

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Wysom*, 2018 ONCJ 450

DATE: 2018 07 10

COURT FILE No.: Ottawa 17-A12943

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

THOMAS WYSOM

Before Justice David A. Berg
Reasons for Sentence

Ms. K. McVey.....counsel for the Crown
Mr. J. Doody.....counsel for the defendant

BERG J.:

[1] On December 22, 2017, Thomas Wysom entered pleas of guilt to the following counts:

- That on or about the 21st day of April in the year 2017 at the City of Ottawa in the East Region, he did without lawful excuse, possess for the purpose of transmission, did make available, distribution, sale, advertising or exploitation child pornography in the form of a video, contrary to section 163.1(3) of the Criminal Code of Canada.
- That between the 21st day of April and the 11th day of October in the year 2017, at the City of Ottawa in the East Region, did, without lawful excuse, possess child pornography in the form of a video contrary to section 163.1(4) of the Criminal Code of Canada.

[2] I note that the Crown has proceeded by way of indictment and that each of the two counts attracts a minimum sentence of one year imprisonment.

[3] The matter then went over for sentencing submissions to March 5 and then May 9 and then again on May 31. During the course of these proceedings, I was provided with the following facts upon which to make findings of guilt:

- On April 21, 2017, the Ottawa Police Service initiated an investigation on the internet and became aware that a particular Internet Protocol address was sharing child pornography on a peer-to-peer network. Through further investigation, Det. Casimir eventually was able to obtain a search warrant for Mr. Wysom's residence.
- That search warrant was executed on October 11, 2017. Mr. Wysom was arrested during the execution of the warrant. He was taken to the police station where, after speaking to counsel, he advised the police that material on the computer which they had located at his home was his and that he was aware that it included child pornography.
- I note that Mr. Wysom remained in custody overnight whereupon he was released on bail. He has not been subject to a house arrest condition or anything akin to such.
- In terms of the number of images of child pornography that the police found on Mr. Wysom's computer, I have been advised that there were a total of 60,165 still images, of which 14,207 were unique images, and that there were a total of 1,626 videos depicting child pornography, of which 1,290 were unique images.
- In terms of the range of subjects in these thousands of images, I have been advised that some depict adult males engaged in a variety of sexual behaviours with children, including vaginal, anal, and oral penetration. There are depictions of male children engaged in various sexual activities with adult females. There are also depictions of male and female children engaged in sexual activities with each other. There are images of female children where the camera is focussed on the genital region, the anus, and/or the chest of the child. Some of these girls are shown with their hands and feet bound. A final category are depictions of girls with semen on their faces. During the sentencing process, I was shown five examples of the videos and five examples of the still photographs.
- I have been advised that the corpus of files was not in an organized state.
- The evidence of Det. Casimir, who testified at these sentencing proceedings, indicated that the manner in which Mr. Wysom obtained these images on-line involved a process whereby the act of

downloading them to his computer automatically shared them with others on his peer-to-peer network. In other words, while Mr. Wysom was sharing his collection, he was not engaged in the act of actively choosing material to send to specific correspondents. On the other hand, he did not move his collection to files that would not be shared on the peer-to-peer network as was possible.

- Det. Casimir testified under cross-examination that he was familiar with the material that had been seized in the Insksetter matter and that in his opinion, Mr. Inksetter's collection had been larger and the images worse.

[4] Two reports were prepared to assist me in this sentencing. The first was a pre-sentence report that was completed on February 27, 2018. In summary, Mr. Wysom has no criminal record. He was born and raised in Wales, the youngest of four children. He had an unremarkable childhood. He described a "mental and emotional breakdown" in his young adulthood that appears to have been induced by certain negative events in his life. Subsequently, in 1992, he travelled to Canada and became a permanent resident in 1996. If I understood correctly, he has resided mainly in Vancouver and Ottawa.

[5] He was married from 1994 to 1998. He has been in a relationship with Laurel Blair for 15 years; they do not live together. Ms. Blair has provided the court with a letter of support and was present on at least one of the court appearances before me. He has no children.

