Citation: *R. v. ex-Ordinary Seaman N.K. Stewart,* 2007 CM 4018

Docket: 200678

DISCIPLINARY COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE HALIFAX

Date: 22 June 2007

PRESIDING: LIEUTENANT-COLONEL J-G PERRON, M.J.

HER MAJESTY THE QUEEN
v.
EX-ORDINARY SEAMAN N.K. STEWART
(Offender)

SENTENCE
(Rendered orally)

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[1] Ex-Ordinary Seaman Stewart, the court has found you guilty of charges number 1, 3, 5, 6 and 7, and has directed a stay of proceedings for charges 2 and 4. I must now impose a fit and just sentence.

[2] In determining the appropriate sentence, the court has considered the circumstances surrounding the commission of these offences, the mitigating circumstances raised by the evidence in mitigation, the aggravating circumstances raised by the prosecutor, and the representations by the prosecution and by your defence counsel, and also the applicable principles of sentencing.

GENERAL PRINCIPLES OF SENTENCING

[3] Those principles which are common to both courts martial and civilian criminal trials in Canada have been expressed in various ways. Generally, they are founded on the need to protect the public, and the public, of course, includes the Canadian Forces. The primary principles are the principles of deterrence that includes specific deterrence, in the sense of deterrent effect on you personally, as well as general deterrence; that is, deterrence for others who might be tempted to commit similar offences. The principles also include the principle of denunciation of the conduct, and last but not least, the principle of reformation and rehabilitation of the offender. The

court must determine if protection of the public would best be served by deterrence, rehabilitation, denunciation, or a combination of those factors.

[4] The court is required, in imposing a sentence, to follow the directions set out in paragraph 112.48(2) of the *Queen's Regulations and Orders for the Canadian Forces*, which obligates it, in determining sentence, to take into account any indirect consequences of the finding or of the sentence, and impose a sentence commensurate with the gravity of the offence and the previous character of the offender.

[5] The court has also considered the guidance set out in sections 718 to 718.2 of the *Criminal Code of Canada*. The purposes and principles enunciated at these sections serve to denounce unlawful conduct, to deter the offender and other persons from committing offences, to separate the offender from society where necessary, to assist in rehabilitating offenders, to provide reparations for harm done to victims or to the community, and to promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[6] The court has also given consideration to the fact that sentences of offenders who commit similar offences in similar circumstances should not be disproportionately different. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline.

[7] It must be remembered that the ultimate aim of sentencing is the restoration of discipline in the offender and in military society. Discipline is that quality that every CF member must have, which allows him or her to put the interests of Canada and the interests of the Canadian Forces before personal interests. This is necessary because Canadian Forces members must willingly and promptly obey lawful orders that may have very devastating personal consequences, such as injury and death.

[8] In the present case, you have been released from the Canadian Forces since January, 2006 and these comments pertaining to discipline might not necessarily still apply to you, but you can still benefit greatly from that quality, which is self-discipline.

[9] The court is guided by the provisions of sections 125, 130, 139 and 172 of the *National Defence Act* in its determination of the lawfully permissible sentence in this case. Only one sentence is imposed upon an offender, whether the offender is guilty of one or numerous offences, and the sentence may be composed of more than one punishment.

SENTENCING RECOMMENDATIONS TO THE COURT

[10] The prosecution suggests that the principles of general and specific deterrence and the principle of denunciation are the prime factors that apply in this case. The prosecution has provided this court with four cases in support of its submission of a sentence of a period of imprisonment for 15 to 30 days. The prosecution has suggested that a fine in the amount of $5,000 would be appropriate, if the court is of the opinion that imprisonment is not the appropriate punishment. The prosecution contends that the amount of $5,000 is the absolute minimum in this case. Your defence counsel asserts that imprisonment is a punishment of last resort and is not applicable in this case. Your defence counsel suggests a sentence of a reprimand and a fine in the range of $600 to $2,000. Your counsel suggests that this fine should be paid at a rate of $200 per month.

