

In the Provincial Court of Alberta

Citation: R. v. Ainsworth, 2010 ABPC 205

Date: 20100615

Docket: 090726571P10102

Registry: Calgary

Between:

Her Majesty the Queen

- and -

Donald James Ainsworth

Sentencing Judgment of the Honourable Judge Bruce R. Fraser

[1] The accused pled guilty to a charge under Section 445.1(1)(a) of the *Criminal Code* to being the owner of a miniature pincher dog, who wilfully permitted the dog to be caused unnecessary pain or suffering or injury to the animal.

[2] I point out he is not charged under Section 445(1) or 445.1(1)(a) with actually causing the injury from which the dog suffered the pain or injury, yet he admits to doing so. He cannot be sentenced to that which he is not charged so at best this can only be treated as an aggravating factor.

[3] I also point out the section stipulates the pain or suffering or injury permitted must be unnecessary. The Information does not include the word “unnecessary”. However, I am satisfied that if I find the pain or suffering was unnecessary from the facts admitted, I can amend the Information on my own motion so that the Information conforms to the admitted facts. **R. v. Powell**, [1965] 4 C.C.C. 349 (B.C.C.A.). In determining whether I can or should make the amendment I have considered Sections 601(3) and (4) of the *Criminal Code* and I am satisfied the Offender would not be misled or prejudiced if I were to do so and no injustice would be done.

[4] The Crown proceeded by summary conviction procedure so the maximum sentence is a fine up to \$10,000 or imprisonment for up to 18 months or both.

Facts as Admitted

[5] On the 14th of March, 2009 the Offender was in his truck with his dog when the dog urinated in the truck. As a result the Offender grabbed, shook, and hit the dog on the head with a flashlight causing a serious eye injury. The dog then ran under some shelving to hide from him. He could not get the dog out. It is said that the Offender drank a lot of alcohol. He went to bed and left the dog there. When he woke up the dog was beside him.

[6] The dog remained with him until March 16. He did not treat the dog for his injury until he asked his girl friend, Ms. Leblanc to take it to the humane society to be treated. Ms. Leblanc did so. A vet examined the eye which had collapsed and was bleeding. He had to remove the eye. It was his opinion that if it had been looked after earlier, he may have been able to save the eye.

[7] The Offender called the humane society and confessed that he had caused the injury and took responsibility for not getting treatment earlier.

[8] The Humane Society seized the dog and made Application to keep it which was granted.

Amendment

[9] Based on these admitted facts it is clear that the dog suffered unnecessary pain, suffering and injury. If the Offender had taken the dog for immediate treatment the eye may have been saved or at least treated resulting in less pain and suffering. Therefore, an amendment should be made to the Information to conform to the admitted facts and I direct that the word “unnecessary” be inserted between the words “caused” and “pain”.

Crown Position on Sentencing

[10] The Crown submits the appropriate sentence is a gaol term of between three to five months to be followed by probation and an Order under Section 447.1(1)(a) of five years. The Crown points out the maximum sentence for this offence was increased by Parliament in November 2008 by summary procedure from six months to eighteen months indicating the seriousness of the offence as considered by Parliament. The Crown provides a number of authorities supporting its position but points out most were decided prior to the amendment. The amended sentencing provisions would be applicable here.

Defence Position on Sentencing

[11] The defence submits a Conditional Sentence Order would be appropriate. They point out he always wanted to plead guilty and always showed remorse demonstrated by the early and timely guilty plea. He has no criminal record whatsoever and if he cannot own a dog or have a dog or animal, he would not be a danger to the community. They point out there is no minimum sentence and any gaol term must be less than two years, therefore a Conditional Sentence Order is available and appropriate if it is consistent with the principles of sentencing. They point out deterrence and denunciation can be achieved through a Conditional Sentence Order. If he must serve a gaol sentence they request one that can be served intermittently which would be three months or less.

[12] I have reviewed the pre-sentence report which concludes the Offender is not a good candidate for community supervision, yet both counsel submit such an Order is appropriate either by Conditional Sentence Order or Probation Order.

