COURT MARTIAL

Citation: *R v Hunter*, 2012 CM 4003

Date: 20120131
Docket: 201130

Standing Court Martial

Canadian Forces Base Gagetown
Gagetown, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.D. Hunter, Offender

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Corporal Hunter, at the conclusion of a full trial, the court found you not guilty of charge No. 1 and guilty of charge No. 2. The court has found you guilty of the offence of conduct to the prejudice of good order and discipline. The court must now impose a fit and just sentence.

[2] Corporal Hunter's future father-in-law was in the business of repossessing vehicles. Corporal Hunter offered to verify the addresses associated with four New Brunswick license plate numbers. Corporal Hunter conducted searches on the Department of Motor Vehicle database located at the CFB Gagetown guardroom to assist his future father-in-law locate these vehicles. This verification had nothing to do with his duties as a military police member. Corporal Hunter abused his privileged position as a peace officer to access a government databank for the benefit of an individual.

GENERAL PRINCIPLES OF SENTENCING

[3] As indicated by the Court Martial Appeal Court (CMAC), sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge (see *R v Tupper* 2009 CMAC 5, at para 13).

[4] The Court Martial Appeal Court also clearly stated in *Tupper* (see para 30) that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada*[1] apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence. Section 718 of the *Criminal Code* provides that the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society" by imposing just sanctions that have one or more of the following objectives:

> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
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> (e) to provide reparations for harm done to victims or to the community; and
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> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[5] The sentencing provisions of the *Criminal Code*, sections 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender (see *R v Angelillo*, 2006 SCC 55, at para 22). A sentence must also be similar to other sentences imposed in similar circumstances (see *R v L.M.*, 2008 SCC 31, at para 17). The principle of proportionality is at the heart of any sentencing (see *R v Nasogaluak*, 2010 SCC 6, at para 41). TheSupreme Court of Canada tells us at paragraph 42 of *Nasogaluak* that proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. But a sentence is also a "form of judicial and social censure". A proportionate sentence may express, to some extent, society's shared values and concerns.

[6] A judge must weigh the objectives of sentencing that reflect the specific circumstances of the case. It is up to the sentencing judge to decide which objective or objectives deserve the greatest weight. The importance given to mitigating or aggravating factors will move the sentence along the scale of appropriate sentences for similar offences (see *Nasogaluak*, paras 43 and 44).

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[1] R.S., 1985, c. C-46

[7] The Court Martial Appeal Court also indicated that the particular context of military justice may, in appropriate circumstances, justify and, at times, require a sentence which will promote military objectives (see *Tupper*, at para 34). But one must remember that the ultimate aim of sentencing in the military context is the restoration of discipline in the offender and in the military society. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline. Only one sentence is imposed upon an offender, and the sentence may be composed of more than one punishment.

[8] The prosecution suggests that the following principles of sentencing apply in this case: general and specific deterrence and denunciation. The prosecution has provided the court with two cases in support of its submission that the minimum sentence in this matter is a reprimand and a fine in the amount of $1,500. Defence counsel asserts that a fine in the amount of $200 is a just sentence in this case.

[9] I have considered the following aggravating factors:

(a) Section 139 of the *National Defence Act* reads as follows:

> (1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:
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> (a) imprisonment for life;
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> (b) imprisonment for two years or more;
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> (c) dismissal with disgrace form Her Majesty's service;
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> (d) imprisonment for less than two years;
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> (e) dismissal from Her Majesty's service;
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> (f) detention;
>
> (g) reduction in rank;
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> (h) forfeiture of seniority;
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> (i) severe reprimand;
>
> (j) reprimand;
>
> (k) fine; and
>
> (l) minor punishments.

Section 129 of the *National Defence Act*, conduct to the prejudice of good order and discipline is an objectively serious offence since one can

be sentenced to dismissal with disgrace from Her Majesty's service or to lesser punishment; and

(b) The Department of Motor Vehicle database is an official database that is to be used for official purposes and not for personal reasons. The misuse of such databases is objectively an aggravating factor. One must also examine why it was used and what information was provided to the unauthorized person to determine the subjective gravity of this misuse.

[10] During this trial, the prosecutor has not argued the evidence proves beyond a reasonable doubt that Corporal Hunter was paid to conduct this search. He even stated there was no concrete evidence to that effect and he stated the issue of remuneration was not an element of the offence. The prosecutor now wants to include it as an aggravating factor that should be considered during sentencing. Defence counsel has submitted that he does not accept that money was involved in this case.

[11] Where there is a dispute with respect to any fact that is relevant to the determination of a sentence the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact (see art. 112.53 of QR&Os). I find the prosecutor has not established beyond a reasonable doubt that Corporal Hunter was paid by his father-in-law. As such, the question of money is not an issue that can be considered during this sentencing.

[12] Your future father-in-law provided you with information he already had lawfully in his possession and you used the DMV terminal to confirm this information. As I have already stated in my verdict, you did not obtain the information for a criminal organisation or a terrorist organisation. It is not the case of a police officer systematically abusing an official database for personal gain. As such, I do not find this unauthorized use of the DMV terminal to be a subjectively serious offence.

