating factors there as well. And I also accept that the mitigating effect of the guilty plea on the animal cruelty charge, call it genuine in part from what I read in the reports. It is though somewhat attenuated by Mr. Elder's departure from the jurisdiction prior to sentencing. That resulted in a delay of the sentencing by about 18 months. That takes away a little bit from the suggestion that it was early.

126 I do recognize though, the systemic benefit of the guilty pleas. I accept that they reflect Mr. Elder, that you — you've taken responsibility for what happened here, and again, there — I find support for that, not just in the fact of your pleas, but in what I've read in the reports.

127 I also notice that you expressed your remorse for your conduct to the authors of the reports, both doctors — or at least — sorry, Dr. Yaku and the author of the pre-sentence report. I accept that as genuine, you've also expressed it in person in court here ten days ago.

128 Now, Mr. Elder struggles with anger management and his mental health challenges are documented in the reports. That is perhaps less of a mitigating factor and more about potential appropriate structuring of the sentence and perhaps it relates to somewhat diminishment of moral blameworthiness, but I think primarily what that does is support at least a rehabilitative component to the sentence.

129 Addiction problems do not seem to connect to the animal cruelty offence. Alcohol played a role it seems though, in the assault.

130 All of that is though, a bit tempered by Mr. Elder's historical residence to pursue anger management or substance abuse treatment. From what is before me, I perhaps optimistically, I see in the reports, a suggestion that there is more of a willingness, more of an openness, more of a commitment to taking some concrete steps, and in part that's reflected in an actual plan.

131 The presence of family and other supports which I wholly accept as the case here, while not purely mitigating, is indeed though supportive of some rehabilitative element. It also gives greater confidence in me and I presume anyone else who looks at the circumstances here, in the prospect that there will be compliance with either or both the existing probation order from Ontario, or any new order that I might make. And ultimately it gives some confidence in the prospect that there is a road to greater community protection through the combination of today's sentence and one that was imposed in Ontario.

132 Now I finally come to applying all of that to the facts here.

133 I start with in seeking to arrive at the fit sentence in making what might be described as the overarching assessment of the gravity of the offence and the degree of responsibility of Mr. Elder for the offence, and particularly the animal cruelty charge. The manner of the commission of the crime of animal cruelty here makes it a very serious offence. The features I earlier described, place it at, while not at the highest end of the scale of gravity, higher than many.

134 While Mr. Elder clearly suffers from one or more mental health disorders, it's difficult based on the report, Dr. Yaku's report in particular, and the pre-sentence report that — to conclude that despite those difficulties, and despite the role that at

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least to some extent, anger played in the animal cruelty events, that the degree of moral blameworthiness would be significantly diminished or in any meaningful way, diminished here.

135 And one needs to look at some of the case law to make the effort to apply those principles and *Belcourt* is one from our Court of Appeal, 2010; 319. And the question is whether or not the mental disorder is such that it — it's reduction should meaningfully or notably reduce the importance of general deterrence, partly because the offender is not an appropriate medium for making an example for others. And so in that respect, the presence of the mental disorder seems to have to play some substantial role, or at least meaningful role in the commission of the actual offences. While I accept there's some role for that here, it strikes me that based on Dr. Yaku's report particularly, it does not, in all of the circumstances, reduce moral blameworthiness except in a relatively small way. Equally, it does not suggest that Mr. Elder is the kind of person who would not be, in a sense, an appropriate medium to express deterrence through a sentence.

136 In my view, it is supportive of the rehabilitative component of a sentence, it reflects some small diminishment of moral responsibility. But given the recurrence of what happened, given the number of events and given the seriousness of those events in relation to the animal cruelty charge, there is remaining, despite recognized challenges with anger management for Mr. Elder, there remains a significant degree of moral blameworthiness here.

137 The nature of the abuse here clearly warrants a gaol term of some consequence, one that reflects denunciation of the deliberate infliction of cruelty of this kind on vulnerable animals. Based on the case law presented to me, the facts here would support a sentence of some consequence. That is offset in a number of ways, of course by the guilty pleas, by Mr. Elder taking responsibility for his conduct, by his now remorse and recognition of the harm he caused.

138 He's a young man, as I say now 26, then 23, with a disadvantaged background that contributed to some extent, to both his present mental health and substance abuse problems and to his offending, so rehabilitation needs to remain within the ambit of a sentence here.

139 The record is problematic, it contributes to the need for some period of incarceration on actually, all of the charges.