[6] He has studied both fine art and commercial animation in a post-secondary school context.

[7] He seems usually to have been gainfully employed. He was employed from 2007 until very recently on the creation of children's cartoons. Apparently, he chose not to renew his contract with his employer as a result of the present charges.

[8] There do not appear to be any substance abuse issues.

[9] Mr. Wysom explained to the probation officer how he began to access child pornography. He indicated that he had had an addiction to adult pornography and then had become desensitized to that material and had needed something more. He told the officer that his viewing of child pornography was compensation for his depression. He indicated that he accepted full responsibility for his actions. I shall return to these issues later in my decision.

[10] Subsequent to his arrest, Mr. Wysom has been under the care of a psychologist, Dr. Drew Kingston. He attends weekly one-on-one sessions with

Dr. Kingston. At the time of the preparation of the pre-sentence report, Mr. Wysom had attended eleven such sessions. In a subsequent letter dated April 27, 2018, Dr. Kingston indicated that Mr. Wysom had attended seventeen sessions with him to date. Dr. Kingston advised the probation officer that Mr. Wysom appeared to be remorseful and motivated to continue counseling. He demonstrated improved insight regarding his specific risk factors and how to deal with them. Dr. Kingston was of the view, I am told in the PSR, that Mr. Wysom presents as low risk to commit another sexual offence.

[11] The PSR outlines that Mr. Wysom also has some physical health issues that should be monitored by correctional staff.

[12] A sexual behaviours assessment was also prepared at my request. It is dated January 31, 2018 (with an addendum in the form of a letter dated to April 24) and addressed to Mr. Doody. Its author is Dr. Jonathan Gray, a forensic psychiatrist.

[13] Mr. Wysom explained to Dr. Gray how he came to access and possess child pornography. He indicated that roughly ten years ago, he had begun using the internet on a regular basis and had started coming across adult pornography sites. Then, through time, he had gradually begun access sites that dealt with images of children, then unclothed children, and then children in overtly sexual contexts. He then began to download the images and videos that he came across. He advised that through time, his interest turned to images of increasingly younger children in these sexual contexts.

[14] Mr. Wysom discussed with Dr. Gray the external stressors in his life that led him to his most active period of accessing and possessing child pornography. I will not list them here. I accept that these stressors existed in Mr. Wysom's life at the relevant times. I do not accept that Mr. Wysom was accessing and possessing child pornography solely because of these external stressors. Mr. Wysom was accessing and possessing child pornography ultimately because he enjoyed accessing and possessing child pornography. The issue is not becoming incrementally desensitized to adult pornography. The issue is enjoying child pornography. The issue is not why society didn't help Mr. Wysom. The issue is that Mr. Wysom enjoyed what he was looking at and he didn't think he would get caught. The stressors in his life may have led him to throw caution to the wind, but the stressors did not create in Mr. Wysom an ability to take pleasure from those images. That ability pre-existed the stressors. Furthermore, Mr. Wysom, I have known many people engaged in destructive or self-destructive behaviours who have stopped what they are doing and sought help. You could have erased your computer and sought professional help. That option was available to you. You did not take it. This is no one else's fault. You have pleaded guilty, you have accepted responsibility, however, I am not at all certain as to the level of your

insight. I think that you are still quite far from comprehending that the problem is you and only you. I think that you are still trying to rationalize your behaviour to yourself and to others in the face of society's reaction to what you have done. You apologized to me after I had to look at a small sampling of your collection. I do not think that you had any difficulty in discerning my reaction. You know well how the vast majority of your fellow citizens would react if they saw those images. For you to suggest that your viewing of these images was due only to external factors and that society has failed you by not helping you before you were charged is disingenuous.

[15] Dr. Gray reviews Mr. Wysom's physical health problems and also goes over his psychological history. These are some of the stressors referred to earlier. I do note that Dr. Gray and Dr. Kingston conferred and that progress by Mr. Wysom in dealing with his problem has been noted.

