

Citation: *R. v. Private R.J. Tupper*, 2007 CM 1028

Docket: 200742

**DISCIPLINARY COURT MARTIAL
CANADA
NEW BRUNSWICK
CANADIAN FORCES BASE GAGETOWN**

Date: 30 October 2007

PRESIDING: COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN

v.

**PRIVATE R.J. TUPPER
(Offender)**

**SENTENCE
(Rendered orally)**

[1] Private Tupper was found guilty on 28 October 2007 of the following offences, namely: breaking out of barracks, contrary to paragraph 87(d) of the *National Defence Act*; two counts of absence without leave, contrary to section 90 of the *National Defence Act*; insubordination for behaving with contempt toward a superior officer, contrary to section 85 of the *National Defence Act*; disobedience of a lawful command, contrary to section 83 of the *National Defence Act*; and resisting an escort whose duty it was to apprehend him, contrary to paragraph 87(c) of the *National Defence Act*.

[2] The circumstances surrounding this case relate to two distinct sets of facts. Facts on which the court martial panel found Private Tupper guilty of the offences charged can be summarized along this way:

[3] On Thursday, 7 December 2006, Private Tupper, who was a serving member of G Coy, Second Battalion RCR, Royal Canadian Regiment, was sentenced to the punishment of confinement to barracks for a period of 12 days ending on 18 December 2006;

[4] Following the award of the punishment, Master Warrant Officer Venus had provided documents so that the punishment be carried out. Master Corporal Moore,

who was the Battalion Orderly Sergeant for 2 RCR, and as part of his duties he was responsible to take care of detainees, persons confined to barracks or on stoppage of leave. He had been informed of Private Tupper's punishment. Master Corporal Moore instructed Private Tupper verbally, and had personally seen him with the written instructions for defaulters, which Private Tupper had also been instructed to read by the Drill Sergeant Major, DSM, Warrant Officer Collins.

[5] As part of the punishment, Private Tupper had to attend building D57 for his roll call at 1930 hours, further to the roll call of 1800 hours. Private Tupper did not report to him at the 1930 hours timing, and Master Corporal Moore tried to contact him on the phone to know about his whereabouts, with no success. At 2040 hours, Master Corporal Moore dispatched a duty driver to Private Tupper's room, and Master Corporal Moore was advised that Private Tupper was not in his room at that time, and Private Tupper did not report to him later, and Master Corporal Moore had not been made aware that Private Tupper had been excused or authorized not to attend his timings. A warrant for arrest was issued on 8 December by Lieutenant-Colonel R.D. Walker, Commanding Officer 2 RCR, for the arrest of Private Tupper for an alleged service offence; that is to say, absented himself without leave.

[6] Approximately 1100 hours, on 14 December 2006, Master Warrant Officer Venus, dressed in combat uniform and wearing his rank insignia, arrived at his company's office when he heard Private Tupper's voice. He went to Private Tupper and saw him dressed in civilian attire sitting at a desk, and Private Tupper knew him. Master Warrant Officer Venus then ordered him to leave the office and stand outside of the G Coy office door. Master Warrant Officer was aware, of course, of the arrest warrant.

[7] Private Tupper stood up, and as he was starting to walk away from the office, said, "Fuck this," or words to that effect, as he continued to walk away further down the hall. Master Warrant Officer Venus described the tone of voice used by Private Tupper as elevated. Private Tupper continued to walk away down the hall, ignoring the words of the master warrant officer, who repeated his order to come back two or three times with no success. The Company Sergeant Major then ordered two unidentified soldiers to stop him, but they did not react; therefore, Master Warrant Officer Venus asked Master Corporal Jobe to do it. Warrant Officer Collins also ordered Sergeant Russell to stop Private Tupper at that time.

[8] Sergeant Russell and Master Corporal Jobe made contact with Private Tupper down the hallway. Sergeant Russell first tried to convince him not to run away and obey. Private Tupper managed to continue further down the hallway after swinging his arms at them and struggling to get away from Sergeant Russell. Sergeant Russell got involved physically with Private Tupper, where the latter was pushing and struggling with him in order to leave, and Private Tupper was smiling during the physical

encounter. Private Tupper was restrained and brought to a chair close by, where he finally calmed down. Master Warrant Officer Venus called the military police who took Private Tupper away from the premises shortly after.