140 There's no reason as well why the presumptive approach of consecutive sentences for the second crime, sir, should not be taken.

141 Balancing all of these factors and subject to a final look for any need of totality adjustment, I sentence Mr. Elder as follows; Mr. Elder if you could stand please.

142 On the animal cruelty offence, that's 1-3-7, there will be a sentence of eight and one half months in gaol. In my view, that is the lowest available sentence that adequately reflects all of the circumstances, including the circumstances of the offence and your personal circumstances.

143 With respect to the assault charge, that's Count 1 on 8-6-4, there will be a sentence of 45 days in gaol, consecutive.

144 With respect to the two breach charges on that Information, Counts 3 and 4, they arise out of the same circumstances as the assault, there will be 21 days on each of those concurrent to each other and concurrent to the assault. With respect to the failure to appear — but also consecutive to the animal cruelty charge.

145 With respect to the failure to appear, there will be ten days consecutive to the other sentences.

146 By my calculation, that makes - sorry - a total sentence of ten months and — I should just — I may have to doublecheck this - ten months and — no, sorry. Ten months and ten days, if my arithmetic is correct, but I'll go through that shortly.

147 With respect to a probation order; in the absence of the Ontario probation order, Mr. Elder, I would - and that goes to June 2021 - I would have imposed probation. I'm of the view that having reviewed the terms of that order, and as it largely contains conditions that I would likely impose, I'm satisfied that it is not necessary for me to impose a similar Alberta order. Given that

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Mr. Elder will be returning to Ontario after his gaol sentence is served and given that his family and treatment supports are there, I'm satisfied that that order will address the rehabilitative concerns here. If you could have a seat then, Mr. Elder.

148 So I make that a total sentence of ten months and ten days.

149 MS. PRZEPIORKA: That's correct, Sir, and if I just may confirm; that's in essence, 310 days —

150 THE COURT: Well I haven't completed my decision yet though, Ms. Przepiorka.

151 MS. PRZEPIORKA: Oh no, sorry, Sir, is that —

152 THE COURT: I —

153 MS. PRZEPIORKA: — the calculation?

154 THE COURT: That would more or less be it, yes.

155 MS. PRZEPIORKA: Thank you.

156 THE COURT: I find a need though to review the total sentence to determine whether some reduction should be made because it would be unduly long or harsh. So the total sentence of ten days — or ten months, ten days, less credit for pretrial custody of course. Given the nature of the animal cruelty here, given Mr. Elder's personal circumstances including his age, previous periods of imprisonment that he served, I do not regard this sentence as being unduly long or harsh, or as some cases put it, crushing. It is in my view, proportionate. It is not a dramatic jump or increase from other sentences up to four months that have been previously been imposed on Mr. Elder for other crimes not as serious as this, and in my view, in fact, the eight and a half months is - on the animal cruelty charge - is really at the lowest end of what would be available in all of the circumstances. And indeed, absent the guilty plea, the sentence could certainly very easily be in the area of 12 months or more. So that, in my view, reflects the maximum benefit that could accrue, Mr. Elder, given all of your personal circumstances here. So then I — there's no need then for that reduction and I —

157 Sentence as follows; so on Count 1, the animal cruelty charge — or sorry, the animal cruelty charge to confirm, eight months, 15 days; on the assault, 45 days, 21 of that is consecutive, 21 days concurrent on each of the breaches, and a further 10 days on the failure to appear. Ten months, ten days in total. Or, and I think I would at least arithmetically turn that into 310 days in gaol, and we subtract 200 and — I'm sorry, I have to go back to my earlier calculation.

158 MS. GREENWOOD: 200 and - excuse me - 28 days, Sir.

159 MS. PRZEPIORKA: I think that's — that's correct, Sir.

160 THE COURT: 228 days, thank you. So less 228 days, that leaves a net sentence to be served of 82 days imprisonment. Roughly two months, 22 days.

161 Now with respect to ancillary orders, Ms. Greenwood, you had provided me with what the Crown was seeking in terms of the prohibition pursuant to 447.1 of the *Criminal Code*; and Ms. Przepiorka, as I recall, you had in effect, no submissions on that application.