[16] As part of his report, Dr. Gray subjected Mr. Wysom to a battery of tests at the Sexual Behaviours Clinic at the Royal Ottawa Health Care Group Forensics Division. As a result of these tests, he is of the opinion that Mr. Wysom can be said to meet the diagnostic criteria for a diagnosis of pedophilic disorder, non-exclusive type, sexually attracted to females. Dr. Gray was also of the opinion that Mr. Wysom's overall risk of future sexual contact with children or child pornography was very low. I accept this assessment, however, I also note Dr. Gray's caveat that risk assessment tools for this type of offender are still in a preliminary stage of development.

[17] An important passage of Dr. Gray's report reads as follows: "Unlike some child pornography offenders, he is able to articulate a nuanced description of the harm he causes the victims portrayed in the illegal materials by downloading and viewing them."

[18] I was provided with a letter dated April 24, 2018 from Dr. J. Paul Federoff, the Director of the Sexual Behaviours Clinic at the Royal Ottawa Hospital. He advises that Mr. Wysom was attending and actively participating in group therapy under Dr. Federoff's direct supervision and appeared to be doing well.

[19] Mr. Doody provided me with several letters of support from friends, neighbours, and family. It is clear from those letters that far from hiding his current legal predicament, Mr. Wysom has come forward and been open about it with significant people in his life.

[20] I have been advised that the global Crown position was for forty months of custody less pre-sentence custody; presentence custody was one day. That global position can be broken down to forty months for the making available count and two years less a day concurrent on the possession charge. Initially, the defence was seeking a reformatory sentence. However, on May 31, after the

Ontario Court of Appeal released its decision in *Inksetter*, Mr. Doody conceded that the facts in Mr. Wysom’s case in light of *Inksetter* required a penitentiary sentence.

[21] The Crown is also seeking the following ancillary orders:

- a mandatory DNA order
- a lifetime SOIRA order [s. 490.013(2.1)]
- a 10 year s. 161 order
- and an order of forfeiture of the seized materials

[22] It is my understanding that Mr. Wysom will be consenting to the making of these orders.

[23] The decision in the *Inksetter* appeal was released on May 23, 2018. As a result, when the Wysom matter was spoken to on May 31, Mr. Doody advised me that he was conceding that a reformatory sentence was not available to Mr. Wysom. Implicit in the defence’s new position is obviously that Mr. Wysom must be sentenced to a penitentiary sentence but that said sentence should be less than that sought by the Crown.

[24] So, to reiterate, the Crown is seeking a sentence of forty months (less pre-sentence custody) while the defence is seeking a penitentiary sentence closer to two years. I now turn to the Ontario Court of Appeal’s decision in *R. v. Inksetter*, 2018 ONCA 474.

[25] Mahlon Inksetter had pleaded guilty to the same two offences as in the case at bar. His collection of child pornographic material was characterized by the Court of Appeal at para. 1 as “...one of the largest and worst collections of child pornography that the Ottawa Police service had ever uncovered.” The police started to go through the collection and identified 133, 266 photographs of which 28,052 were unique photographs and 3,032 videos of which 1,144 were unique videos of child pornography on Mr. Inksetter’s computer and other devices. At the point that they stopped their reviewing and categorizing, there were still 1.2 million photographs and 40,000 videos left to be analyzed.

[26] Qualitatively, the Court of Appeal noted at para. 4 that the lead investigator testified at the sentencing “that the respondent’s collection – which was amassed over several years – was among the top one or two most difficult collections she has ever had to review. Ninety-five percent of the material depicted actual penetration and other explicit sexual activity. Some of the images of explicit sexual activity involved children as young as one-year old. The images included bondage and bestiality. The respondent organized his collection in hundreds of folders, named in a manner consistent with their contents.” Indeed, in his sentencing decision, the trial judge referred to the collection as being “very well-organized” and as “at the extreme end of the spectrum;” see para. 6.

