

SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Wournell, 2014 NSSC 305

Date: 20140801
Dket: CRH 423716
Registry: Halifax

Between:

Her Majesty the Queen

v.

Caiden Donte Wournell

SENTENCING DECISION

Restriction on publication: (s.539, 486.4 and 517 CC)

Judge: The Honourable Chief Justice Joseph Kennedy

Heard: June 3 and 4, 2014, in Halifax, Nova Scotia

Sentencing: August 1, 2014

Counsel: Michelle James, Provincial Crown
Trevor McGuigan, for Defence

By the Court:

[1] This is not an exact science. What is an appropriate sentence in each specific is something that we try to accomplish but there are no two people that come before this Court to be sentenced who are the same and no two offences are exactly alike. The other thing, sometimes I get the impression that people think the judges can come in here and just sentence as we are inclined on the day we climb on the bench. That is not the case, we are instructed and constrained and encouraged by hundreds and hundreds of other cases, many of which are binding upon us, we have to try in each specific to come up with some form of proper sentence that satisfies those constraints. A sentence that is within the range and guidelines that are properly set by Superior Courts.

[2] This is a charge of sexual assault, sexual assault is subject to s.271(1)(a)CC of the **criminal code**. Mr. Wournell was found guilty of one count of sexual assault by this court by me sitting as a judge alone after a two day trial that commenced on June 3rd, 2014.

[3] Just a very brief summary of the facts. The incident took place

September 21st, 2013, at the time Mr. Wournell was twenty years of age, he meets the young lady who is sixteen years of age at the time, they meet at the Dartmouth bus terminal. They are unknown to one another, never met before, meet for the first time at the bus terminal at the Dartmouth end of the MacDonald bridge. Mr. Wournell invites the victim to come with him for a walk and to share some marijuana. She agrees and they do, they go for a walk and they share a joint. Then she testifies that at some point he, Mr. Wournell, grabbed my crotch, kissed her on her neck, she testified and I am quoting "I just laughed it off and pushed him just joking around he did it again, this time I said hey no stop". She said he started getting aggressive, eventually he pulled her pants down and has sexual intercourse with her. I found and I repeat, that she did not consent and her lack of consent would have been obvious, Mr. Wournell would have known that she was not consenting. Later she is found by a passerby on the side of the street crying, her pants still down around her ankles and says to the young woman on the bicycle, who first encounters her, "I was just raped". On the totality of the evidence I found sexual assault.

[4] Let me very briefly speak to the principles of sentencing. Section

718 of the **criminal code** sets out the fundamental principles of sentencing denunciation, deterrence both general and specific, separation of offenders from society when necessary, rehabilitation and promotion of a sense of responsibility in the offender.

[5] Section 718.1 of the **criminal code** directs that a sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. Section 718.2(b) states a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[6] I will be specific about sexual assault, while it is difficult to describe a precise sentencing range, cases in this province, in Nova Scotia would indicate that even in the absence of a criminal record that a conviction for sexual assault should generally not attract less than two years federal time. In the instance of *R. v. J.J.W. NSCA (2012)* this is our Court of Appeal, they held that a five month sentence that the trial court had given for sexual assault, which involved forced anal intercourse, the five month sentence was “demonstrably unfit” meaning that it was too low.

[7] In *R. v. WHA*, 2011 NSSC 246, [2011]N.S.J. No. 460, this court Justice Rosinski of this Court, 36 year old offender had non consensual intercourse with a 17 year old cousin of his wife. There were aggravating factors, including the complainants age, a prior criminal record for sexual offences and the provision of alcohol and marijuana to the complainant. Justice Rosinski of the of the Nova Scotia Supreme Court sentenced a period of five years on a sexual assault count and that was a 36 year old.

[8] In the *R. v. DHE*, 2012 NSSC 260, [2012] NSJ No. 428, in this court and in this case Justice Scaravelli was dealing with a 49 year old offender who had given the victim drugs and alcohol then had intercourse with her when she was passed out. He pleaded guilty to sexual assault, sentenced for three years. Justice Scaravelli noted looking at the nature of the offence and the offender and the degree of culpability he preplanned and performed sexual intercourse on the victim while she was drug induced into a helpless state.

[9] Finally, *R. v. Marshall*, 2008 NSSC 132, [2008] NSJ No. 209, that

was a 39 year old First Nations Chief, came to Halifax, he encountered a 20 year old victim who had come from his community to live in Halifax to attend school. She was a success story, he took her away from her studies, bought her drinks, took her to a strip club and then a hotel where he had intercourse with her after she had passed out. The defence requested a conditional sentence, I imposed a sentence of three years in a Federal Institution.

[10] Lets talk about this offender, he is now 21 years old and was 20 at the time. He does have a criminal record, crown has pointed that out and particularly the robbery and the serious assault. I will say in relation to both of those offences though that they were committed when he was a young offender, I think the robbery was 2007, seven years ago, and he would have been 13 or 14 years of age, it is not as though he is 31 today and we are talking about a robbery that took place three or four years ago when he was in his mid twenties. We are talking about an offence that took place when he was in his mid teens. That also applies to the assault, I think the assault was 2009 so you can do the math, he wasn't very old.