[13] I will now examine the mitigating factors in this case:

(a) you do not have a conduct sheet, thus you are a first-time offender;

(b) you cooperated with the CFNIS investigation; and

(c) the evidence indicates that you conducted an unauthorized search only once.

[14] You exercised your right to plead not guilty. You were found guilty by this court at the end of a complete trial. The exercise of your right cannot be viewed in a negative manner and it cannot be considered as an aggravating factor. Canadian jurisprudence generally considers an early plea of guilty and cooperation with the police as tangible signs that the offender feels remorse for his or her actions and that he or she takes responsibility for those illegal actions and the harm done as a consequence of these actions. Therefore, such cooperation with the police and an early plea of guilty

will usually be considered as mitigating factors. Although the doctrine might be divided on this topic, this approach is generally not seen as a contradiction of the right to silence and of the right to have the prosecution prove beyond a reasonable doubt the charges laid against the accused but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with the judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions.

[15] An accused that pleads not guilty cannot hope to receive the same consideration from the judicial process. This does not mean that the sentence is increased because the accused has been found guilty after pleading not guilty, it only means that his or her sentence will not be affected by the mitigating factor of a plea of guilty.

[16] You were 26 years old at the time of the offence. You had joined the Canadian Forces in August 2007. You were qualified as a military police member, your QL3, in September 2008. You were promoted to the rank of Corporal (substantive) in June 2010 although you had been wearing that rank since September 2007. You were a relatively inexperienced military police member having only benefitted from approximately 17 months as a patrolman prior to the offence. As such, I will consider this inexperience as a mitigating factor.

[17] I have carefully reviewed Exhibit 19, your 1 April 2010 to 31 March 2011 Personnel Evaluation Report. Your performance has been rated as skilled and your potential was assessed as normal. It is a good evaluation report and indicates that you have earned the respect of your peers and superiors through your consistent efforts. Your OC, Captain Neufeld, expects you to progress to the next rank level "at a quicker than normal rate". Exhibit 18, your Personnel Development Review for the period of 1 April 2010 to 15 August 2010 is also quite positive. As such, this demonstrates that you have endeavoured to become a competent member of the military police since this offence and you have performed your work well be it as a patrolman or employed in non-military police tasks.

[18] Exhibit M1-2 was presented during the plea in bar motion and is included in the evidence of this trial. Exhibit M1-2 is the notes of the telephone interview conducted with Major Ethier by Major Rawal, the prosecutor. Major Ethier is the Commanding Officer of 3 MP Unit. I understand the following from those notes.

[19] Only the guardhouse in Gagetown would have been aware of this incident ("only impact would have been Gagetown" as written in the notes). Major Ethier stated that justice is supposed to be swift. There is a possible negative impact if the process drags out too long. Other than that incident, Major Ethier had positive comments concerning Corporal Hunter. Corporal Hunter was an effective MP and a strong soldier. It would be a shame to lose him. It was not Major Ethier's intent to initiate release procedures and he would like to retain Corporal Hunter with his badge.

[20] Major Ethier believed Corporal Hunter had reported himself to his chain of command with pressure from his shift mates but had still admitted his wrongs and had learned his lesson. Major Ethier thought this was a relatively minor incident in the grand scheme of things. He saw it as a small issue easily dealt with in comparison to other offences.

[21] Corporal Hunter had been without his badge for approximately one and a half years and the administrative process associated with the badge would begin after the trial. Major Ethier did not know if the provincial authorities were aware of the situation but he thought they would be happy to see that appropriate actions were being taken and they would not deny the access to the DMV database.

[22] I share Major Ethier's concern with the delay in bringing this matter to trial. The court has not been provided with any information as to why it has taken so long to hold this court martial. Corporal Hunter was interviewed in April 2010 and he admitted to using the DMV terminal to help his father-in-law (see Exhibit 12). A charge sheet was signed by Major Rawal on 31 May 2011 and the charges were preferred on 9 June 2011. A convening order was signed on 9 November 2011. This trial began on 10 January 2012.

[23] Defence counsel has commented on the effect of this delay on discipline, military justice, the Canadian Forces and the offender. The Supreme Court of Canada has held that state conduct not rising to the level of a *Charter* breach can be properly considered as a mitigating factor in sentencing. Where the state misconduct in question relates to the circumstances of the offence or the offender, a sentencing judge may properly take the relevant facts into account in crafting a fit sentence, without having to resort to section 24(1) of the *Charter* (see para 3 of *Nasogaluak*).

[24] I am not finding that there has been any misconduct on the part of the prosecutor or any other person involved on the bringing of this case to trial. But this is a relatively simple case. Corporal Hunter had admitted to using the computer in April 2010. Corporal Hunter has been stripped of his MP credentials for the last year and a half. He has lost the opportunity to participate on courses and be evaluated as a military police member. The prosecution and every authority in the disciplinary process have the duty to deal with charges as expeditiously as the circumstances permit (see s. 162 of the *NDA*).