Analysis

[13] The authorities provided to me by counsel are as follows:

- 1) ***R. v. Brown***, 2004 ABPC 17

There was a guilty plea but three days of evidence called to resolve factual issues. The plea was to Section 445(1)(a) for killing a neighbour's dog by shooting. The sentence was suspended for 18 months and probation.

- 2) ***R. v. Zeller***, 1998 ABPC 19

There was a guilty plea to Section 445(1)(a), killing a dog by hitting it with a shovel. The sentence was 60 days intermittent followed by two years' probation.

- 3) ***R. v. Patrick*** (transcript only)

There was a guilty plea to Section 446(1)(a), causing injury to an animal by wilful neglect while being driven or conveyed. He

kicked a dog several times causing it to lose an eye. He was sentenced to 60 days intermittent and probation for one year. There was no evidence the dog was being driven or conveyed.

4) ***R. v. Gehring*** (transcript only)

There was a guilty plea to causing injury to a dog by wilful neglect while being driven or conveyed pursuant to Section 446(1)(a). However, the court sentenced him under Section 445.1(1)(a) of wilfully causing unnecessary pain, suffering or injury to an animal, but referred to Section 446.1(a) which does not exist. (See page 47) He twice stabbed a dog causing death. He was sentenced to 45 days gaol intermittent followed by 15 months probation. Again there was no evidence the dog was being driven or conveyed.

5) ***R. v. Mackinnon*** (transcript only)

From the transcript it is unclear what section of the *Code* he pled to, only referring to a cruelty to animals charge. However, he killed his cat and received 60 days gaol intermittent.

6) ***R. v. Presnail*** (2000), 264 A.R. 258 (Alta. P.C.)

The accused was found guilty under Section 445(a) and 446(1)(a) when he threw a cat against the wall and off a 3rd floor balcony causing injuries. He was sentenced to 90 days followed by two years probation.

7) ***R. v. Wicker*** 2007 ABPC 129

The accused pled guilty to Section 446(1)(a), (although the court categorized it as wilfully causing unnecessary pain or injury to a cat) by forcing it into scalding hot water and then not having it treated until it had to be put down. He was sentenced to three months' gaol to be served intermittently followed by two years' probation. Again there was no evidence the cat was driven or conveyed.

8) ***R. v. Piasentin***, 2008 ABPC 164

The accused pled guilty to Section 445.1(1), causing unnecessary pain and injury to a puppy. He hit the puppy repeatedly causing

unconsciousness and injury to his lung, brain and liver resulting in him being put down the next day. He was sentenced to five months' Conditional Sentence Order followed by two months' probation. This was a charge of causing unnecessary pain and suffering, not just permitting unnecessary pain and suffering.

[14] Six of the eight cases resulted in the death of the animal either by killing or euthanizing. Two of the charges were for killing the animal; the others appear to be for causing injury except for one that was for permitting unnecessary pain or suffering or injury as is the charge here. The sentences range from one of Probation; one of a Conditional Sentence Order; one of 45 days; three of 60 days; two of 90 days all intermittent. There appears to be no pattern of sentence based on the animal being killed. The two cases where the animal did not die, the sentences were 60 days and 90 days, the latter being the only case where there was not a guilty plea. In both cases where the sentence was Probation or a Conditional Sentence Order, the animal was killed or put down. In one of those cases he was charged with killing the animal and in the other with causing unnecessary pain and suffering or injury. I can detect no pattern of sentencing based on causing death, or causing pain and suffering or permitting pain and suffering unnecessarily, based on these authorities, many of which it appears the Offender was charged and sentenced under the wrong section.

[15] The applicable principles of sentencing in Section 718 here are:

- a) denunciation
- b) deterrence - specific and general
- c) rehabilitation
- d) to separate offenders from society where necessary
- e) to promote a sense of responsibility in Offenders and to acknowledge the harm done.

[16] As well it is a principle of sentencing that the sentence must be proportionate to the gravity of the offence.

[17] It is also a sentencing principle that an Offender should not be deprived of liberty if less restrictive sanctions are appropriate.

