COURT MARTIAL

Citation: *R v Cyr*, 2012 CM 4020

Date: 20121102
Docket: 201243

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, BC, Canada

Between:

Her Majesty the Queen

- and -

Master Seaman P.J.A.A. Cyr, Offender

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

REASONS FOR SENTENCE

[1] Master Seaman Cyr, at the conclusion of a full trial, the court found you guilty on the first charge with the special finding that you had obtained by false pretence from the government of Canada the sum of $461.42 and not $663.32 by claiming leave travel assistance benefits based on a mode of transportation you did not use. The court directed that the proceedings on the second charge be stayed. The court has found you guilty of the offence of obtaining by false pretence contrary to section 362(1)(a) of the *Criminal Code of Canada* and laid under section 130 of the *National Defence Act*. The court must now impose a fit and just sentence.

[2] On 15 July 2010, you attended the CFB Esquimalt Base Orderly room where you signed a Request for Accountable Advance for Public Funds in the amount of $1369.12, citing the purpose for this request as "LTA 21 August 2010 to 12 September 2010". You also presented your signed leave pass and indicated your intent to travel by private motor vehicle.

[3] You testified your initial plan was to drive to go meet your parents in Kingston. You would then join them to drive to Halifax to attend your brother's wedding on 28

August. You would then return with your parents to Kingston to attend your sister's wedding and remain in Kingston until you would drive back to Victoria. You would have spoken to your mother sometime between 16 and 19 July and she would have suggested you fly instead of driving since you would be on the road for approximately 10 days during your leave period. It was decided you would fly to Halifax and drive back to Kingston with your family.

[4] On 19 July 2010, you purchased a one-way ticket for an Air Canada flight flying 26 August 2010, departing Victoria, BC, and arriving at Halifax. The total cost of this flight was $393.25. On 8 August 2010, a one-way ticket for an Air Canada flight flying 12 September 2010, departing Toronto, Ontario and arriving at Victoria, BC, was purchased. The total cost of this flight was $422.76. The total cost of the flights was $816.01.

[5] On 1 October 2010, you attended the CFB Esquimalt Base Orderly Room and submitted a General Allowance Claim for Leave Transportation Assistance for the period 21 August to 12 September 2010, claiming for your travel, "PMC Victoria, BC to Kingston, Ontario", a distance of 8,557 kilometres for a total amount of $1454.69. You signed the document as, "certified that the items claimed herein have not been claimed previously and that the details are as stated". You were paid a further $85.57 in final settlement of your LTA claim.

[6] The court found that your actual expenses were $993.27. This is the amount you could have claimed based on your chosen mode of transportation. The court found that you received the sum of $461.42 in excess of your entitlement to reimbursement.

[7] As indicated by the Court Martial Appeal Court, sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard the witnesses the and it is one of the most difficult tasks confronting a trial judge.

[8] The Court Martial Appeal Court also stated that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* 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 sanction that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

[9] 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. A sentence must also be similar to other sentences imposed in similar circumstances. The principle of proportionality is at the heart of any sentencing. The Supreme Court of Canada tells us that proportionality means that 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 or social censure. A proportionate sentence may express, to some extent, society's shared values and concerns.

[10] 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 deserves the greatest weight. The importance given to mitigating and aggravating factors will move the sentence along the scale of appropriate sentences for similar offences.

[11] 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. 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.

[12] Only one sentence is imposed upon an offender and the sentence may be composed of more than one punishment. The prosecution suggests that the following principles of sentencing apply in this case: denunciation and general and specific deterrence. The prosecution has provided this court with four cases in support of its submission that the minimum sentence in this matter is a severe reprimand and a fine in the amount of $2,000. Defence counsel asserts that a reprimand and a fine in the amount of $1,000 is a just sentence in this case.

[13] I will firstly examine the aggravating factors. I do not find that the offence is objectively serious. I say that because Parliament has chosen to impose a maximum sentence of two years when this type of offence is prosecuted as an indictable offence. As such, this is at the lowest end of the spectrum of sentences for indictable offences. Subjectively, I find this offense not to be as serious as offences where the offender is not entitled to the total amount claimed. You have been found guilty of having obtained by false pretence the sum of $461.42 of the $1454.69 that had been paid to you based on the false information you had provided the clerks completing your requests and your

General Allowance Claim. You were allowed to claim the LTA benefits; you chose to claim more than the amount to which you were entitled.

