COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R. v. Barnes,***
2005 BCCA 432

Date: 20050819
Docket: CA032867

Between:

Regina

Respondent

And

Dwight William Barnes

Appellant

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Huddart
The Honourable Madam Justice Levine

Oral Reasons for Judgment

M.F. Allen — Counsel for the Appellant

K.D. Madsen — Counsel for the Respondent

Place and Date: Vancouver, British Columbia
August 19, 2005

[1] **RYAN J.A.:** On January 4, 2005, the appellant pleaded guilty to four counts on an Information sworn by a member of the Courtney R.C.M.P. on September 9, 2004. Specifically, the offences were the following:

> Count 1
>
> Dwight William BARNES, between the 1st day of August, 2004 and the 9th day of August, 2004, inclusive, at or near Courtenay, in the Province of British Columbia, did commit theft of cheques, the property of Evelyn-Ann Tilsworth, of a value not in excess of five thousand dollars ($5,000.00), contrary to Section 334(b) of the Criminal Code.
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> * * *
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> Count 4
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> Dwight William BARNES, between and including the 1st day of August, 2004 and the 9th day of August, 2004, at or near Courtenay, in the Province of British Columbia, willfully and without lawful excuse killed a cat, which was kept for a lawful purpose, contrary to Section 445(a) of the Criminal Code.
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> Count 5
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> Dwight William BARNES, between the 1st day of August, 2004 and the 9th day of August, 2004, inclusive, at or near Courtenay, in the Province of British Columbia, willfully and without lawful excuse killed a cat, which was kept for a lawful purpose, contrary to Section 445(a) of the Criminal Code.
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> Count 7
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> Dwight William BARNES, on or about the 4th day of September, 2004, at or near Courtenay, Province of British Columbia, did intentionally or recklessly cause damage by fire or explosion to property, the Eureka Club, located at 280 4th Street, Courtenay, British Columbia, not owned in whole or in part by Dwight William BARNES, contrary to Section 434 of the Criminal Code.

[2] Count 1 is an indictable offence punishable by a maximum of two years imprisonment. Counts 4 and 5 are summary conviction offences punishable by a maximum of six months imprisonment. Arson is an indictable offence punishable by a term of imprisonment not exceeding 14 years.

[3] On March 15 of this year, the appellant was sentenced to a total of two years imprisonment. He was sentenced to two years concurrent on the theft and arson charges. He was sentenced to six months concurrent for killing the animals. He seeks leave to appeal sentence.

[4] The appellant is a 20 year-old aboriginal male who may suffer from Fetal Alcohol Syndrome, Fetal Alcohol Effects, or Neo-Natal Abstinence Syndrome. He has other psychological conditions of which to this date there is no clear diagnosis. He has no criminal record. Counsel for the appellant says that the sentencing judge sentenced him to a term of preventative detention and that the sentence is therefore unreasonable and unfit.

[5] The facts of the offences reveal the significant psychological problems facing the appellant.

[6] In August 2004, the appellant rented a room in Cumberland in the home of Ms. Tilsworth. Ms. Tilsworth is the complainant in Counts 1, 4 and 5 of the Information. Very soon thereafter, Ms. Tilsworth received a telephone call from the appellant's mother advising her that the appellant had sent her a cheque, in the amount of $100, drawn on Ms. Tilsworth's account. The appellant's mother recognized the writing as that of her son. Ms. Tilsworth took the appellant to the

police on August 10. In his interview with the police the appellant admitted not only stealing the cheque but to killing Ms. Tilsworth's two cats.

[7] The appellant, who was cooperative with the police, took the police to the place in Ms. Tilsworth's garden where he had buried the cats. He had beheaded the cats on two separate occasions, mutilated their bodies, and buried them. When dug up, their bodies were headless; one of the cats had a distended anus. As a result of these revelations the appellant was charged with the offences of which Ms. Tilsworth is the victim. He was released on an undertaking to appear and directed to a hospital for a mental assessment.