[9] On 11 January 2007, Private Tupper was absent at morning roll call at 0730 hours. Sergeant Simmons noted the absence. The place of duty of Private Tupper on 11 January 2007, at 0730 hours, was G Coy Stores, building D57, CFB Gagetown, New Brunswick. Sergeant Simmons was informed that morning that Private Tupper had phoned in at the company stores office. He met with Private Tupper at 0945 hours on 11 January 2007, at that location.

[10] At approximately 0855 hours, Master Corporal Parker had received a phone call from Private Tupper who told him that he had slept in because he had slept in a different room. Private Tupper told Master Corporal Parker that he would be a little late coming to work. Master Corporal Parker said "Okay," that he explained meant "right." Master Corporal Parker told Private Tupper to come to work ASAP, meaning as soon as possible. He then informed his chain of command of the content of that conversation, and Master Corporal Parker did not see Private Tupper before 0945 hours on 11 January 2007. And this completes the summary of the evidence.

[11] During the sentencing hearing, Private Tupper admitted that he also committed a service offence of a similar character; that is, absence without leave contrary to section 90 of the *National Defence Act*, for which he was found guilty by the court. Private Tupper asked this court to take that service offence into consideration for the purposes of the sentence as if he had been charged with, tried for, and found guilty of that service offence. Pursuant to 194(1) of the *National Defence Act*, the court acceded to that request.

[12] The facts surrounding this particular offence reveal that at approximately 0730 hours, on 31 May 2007, without authority, Private Tupper was absent from Second Battalion, Royal Canadian Regiment, and remained absent until approximately 0800 hours, 31 May 2007, despite being ordered by Sergeant Dube the day before. Private Tupper was found in his room at 0740 hours, asleep in civilian attire. He reported himself at 0800 hours at his place of duty.

[13] In determining sentence today, the court accepted as proven all facts expressed or implied that were essential to the court martial panel findings of guilty. I have also considered the circumstances surrounding the commission of the offences presented during the sentencing procedure, as well as the testimonies heard and the documentary evidence filed with the court at that time. I've also considered the case law provided by counsel in their submissions on sentence. Finally, the court has considered any direct and indirect consequences that the finding and sentence will have on Private Tupper.

[14] During the sentencing procedure, the court heard several witnesses. Major Hartson, the Officer Commanding G Coy, 2 RCR and former Commanding Officer of 2 RCR rear party, testified at length as to the importance of discipline at his unit and the discipline problems they have. He stressed the impact on the unit of the lack of personal discipline at the lowest level in matters of strict and immediate compliance and the total respect required from the soldiers towards the chain of command. His testimony, as well as all other military witnesses heard at trial, unequivocally stressed the importance to instill discipline in training and in the day-to-day life of service members in order to bring it, both collectively and personally, on the battlefield.

[15] The court accepts from his testimony, that as 2 RCR is getting ready to be deployed to Afghanistan in summer 2008, it is critical that his unit achieve and maintain the highest level of discipline and cohesiveness in order not to endanger the lives of soldiers beyond the inherent risks associated with missions of combat, and to succeed in that mission. Major Hartson described at length the negative impact of Private Tupper's actions on unit discipline so far, and the administrative burden he has become for him and his subordinates. He testified that the unit had requested that Private Tupper be released from the Canadian Forces for the violation of the drug policy, but does not expect that the administrative authorities at the National Defence Headquarters will accept that recommendation.

[16] Major Hartson also described Private Tupper as an average soldier when he peaked in April 2006, but that since the discovery of Private Tupper's drug problem, he has been a very poor performer with significant shortcomings with strict obedience and respect towards the chain of command, including after the laying of charges. Finally, Major Hartson explained the circumstances surrounding the entries that appear on Private Tupper's conduct sheet. Private Tupper provided to the court—or provided the court with his own views with regard to those previous convictions.

[17] Mr Jones and Mrs McKenzie testified with regard to their dealings with Private Tupper and his addiction to cocaine. Mr Jones has testified that Private Tupper requires more treatment, and that he did not follow his recommendations, at least in the last few months. Mrs McKenzie described her dealings with Private Tupper on or about 7 December 2006, where she met him in crisis. She testified that he enrolled himself at the detoxification centre in Fredericton at that time, and that, to her knowledge, Private Tupper had checked himself out of that treatment centre contrary to professional advice. She contradicts Private Tupper on this point. She was not aware that Private Tupper was serving a punishment of confinement to barracks when he decided to register and enter in a detoxification centre.