[27] Mr. Inksetter’s personal situation at the time of the offence was not unlike that of Mr. Wysom. He was 51 years of age. He was not married. He had no criminal record. He pleaded guilty at the first reasonable opportunity. He faced certain external stressors not dissimilar to those faced by Mr. Wysom. He began viewing adult pornography and then graduated, if that is the correct word, to child pornography. It seems that his viewing of this latter type of material was accompanied by increasing marijuana use, however, I do not understand the suggestion to have been that there was a causal link. Assessments by a psychologist and a psychiatrist agreed that Mr. Inksetter was at a very low risk to commit a future child pornography offence. However, unlike Mr. Wysom, the sexual behaviours assessment concluded that a diagnosis of a pedophilic disorder was unlikely.

[28] The trial judge sentenced him to two years less a day and three years’ probation. However, the Court of Appeal was of the view that this sentence was in error. As Hoy ACJO wrote for the unanimous court, at paragraph 3:

“Respectfully, I agree with the Crown that while the trial judge specifically acknowledged that denunciation and deterrence were the paramount sentencing objectives for offences involving child pornography, his reasons demonstrate that he failed to give them paramount effect and that his error had an impact on the sentence that he imposed.”

and imposed a global sentence of three and one half year’s imprisonment. The Court of Appeal stressed that denunciation and general deterrence are the primary principles of sentencing for offences involving child pornography. It is noteworthy that Hoy ACJO indicated at para. 21 that:

“... I agree with the trial judge that the objectives of specific deterrence and rehabilitation were largely met before sentencing. In my view, having regard to the circumstances of the offence and the offender, a global sentence of three and one half years’ imprisonment for possession of child pornography and making child pornography available is required to satisfy the objectives of denunciation and general deterrence.”

[29] The ONCA broke down the global sentence to 3 years for the possession and 3.5 years for the make available to be served concurrently, stating at para. 27:

“[a] longer sentence on the count of “make available” child pornography than for the count of “possession” is warranted because by making images and videos he downloaded available to others via the internet, the respondent contributed to the further victimization of the children depicted in the pornographic images“

[30] The Court of Appeal has thereby seemingly established an upper range for sentences upon guilty pleas by first time offenders to these offences: 36 months for possession and 42 months for making available. It is to be remembered here that Mr. Inksetter’s collection was “...one of the largest and worst collections of child pornography that the Ottawa Police service had ever uncovered.” I note the following differences between the facts in Mr. Inksetter’s matter and the matter at bar:

- while large, Mr. Wysom’s collection was significantly smaller than that of Mr. Inksetter;
- the depictions of sexual violence in Mr. Wysom’s collection, while vile, were not characterized in evidence before me as being “at the extreme end of the spectrum.” Indeed, the evidence that I heard from Det. Casimir was that the images in the Inksetter corpus were worse; and
- unlike Mr. Inksetter’s collection, Mr. Wysom’s material had not been curated, in other words, Mr. Wysom had not spent time and effort categorizing his child pornography. I pause here to remark that to be frank, I am not at all certain why a curated collection of such material would be qualitatively worse than one that was uncurated.

[31] Thus, while Mr. Wysom must be sentenced to the penitentiary, the length of an appropriate sentence in his matter will be less than the forty-two months to which the Court of Appeal sentenced Mr. Inksetter. On the other hand, it must be at least 24 months as was conceded by the defence. I reiterate here that even without the defence concession, the facts in Mr. Wysom’s case would not allow for a sentence in the reformatory.

[32] In *R. v. Kwok*, [2007] O.J. No. 457, Molloy J. stated the following:

[7] Not surprisingly, each case turns on its own particular facts. However, an analysis of the case law does reveal an emerging consensus on the relevant factors to be taken into account: see, in particular, *R. v. Parise*, [2002] O.J. No. 2513 (Ont. C.J.); *R. v. Mallett*, [2005] O.J. No. 3868 (S.C.J.). Generally speaking, any of the following are considered to be aggravating factors: (i) a criminal record for similar or related

offences; (ii) whether there was also production or distribution of the pornography; (iii) the size of the pornography collection; (iv) the nature of the collection (including the age of the children involved and the relative depravity and violence depicted); (v) the extent to which the offender is seen as a danger to children (including whether he is a diagnosed pedophile who has acted on his impulses in the past by assaulting children); and (vi) whether the offender has purchased child pornography thereby contributing to the sexual victimization of children for profit as opposed to merely collecting it by free downloads from the Internet. Generally recognized mitigating factors include: (i) the youthful age of the offender; (ii) the otherwise good character of the offender; (iii) the extent to which the offender has shown insight into his problem; (iv) whether he has demonstrated genuine remorse; (v) whether the offender is willing to submit to treatment and counseling or has already undertaken such treatment; (vi) the existence of a guilty plea; and (vii) the extent to which the offender has already suffered for his crime (for example, in his family, career or community).

