

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Reiner*, 2007 YKSC 42.

Date: 20070515
Docket: S.C. No. 06-01516
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

ROBERT FRANZ REINER

Before: Mr. Justice R.S. Veale

Appearances:
Michael Cozens
Emily Hill

For the Crown
For the Defence

**MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): On March 13 of 2007, Robert Reiner was convicted of assaulting Kelly Clay while threatening to use a knife, contrary to s. 267(a) of the *Criminal Code*. The offence took place at the private residence of Mr. Clay and his partner at Rainbow Road in the City of Whitehorse in the early morning of May 7, 2006.

[2] Mr. Reiner's spouse, Esmeralda Charlie, and his child, Nevada, had left his residence on a permanent basis as the result of a domestic dispute on the previous evening. They were staying the night at the Rainbow Road residence. Ms. Charlie had visited the RCMP to obtain their assistance in removing her personal effects from Mr. Reiner's residence and that was communicated to Mr. Reiner. Fortunately, neither Ms.

Charlie nor Mr. Reiner's daughter, Nevada, witnessed the altercation when Mr. Reiner appeared at the Rainbow Road residence and demanded to see his child. He was intoxicated and did not accept the advice of Mr. Clay, who asked him to leave. In the resulting altercation, Mr. Reiner had his hand on the throat of Mr. Clay. He also threatened to use a small pocket knife, although the blade was never opened.

[3] The Crown and defence have put forward a joint sentencing proposal of a conditional sentence of between four and six months but they have not agreed on all the terms of a conditional sentence. They have agreed on a number of aggravating factors.

[4] Firstly, the offence occurred following a domestic dispute at a private residence where Ms. Charlie and Nevada were staying after making a decision to leave Mr. Reiner. These situations are particularly dangerous because emotions are running high, particularly when Mr. Reiner was intoxicated.

[5] Secondly, Ms. Charlie's friends were providing safe refuge and shelter to her and Nevada, and Mr. Reiner had no business being there at that time of the night and in that condition.

[6] Thirdly, Mr. Reiner has a prior criminal record, which includes a 1999 conviction for possession of property obtained by crime under \$5,000, and a 2004 conviction for obstructing a peace officer in possession of a scheduled substance contrary to the *Controlled Drugs and Substances Act*, and he was convicted of a breach under s. 145(3), in that he breached his current release order which prohibited him from drinking alcohol.

[7] The Crown and defence also agree that there are mitigating factors. Mr. Reiner was cooperative on his arrest and has certainly been cooperative with his probation officer during his release and in the preparation of the pre-sentence report that has been prepared by Ms. Treusch. Secondly, he has taken steps towards his rehabilitation, particularly in not drinking since his breach of his release conditions, which means no alcohol for almost a year, and maintaining a healthy relationship with his family, his partner and his daughter and his partner's family, and that is certainly to his credit.

[8] I do have a concern that he has underestimated the seriousness of the offence. I also am of the view that while Mr. Reiner has made some positive efforts to change his lifestyle, he has had a tendency to minimize his alcohol problem as a past alcohol problem rather than one that both his partner and his own mother believe to be a serious concern. However, I also should indicate that Mr. Reiner has agreed, to his credit, to take treatment that is alcohol related or for any other issue that may be recommended by his supervisor.

[9] The probation officer has indicated that he is a good candidate for a conditional sentence, which will allow him to serve his sentence while remaining in the community and continuing his employment and supporting his partner and his child. I am satisfied that the range of four to six months, as agreed by the Crown and the defence, is an appropriate range, and that serving the sentence in the community will not endanger the safety of the community.

[10] I am also of the view that the purpose of this sentence is one that should reflect the importance of rehabilitation, in addition to punishment and deterrence.

[11] As stated by former chief justice of the Supreme Court, Chief Justice Lamer in the case of *R. v. Proulx*, [2000] 1 S.C.R. 61, house arrest is the norm and not the exception. I am going to quote from three different paragraphs where this is dealt with in *R. v. Proulx* at paragraph 103:

First, the conditions should have a punitive aspect. Indeed, the need for punitive conditions is the reason why a probationary sentence was rejected and a sentence of imprisonment of less than two years imposed. As stated above, conditions such as house arrest should be the norm, not the exception. This means that the offender should be confined to his or her home except when working, attending school, or fulfilling other conditions of his or her sentence, e.g. community service, meeting with the supervisor, or participating in treatment programs.

