

2012 CarswellOnt 12526
Ontario Court of Justice

R. v. Happy

2012 CarswellOnt 12526, [2012] O.J. No. 4635

Her Majesty the Queen v. Brett Happy

W.A. Gorewich J.

Heard: July 5, 2012

Judgment: July 5, 2012

Docket: Newmarket 11-11090

Counsel: J. McKeachie, for Crown

G. Nardella, for B. Happy

Subject: Criminal

Table of Authorities

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

W.A. Gorewich J., (Orally):

1 I am going to address my remarks at the outset to the application for the one point five credit as opposed to the one to one credit. I heard evidence in the matter because the granting of the one point five, in my view, is a serious consideration and I want to treat it seriously.

2 In this case, Mr. Happy testified that is unusual in these types of applications, it happens infrequently. I have no difficulty accepting Mr. Happy's evidence with respect to lock-down's, with respect to the lack of showers, which would be a consequence of a lock-down, and indeed his inability to shave when I suppose he wanted to shave according to the rules of the institution.

3 My opinion is, that lock-down's are part of jail life, be it in a holding institution or in a formal prison. The reason it is a fact of life is because there are many individuals there from many walks of life, they are there for many reasons and they come from every part of the community and are charged with virtually every offence which is contained in this great big book called the *Criminal Code*.

4 So there is lots of culture going on in there and lots of different kind of behavior. I understand lock-down's and certainly in my previously life I have been in enough jails visiting clients to understand that they are frequent, lawyers have to wait to see clients and of course, clients are being locked-down in that process. I understand the discomfort that goes along with lock-downs. But that would not persuade me to grant the one point five, because to a very large extent in my view, the jail authorities cannot control every aspect of behaviour that is carried on or carried out by the inmates. There are just far too many. I understand that much is controlled when you can eat, when you can sleep, when you go to the washroom, when you watch t.v., but fights break out and things happen on the range and I know that, so that does not persuade me.

5 I am concerned about your being in a cell with someone who is sick, and I accept that, there is no evidence to challenge that, I am going to accept your word and your testimony on that. You are in a cell, not of your own choice of course, with someone who has a virus, someone who had to be hospitalized and as a matter of course, you picked up the bug. You were ill as your evidence indicates for about three weeks, you had the flu, you had tonsillitis, you had an ear infection. It may well be connected to the person with whom you had to share a cell, and in fact caught it from that person and I accept that.

6 In an ideal world, you should not have been in a cell with someone who was ill, it is not an ideal world obviously.

7 I am also concerned by the fact that doctors are not available, not just for you, for the population at large, the prison population at large. Doctors should be available and certainly in an era before this one, doctors were available. So I am going to accept your testimony, sir, that you did not see a doctor either by way of video or in person. That is a concern. Doctors should be available.

8 I am not going to make any comment with respect to the take down. Take downs I suppose by definition are always risky, police by virtue of their employment and the responsibilities that they take on, expose themselves to risk every time they go out on an investigation and they do not know what they are going to be facing when they arrive at the scene.

9 So in this case, they are at a break and enter, they have their evidence from their surveillance people about what is going on and they are going to be in a state of anxiety, a state of alertness, both for their own protection and in deed to affect the take down of the people they are there to apprehend. If someone gets tackled in the process, I suppose that is another fact of life. I commend the officer, he was very credible in his testimony. He stated that Mr. Happy did not confront him with any weapon or indeed any police officer with a weapon, and I think the problem from the police perspective is, is that when police cannot see someone's hands, if indeed your hands were under you or went into your pants or into your waistband, then that is a concern. But I do not take any issue with the fact that in this circumstance somebody did not immediately respond to a command, so someone got tackled and it was Mr. Happy.

10 The issue of sleeping using a roll of toilet paper as a pillow, that is not acceptable. That is not acceptable. The fact of the lost records, even in preparation for today's hearing, those records should have been preserved, because someone goes to court and the jail is in the process of cleaning its premises, whatever it is, the property of inmates within their own cells so long as it is not contraband, should be respected. That is just in my view common sense and I also want to underscore the fact people who are in holding centers, have not been found guilty of anything. They ought not to be punished yet, until they are found guilty, and sometimes they are not found guilty. So his record should not have been destroyed and he should not have had to have used a toilet paper roll as a pillow.

11 So in balancing all of these factors and it is sometimes very refreshing and elucidating to have a hearing of this nature because it certainly gives an adjudicator a basis upon which to make a decision and more so than submissions, although submissions are always helpful.

12 I am going to accede to the request and order the credit be on a one point five rather than on a one to one basis. So in terms of calculation then, I am sentencing you, sir, and I am going to ask you to stand, I am sentencing you to a term, to the equivalent term of two years less a day. I am instructing Madam Clerk to note the six and a half months of pre-trial custody as the formal and actual time in custody, but I am giving you credit for nine months and three weeks. I am therefore sentencing you, sir, to a term of 14 months and one week concurrent on each count, taking into account the one point five. Are there any other housekeeping matters with respect to Mr. Happy?

MR. MCKEACHIE: If the balance of the charges could be marked withdrawn please.

THE COURT: Yes. The rest of the charges against Mr. Happy are withdrawn. Ms. Nardella, is there anything you wish to address me on?

MS. NARDELLA: Not at this time, Your Honour. No, thank you, Your Honour.

THE COURT: Is there another time you wish to address me?

MS. NARDELLA: No. Perhaps on another matter, Your Honour. Thank you.

THE COURT: All right. In terms of victim fine surcharge, I do not think either of these gentlemen are in any position to pay, so I am going to waive it on both. All right. Thanks very much. And thank you, Ms. Nardella.

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