



COURT MARTIAL

Citation: *R. v. Whelan*, 2018 CM 2035

Date: 20181220

Docket: 201841

General Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman J.A. Whelan, Offender

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

NOTE:	Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "Use of Personal Information in Judgments and Recommended Protocol".
-------	--

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Today, Leading Seaman Whelan admitted his guilt to the first and only charge on the charge sheet. The Court must now determine and pass sentence on this charge which reads as follows:

"First Charge

AN ACT TO THE PREJUDICE OF GOOD
ORDER AND DISCIPLINE

Section 129 N.D.A.

Particulars: In that he, on or about 3 October 2017,
at CFB Esquimalt, British Columbia, conducted an

unauthorized search of the personal belongings of
XXXX OS Gallant.”

[2] In exchange for the Director of Military Prosecutions’ undertaking not to proceed on charges relative to additional uncharged conduct, counsel requested the Court to consider that uncharged conduct and mental health of the accused as outlined in the Agreed Statement of Facts and Circumstances in assessing their joint recommendation.

[3] The Agreed Statement of Facts and Circumstances reads as follows:

“AGREED STATEMENT OF FACTS AND CIRCUMSTANCES

1. At all material times LS Whelan was a member of the Regular Force, Canadian Armed Forces, and stationed at CFB Esquimalt.
2. On 3 October 2017, LS Whelan was employed as a barrack warden at Bernays Block in CFB Esquimalt.
3. On that day, LS Whelan entered OS Galant’s private room and rifled through his drawers.
4. OS Galant had previously lost money from his room, and so had set up a camera to capture motion of anyone entering. The camera took video of LS Whelan’s activities in the room.
5. On 28 March 2018, LS Whelan was charged for entering the room. A charge under section 129 of the National Defence Act was preferred on 12 June 2018.
6. Before a trial could be convened on that charge, LS Whelan was arrested by Victoria and Oak Bay Police Departments and charged with various offences which are currently before the civilian courts.
7. On 20 Oct 2018, LS Whelan was arrested by Military Police for pulling a fire alarm and breaking into a Ford F-150 pickup truck in the Work Point portion of CFB Esquimalt.
8. On 20 October 2018, he was released by the Custody Review Officer on conditions, including confinement to the Work Point portion of CFB Esquimalt and to report periodically to designated personnel.
9. On 22 October 2018, the conditions were altered to confine LS Whelan to the Naden portion of CFB Esquimalt.

10. On 26 October 2018, LS Whelan failed to report at 1300 hrs, and was found to be outside of the Naden portion of CFB Esquimalt. He was consequently arrested for breach of conditions. He was retained by the Custody Review Officer until a Custody Review Hearing could be held in front of a Military Judge.

11. While detained and awaiting the Custody Review Hearing, LS Whelan was admitted multiple times to the Royal Jubilee Hospital for psychiatric evaluation. He was intoxicated from injecting marijuana. On returning from the hospital under MP guard on 27 October 2018, LS Whelan fled from his two escorts, but surrendered himself after a brief chase.

12. LS Whelan began to see CAF psychiatric staff, and was diagnosed with a Substance Induced Psychotic Disorder.

13. On 4 November 2018, while in the detention facility at CFB Esquimalt, LS Whelan pulled the fire alarm.

14. LS Whelan was released by Military Judge Commander Sukstorf on 5 November 2018, on conditions. LS Whelan's conditions included to remain within the confines of the Naden portion of CFB Esquimalt, and to report periodically to designated personnel.

15. On 6 November 2018, LS Whelan breached his conditions of release by again leaving the confines of the Naden portion of CFB Esquimalt and failing to report at 1300 hrs.

16. LS Whelan was evaluated by medical staff as unready to attend a residential treatment program, though they held hopes that his condition would continue to improve such that he could attend.

17. On 13 November 2018, Military Judge Sukstorf again released LS Whelan on conditions.

18. Medical staff and LS Whelan's Chain of Command continued to search for viable treatment options, but medical staff ultimately decided that LS Whelan was not suitable for a residential treatment facility and would not be in the foreseeable future. LS Whelan no longer wishes to attend a residential treatment program.

19. LS Whelan's unit has concluded that he is unemployable in his trade, and is preparing a recommendation for administrative release. LS Whelan wishes to be released from the Canadian Armed Forces so he can have a fresh start elsewhere."

The joint submission

[4] In the joint submission, counsel recommend that the Court impose a sentence of dismissal from Her Majesty's service.

[5] The joint submission 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 SCC clarified that a trial judge must impose the sentence recommended 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] As background, a plea bargain occurs when counsel come together, outside the court, to discuss their respective positions in what we called a quid pro quo manner which, in this case, also resulted in a joint recommendation on sentence to the Court. In essence, in exchange for a guilty plea, the prosecution recommends a sentence that the accused is prepared to accept, avoiding the stress of a trial and providing an opportunity for offenders, such as Leading Seaman Whelan, to begin, or in this case, continue making amends and to rehabilitate. 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. Joint submissions are vitally important to the well-being of the military justice system, as they are in civilian criminal courts, because they free up resources and allow justice participants to focus their resources on more demanding cases.

