



COURT MARTIAL

Citation: *R. v. Whaley*, 2017 CM 2001

Date: 20170530

Docket: 201649

Standing Court Martial

14 Wing Greenwood
Greenwood, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.B. Whaley, Offender

Before: Commander S.M. Sukstorf, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Corporal Whaley, today you have admitted your guilt to three offences. One count under section 114 of the *National Defence Act*; that is to say, stealing, when entrusted by reason of your employment, with the custody, control or distribution of the thing stolen. The particulars read as follows:

In that he, between 1 April 2015 and 31 May 2015, inclusive, at or near Canadian Forces Base (CFB) Greenwood, Nova Scotia, while employed at 14 Wing Operations Electronic Sensor Support, and so entrusted with the custody, control or distribution of the contents of Rooms 1515 and 1518-A, stole the items listed at annex A, part of the assets so entrusted to him.

[2] The second count, under section 130 of the *National Defence Act* for trafficking in property obtained by crime, contrary to section 355.2 of the *Criminal Code*. The statement of particulars reads as follows:

In that he, on or about 22 May 2015, at or near Halifax, Nova Scotia, without authority, did traffic property, to wit: items 1, 2, 3, 10, 11 and 12 listed at annex A, knowing that the said property was obtained by the commission in Canada of an offence punishable by indictment, to wit: stealing contrary to section 114 of the *National Defence Act*.

[3] The third count, under section 116(a) of the *National Defence Act*; that is to say, sold improperly public property. The particulars read as follows:

In that he, on or about 22 May 2015, at or near Halifax, Nova Scotia, without authority, sold to Mr Scott Tanner of Brookside, Nova Scotia, the items 1, 2, 3, 10, 11 and 12 listed at annex A, the property of the Government of Canada.

Statements of Circumstances and Agreed Facts

[4] The following Statement of Circumstances and Agreed Statement of Facts were provided to the court:

“STATEMENT OF CIRCUMSTANCES

1. At all material times, Cpl WHALEY was a member of the Regular Force posted to the Canadian Forces Base Greenwood. He was employed as an Airborne Electronic Sensor Operator within the 14 Wing Operations Electronic Sensor Support section (14 ESS).

THE FIRST INVESTIGATION

2. On 27 April 2015, WO LEGERE, from 14 ESS, contacted the Military Police to report the theft of an airborne camera system. WO LEGERE explained that the following property was missing:

- a. a Nikon D4s camera;
- b. Nikkor AF-S 80-400m lens;
- c. two batteries;
- d. a battery charger;
- e. 3 flash memory cards; and
- f. a Nikon GPIA GPS attachment.

3. As part of the investigation, on 30 September 2015, the Military Police located an advertisement on Kijiji, a classified advertising website, for a Nikon D4s camera, in Grand Manan, NB.

4. The Military Police was able to contact the seller, Mr WOLTER, and confirmed that the serial number of the camera being sold matched

the serial number of the camera reported stolen by 14 ESS. The seller of the camera agreed to turn the camera, and other items, over to the Military Police.

5. On 7 October 2015, the Military Police then received items 1, 2, 3, 10, 11 and 12 of Annex A to the charge sheet via Canada Post.

6. Mr WOLTER informed the Military Police that, on 16 June 2015, he traded \$7000 worth of his property, to a Mr TANNER in exchange of:

- a. \$1500 in cash; and
- b. items 1, 2, 3, 10, 11 and 12 of Annex A to the charge sheet.

7. The Military Police then contacted Mr TANNER who advised that, on 22 May 2015, he had purchased from Cpl WHALEY items 1, 2, 3, 10, 11 and 12 of Annex A to the charge sheet.

8. On 9 October 2015, Cpl WHALEY was arrested by the Military Police for Stealing, contrary to section 114 of the National Defence Act. Later that day, the Military Police entered Cpl WHALEY's residence with a Warrant to Search. The Military Police located item 4 of annex A to the charge sheet, which was laying amongst other camera lenses, on a table in Cpl WHALEY's dining room.

THE SECOND INVESTIGATION

9. On 12 Jan 2016, WO BRACE contacted the Military Police to report that camera equipment was missing.

10. As part of this second investigation, the Military Police reviewed pictures from first investigation described above. One of the investigator was able to match a serial number from one of the missing lenses to a lens shown in a picture taken at Cpl WHALEY's residence during the previously executed Search Warrant.