In paragraph 111, Chief Justice Lamer stated:

House arrest may also have a rehabilitative effect to a certain extent in so far as it prevents the offender from engaging in habitual anti-social associations and promotes pro-social behaviours such as attendance at work or educational institutions.

And finally, paragraph 127, which is the summary. I am referring to number 2.

A conditional sentence should be distinguished from probationary measures. Probation is primarily a rehabilitative sentencing tool. By contrast, Parliament intended conditional sentences to include both punitive and rehabilitative aspects. Therefore, conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest should be the norm, not the exception.

[12] Now, I have read those particular provisions because I want to make it clear that, in my view, the practice of imposing curfews, as there was some indication it is a practice in the Territory, does not reflect, in my view, the decision of Supreme Court of Canada in *R. v. Proulx*. A conditional sentence is a sentence of imprisonment in the community, and the freedom of movement of the offender is restricted, with the exception when there is written permission from the conditional sentence supervisor to

be away from the offender's home. In my view, a curfew is not generally appropriate for a conditional sentence unless there are some very exceptional circumstances:

[13] In the case before me, I am of the view that a house arrest is the appropriate term of the conditional sentence. Mr. Reiner's previous record, his breach of the release conditions, do not, in my view, support any exceptional circumstances.

[14] So, Mr. Reiner, I just want to make it clear to you that the sentence that I am going to impose is one that you will be under house arrest and you will only be able to leave your residence when you have the written permission of your conditional sentence supervisor.

[15] I am also of the view that the offence is a serious one and I am therefore imposing a conditional sentence of six months imprisonment, to be served in the community on the following conditions:

1. You must keep the peace and be of good behaviour.
2. You must appear before the Court when required to do so by the Court or your conditional sentence supervisor.
3. You must report to a conditional sentence supervisor within two working days and thereafter when required by your supervisor, and in the manner directed by your supervisor.
4. You must remain in the Yukon Territory unless you have the written permission from the Court or your supervisor to be out of the Territory.

5. You must notify the Court or your supervisor in advance of any change of name or address and promptly notify the Court or your supervisor of any change of employment or occupation.

House Arrest:

6. You must reside at a residence approved by your supervisor and not change your residence without your supervisor's written consent.
7. You must remain inside your residence except for reporting to your supervisor and as your supervisor permits in writing, which I will set out below.
8. You are to present yourself at the door of your residence when requested by the staff of the Yukon Justice, Community and Correctional Services Department or police officers in order to confirm your compliance with this condition.
9. You are to answer your home telephone when called by staff of the Yukon Justice, Community and Correctional Services Department or police officers in order to confirm your compliance with this condition.
10. Your supervisor may give you written permission to be away from your residence for the purpose of:
 - (a) going directly to your place of work and then returning directly to your residence after working,
 - (b) attending counselling or treatment approved by your supervisor,
 - (c) shopping two hours twice each week, and
 - (d) exercise of a total of five hours per week.

11. When you are away from your residence, you must not enter any premises where the primary commodity for sale is alcohol, including government liquor stores, beer and wine stores, taverns, pubs, licensed lounges, cabarets, special events, facilities, strip bars and gambling casinos.
12. When you are away from your residence, you must carry this order and your supervisor's written permission letter with you at all times, and you must produce this order and the written permission letter to any peace officer who stops or questions you for any purpose.

Prohibited Substances:

13. You must abstain absolutely from the possession or consumption of alcohol or other intoxicating substances, illicit drugs or drugs which require a doctor's prescription, except that you may consume drugs which require a doctor's prescription in the manner and in the amounts directed by the prescribing doctor.
14. You must not have any alcohol or other intoxicating substances, illicit drugs or non-prescribed drugs at your residence.
15. You must allow your supervisor or any peace officer to inspect your residence to see that you have complied with this condition.
16. You must provide breath samples or urine samples or both on the demand of your supervisor at any time and on the demand of any peace officer who reasonably suspects that you have breached the abstention condition.