[7] As you heard when I verified the guilty plea earlier, by entering into a plea bargain, the constitutional right to be presumed innocent is given up and this should never be done lightly. In fact, by virtue of the oath taken by all service members, this right is one we all stand to protect. Thus, in exchange for making a plea, the accused must be assured of a high level of certainty that the court will accept the joint submission.

Assessing the joint submission

[8] The punishments available to a court martial are set out in subsection 139(1) of the *National Defence Act (NDA)*. The punishment of dismissal from Her Majesty's service is included at paragraph 139(1)(e) and is a higher form of punishment than that of detention. As a result of the disciplinary issues outlined in the Agreed Statement of Facts and Circumstances, Leading Seaman Whelan has already served 17 days in detention. In addition, upon his release from detention, the Court had imposed several very restrictive conditions on Leading Seaman Whelan, which were neither sustainable by his unit nor was their continuation considered acceptable by this Court.

The evidence

[9] In this case, the prosecution read the Agreed Statement of Facts and Circumstances and then provided the documents under *Queen's Regulations and Orders*

for the Canadian Forces (QR&O) article 112.51 that were supplied by the offender's chain of command. The Agreed Statement of Facts and Circumstances informed the Court of the facts specific to the charge before the Court, other ongoing disciplinary issues, as well as the personal circumstances of Leading Seaman Whelan.

[10] In addition, pursuant to the new provision, QR&O 112.482, the prosecution advised the Court that it had consulted with Ordinary Seaman Gallant, who is now an aviator, and advised him of the plea bargain as well as his right to prepare a victim impact statement. The prosecution advised the Court that Aviator Gallant chose not to submit a statement.

[11] Furthermore, the Court benefited from counsel's submissions to support their joint position on sentence where they highlighted the facts and considerations relevant to Leading Seaman Whelan.

[12] Counsel's submissions and the evidence before the Court have enabled me to be sufficiently informed of Leading Seaman Whelan's personal circumstances so I may ensure that the court imposes a sentence specifically for him, taking into account the rehabilitation and progress he has made to date.

The offender

[13] Leading Seaman Whelan is 35 years old. He enrolled in the Canadian Armed Forces (CAF) on 29 July 2010 and he served his country well for over 8 years. It is noted from his conduct sheet that Leading Seaman Whelan has struggled for some time with various substance abuse issues.

[14] The Court noted that Leading Seaman Whelan has also taken significant steps towards rehabilitation, but most of these steps have been imposed through court orders. But the Court notes that the next steps to his recovery are best pursued outside of the CAF.

Purposes, objectives and principles of sentencing to be emphasized in this case

[15] The fundamental purposes of sentencing in a court martial are to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale and to contribute to respect for the law and maintenance of a just, peaceful and safe society. In order to accomplish this, it is imperative that members be provided opportunities to reform their conduct and address any shortcomings.

[16] The fundamental purposes of sentencing are achieved by imposing sanctions that have one or more of the objectives set out within the *NDA* at subsection 203.1(2). The prosecution has emphasized that, in negotiation, he and defence counsel closely considered the objectives of sentencing set out therein and he provided this Court extensive reasons why the recommended punishment satisfies them. On the facts of the case, the prosecution and defence submit that the objectives they considered most

important are general and specific deterrence as well as denunciation. Defence counsel highlighted that, on the facts of the case, these objectives should not impair the member's ongoing rehabilitative efforts and both counsel submitted that Leading Seaman Whelan's conduct is no longer conducive to military service.

[17] It is a fundamental principle that the sentence be proportionate to the gravity of the offence and the degree of the responsibility of the offender. This was the sentencing principle that most concerned the Court. The offence before the Court is not overly serious and in assessing the joint submission made by counsel, it is imperative that the Court first consider the gravity of the offence. Although the charge before the Court is not overly grave in itself, it did involve a very serious breach of trust which is essentially a hallmark and a requirement of the steward trade. As a steward and working as a barrack warden, Leading Seaman Whelan was entrusted to safeguard the personal residences of military members. As defence counsel stated, a person's home which includes a member's personal belongings, no matter how small or confined it is, has tremendous privilege attached to it and he breached this trust by using his position as a barrack warden to gain access to Aviator Gallant's personal belongings.

[18] In addition, it is the repetitive breaching of military direction, and the military conditions imposed by the Court that revealed that Leading Seaman Whelan's continued service is detrimental to both his ongoing rehabilitation as well as to any benefit to the CAF. I agree with counsel's assessment in this regard.

Accounting for relevant aggravating or mitigating circumstances

[19] In the military justice system, under section 203.3 of the *NDA*, in imposing a sentence the Court shall also take into consideration a number of principles relevant to the case. Firstly, in imposing a sentence, the Court shall increase or decrease its sentence to account for any relevant aggravating or mitigating factors relating to the offence or to offender.