[11] The one adult offence that he has got is flight to avoid capture, no prior sexual related offences. He has a grade nine education and wants to improve that and I hope he does. He very well may have some mental health issues, I noted that he appears to have an above average family and community support. I watched family members in this courtroom while the trial was taking place, my impression was this young man has people who care about him. I can't say that about everybody who comes into this courtroom, believe me, so that is an advantage, potential advantage down the road and I did note that he turned himself into police, which says something.

[12] This is sexual assault that we are talking about here, I read the father's victim impact statement and I can imagine, we all or most of us have daughters, I can imagine, contemplate that. This event will have repercussions for that young lady for the rest of her life. Sexual assault is becoming distressingly common in this society, there is a lot of it going on. So the general deterrent is an important aspect of sentencing. We live in an interesting time so called "jackass culture" where boneheads are heroes outrageous behaviour attracts public support. One of the symptoms of

these interesting times is that people are being sexual assaulted on a regular basis. It is going to require the construction of more federal institutions because society will not put up with it.

[13] Sexual assault is a serious offence and I am balancing that, I am trying to balance what is best for this young man before me and at the same time recognize what happened to this young woman and recognize what is going on in society and trying to address that situation.

[14] Serious sexual assault, this was not a random attack on a jogger, not that type of an offence, not that type of scenario rather it developed from what appeared to have been, at least in the first aspect of the contact, appeared to have been a positive interaction between strangers, if you can refer to smoking of marijuana as positive. They seemed to be getting along alright enjoying one another's company. I think it is possible that for a period of time this young man thought that his contact might lead to consensual sex. He was wrong. It didn't happen and I hope that I am clear in my findings when I said and I repeat that this was not consensual sex, no consent going on here and that lack of consent was as indicated

was manifest so what was initially, may have initially have been a positive encounter turned very bad.

[15] I have considered all of the circumstances of this matter, trying to come to a balance and balance all of the various interest, this young man has one significant advantage he is only 21 years old, only 21 years old and no reason to think that when he is 31 and 41 years old he will have these kinds of problems. It is not necessary that that happens. People do change, I have seen it over and over again that people who get themselves in very very serious trouble as young people do better as they age, that happens and it happens again and again. No reason why it can't happen here.

[16] There is a real chance that behaviour at 20 will not characterize the rest of your life.

[17] I understand the crown's position in this matter is based upon the crown's understanding of the prior record. And while I am in full in agreement that robbery and serious assault are bad offences, serious

offences I do accept the defence position that they happened when this man was very young man, hardly more than a child and I put them in that context when I am dealing with this matter. Keeping in mind the nature of the offence, the offender who is before the court and trying to balance all of the various factors, I conclude that a proper sentence is a totality of three years in a federal institution.

[18] As to credit for time served, Mr. Wournell has been held on remand for 312 days since the day he turned himself into police on September 24, 2013. The defence has suggested that the enhanced credit provision permitted by s.719(3.1) to the maximum of 1.5 days credit for one day remand time should be used. I note again as the case in *Summers* that the time served on remand would not be counted when determining the early release and parole. The defence claims that Mr. Wournell's detention was not based on either of the exception clauses, exception sections referred to in s.719 (3.1). I heard what the crown said in relation to the rationale behind the remand in the matter but I have to say that we do not have a transcript and I do not intend to speculate as to what was in the mind of that remand judge at the time the remand entered. I am aware of

R. v. Summers, S.C.C. 2014 Carswell ONT 4479 and I quote and I apologize but I quote from the first paragraph of the head note that is in the Carswell report:

Per Karakatsanis J. (McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring): The sentencing judge did not err in law by granting enhanced credit under s. 719(3.1) on the basis of the accused's loss of eligibility for early release and parole. The "circumstances" justifying enhanced credit under s.719(3.1) may include loss of eligibility for early release and parole. To conclude otherwise, it would be necessary to read limiting language into s. 719(3.1) that was not there. Judges should continue to assign credit on the basis of the quantitative rationale, to account for lost eligibility for early release and parole during pre-sentence custody, and the quantitative rationale, to account for the relative harshness of the conditions in detention centres.

[19] I am satisfied that is the case in this detention centre. I am going to grant the enhanced 1.5 days for one day of remand and I will sign the three orders suggested.

[20] My bottom line is this, three years totality on the basis of 312 days remand times 1.5 and I leave the go forward time on that basis to counsel. I am going to break for 5 or 10 minutes and ask counsel to calculate to make sure that they are both satisfied on the totality of the three years with a 1.5 credit, both satisfied as to the amount of go forward time when we are all satisfied, that is the amount I will direct int this matter. We will take

10 minutes please.

The Court : Thank you, you may be seated. Go forward time, we have an agreement?

Ms. James: We have calculated as 628 ...

Mr. McGuigan: Yes.

Ms. James: 628 days.

The Court: I'm sorry.

Ms. James: 628

Mr. McGuigan: days

The Court: 628 both are in agreement?

Ms. James: Yes my lord

Mr. McGuigan: Yes

The Court: Go ahead time 628 days federal institution, I have signed two of the orders and will sign the third order, the firearms order when it is available. Thank you counsel.

NOTE:

Orders granted: DNA Order

SOIRA - 20 years

FIREARMS PROHIBITION - 15 years

J.