Citation: *R. v. White*, 2019 CM 4017

Date: 20191009
Docket: 201908

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Ordinary Seaman A.S.J. White, Offender

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Ordinary Seaman White, having accepted and recorded your plea of guilty in respect of the first charge on the charge sheet, the Court now finds you guilty of breach of conditions contrary to section 101.1 of the *National Defence Act* (*NDA*).

A joint submission is being proposed

[2] I now need to impose the sentence. This is a case where a joint submission is made to the Court. Both prosecution and defence counsel recommended that I impose a fine in the amount of $500.

[3] This recommendation of counsel severely limits my discretion in the determination of an appropriate sentence. As any other trial judge, I may depart from a joint submission only if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. This is the test promulgated by the Supreme Court of Canada (SCC) in *R. v. Anthony-Cook*, 2016 SCC 43.

[4] Indeed, the threshold to depart from the joint submission being made is high as joint submissions respond to important public interest considerations. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress and expense of a trial and allowing efforts to be channelled into other matters. Furthermore, offenders who are remorseful may take advantage of a guilty plea to begin making amends. The most important benefit of joint submissions is the certainty they bring to all participants in the administration of justice.

[5] Yet, even if certainty of outcome is important for the parties, it is not the ultimate goal of the sentencing process. I must also keep in mind the disciplinary purpose of the Code of Service Discipline and military tribunals in performing the sentencing function attributed to me as military judge. As recognized by the SCC, courts martial allow the military to enforce internal discipline effectively and efficiently. Punishment is the ultimate outcome once a breach of the Code of Service Discipline has been recognized following either a trial or a guilty plea. It is the only opportunity for the Court to deal with the disciplinary requirements brought about by the conduct of the offender, on a military establishment, in public and in the presence of members of the offender's unit.

[6] The imposition of a sentence at court martial proceedings, therefore, performs an important disciplinary function, making this process different from the sentencing usually performed in civilian criminal justice courts. Even when a joint submission is made, the military judge imposing punishment should ensure, at a minimum, that the circumstances of the offence, the offender and the joint submission are not only considered, but also adequately laid out in the sentencing decision to an extent that may not always be necessary in other courts.

[7] The fundamental principle of sentencing found at section 203.2 of the *NDA* provides that a military judge shall impose a sentence commensurate with the gravity of the offence and the degree of responsibility of the offender.

Matters considered

[8] In this case, the prosecutor read a Statement of Circumstances which was formally admitted as accurate by Ordinary Seaman White. It was entered in evidence as an exhibit, along with other documents provided by the prosecution as required at *Queen's Regulations and Orders for the Canadian Forces* article 112.51. For its part, the defence also produced an Agreed Statement of Facts describing the personal situation of Ordinary Seaman White at the time and since the offence.

[9] In addition to this evidence, the Court also benefitted from the submissions of counsel that support their position on sentence on the basis of the facts and considerations relevant to this case, as well as by comparison with judicial precedents in similar cases. As a result, I can adequately apply the purposes and principles of

sentencing to the circumstances of both the individual offender and the offence committed in this case.

The offender and the offence

[10] The Statement of Circumstances and Agreed Statement of Facts reveal the following circumstances relevant to the offender and the offence.

[11] Ordinary Seaman White is 25 years old. He joined the Canadian Armed Forces (CAF) in December 2016 in his home town of Windsor, Ontario. After successfully completing basic training in St-Jean, QC, he joined the Canadian Forces School of Communications and Electronics here in Kingston, to begin training in the Communications Research occupation. His career progression has been placed on hold when he was removed from training in October 2017, following his arrest on allegations of sexual assault and assault. He was released from custody by a custody review officer from his unit on 7 October 2017 on a number of conditions, including the condition that he abstain from possessing or consuming alcohol or intoxicating substances.

[12] On 28 December 2017, Ordinary Seaman White was visiting his parents in Windsor while on authorized leave from his unit. Driving a pickup truck, he came upon a joint Windsor Police Service Ontario Provincial Police RIDE program traffic stop in Windsor. Apparently failing to notice the immobilized police cruiser, Ordinary Seaman White struck a curb while abruptly changing lanes to avoid a collision. He was intercepted by a constable who noticed that the vehicle smelled of alcohol, that Ordinary Seaman White's eyes were glassy, that his speech seemed slow and deliberate and that his breath smelled of alcohol. Containers of alcoholic beverages could be seen in the vehicle. Ordinary Seaman White was required to provide a breath sample in a roadside screening device and the result was "Warn". The constable discovered through the Canadian Police Information Centre that Ordinary Seaman White was subject to the condition not to possess or consume alcohol. He then arrested Ordinary Seaman White for breach of conditions and contacted the military police. He also served Ordinary Seaman White with a notice of suspension of his driver's permit for three days. Ordinary Seaman White was required to pay $198 on 31 December 2017 to reinstate his driver's permit.