[11] I have reviewed exhibits 31, 32, 33, 34 and 35 in great detail. These exhibits and your testimony clearly indicate that you were diagnosed with depression that was qualified as mild depression, and that you were suffering from other types of mental health problems such as post-traumatic stress associated with your 2003 motor vehicle accident and from severe headaches. Exhibit 31 also indicates that your family was also a cause for your hopelessness and your depressed mood. You were also suffering from the injury to your ankle and from other physical injuries. The court understands from these exhibits and from your testimony that you were suffering from significant mental health complications that surely affected your behaviour. You described to Warrant Officer Roberts on 26 July, 2005 at exhibit 35, that you suffered from short-term memory loss that caused you to not find your ship the previous day. You were ultimately charged with, and convicted of, absence without leave for that incident. It was noted at exhibit 34, that the charges you were facing at the time were another source of stress.

[12] The court also understands from these exhibits that you did not appear to be trying to help yourself very much during this period of time. You were diagnosed with a depressed mood and prescribed anti-depressant, Sertaline, by Dr Teehan, in February, 2005. You chose not to take this medication. This decision is reflected in exhibits 33, 34 and 35. It was also noted in exhibit 33 that your dissatisfaction with your job and the military had aggravated your mood. It was noted in exhibit 34 that you were markedly dissatisfied with your job, but that you could not quit because of your debt of $30,000. The court has not been provided any information on the exact nature of this debt, except that you now owe $12,000. Finally, the court has also noted that exhibit 33 also makes mention of your abuse of alcohol, body supplements, caffeine, Pepsi, and that you were unwilling to change these behaviours. You were counselled by Dr Zwicker on such lifestyle choices and their effects on you.

[13] You stated that you were going through a severe depression during your testimony at the time of the 13 June, 2005 and 25 July, 2005 offences, but your medical

documents do not describe this level of depression. You testified that you realized you did not enjoy life in the Canadian Forces after your car accident in 2003. You also testified that you re-enrolled in the Canadian Forces soon after that accident because your father pressured you into re-enrolling.

[14] You were found guilty of wilfully altering a CF 2018, Medical/Dental Disposition Report, on 10 March, 2005, on 21 March, 2005 and on 12 October, 2005. You altered these CF 2018 forms to deceive your supervisors into believing you were allowed to be absent from your place of duty for medical reasons. You also forged a medical note on 22 November, 2005 for the same purpose, although I note you were granted sick leave on the following day by a competent authority. The charges in your conduct sheet also reflect this pattern. The medical notes dated 26 July, 2005 at exhibit 35, also note that you had used your four weeks' of leave for that annual leave year, starting on 1 April, 2005. It is clear from the evidence heard in court, and from the exhibits, that you did not want to be present at your place of work and that you took whatever means you felt necessary to achieve your aim. The offences on the present charge sheet all involve a certain level of premeditation and represent a clear pattern on your part over a significant period of time.

[15] The Canadian Forces Medical Service tried to help you by granting you some days excused duty and sick leave, and by providing you with medical assistance and prescribing anti-depressants. You, on the other hand, decided to choose which assistance you would accept and follow. The evidence clearly demonstrates that you had one goal: to stay away from your place of duty, if that place of duty did not suit you. You also chose to deceive your superiors and to betray their trust to achieve your objective.

[16] You are a repeat offender. I do note that two of these five charges occurred before the offences on your conduct sheet and before your summary trial for these offences. If you needed a summary trial to know that forging a document was unlawful, this knowledge was passed on to you on 26 August, 2005. It does not appear that the summary trial, or the sentence you received, had much of an impact on you since you committed three similar offences in the weeks and months following this summary trial.