[18] Private Marr and Private Anderson testified that they were very good friends of Private Tupper and that they trust him and can always depend on him. Private

Marr said that the behaviour of Private Tupper in the last months is certainly not that of the Private Tupper he knows when at his best. Every witness heard praised Private Tupper for his level of fitness, describing it above the other soldiers; however, these witnesses stressed the importance to follow orders and self-discipline in an infantry unit.

[19] Master Corporal Anderson testified that he directly supervised Private Tupper for a period of four to five days, and worked with him for about four months. He said that he would work with Private Tupper again. He agreed that service members cannot engage in physical altercation with superiors, and that people who do not follow orders may ultimately endanger the life of their comrades.

[20] Mrs Peters testified that she's Private Tupper's older sister, and that she knew of his problems with drugs. To her knowledge, she noticed a change in Private Tupper's behaviour when their grandmother passed away last year. She said that she spoke to Private Tupper about his problems and that she's very supportive of her younger brother. She said that he came to her to seek help, and that it is when Private Tupper decided to enter in rehabilitation. She was aware, though, that Private Tupper was supposed to be at his barracks when he turned himself into the detoxification centre. She personally doesn't feel that he requires more treatment, but people who care about him and support him.

[21] Private Tupper testified about his drug addiction and his recent encounter with the military justice system, as well as civilian justice system. It is clear from his testimony, that he feels that his chain of command has been unfair and unsupportive of him in his battle with drugs. Private Tupper testified that his superiors were picking on him all the time. He said that he wants out of the military and that he could not return to his current unit.

[22] I must say that the evidence before me clearly indicates that Private Tupper was treated as a pure disciplinary and administrative problem who was generating more than his fair share of concerns and paperwork. It may have been the only way to deal with the matter at the time, but in retrospect it is equally clear that the unit authorities did not see signs that could have alerted them to the source of that problem, i.e., Private Tupper's addiction to cocaine. They simply tried to deal with the matter, and they simply tried to deal with some of the consequences. However, the court is not satisfied that Private Tupper's attitude, unbecoming of a professional soldier, is only attributable to his addiction. His testimony highlights his disrespect for his chain of command.

[23] It has long been recognized that the purpose of a separate system of military justice or tribunals is to allow the Armed Forces to deal with matters that pertain directly to discipline, efficiency, and morale of the military. However, the punishment imposed by any tribunal, military or civil, should constitute the minimum

necessary intervention that is adequate in the particular circumstances. When a court must sentence an offender for offences that he has committed, certain objectives must be pursued in light of the applicable sentencing principles. It is recognized that these principles and objectives will slightly vary from case to case, but they must always be adapted to the circumstances and to the offender.

[24] In order to contribute to military discipline, the sentencing principles and objectives could be listed as: firstly, protection of the public, and this includes the Canadian Forces; secondly, the punishment and the denunciation of the unlawful conduct; thirdly, the deterrence of the offender and other persons from committing similar offences; fourthly, the separation of offenders from society, including from members of the Canadian Forces where necessary; fifthly, the rehabilitation of offenders; sixthly, the proper proportionality to the gravity of the offence and the degree of responsibility of the offender; seventhly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; eighthly, an offender should not be deprived of liberty if less restrictive punishment or combination of punishments may be appropriate in their circumstances; and finally, the court shall consider any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[25] The court concludes that the sentence imposed in this case shall answer the protection of the public and the Canadian Forces through punishments that will contribute to the maintenance of discipline and the interest of military justice, and emphasize the objectives of general deterrence, punishment, and denunciation of the conduct.

[26] Private Tupper was found guilty of offences of insubordination and disobedience that are at the core of military discipline. It is generally recognized that these offences of disobedience and insubordination are some of the most serious offences in the military justice system as they undermine the foundation of a military organization. However, the sentence must allow for rehabilitation, considering the young age of the offender, and not impede his attempts to cure his drug and alcohol addictions that played a significant role in the commission of most of these offences.

