



## COURT MARTIAL

**Citation:** *R. v. O'Toole*, 2012 CM 1010

**Date:** 20120910

**Docket:** 201240

Standing Court Martial

Canadian Forces Base Esquimalt  
Esquimalt, British Columbia

**Between:**

**Her Majesty the Queen**

- and -

**Ordinary Seaman K.G. O'Toole, Offender**

**Before:** Colonel M. Dutil, C.M.J.

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### REASONS FOR SENTENCE

(Orally)

[1] Ordinary Seaman O'Toole has pleaded guilty to three charges, namely: disobeyed a lawful command of a superior officer under s. 83 of the *National Defence Act*; stealing under s. 114 of the *Act*; and, failed to comply with conditions imposed under division 3 under s. 101.1 of the *Act*. The circumstances surrounding the commission of the offences are the following: On the morning of 13 April 2012, Ordinary Seaman O'Toole reported to sick parade at the Canadian Forces Health Services Centre (Pacific) at Canadian Forces Base Esquimalt, British Columbia. Ordinary Seaman O'Toole was seen by Captain Chana, his treating physician at the base clinic. Ordinary Seaman O'Toole went to see Captain Chana to request time off from work. The doctor noted that Ordinary Seaman O'Toole was behaving in a disinhibited and disrespectful manner, and was using profanity during his appointment. Captain Chana requested that the clinic warrant officer speak to Ordinary Seaman O'Toole regarding that behaviour. Captain Chana was concerned that Ordinary Seaman O'Toole may have been under the influence of a drug. After having left Ordinary Seaman O'Toole alone for a period of time

Captain Chana returned to the treatment room where Ordinary Seaman O'Toole was located and found him standing in front of a cupboard, labelled "injectable medications." The cupboard door was open and Ordinary Seaman O'Toole had a box of medication in his hand. The doctor took the medication from Ordinary Seaman O'Toole and told him to return to his treatment area. Ordinary Seaman O'Toole instead left the treatment room and a short time later left the base clinic. Chief Petty Officer 2nd Class Slater was at the base clinic that morning and took note of a person, later identified as Ordinary Seaman O'Toole, who was, at least in his opinion, inappropriately dressed in civilian clothing. A short time later Chief Petty Officer 2nd Class Slater was outside the clinic speaking with Chief Petty Officer 2nd Class Morse, a colleague, when Ordinary Seaman O'Toole exited the building. Neither of the chief petty officers knew Ordinary Seaman O'Toole and so Chief Petty Officer 2nd Class Morse asked him his name to which Ordinary Seaman O'Toole only replied "What?" Chief Petty Officer 2nd Class Slater then asked Ordinary Seaman O'Toole whether he was in the military. The offender replied "No thanks. Have a great day" and he walked away. Chief Petty Officer 2nd Class Slater re-entered the base clinic and asked Captain Chana if he knew whether the individual he had been treating was in the military. Captain Chana advised the chief petty officer that Ordinary Seaman O'Toole was in the military and told his name. Chief Petty Officer 2nd Class Slater then left the building where he saw Ordinary Seaman O'Toole on the street in front of the base clinic. Chief Petty Officer 2nd Class Slater called Ordinary Seaman O'Toole by name and Ordinary Seaman O'Toole turned and looked at the chief petty officer. Chief Petty Officer 2nd Class Slater then told Ordinary Seaman O'Toole to report to him, saying "Come here now." Ordinary Seaman O'Toole said, "What?" And Chief Petty Officer 2nd Class Slater repeated his command for Ordinary Seaman O'Toole to report to him. The offender began to cross the street toward Chief Petty Officer 2nd Class Slater, but then stopped and asked "Why?" To which the chief petty officer 2nd class answered "Because you've just lied to two chief petty officers." Ordinary Seaman O'Toole then turned and started to walk away. The chief petty officer repeated his command for Ordinary Seaman O'Toole to report to him, specifying that it was a direct order. At that point Ordinary Seaman O'Toole turned away from Chief Petty Officer 2nd Class Slater, ran into a side yard between two residential houses, and left the area. Shortly after a manager at the Royal Bank of Canada in Esquimalt called the Victoria City Police as Ordinary Seaman O'Toole was involved in an argument with her and another bank manager regarding access to funds. Military Police from Canadian Forces Base Esquimalt were also dispatched to assist. When the police arrived they arrested Ordinary Seaman O'Toole, at 1212 hours on 13 April 2012, and searched him incidental to his arrest. During that search Ordinary Seaman O'Toole was found to be in possession, among other things, of medication missing from the "injectable medications" cupboard as Ordinary Seaman O'Toole had earlier been found in front of at the base clinic. He had:

- a. 2 vials of injectable lidocaine (20 ml);
- b. 2 vials of injectable marcaine (20 ml);
- c. 1 vial of injectable sodium chloride (10 ml); and

- d. 1 bottle of nitroglycerine (200 doses).

[2] Ordinary Seaman O'Toole was initially retained in custody by the military police who arrested him. At 1045 hours on 14 April 2012, he was released from custody by a custody review officer from his unit on several conditions. These conditions included:

- a for him to remain under military authority;
- b. to report at 0800, 1700 and 2100 hours daily to CFB Esquimalt Base Duty Officer/Duty Petty Officer; and
- c. remain within the confines of CFB Esquimalt, HMCS NADEN; ie. to live in Nelles Block.

[3] At 1700 hours, on 14 April 2012, Ordinary Seaman O'Toole failed to report to the Base Duty Officer or Duty Petty Officer, that was his second report. The Base Duty Officer informed Ordinary Seaman O'Toole's unit and the military police, and both began to investigate. He also failed to report at 2100 hours that evening and at any time on 15 of 16 April 2012. On 16 April 2012, his commanding officer issued a warrant for his arrest.

[4] It was soon determined by the military police that Ordinary Seaman O'Toole had left the Victoria area soon after he was released from custody and had taken a bus to Winnipeg, Manitoba, where his mother lives. As a result of a call to the Winnipeg Police Service from Ordinary Seaman O'Toole's mother, Ordinary Seaman O'Toole was arrested by members of the Winnipeg Police Service at 0113 hours on 17 April 2012. He was turned over to the custody of the military police in Winnipeg at 0145 hours, 17 April 2012.

[5] An agreed statement of facts completed the information provided to the court to assist in determining a fair and just sentence. It provides in part that following his arrest by the members of the Winnipeg Police Service he was transferred to the custody of the military police in Winnipeg and for that purpose two members of his unit flew to Winnipeg and returned to Canadian Forces Base Esquimalt with the offender on the evening of 18 April 2012. On his arrival he was placed in custody at the Military Police Unit in Esquimalt. A custody review officer directed on 18 April 2012 that Ordinary Seaman O'Toole was to be retained in custody and began to arrange to have Ordinary Seaman O'Toole brought before a military judge for a "show cause" hearing. On 19 April 2012 Ordinary Seaman O'Toole was charged with the offences that resulted in this court martial. At 1336 hours, 20 April 2012, in consideration of the continuing duty to release provided for in s. 158.3 of the *National Defence Act*, a custody review officer from his unit released Ordinary Seaman O'Toole on further conditions. Ordinary Seaman O'Toole was in custody from 1212 hours, 13 April 2012 until 1045 hours, 14 April 2012; and then again following his breach of release conditions and arrest in Winnipeg from 0113 hours, 17 April 2012 until 1336 hours, 20 April 2012. Following his release

from custody on 20 April 2012, arrangements were made by health care professionals from Canadian Forces Base Esquimalt for Ordinary Seaman O'Toole to attend Edgewood, a private residential addiction treatment facility in Nanaimo, British Columbia. This was supported by Ordinary Seaman O'Toole's unit. He has attended the centre's inpatient treatment programme from 27 April 2012 to 17 June 2012. Ordinary Seaman O'Toole successfully completed the centre's treatment programme and he has resumed his duties at Canadian Forces Base Esquimalt on 19 June 2012. On his return to duty from the Edgewood facility, Ordinary Seaman O'Toole's conditions of release were amended. He is now currently living in single quarters on Canadian Forces Base Esquimalt.