[33] In the case of Mr. Wysom, the aggravating factors, as I see them are:

- the size of the collection;
- the age of some of the children depicted;
- the nature of some of the acts depicted;
- while Mr. Wysom has been diagnosed as a pedophile, he has never acted on those impulses and committed a sexual offence; however, I find that Mr. Wysom's lack of insight into his disorder is aggravating. As I will discuss under mitigating factors, his lack of insight does not mean that he is not motivated to avoid any further forays into child pornography. To my mind, it just means that until such time as he fully accepts that he is the problem and not the stresses of life or society at large, he has not fully accepted his blameworthiness in this matter;
- in the circumstances of Mr. Wysom, the distribution of the child pornography is not an aggravating factor, it is a separate charge for which I will also be sentencing him.

[34] In mitigation, I find the following:

- Mr. Wysom's guilty plea. To be clear, I accept that in the circumstances of this case, Mr. Wysom has entered an early plea of guilt;
- his co-operation with the investigators;
- his otherwise good character;
- his pro-social contacts in the community'
- he appears to recognize the anti-social nature of his behaviour and seems to well understand the process by which the children who are depicted in these pornographic images are not only victimized, but victimized time and time again. This level of insight would bode well for his efforts at rehabilitation; I have already commented on what I perceive to be the limits to his insight;
- I accept that his insight into how the children were victimized has led him to be remorseful;
- Mr. Wysom began treatment with Dr. Kingston and Dr. Federoff and underwent a sexual behaviours assessment; and
- both a psychologist and a psychiatrist have opined that Mr. Wysom presents as being at a low risk to reoffend.

[35] As I have indicated earlier, the facts in Mr. Wysom's matters, while serious, are not as serious as those in the Inksetter matters. The number of images possessed by Mr. Wysom was significantly smaller and the images themselves were not at the extreme end of the spectrum as they were in Inksetter. Mr. Wysom's level of insight, while sufficient to allow him to engage in therapeutic sessions in a meaningful manner, is nonetheless limited by his lack of acceptance that the problem resides within him.

[36] Given that the main goals of sentencing in cases of child pornography are denunciation and deterrence, the effect of the listed mitigating factors is quite limited; the main thrust of this sentencing is aimed at denouncing the two offences to which Mr. Wysom has pleaded guilty and deterring other like-minded individuals from committing similar offences. This is not to say that I have ignored the other principles of sentencing, but that they are of limited effect in cases like this.

[37] Coming up with an appropriate sentence for Mr. Wysom is not a straightforward mathematical exercise. One does not say, for example, that the number of images in Wysom's collection was but a calculable fraction of those in Inksetter's collection and that therefore Wysom's sentence should reflect that number. While I suppose that when dealing with only the numerical aspects such a formula would be possible, to my mind the qualitative differences do not lend themselves to a mathematical formula. I note here once again the significant qualitative difference between the Inksetter collection and that possessed by Mr. Wysom.

[38] Taking all of the foregoing into account, my sentence is a global sentence of 28 months broken down as follows: 28 months on the charge of making child pornography available; 18 months on the possession of child pornography to be served concurrently. The one day of presentence custody is to be deducted from that total.

[39] I am also granting the orders sought by the Crown:

- a mandatory DNA order;
- a lifetime SOIRA order [s. 490.013(2.1)];
- a 10 year s. 161 order;
- and an order of forfeiture of the seized materials.

[40] As well there will be a victim fine surcharge of \$400. Given my sentence, I will grant Mr. Wysom two years to pay that amount.

Released: July 10, 2018

Signed: Justice David A. Berg