[17] Although you stated in court that you realize you made mistakes and that you accept responsibility for what you have done, I have not been convinced by your testimony that you can really fully accept responsibility for your actions. I am willing to accept that at the time of the offences, you were suffering from a form of depression that was surely influencing your judgement. Nonetheless, your inability, at the same time, to demonstrate any effort to help yourself by following the recommendations of the doctors and your refusal to take the medications prescribed, is consistent with your present approach towards these events. Your testimony has consistently attempted to deflect

any responsibility. I found your answer to the prosecutor concerning the forged medical note left for PO1 Fischer to be quite revealing.

[18] Your testimony has also left me with some doubts concerning the veracity of your answers. You did not answer truthfully when asked how much you had worked since January, 2006. Working less than one month for Jeff Deuville Electrical does not coincide with summer employment at the Mountain Golf and Country Club. Also, you contradicted your initial answer concerning graduates of the Nova Scotia Community College working at Fort McMurray.

[19] Simply put, although I accept that your state of mind was somewhat influenced by your depression at the time of the offences, you have not convinced me that you are a person that can be trusted or that you can truly accept responsibility for your actions.

[20] You are 26 years old and have all of life ahead of you to improve yourself and your lot in life. You presented your request for voluntary release on 1 July, 2005 and you were granted your release in January of 2006. It appears from exhibits 28, 29 and 30 that you have invested much efforts to improve your life and become a productive member of society since your release from the Canadian Forces. You have obtained a college certificate in Electrical - Construction and Industrial. Exhibit 30 indicates that there is a job waiting for you at the Mountain Golf and Country Club. You testified that you would work as an apprentice electrician and that you will be paid $8.50 per hour. You say that you wish to go work in Alberta. As I understand it, you are considering Alberta because of the job opportunities and the possibility of getting higher wages. You presently live with your parents and the evidence indicates that you do not have to pay for room and board. You have testified that your relationship with your family has improved since you have left the CF and that you have the support of your family and that they lend you money.

[21] It appears that you have a better chance of succeeding in the civilian world than you had in the Canadian Forces. Time will tell if you do become a person who can fully account for himself and be a productive member of Canadian society.

MITIGATING FACTORS

[22] I find as mitigating factors: Your age; your medical situation at the time of the offences; your efforts at obtaining a college certificate since your release from the Canadian Forces in January, 2006; and your employment prospect with the Mountain Golf and Country Club.

[23] I find as aggravating factors: The number and nature of the offences; the premeditation and the repetition of these offences; and the fact that you are a repeat offender.

[24] I have reviewed the case law provided to me by the prosecutor. I agree with the prosecutor that none of these cases is "on all fours" with the present case since they either deal with different charges or represent very different situations. Therefore, they are of little use to me.

[25] The present case involves an offender altering a CF 2018 form on three occasions to permit him to be absent from his place of duty. It is not a case of using false documents to deprive the Canadian Forces of money. Although it could be argued that an absence without leave is a deprivation of money, one must consider the specific facts of the case, when comparing it with other cases.

[26] Ex-Ordinary Seaman Stewart, please stand up. I believe this sentence must focus primarily on the denunciation of the conduct of the offender and on general and specific deterrence. I mention specific deterrence because the offender has not convinced me that he fully realizes the nature of his actions, nor does he fully accept the consequences of his acts.

[27] I do not believe that a sentence of incarceration is the appropriate sentence in this specific case. The nature of your medical problems at the time of the offences, your efforts to improve yourself since your release from the Canadian Forces and the positive prospects for employment lead me to believe that incarceration would not be a just and reasonable sentence in this case. The aggravating factors that I have explained lead me to believe that the court must impose a sentence that will provide you with a clear message, to you and others, and assist you in taking responsibility for your past offences.

[28] Ex-Ordinary Seaman Stewart, the court sentences you to a reprimand and a fine in the amount of $3,000. The fine shall be paid in monthly installments of $200, commencing on the first day of July, 2007.

LIEUTENANT-COLONEL J-G PERRON, M.J.

Counsel:

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