[14] I do not find the evidence at trial clearly demonstrates premeditation on your part. I have already stated in my verdict that I am willing to believe that your intent was to drive to and from Kingston when you received your advance of $1369.12 on 15 July 2010. But the evidence clearly shows that you were aware of the costs of the two flights and of the taxi rides when you finalized your claim on 1 October 2010. You knew at that time that you had spent approximately $950 and that you were claiming an amount that was much higher. You could have informed the clerk of your exact mode of transportation at that time but you did not. As such, I do not find that this offence involved much premeditation and do not consider it as an aggravating factor.

[15] You were not completely truthful with the CFNIS investigators during your interview. You admitted that you had flown to Halifax but you lied when you explained why you had decided to fly and you lied about driving back to Victoria. You explained during your testimony that you had lied to protect your wife. You testified during your trial and you were deemed not credible when explaining why you did not inform the clerks of your actual mode of transportation. This assessment of your credibility leads me to believe that this sentence must incorporate the principle of specific deterrence.

[16] You enrolled in the Reserve Force in 2011. Exhibit 17, your Member's Personnel Record Résumé, indicates that you have served approximately 540 days of Class A and B service between 2001 and 2008. You were employed under a Class C Reserve Service Statement of Understanding from 18 June 2009 until 17 June 2012 with the Fleet Diving Unit Pacific. You were appointed a master seaman on 1 January 2011; as such you were a leading seaman when you committed the offence. You were 26 years old at the time of the offence. I do not consider your rank to be an aggravating factor, but you were old enough and had the benefit of enough experience in the CF to know better than to defraud the Government of Canada.

[17] You exercised your right to plead not guilty. You were found guilty by this court at the end of a complete trial. This 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 his or her 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.

[18] 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.

[19] I will now examine the mitigating factors in this case. You do not have a conduct sheet; thus, you are a first time offender. Following the verdict, you have paid to the CFB Esquimalt cashier the amount of $461.42 as restitution of the sum obtained by false pretence. This voluntary payment on your part ensures that the Canadian Forces does not have to initiate the necessary administrative process to recoup this sum from you.

[20] I have carefully reviewed Exhibit 21, three Personnel Evaluation Reports while you were serving with the Fleet Diving Unit Pacific. Your performance has been rated as outstanding or superior, depending on the year, and your potential was assessed as outstanding or superb. They are excellent evaluation reports and indicate that you have earned the respect of your peers and superiors through your consistent efforts.

[21] I always expressed a concern with delays in bringing a matter to trial. The court has not been provided with much information as to why it has taken so long to hold this court martial. The offence occurred on 1 October 2010 and the military police became aware of it sometime in November 2010. Master Seaman Cyr was interviewed on 15 December 2010. A Record of Disciplinary Proceedings was produced on 26 August 2011. A charge sheet was signed by Lieutenant-Commander Reeves on 28 June 2012 and the charges were preferred on 6 July 2012.

[22] Defence counsel has commented there is no evidence before this court that demonstrates this is a complex fraud case and thus the need for a lengthy and complex investigation. 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, the 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 *R v Nasogaluak*, 2010 SCC 6).

[23] I am not finding that there has been any misconduct on the part of the prosecutor or any other person involved in the bringing of this case to trial. But I have not been provided with much evidence to explain this delay. The prosecution and every authority in the disciplinary process have the duty to deal with charges as expeditiously as the circumstances permit (see section 162 of the *National Defence Act*). Lengthy delays do not serve the purposes of discipline and of military justice. They also often have a negative impact on the offender. As such, I will consider this delay as a mitigating factor.

[24] Master Seaman Cyr, stand up. I believe this sentence must focus primarily on the denunciation of the conduct of the offender and on specific and general deterrence but it must also focus on the rehabilitation of the offender.

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

FOR THESE REASONS, THE COURT:

[26] **SENTENCES** you to a reprimand and a fine in the amount of $1,200. This fine shall be paid in monthly payments of $200. If you are released from the Canadian Forces, the entire amount then outstanding shall become due and payable the day before your effective date of release from the CF.

Counsel:

Lieutenant-Commander P.D Desbiens, Directorate of Defence Counsel Services
Counsel for Master Seaman P.J.A.A. Cyr

Lieutenant-Commander D.T. Reeves, Canadian Forces Prosecution Services
Counsel for Her Majesty the Queen