[27] In arriving at what the court considers to be a fair and appropriate sentence, the court has considered the following factors to aggravate the sentence:

1. The objective gravity of the third and fourth charges. Offences under section 83 and 85 of the *National Defence Act* are punishable of imprisonment for life and dismissal with disgrace from Her Majesty's service respectively. They are extremely serious offences;

2. The particular context of this case as revealed by the evidence at trial with regard to the other offences. Although they are punishable for imprisonment for less than two years, they were committed in a context of insubordination and disobedience which placed them at the higher spectrum for these offences, especially in the context that the first and second charge were committed, where Private Tupper was already serving a sentence of confinement to barracks for absence without leave, for which he was convicted the same day. This behaviour showed a profound disrespect for the rule of law and the military justice system. However, it has to be contextualized with the mental condition of Private Tupper that same day, where he continued to use cocaine in his barracks while serving this sentence, and his decision to seek help immediately for his drug addiction;

3. The fact that you have a conduct sheet for similar or related offences with regard to disobedience and military misconduct. However, the court does not accept the submission made by the prosecution that the court should consider as aggravating the fact that you were an administrative burden for your unit, and that you continued to show poor military conduct off duty and in your civilian capacity. The court will not sentence you for offences that you have not been charged with, tried, and convicted, and substitute the court process to administrative procedures and remedies that exist for unit authorities to deal with persons who become administrative burdens for reasons that are within the member's control or not, and up to and including release;

4. The fact that you tried to cover up your escape from barracks on 7 to 14 December 2006, by implicating health services in order to provide you with a justification to be absent from your place of duty. Although I understand that you may have left your confinement to barracks in order to resolve your drug problem, you still escaped from a lawful punishment. Should you have, on your return to the unit on 14 December 2006, after leaving the detoxification centre, faced the music as to the reasons for your actions rather than using deceit, I could have inferred a sincere respect for your chain of command and conclude

that your actions were strictly attributable to your condition. Unfortunately, this is not the case;

5. The fact that, for all practical purposes, you never served your sentence of confinement to barracks that was awarded by a service tribunal;

6. The fact that you are an experienced soldier who knew, or ought to know, the importance of obedience and respect of the chain of command.

[28] The court considers the following factors to mitigate the sentence:

1. Your young age and your precarious medical situation. Although you may think that you may not need support in the manner described by Mr Jones in order to win the battle over your personal demons, you are very fragile, and I agree with your sister when she says that you need to be in a proper environment where people care about you; and

2. The fact that these incidents are largely attributable to your addiction to cocaine.

[29] The prosecution suggests that the minimal punishment should consist of imprisonment for a period of three to six months. Your counsel recommends that any sentence of incarceration should be suspended because your unit never properly corrected your conduct, as it appeared from the charges, and that these events are a result of your cocaine use that spiraled out of control. Your counsel also stressed the importance that the sentence should allow you to continue treatment for your drug addiction.

[30] In *R. v. Gladue*, (1999) 133 C.C.C (3d) 385, the Supreme Court of Canada stated that imprisonment should be the penal sanction of last resort, and this was recently reiterated by the Court Martial Appeal Court in *R. v. Baptista*, mutual citation 1, delivered on 27 January 2006. It is abundantly clear that imprisonment should be used only where no other sanction, or combination of sanctions, is appropriate to the offence and to the offender.

[31] In order to craft a fair and appropriate punishment, or appropriate sentence, the court has closely examined the other punishments and combination of punishments under section 139 of the *National Defence Act* to ensure the protection of the public by a sentence that would promote the need for punishment, denunciation, as

well as general deterrence. Of course, without unduly compromising the rehabilitative aspect of the sentence in this case. Your convictions clearly indicate a profound disrespect for military authority, obedience, and for the rule of law. They are extremely serious in the circumstances, and they take all their significance in the context of the Canadian Forces' involvement in the war against terrorism. These institutional values and skills distinguish members of the military with other members of the society.

[32] If your actions had not been enhanced by your drug addiction to cocaine, a punishment for imprisonment for a period of five months would be totally adequate. In addition, the evidence before me does not provide me with compelling reasons that would allow me to suspend such period of imprisonment. Moreover, the evidence before me, including your own testimony, supports the conclusion that there's no place for you in the Canadian Forces anymore. The objective seriousness of these offences, but more particularly the circumstances in which they were committed are so severe that the court must impose a punishment of last resort to effectively meet the required sentencing principles and objectives, as well as maintaining discipline and confidence in the administration of military justice.

[33] However, the sentence of this court can be for others, denounce and punish your conduct with punishments lower in the scale of punishments and leave room to assist you in the battle against your drug addiction. For these reasons, the court sentences you to dismissal with the accompanying punishment of detention for a period of 90 days. Break off and sit with your defence counsel.

[34] In addition, the court makes the following order; namely, an order to prohibit you, for a period of seven years, starting today and ending on 29 October 2014, from possession of any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, pursuant to section 147.1 of the *National Defence Act*. This sentence was pronounced at 1404 hours on 30 October 2007.

COLONEL M. DUTIL, C.M.J.

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