11. On 22 January 2016, the Military Police entered Cpl WHALEY's residence with a second Warrant to Search. Cpl WHALEY provided to the Military Police items 5, 6 and 7, which he retrieved from his residence. Cpl WHALEY was then arrested a second time for stealing contrary to section 114 of the National Defence Act.

THE SURRENDERING OF MORE LENSES

12. On 28 January 2016, Cpl WHALEY voluntarily attended the Military Police and surrendered items 8 and 9, which were later

confirmed to also be property of the Canadian Armed Forces that was stolen.

ADDITIONAL FACTS SURROUNDING THE STEALING OF THE ITEMS AT ANNEX A TO THE CHARGE SHEET

13. Cpl WHALEY began working at the ESS in the beginning of April 2015. He quickly realised that photography gear was easily accessible.

14. Cpl WHALEY is a hobbyist photographer. The knowledge he acquired through this hobby, as well as the fact that, back in April 2015, he owned a Nikon lens and a Nikon D7100 camera made him fully aware of the value of the items he stole.

15. On separate days during the month of April 2015, Cpl Whaley stole all the items listed at annex A to the charge sheet.

16. All the items stolen were stored in those rooms 1515 and 1518-A. Corporal Whaley was one of the member who had ready access, and was entrusted with, the equipment contained in both these rooms.

FACTS SURROUNDING THE IMPROPER SELLING OF PUBLIC PROPERTY BY CORPORAL WHALEY

17. In May 2015, Cpl Whaley placed an advertisement on kijiji to sell items 1, 2, 3, 10, 11 and 12 of annex A to the charge sheet.

18. On 22 May 2015, Mr TANNER met with Cpl WHALEY at the Starbucks Coffee shop on Lacewood drive in Halifax.

19. Cpl WHALEY mentioned that he was a military member, which contributed to an increase of confidence by Mr TANNER in Cpl WHALEY's trustworthiness.

20. Cpl WHALEY indicated that he, himself, had bought item 3 of Annex A to the charge sheet from a friend at the "Greenwood photography club".

21. Mr TANNER paid \$4500 cash to Cpl WHALEY for items 1, 2, 3, 10, 11 and 12 of Annex A to the charge sheet.

VALUE OF THE ITEMS STOLEN

22. The Canadian Armed Forces purchased the items stolen for a total of \$13,518.19, broken down as follow:

#	Item type	Make	Model	Value
1	Battery	Nikon	EN-EL18A	\$137.15
2	Battery	Nikon	EN-EL18A	\$137.15
3	Camera body	Nikon	D4S	\$5,557.47
4	Camera Lens	Nikon	AF-S 80-400MM	\$2,035.47
5	Camera Lens	Nikon	NIKKOR 105MM F/2 8G IF-ED	\$689.68
6	Camera Lens	Nikon	NIKKOR 85MM F/2 8D	\$1,619.52
7	Camera Lens	Nikon	NIKKOR 24-70MM F/2 8G ED	\$1,376.59
8	Camera Lens	Nikon	NIKKOR 50 MM	\$117.30
9	Camera Lens	Nikon	NIKKOR 70-200MM	\$1,557.00
10	Charger	Nikon	MH-26A	Came with item 3
11	Flash Cards	Sandisk	Extreme	\$69.30
12	Flash Cards	Sandisk	Extreme	\$69.30
13	GPS Attach	Nikon	GP1A	\$152.26

ARRESTS AND RELEASES OF CORPORAL WHALEY

23. Cpl WHALEY was arrested on two occasions as follow:

a. At 1432 hrs, on 9 October 2015, Cpl WHALEY was arrested by the Military Police for Stealing, contrary to Sec 114 NDA. He was then released with the following conditions at 1745h on the same day:

- (1) remain under Military Authority;
- (2) report at 0830 hrs to Sgt Pike; and
- (3) keep the peace and be of good behaviour.

b. At 1825 hrs, 22 January 2016, Cpl WHALEY was arrested by Cpl DUCHESNE-TANGUAY for Stealing, contrary to Sec 114 NDA. He was then released with the following conditions at 2135h on the same day:

- (1) remain under Military Authority;
- (2) report at 0830 hrs to MWO MCGRATH;
- (3) remains within the confines of 14 Wing Greenwood; and
- (4) keep the peace and be of good behavior.