[8] While on release, the appellant set fire to the Eureka Club in Courtenay. The Eureka Club is a gathering place for people with mental health problems that the appellant had been frequenting. Fires had been set in five or six locations on the premises. The appellant had rifled a cash box before setting the fires. In a statement to the police he said that he set the fires to cover up his involvement in the theft. The fires caused about $75,000 damage to the Eureka Club. There was also about $10,000 damage done to the building next door.

[9] The appellant was arrested on the arson charge on September 7, 2004. In another interview with police he spoke freely about sexual fantasies he had, of plans to kill several people and dismember them, of being afraid to do so, but of being empowered by killing the cats.

[10] The Crown placed e-mails before the court that the appellant had sent to his sister and uncle. He spoke of the same fantasies and desires in the e-mails.

[11] As a result of his arrest and guilty pleas the appellant has undergone a series of psychiatric assessments. He was first assessed by the Forensic Psychiatric Services Commission to determine whether he was suffering from a mental disorder that would exempt him from criminal responsibility. He was found not to be suffering from such a mental disorder. The conclusions of the psychiatrists are found in a report dated December 22, 2004. The report played an important role in the sentencing before the trial judge and I will return to it presently.

[12] The appellant was also assessed after his guilty plea by Dr. LaTorre, another psychiatrist with the Forensic Psychiatric Commission. His report dated February 10, 2005 also played an important role in the sentencing proceedings.

[13] Both reports before the trial judge contain alarming material. In the first report prepared by Drs. Shabbits and Meldrum, it is recorded that the appellant recounted to them many experiences and fantasies, most of which centre around death, sex and assuming different identities.

[14] The appellant was asked about the commission of the four offences. He seemed to relate his theft of the cheques to being a "con" man who could charm people into thinking he was someone he was not. He gave different explanations for killing the cats but he said that he did it "for the challenge, in part, exciting". He said that he had hidden in the Eureka Club while someone closed up. He then wandered about the place looking through offices and drawers. He thought about burning down the club after he found a lighter in a desk because his fingerprints could be on

the doors that he had opened. When asked how he felt at the time he lit the fires, he said that he did not care at the time; "no feelings, interesting just to get out".

[15] In the end, the psychiatrists in the first report said this:

> It is our opinion that the clinical features described above are likely related to elements of an Autistic Spectrum Disorder, a Personality Disorder and to in utero exposure to substances. He also has a history of substance abuse, notably cocaine. He does not show any current or past evidence of a mood disorder (such as Bipolar Disorder or Clinical Depression), anxiety disorder or psychotic disorder; however, it is possible that he may go on to develop such illnesses in the future.
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> Mr. Barnes also has expressed some sexually deviant preferences, notably sadism (a sexual interest in seeing other people suffering) as well as necrophilia (a sexual interest in dead human bodies). He has, more recently, denied having sexually deviant preferences and explained his past statements as representations of non-sexual thoughts that he found exciting, or as attention-seeking efforts. It has also been noted that has made statements regarding sexual and violent themes in a somewhat inconsistent manner to various clinicians. The diagnosis of paraphilia (sexual deviance) has been raised, but it is difficult to include or exclude in this situation, as it is generally made on an individual's report. Laboratory testing is not reliable for diagnostic purposes and is not used for such purposes at the Forensic Psychiatric Hospital.
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> However, it is our opinion that the [*sic*] Mr. Barnes presents as a high risk in terms of future violence and sexual offending.

[16] Dr. LaTorre reported, perhaps in more depth, the appellant's discussion of the same themes. He talked of impersonating people. He spoke of an interest in animal parts. When asked why he killed the cats he said, "well, maybe he had an interest to do it". He said he beheaded the cats to see what it would look like. The appellant denied any sexual feelings associated with the arson.

[17] In presenting his diagnosis, Dr. LaTorre explored many different areas of sexual deviation. In the end he gave his provisional diagnoses as this:

DSM	-	Axis I	Alcohol Abuse
			Pervasive Developmental Disorder Not Otherwise Specified (by history)
			Rule Out Cocaine Abuse
			Rule Out Necrophilia
			Query Dysthymic Disorder
		Axis II	Personality Disorder Not Otherwise Specified (Mixed with narcissistic, schizotypal and borderline traits)

[18] As for risk of re-offending, he said:

> Overall, then, his PCL-R-2 scores, as noted earlier, suggest somewhere between a Moderate and a High risk of subsequent violence. Particularly worrisome is that he seems to match the personality traits of psychopathy, which would be consistent with an individual who can engage in the unempathic, callous and remorseless use of others. Combined with test results suggesting a deficit in ability to inhibit one's behaviours, I see Mr. Barnes as an individual who remains at risk for violence unless significant, effective intervention is introduced.