[13] Ordinary Seaman White was under some stress at the time of his arrest in December 2017. This was his first visit since his father had been diagnosed with terminal Stage IV lung cancer. His father subsequently died on 3 September 2018. Ordinary Seaman White was first charged with the offence before the Court on 18 July 2018, along with a charge of sexual assault and assault. After these charges were laid, his Commandant served him with a notice of intent to recommend his release which has not been pursued pending judicial resolution of the charges. In March 2018, the charges against Ordinary Seaman White for sexual assault and assault were withdrawn from the jurisdiction of the Code of Service Discipline and were relaid by investigators in the Canadian Forces National Investigation Service by way of information before the

Ontario Court of Justice. The charges remain part of an ongoing process before civilian court.

Seriousness of the offence

[14] The Court has considered the objective gravity of the offence in this case. The offence of breach of conditions contrary to section 101.1 of the *NDA* attracts a maximum punishment of imprisonment for less than two years.

[15] The circumstances of the offence in this case do not reveal aggravating factors justifying the Court to increase the sentence beyond what is called upon by the offence itself. I have been made aware of decisions in the matters of *R. v. Private H.A. Castle*, 2008 CM 2007 and *R. v. Desgroseilliers*, 2013 CM 2014 to the effect that, in the military context, the offence of failing to comply with a condition of release from custody is more serious than the analogous offence in the civilian context as it constitutes disobedience of an order given by a superior officer. I do agree. Yet this is part of the gravity of the offence itself and is not an aggravating factor on its own.

Mitigating factors

[16] The Court acknowledges the following mitigating factors:

(a) Ordinary Seaman White's guilty plea today, which avoided the expense and energy of running a trial and demonstrates that he is prepared to take responsibility for his actions in this public trial in the presence of members of his unit and of the broader military community.

(b) The personal situation of Ordinary Seaman White at the time of the offence in December 2017. Notably that he was 23 at the time, with just over one year of experience as a member of the CAF; that he was no doubt under some stress due to the difficult situation he found himself in, given the serious allegations made against him; the suspension of his training in the CAF and, of course, the very unforgiving diagnosis faced by his father at the time.

(c) Third, the fact that Ordinary Seaman White has no conduct sheet.

(d) Finally, the prospects of rehabilitation for Ordinary Seaman White as a young man whose career in the CAF is and has been under revision for quite an extended period of time, bringing stress and uncertainty, but who has a long road ahead of him as a citizen who can contribute positively to society in any capacity in the future.

Objectives of sentencing to be emphasized in this case

[17] The circumstances of this case require that the focus be placed on the objectives of denunciation and general deterrence, as well as rehabilitation, in sentencing the offender. Specifically, I believe that the sentence proposed, a fine, must be sufficient to denounce and act as a deterrent on a young member who still has to learn habits of obedience, yet, allow its consequences to be manageable for the offender given the mitigating factors mentioned previously.

Assessing the joint submission

[18] The submissions from counsel contained brief references to previous cases, which assist me in determining that the fine being proposed is within the range of sentences imposed in similar cases in the past. The issue for me to assess as military judge is not whether I like the sentence being jointly proposed or whether I would have come up with something better. As stated earlier, I may depart from the joint submission of counsel only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[19] In determining whether that is the case, I must ask myself whether the joint submission is so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the military justice system. I do believe that a reasonable person aware of the circumstances of this case would expect that the offender receive a punishment which expresses disapprobation for the failure in discipline involved and has a real impact on the offender. The fine proposed is, in my view, aligned with these expectations.

[20] As recognized by the SCC, trial judges must refrain from fidgeting with joint submissions of counsel if their benefit can be maximized. Indeed, prosecution and defence counsel are well placed to arrive at joint submissions that reflect the interests of both the public and the accused. They are highly knowledgeable about the circumstances of the offender and the offence, as with the strengths and weaknesses of their respective positions. The prosecutor who proposes the sentence is in contact with the chain of command. He or she is aware of the needs of the military and civilian communities and is charged with representing the community's interest in seeing that justice be done. Defence counsel is required to act in the accused's best interests, including ensuring that the accused's plea is voluntary and informed. Both counsel are bound professionally and ethically not to mislead the Court. In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest.

[21] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, and the mitigating factors mentioned previously, I conclude that the sentence jointly proposed by counsel is entirely appropriate and will certainly not bring the administration of justice into disrepute or would otherwise be contrary to the public interest. I will, therefore, accept it.

[22] Ordinary Seaman White, the offence you have pleaded guilty to is serious as it constitutes a breach of an order given by the officer who released you from custody. I understand the stress you were under at the time of the offence but remember that this should not be interpreted as an excuse to offend further, especially considering there may be more stressful situations coming your way with potential judicial proceedings in civil courts. You are still young. You need to reflect on what happened and convince yourself that it should not happen again. To achieve the potential that the CAF recruiters saw in you when you were assigned to training as communications researcher, you absolutely need to avoid coming before criminal courts in the future.

FOR THESE REASONS, THE COURT:

[23] **SENTENCES** Ordinary Seaman White to a fine in the amount of $500, payable forthwith. In the event he is released from the CAF for any reason before the fine is paid in full, then any outstanding unpaid balance will be due the day prior to his release.

Counsel:

The Director of Military Prosecution as represented by Lieutenant(N) J.M. Besner

Mr R. Fowler, Law Office of Rory G. Fowler, 221 Queen Street, Kingston, ON Counsel for Ordinary Seaman A.S.J. White