24. Throughout his interactions with the Military Police, Corporal Whaley was cooperative. During both investigations, he provided

statements to the Military Police in which he admitted taking the items the investigators were specifically looking for within each investigation.

25. However, Corporal Whaley did not advise the Military Police that had taken more equipment, namely: items 5, 6 and 7 until he was found, as part of the second investigation, to have stolen more items.”

“AGREED STATEMENT OF FACTS

INFORMATION ON THE IMPACT OF THE LOSS OF STOLEN ITEMS

1. The material stolen by Corporal Whaley was purchased to eventually be used for reconnaissance purposes onboard the CP-140M Aurora.

2. The camera had not received flight permits for the Aurora at the time of the offences. Once the permits came in, there were still enough cameras to meet operational demands at the time.

CORPORAL WHALEY’S PERSONAL CIRCUMSTANCES

3. On 2 November 2015, because of his severe financial difficulties, Corporal Whaley was referred by his Chain of Command to SISIP financial counseling. On 16 February 2016 the SISIP Financial Counsellor reported to Corporal Whaley's supervisor that he was participating and cooperating fully in the Financial Counseling process. The counselor wrote: "He continues to demonstrate a responsible attitude in being receptive to counseling, and in implementing recommendations readily. In addition, he is steady in his commitment to helping himself through the continuation of second income and strict budgeting."

4. Attached are letters from supervisors offering their perspective on Corporal Whaley.

5. Corporal Whaley has apologized to Mr. Wolter in writing and has fully compensated him for his loss. Attached is an e-mail from Mr. Wolter.”

Joint Submission

[5] The joint submission before the court today is reviewed in the context of the current Supreme Court of Canada (SCC) guidance in *R. v. Anthony-Cook*, 2016 SCC 43. In that decision, the Supreme Court clarified that a trial judge must impose the sentence proposed in a joint submission “unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.”

[6] Both the prosecution and defence counsel recommend that I impose a sentence of 14 days' detention and a fine of \$3,000, to be paid in instalments.

So how does one determine if a proposed sentence is not otherwise in the public interest?

[7] By setting a high "public interest" threshold, the SCC sent a message reinforcing the importance of plea bargaining within the criminal justice system. The efficient use of plea bargaining and joint submissions benefit many different stakeholders engaged in the criminal justice system, as well as within the military justice system.

[8] A plea bargain occurs when counsel come together, outside the court, to discuss their respective positions in a quid pro quo or solution-oriented manner. There is give and take required to come to a joint recommendation. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress of a trial and providing an opportunity for offenders, such as Corporal Whaley, who are clearly remorseful to begin making amends, which I have noted he has done. By encouraging plea deals, the burden on the court is reduced and the prosecution benefits directly by not needing to take every matter to a full court martial.

[9] The military justice system supports the maintenance of discipline in the Canadian Armed Forces (CAF) and, in the case of *R. v. Généreux*, [1992] 1 S.C.R. 259, the SCC reinforced that "breaches of military discipline must be dealt with speedily and, frequently", which I note your Chain of Command did do.

[10] Logistically, coming to a meaningful resolution in a discipline matter, victims and witnesses are not required to travel and, more importantly, will be spared the ordeal of testifying, which may be particularly important where the charges flow from a significant emotional event. It also assists the defence in that the accused can assess his or her options for resolution earlier rather than later.

[11] In the case of the military justice system, the systemic benefits of joint submissions also extend to the unit. The accused's unit is responsible for providing the necessary administrative support to a court martial and then, when the matters can be dealt with quickly, all stakeholders benefit directly.

[12] The most important gain is the certainty that an accused receives from this process. The accused person has a lot to lose. As you heard when I did the verification earlier, by entering into a plea bargain, the presumption of innocence is gone and it should never ever be given up lightly. Thus, in exchange for making a plea, the accused must receive a high level of certainty that the court will accept the joint submission.

Assessing the joint submission

[13] When the SCC set a high threshold leveraging the benefits of joint submissions, it placed significant responsibility on the prosecution and defence counsel. The prosecution and defence counsel are well placed to arrive at a joint submission that reflects the interests of the public, the CAF and the accused. Counsel are highly knowledgeable about the circumstances of the offender and the offences, as with the strengths and weaknesses of their respective positions. The prosecutor who proposes a sentence would have been in contact, or her counterparts would have been in contact, with the Chain of Command. He or she is aware of the needs of the military and its surrounding community and is charged with representing those interests.