[19] Dr. LaTorre recommended a minimum sentence of two years for treatment in the federal system, the only place he said where this appellant might receive the type of treatment required.

[20] Counsel for the Crown submitted to the trial judge that a term of imprisonment in a federal institution would be appropriate.

[21] Counsel for the defence noted the difficulty that all the psychiatrists had in classifying the appellant's mental status. He noted that the appellant had gone back and forth between admitting to terrifying acts and fantasies to saying that he said these things only to get attention. He submitted that the trial judge should refrain from sentencing the appellant on the basis that it was feared that the appellant might commit offences unrelated to those with which he was charged.

[22] The sentencing judge recognized the disturbing aspects of the reports, the age of the offender, the offences with which he was charged, and finally concluded that taking into account a lengthy period of dead time, the appellant should be sentenced to incarceration for a period of two years. He said this:

> [5] In this case, in my view, the protection of the public becomes the most significant consideration and one which outweighs in combination all of the other factors that are here.
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> [6] I know that if an appeal court reads these reasons, one of the things that will cause them concern is that I tend to be a judge who likes to debate during the course of the proceedings, which then requires them to read all of the submissions in order to find out really why I have done what I have done, and I know that they have been critical of that before. I am too late in my career to change doing things in that fashion, but many of the reasons for doing this are things that I have raised both with Mr. Richardson and Mr. Yeo in the course of this.
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> [7] The principal considerations here -- and let me say that in categorizing these offences, each of them, in the scope of their own types of offences, does not come anywhere near the top end of those offences, although I am not sure how one can more kill a cat than less kill a cat. The offence is such that you take the life of an animal, and the circumstances surrounding it, I guess, make it worse or better.
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> [8] Committing theft, there are lots of different ways to do it, and doing it stealthily in stealing cheques is toward the lower end of it. In terms of arsons, the nature of this fire, although it caused a fire, there was no an accelerant used, and there is no indication that his intention

> was to burn the place down, other than simply the intent to start the small fires that were there.
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> [9] Having said all of that, the reports from the psychiatrist[s] -- and I have referred to them at length, but, in particular, the report dated February the 10th of 2005 and signed by Dr. LaTorre. The materials contained at basically pages 19, 20, 21, and 22 -- well, through the end of the report really, page 24, combined with the two-page letter from Dr. Murphy, dated December the 21st, persuade me that, in relative weighting, the protection of the public becomes the most significant consideration before me.

[23] I am not sure why the sentencing judge came to the conclusion that the appellant was not interested in burning down the building in the arson count. The appellant set five or six fires in the building with the intention of destroying fingerprints that he left on doors throughout the building. It seems to me that the inference must be that he intended to burn down the building.

[24] In spite of the very able submissions of Mr. Allen, I am not persuaded that the trial judge imposed an unfit sentence in this case. Given their factual context, these offences were serious. Psychiatric reports demonstrate that the psychiatrists have not discounted the appellant's statements as mere attention getting. The appellant is a difficult person to assess. All of the experts came to the conclusion that he is dangerous. He is at the high end to re-offend.

[25] I disagree with counsel that the appellant is not a risk to again commit the types of offences set out in the Information. As I read the reports, there is a well-grounded fear the appellant remains fascinated by many forms of violent acts. He has an interest in committing violent and/or sexual criminal acts just to see what it is

like. He is therefore dangerous to the community and there is little likelihood he will change unless he is treated.

[26] In my view, then in spite of the absence of a record and the youthfulness of the appellant, the sentence in this case was not unfit. I would grant leave but dismiss the appeal.

[27] **HUDDART J.A.:** I agree.

[28] **LEVINE J.A.:** I agree.

[29] **RYAN J.A.:** Leave is granted. The appeal is dismissed.

"The Honourable Madam Justice Ryan"