162 MS. PRZEPIORKA: That's correct, Sir, I retained instructions from my client on that.

163 THE COURT: Right. And that is — what's being sought is a lifetime prohibition on possession, owning, having custody or control of animals in effect. Now, that also requires by the wording of the proposed order, you to provide the Calgary Human Society with your address and —

164 THE ACCUSED: I'm going to be in Ontario.

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165 THE COURT: — consent in effect as part of it, to attend at your address to provide them access if they wish to search the residence —

166 THE ACCUSED: Ontario.

167 THE COURT: — for animals. And you understand that, Ms. Przepiorka?

168 MS. PRZEPIORKA: Yes, Sir, and just for the record, Mr. Elder is just confirming that — so that the Court knows, that he'll be in Ontario.

169 THE COURT: Yes.

170 THE ACCUSED: Yeah, so they don't need my address (INDISCERNIBLE).

171 THE COURT: I appreciate that.

172 MS. GREENWOOD: And just — sorry, I don't have a copy of the order in front of me. It specifies Calgary Humane Society or a peace officer, does it not?

173 THE COURT: Yes. Members of the Calgary — so you'll permit access to your residence by members of the Calgary Humane Society, Alberta SPCA or any peace officer as defined in the *Animal Protection Act*.

174 THE COURT CLERK: Thank you.

175 THE COURT: And given what occurred here, that order would seem to be appropriate. And I don't believe there was a request for any further ancillary orders.

176 MS. GREENWOOD: I didn't mention them last date, Sir, but these are all secondary designated offences. Given Mr. Elder's criminal — violent criminal history, the Crown is recommending a DNA order and a Section 110 weapons ban, Sir.

177 THE COURT: Ms. Przepiorka, any submissions on that?

178 MS. PRZEPIORKA: Sir, I will only say that in these circumstances, I would suggest that the Court does not have to exercise its discretion in terms of the DNA. If I just may approach Mr. Elder for one moment, Sir, he's got a document I would just like to look at.

179 THE COURT: Go ahead.

180 MS. PRZEPIORKA: Thank you. And Sir, what I'm just looking for is I understand that Mr. Elder received a five year 110 order on his last sentence. And I am holding that right now, Sir.

181 THE COURT: Yes, I see that, it's noted on the record here.

182 MS. PRZEPIORKA: Yes, Sir, so in my respectful submission, that —

183 MS. GREENWOOD: For five years?

184 MS. PRZEPIORKA: — has also been — five years.

185 MS. GREENWOOD: The minimum is ten.

186 MS. PRZEPIORKA: Well the order states five.

187 MS. GREENWOOD: So the Crown's position would be that we could correct that here by imposing the ten year order if the Court views it appropriate.

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188 THE COURT: All right, Ms. Przepiorka, anything further?

189 MS. PRZEPIORKA: Well, I think the problem is, Sir, that the minimum is ten years according to the *Code*, so I'm not sure what happened on that order, Sir. So perhaps they could run concurrent.

190 THE COURT: I'm just going to deal with what's before me and —

191 MS. PRZEPIORKA: Thank you.

192 THE COURT: — in terms of the situation here, first off, there will be a secondary DNA with respect to the animal cruelty offence, and I think that's appropriate and not disproportionate given the circumstances, and so that will be taken on an in custody basis, though it — it does appear from the record that Mr. Elder, you may be on the databank already —

193 THE ACCUSED: Yeah, I — this happened last — back home —

194 THE COURT: Yes.

195 THE ACCUSED: — and you guys already have my DNA, you're not taking it again. I did that same thing back home.

196 THE COURT: And then with respect to the weapons prohibition, given again, the nature of the animal cruelty charge here and the circumstances and the use of what could be described as a weapon in my view, it is appropriate to impose a Section 110 order in relation to that charge, so that will be for a period of ten years, weapons prohibition.

197 With respect to the other charges, Ms. Greenwood, I don't know if we've addressed them yet?

198 MS. GREENWOOD: To be withdrawn please.

199 THE COURT: Very good. And no objection to that.

200 MS. PRZEPIORKA: No, Sir.

201 THE COURT: So the other charges before the Court then are all withdrawn. All right. Very good, so are — is there anything else that we need to address today?

202 MS. GREENWOOD: No, Sir.

203 MS. PRZEPIORKA: No, Sir.

204 MS. GREENWOOD: I don't believe so.

205 THE COURT: All right, well thank you both counsel, for your very capable and thorough presentations.

206 MS. PRZEPIORKA: Thank you, Sir.

207 THE COURT: Mr. Elder, I wish you the best in the next steps.

208 THE ACCUSED: Yeah, once I get home.

209 THE COURT: All right. And we are adjourned.

210 MS. PRZEPIORKA: Thank you, Sir.

Order accordingly.

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