[14] Defence counsel is required to act in the accused's best interest, including ensuring that the accused's plea is a voluntary and informed choice and unequivocally acknowledges his guilt.

[15] As members of the legal profession and accountable to their respective Law Societies, the prosecution and defence counsel have a duty not to mislead the Court in their submissions. In short, it is my expectation that they are committed to recommending a sentence that is fair and consistent with the public interest.

Sentencing matters considered

[16] In this case, the prosecutor read the Statement of Circumstances and provided the documents required by the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51 that were supplied by the Chain of Command. The Agreed Statement of Facts was also introduced on consent to inform the Court as to facts pertaining to the material stolen by Corporal Whaley.

[17] In addition, there were three letters placed before the court: a letter from Lieutenant-Colonel Horne, Wing Operations Officer; Major Chiasson, Chief Mission Support Officer; and a letter from Captain Johnson, General Manager, Greenwood Military Aviation Museum. Also, there was an email exchange that occurred between Corporal Whaley and Claus Wolter, which confirms that restitution was made and includes a remorseful apology.

[18] Furthermore, the Court benefitted from excellent submissions from counsel to support their joint position on sentence, based on the facts and considerations relevant to this case. They also provided the court with a number of judicial precedents for comparison.

[19] Their submissions and the evidence before the court have enabled me to be sufficiently informed so I may consider any indirect consequence of the sentence, and to impose punishment adapted to Corporal Whaley and the offences committed.

With regard to the Offender

[20] Corporal Whaley is 51 years old. He enrolled in 1989 and has served his country very well, both in garrison and on operations. I note he does have a conduct sheet dated 2015 for an offence that occurred in October 2014. As noted in the Agreed Statement of Facts, Corporal Whaley had financial issues that may have contributed to the commission of the offences. He sought help from his chain of command to resolve these issues.

Objectives of sentencing to be emphasized in this case

[21] The objectives of sentencing emphasized are those of deterrence and denunciation which I agree with.

[22] In making the joint submission, counsel advised the court that they have taken into account all relevant aggravating and mitigating factors. However, prosecution did include a couple aggravating factors for the record:

- (a) The member was in a position of trust and he utilized that position of trust to access the material itemized in Annex A, which he took and then sold to an unsuspecting buyer;
- (b) The goods were items to be used on board an Aurora aircraft in an operational circumstance. That is serious; and
- (c) He has a recent conviction on his conduct sheet, although I note that it is not directly related to the charges before the court today.

[23] With respect to mitigating factors, your pleas of guilty and the rationale behind them, as described in the Agreed Statement of Facts, must be given their full weight. You genuinely show remorse and have taken steps to ensure restitution to the victim. You have succeeded in your remedial measures but, more importantly, you have regained the confidence of your Chain of Command. Given the seriousness of the offences that are before the Court today, this is a significant mitigating factor. The letters of support, although not completely glowing, indicate that you are committed to making amends, and the Court recognizes that.

[24] I note from your conduct sheet that there was a previous incident that occurred in October 2014. It appears clear that you struggled personally from late 2014 until late 2015 when you were required to deal with what you had done. The types of offences before the court are directly related to a failure of ethical obligations. As noted above, I am impressed with your response to the remedial measures imposed and your efforts made to regain the trust of your Chain of Command. They have supported and provided you a rare opportunity to rehabilitate yourself and regain control of your life. Rehabilitation is the ultimate aim of sentencing and you can show your gratitude by ensuring you never end up in a court like this again. You must continue to reorient your life in a positive way and uphold the ethical standards required by every one of us serving in uniform. We all have the duty of honesty, integrity and loyalty. They are

essential for us to work together. You now have an opportunity to move forward with your life. Considering all of the above, the Court is amply satisfied that counsel have discharged their obligation in making their joint submission, on sentence.

FOR THESE REASONS, THE COURT:

[25] **FINDS** you guilty on the first, third and fifth charges, not guilty on the second charge, and directs that the proceedings on the fourth charge be stayed.

[26] **SENTENCES** you to detention for a period of 14 days and a fine of in the amount of \$3,000 to be paid in monthly instalments of \$250 beginning 15 June 2017.

Counsel:

The Director of Military Prosecutions as represented by Major M.E. Leblond

Mr. E. Thomas, Defence Counsel Services, Counsel for Corporal D.B. Whaley