Aggravating factors

[20] After hearing the submissions of counsel, the Court highlights the following aggravating factors:

- (a) Breach of trust. As I discussed above, the offence before the court involved a breach of trust by Leading Seaman Whelan in performing his duties as a barrack warden.
- (b) Conduct sheet. Leading Seaman Whelan has a conduct sheet reflecting similar offences; two offences involve him consuming beer from the ship's beer and pop stores, as well as an incident involving intoxication. Hence, there is a pattern of behaviour that reflects repeated breaches of trust as well as inappropriate use of intoxicants that must be deterred.

- (c) Inability to maintain necessary discipline. Leading Seaman Whelan's conduct reveals his inability to conform to military direction and expectations. It is compounded by the repetitive breaches. Although he has managed to maintain some compliance with the Court conditions placed upon him, it requires significant effort from his chain of command and the imposition of Court conditions which are not sustainable either in terms of the unit's resources or in the interest of justice.

Mitigating factors

[21] After hearing the submissions of counsel, the court highlights the following mitigating factors:

- (a) Guilty plea. As described in the Agreed Statement of Facts and Circumstances, his courage displayed in accepting responsibility and understanding his limitations must be given significant weight by the Court. His guilty plea also saved the Court and counsel considerable time and permits Leading Seaman Whelan to move on with the next stage of his life.
- (b) Remorse. As his counsel indicated, right from the beginning, Leading Seaman Whelan demonstrated remorse for his conduct. He has also recognized and accepted his inability to conform to the rigours and expectations of military service.
- (c) Time served in detention. As a result of the recent disciplinary offences as described in the Agreed Statement of Facts and Circumstances, Leading Seaman Whelan has already served 17 days in detention. The Court must give him significant credit for the time served and recognize that detention is no longer a suitable option for assisting him in his rehabilitation.
- (d) Medical diagnosis. Leading Seaman Whelan was diagnosed with medical and mental health conditions which require him to work towards recovery. He is now receiving medical assistance, however, the court has been advised he needs to separate himself from the military environment to permit him to address other factors in his life which are necessary for his continued rehabilitative success.

Parity

[22] The law requires that the sentence be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. In making the joint submission, prosecution relied upon two precedents which the Court reviewed, being *R. v. Caicedo*, 2015 CM 4020 and *R. v. Ayers*, 2017 CM 1012. In short, based on the

case law and the submissions made by counsel, it is clear that the sentence recommended is in an acceptable range considering those historically awarded for this type of repeat offenders.

Moderation

[23] Also under the principles of sentencing set out in section 203.3 of the *NDA*, an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances. It is clear that detention is no longer of assistance in Leading Seaman Whelan's recovery or ensuring his compliance. As such, based on the totality of the circumstances, the sentence that provides him with his best prospect of recovery and does not involve detention is best addressed by the punishment of dismissal.

Any indirect consequences of the finding of guilty or the sentence should be taken into consideration

[24] Pursuant to paragraph 203.3(e), defence counsel made extensive submissions on the indirect consequences of the finding and the sentence of detention on the offender. He explained that Leading Seaman Whelan has a number of issues that he will have to sort out in releasing from the CAF which includes finding work and dealing with charges he is facing in the civilian criminal justice system.

[25] Defence counsel also submitted that the effect of his dismissal provides him the ability to move on with his life and will provide Leading Seaman Whelan a reasonable chance of continued rehabilitation.

[26] In the Court's view, if there is a possibility that he will make enduring progress in his personal rehabilitation, and such improvement would benefit society and the CAF, then this Court should support it. I agree with the recommendation.

[27] Leading Seaman Whelan, you have been through a rough couple of months, but you must be congratulated on the steps that you have taken to turn your life around. Your sustained effort to date demonstrates that you recognize the work involved; you know it is not going to be an easy journey. You are only 35 years old and you have a whole life ahead of you. There is so much left for you to live for. Your efforts to battle addiction will be a daily and lifelong struggle, but the courage you have displayed in the last couple of months shows that you have something special deep down that you can draw upon to help you succeed. You are a strong man and you can keep your addiction in check. You can make 2019 your year of change. Although, it is also going to be the year where you have to face the consequences of your conduct, it can also be the year where you start to live fully and turn your life around.

[28] You have the unfortunate diagnosis of not simply struggling with addiction but your other health issues exacerbates the challenge that lies ahead. That should give you extra motivation to keep it in check. So believe in yourself, just as your counsel has.

Conclusion

[29] The punishment of dismissal sends a message that this type of conduct, particularly with respect to a breach of trust in the exercise of one's duties, will not be tolerated in the CAF. It is the Court's assessment that in their joint submission, counsel have appropriately weighed all the principles as set out in section 203.3 of the *NDA* and they have discharged their obligations. As such, the recommended sentence is in the public interest and does not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[30] **FINDS** Leading Seaman Whelan guilty of the charge before the Court.

[31] **SENTENCES** Leading Seaman Whelan to dismissal from Her Majesty's service.

Counsel:

The Director of Military Prosecutions as represented by Major A. van der Linde

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Leading Seaman J.A. Whelan