[6] Counsel for the prosecution and defence have made a joint submission on sentence. They recommend that Ordinary Seaman O'Toole be sentenced to a reprimand accompanied by a fine in the amount of \$1200. Although this court is not bound by this joint submission or joint recommendation it can only reject it if the recommendation is contrary to the public interest and the sentence would bring the administration of justice in disrepute.

[7] In the context of sentencing an offender under the Code of Service Discipline, a court martial should guide itself with the appropriate sentencing purposes, principles and objectives, including those enunciated in ss. 718.1 and 718.2 of the *Criminal Code*. The fundamental purpose of sentencing at court martial is to contribute to the respect of the law and the maintenance of military discipline by imposing punishments that meet one or more of the following conditions:

1. the protection of the public, including the Canadian Forces;
2. the denunciation of the unlawful conduct;
3. the deterrent effect of the punishment, not only on the offender but also upon others who might be tempted to commit such offences; and finally,
4. the reformation and rehabilitation of the offender.

[8] The sentence must also take into consideration the following principles. It must be commensurate with the gravity of the offence, the previous character of the offender and his/her degree of responsibility. The sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A court must also respect the principle that an offender should not be deprived of liberty if less restrictive punishments may be appropriate in the circumstances. Finally, the sentence should or will be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. However, the court must act with restraint in determining sentence by imposing such punishment or punishments that constitute the minimum necessary intervention to maintain discipline.

[9] In this case the aggravating factors are the following:

- a. the objective seriousness of an offence under s. 83 of the *National Defence Act* shows that a person found guilty of that offence is liable to imprisonment for life. This is a very serious offence. For the offences under s. 114 and 101 of the *Act*, they are respectively punishable to a maximum period of imprisonment for a term of seven years, in these circumstances, and to imprisonment for less than two years;
- b. the subjective seriousness of the offences as described in the statement of circumstances. It indicates a pattern of conduct that emphasized a serious taste for disrespectful conduct and blatant disregard for military authority and self-discipline and the legal process. With regard to the offence of stealing I find it mostly aggravating that the public property stolen involved prescribed medication when the offender took the opportunity to steal it as he was left alone in a treatment room; and
- c. the conduct sheet of Ordinary Seaman O'Toole reveals prior convictions of Absence Without Leave and Drunkenness which tends to show a lack of compliance with the basic requirements of military discipline.

[10] However, there are significant mitigating circumstances in this case:

- a. Ordinary Seaman O'Toole has accepted full responsibility for his conduct by pleading guilty before this court;
- b. the offender is still relatively young at 25 years of age and he has now successfully completed an in-house treatment programme for addiction problems. He has now resumed his regular activities in his unit and I am informed that he does so very well. The prosecution informed the court as well that his potential to become a valuable member of the Canadian Forces is very good, of course, if he continues in that direction; and finally,
- c. Ordinary Seaman O'Toole has spent almost six days in pretrial custody for the incidents that led to this court martial.

[11] The court agrees with counsel that the proposed sentence is the minimal sentence in the circumstances and it is not so off the mark that its adoption by this court martial would be contrary to the public interest or bring the administration of military justice into disrepute. It also fits within the range of sentence imposed in similar circumstances. The proposed sentence is sufficient to meet the objectives sought; namely, general deterrence, specific deterrence, denunciation and rehabilitation

**FOR THESE REASONS, THE COURT:**

[12] **FINDS** you guilty of the first charge under s. 83 of the *National Defence Act*; guilty of the second charge under s. 114 of the *National Defence Act*; and, guilty of the third charge under s. 101.1 of the *National Defence Act*.

[13] **SENTENCES** you to a reprimand and a fine in the amount of \$1200 payable in twelve equal monthly instalments of \$100 starting on 15 October 2012.

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**Counsel:**

Lieutenant-Colonel S.D. Richards, Canadian Military Prosecution Services  
Counsel for Her Majesty the Queen

Major D. Berntsen, Directorate of Defence Counsel Services  
Counsel for Ordinary Seaman O'Toole