[18] The aggravating factors are as follows:

- a) failure to assist the animal when the Offender was in a position of trust;
- b) the severity of the injury resulting in the loss of an eye;
- c) the severity of the cause of the injury by the Offender to which he admits.

[19] The mitigating factors are:

- a) the early and timely guilty plea;

- b) that he confessed almost immediately and took full responsibility;
- c) that he eventually did ensure the dog was treated;
- d) that he was somewhat intoxicated at the time causing lack of judgment and impulsiveness.

[20] Having reviewed these factors, the principles of sentencing and the authorities, I have concluded the appropriate sentence is a period of imprisonment. However, I must remind myself he is not charged with causing the injury, but with permitting unnecessary pain and suffering and injury. He cannot be sentenced for that which he is not charged. The question for the court is whether the sentence should be served in an institution or in the community. Should the sentence be served in an institution, I am of the view the sentence should be in the 60 day range and served intermittently. In coming to this conclusion, I have considered the maximum sentence has increased. Should it be served in the community, the term would be much longer, approaching nine months. I have reviewed the pre-sentence report and the opinion he is not a suitable candidate for supervision. I cannot see the basis for that opinion.

[21] The pre-conditions to a Conditional Sentence Order are that there is no minimum sentence and the appropriate sentence would be less than two years. Both qualify here. The court must also be satisfied that he would not be a danger to the community. The Offender has no criminal record, is 46 years of age, and if prohibited from having the custody or control of an animal under Section 447.1(1)(a), he could not be said to be a risk to the community under a properly constructed Conditional Sentence Order or that he would be a risk to re-offend.

[22] The real issue is whether a Conditional Sentence Order would be consistent with the principles of sentencing. The Supreme Court in *R. v. Proulx* (2000), 140 C.C.C. (3d) 449, has determined that a Conditional Sentence Order may provide sufficient denunciation and deterrence, although incarceration provides significantly more. Without question, a person can be better rehabilitated by a Conditional Sentence Order than a short sharp gaol sentence. Is it necessary that this Offender be separated from society? Not in my view. Very little is to be gained. Lastly, a sense of responsibility and acknowledgment of harm done can be better addressed by a Conditional Sentence Order. The fact the maximum sentence has increased should have no effect on whether a Conditional Sentence Order is the appropriate sentence or not. What it does do is allow the Conditional Sentence Order to be more than six months which may be more appropriate.

[23] Taking into account the sentence must be proportionate to the gravity of the offence and that an Offender should not be deprived of his liberty if less restrictive sanctions are appropriate, I am of the view that given the aggravating and mitigating factors here and the fact he is being sentenced for permitting unnecessary pain and suffering and not for causing the injury even though he did so, that a sentence served in the community of nine months is the appropriate sentence.

[24] The optional conditions will be as follows:

- 1) House arrest with standard exceptions.
- 2) Fifty (50) hours of community service to be served with the Humane Society at their direction. If they do not wish your services then a charitable donation to the Humane Society in the amount of \$500.00. This option is to be decided by your supervisor. Either the service hours or the donation must be completed by the first six months.
- 3) Attend for assessment and complete any counselling or treatment as directed particularly for alcohol abuse and anger management.
- 4) Refrain from purchase, possession, use or consumption of alcohol or drugs except by prescription.
- 5) Not to be present in any premise where the primary purpose is to sell or serve alcohol.
- 6) Maintain a land phone with no forwarding system and will answer the telephone or door at any time of day or night to authorities checking on compliance with house arrest.
- 7) When not in your residence with approval, you will carry a copy of this Order on your person and produce it upon request to your Supervisor, designate or any police officer for their examination.

[25] There will be a Prohibition Order pursuant to Section 447.1(1)(a) for a period of five years prohibiting you from owning or having the custody or control of any animal or bird. To do so during the term of this Order is a criminal offence.

Dated at the City of Calgary, Alberta this 15th day of June, 2010.

Bruce R. Fraser
A Judge of the Provincial Court of Alberta

Appearances:

Gordon E. Haight
for the Crown

Andrea Serink
for the Defence