[25] Lengthy delays do not serve the purposes of discipline and of military justice. They also often have a negative impact on the offender. While I have not been provided with any evidence to explain the delay; I do find that Corporal Hunter has been affected in a negative manner by the lengthy delay. As such, I will consider this delay as a significant mitigating factor.

[26] Corporal Hunter was punished by his unit sergeant major for the unauthorized use of the DMV computer. He was given two days of extra duties. He performed manual labour, moving filing cabinets and furniture for one day, and he completed a 12-

hour patrol shift on the second day. These extra duties were completed during days he was scheduled to be off duty. While this is not a process and a punishment that could support the plea in bar motion; the punishment will be taken into account by this court when determining sentence.

[27] I have reviewed the two cases provided by the prosecutor. The Warrant Officer (retired) MacLellan case is of very little value since the prosecutor only referred to paragraphs 3 and 4 which deal with general principles of sentencing and the restoration of discipline in military society.

[28] The prosecutor relies mostly on the *Master Corporal Morrell* 2006 Standing Court Martial to suggest the appropriate sentencing range in the present case. Master Corporal Morrell was a military police member who was initially charged twice under section 125 of the *National Defence Act* (Wilfully making a statement in a document made by him that was required for official purposes) and once under section 129 of the *National Defence Act*. At trial, the prosecution withdrew one charge, a section 125 charge, and Master Corporal Morrell pled guilty to negligently making a statement in a document made by him that was required for official purposes and to the section 129 charge.

[29] The facts of that case are as follows: Master Corporal Morrell was on duty in his patrol car when a friend of his joined him in his patrol vehicle. Contrary to military police policy, Master Corporal Morrell used the vehicle's onboard computer to run a record check of his friend's license through the Canadian Police Information Centre computer system (CPIC) and revealed the results of the check to her. Later that same evening, a taxicab approached Master Corporal Morrell's vehicle and the driver gave Master Corporal Morrell a plastic bag allegedly containing marijuana. Master Corporal Morrell made an entry in his MP Notebook of the incident but failed to provide a complete account of the information provided by the taxi driver. Master Corporal Morrell cooperated with the NIS investigation and provided a cautioned statement admitting his wrongdoing when he was first contacted by the NIS.

[30] The particulars of the section 125 charge in the *Morrell* matter reads as follows:

> "In that he, on or about 21 August 2004, at or near CFB Borden, made an incomplete statement in a military police notebook stating that a taxicab driver had "no idea" where a bag apparently containing marijuana had come from, knowing that the said taxicab driver had provided information as to the origin of the bag."

The particulars of the section 129 charge reads as follows:

> "In that he, on or about 20 August 2004, at or near CFB Borden, without authorisation revealed to another person information from the Canadian Forces Information Centre computer system."

[31] Master Corporal Morrell was a 35-year-old reservist who had joined the Canadian Forces in 1991 and had had the benefit of numerous years of employment as a Class B reservist. He had fully cooperated with the CFNIS investigation.

[32] A joint submission of a reprimand and a $700 fine was presented to the sentencing judge and accepted by him. In his sentence, the judge stated it was a case of "a prime example of lack of integrity and judgment". The court also found the facts of that case were objectively serious "in the context of an MP performing the basic job he was trained for and he taught to his peers, i.e. patrolling and investigating."

[33] I find the *Master Corporal Morrell* court martial is more serious than the present case. The prosecutor is correct when he states that Morrell was a Master Corporal with more experience than Corporal Hunter. The section 125 offence is a more serious offence than a section 129 offence since it has a maximum punishment (three years imprisonment) that is higher on the scale of punishment than the maximum punishment (dismissal with disgrace) for the section 129 offence.

[34] Master Corporal Morrell made a false entry in his MP notebook. Every police officer knows the importance of making correct entries in a notebook. He was also a Master Corporal with many years of experience. The facts of the Morrell matter and of this case are quite different, so are the offences.

[35] I believe this sentence must focus primarily on the denunciation of the conduct of the offender but it also must focus on the rehabilitation of the offender.

[36] In determining the appropriate sentence the court has considered the circumstances surrounding the commission of this offence, the mitigating and aggravating circumstances presented by your counsel and by the prosecutor and the representations by the prosecution and by your defence counsel as well as the applicable principles of sentencing.

[37] The court will impose a sentence that will take into account the numerous mitigating factors I have considered. I am also relying heavily on the evidence of your chain of command, Major Ethier, Master Warrant Officer Murphy, Warrant Officer Cochrane and Warrant Officer Canonaco, as individuals that know you much more that I do. It would appear from the evidence of your superiors and your Personnel Evaluation Report that you have learned from your mistake and can become a productive member of the Canadian Forces.

FOR THESE REASONS, THE COURT:

[38] **SENTENCES** Corporal Hunter to a fine in the amount of $200.

Counsel:

Major P. Rawal and Lieutenant(N) C.J. Colwell, Director of Military Prosecutions
Counsel for Her Majesty the Queen

Mr D. Bright, Directorate of Defence Counsel Services
Counsel for Corporal D.D. Hunter