Rehabilitation and Treatment:

17. You must take such alcohol and/or drug assessment, counselling or programming as directed by your supervisor, and attend and complete a residential treatment program as directed by your supervisor.
18. You must take such assessment, counselling and programming as directed by your supervisor.
19. You should have no contact directly or indirectly or communication in any way with Kelly Clay except with the prior written permission of your supervisor.
20. You must participate in such educational or life skills programming as directed by your supervisor.
21. You must make reasonable efforts to maintain suitable employment and provide your supervisor with all necessary details concerning your efforts.
22. You must provide your supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities which you have been directed to do pursuant to this conditional sentence order.
23. You must not have in your possession any firearm, ammunition, explosive substance or weapon.

[16] I am also ordering that pursuant to s. 491 there shall be a mandatory forfeiture of the knife that was used in the offence. Pursuant to s. 109 of the *Criminal Code*, there will a mandatory ten year weapons prohibition commencing from the completion of your

probation order, which I will deal with in a minute. Thirdly, I am going to make an order that there be a collection of your DNA pursuant to s. 487.051(1)(a) of the *Criminal Code*.

[17] It is important for you to understand, Mr. Reiner, and I believe you do, that if you breach any of these conditions, you may be called back to this court and you may be sentenced to serve the remaining part of your conditional sentence in jail.

[18] In my view, it is also appropriate to have a period of probation of one year on the same conditions as the conditional sentence conditions but excluding the house arrest conditions, paragraphs 6 to 10, and condition 16. I am doing so to ensure that you have a full opportunity to obtain the rehabilitative services that are going to be made available to you, and to ensure that you have adequate time to take these treatments. I am convinced that you made a mistake and that you have acknowledged that, but I hope that you are going to treat this conditional sentence and probation in a constructive manner, because my belief is that, at the end of the day, you will come out a stronger and better person, and I know it will be to the benefit of your partner and your daughter, particularly.

[19] Any questions?

[20] MR. COZENS: Just a few that arise, My Lord. First with respect to the house arrest and the checking at the door or the telephone. I hadn't noticed whether there was a clause that indicated a failure to answer would be a presumptive breach of his condition?

[21] THE COURT: That was not an issue that was raised by the Crown before. What is your view on that?

[22] MS. HILL: I think, to be fair and standard -- it's standard; it follows the knock and talk.

[23] THE COURT: You can include that in the clause, then, Mr. Cozens.

[24] MR. COZENS: With respect to the requirement to provide a sample, now, it's been my understanding since the Supreme Court of Canada dealt with the *R. v. Shoker* case, 2006 SCC 44, on probation clauses that even though that was not directly what was dealt with, by the reasoning of that, it cast some doubt on the ability to do that even on a conditional sentence, which has, of course, a lower expectation of privacy because it's a jail sentence. I notice that the -- I believe it was in 2005, the *R. v. Joe* case, 2005 YKCA 9 out of our court of appeal, while not directly dealing with that issue, looked at whether that condition might also be erroneous except they didn't have to deal with it as a sentencing that hadn't been concluded. They were dealing with another aspect. And from my read of *Shoker*, it seems that they're saying there needs to be some legislative change in guidelines. So I'm not sure what our submissions were on that point this morning, but --

[25] THE COURT: Well, my recollection is that they were completely the opposite. Was I correct in understanding that, Ms. Hill?

[26] MS. HILL: No, I think Ms. Grandy took the position, and I think my friend has fairly put it that there is still some debate, but I think Ms. Grandy took the

position it was appropriate on a conditional sentence, inappropriate on a probation order.

[27] THE COURT: Right, and that is the conclusion that I have reached, Mr. Cozens.

[28] MR. COZENS: Well, certainly. It may well be a subject of another matter.

[29] THE COURT: You can consult a higher court if you wish but I am not going to change that condition.

[30] MR. COZENS: I'm certainly not going to go upstairs with it. But no, I am not familiar with any cases that have directly dealt with that since *Shoker*. It's just one of the lines of reasoning that may end up being followed or it may not.

[31] With respect to the firearms, my understanding is that a firearms prohibition order takes places today and, from what Your Lordship said, will run from today, through the sentence, through the probation order and then an additional ten years?

[32] THE COURT: Yes, but essentially I have made it a condition of the conditional sentence order, and then I have said the prohibition under s. 109 commences on the completion of the probation.

[33] MR. COZENS: The read of s. 109 says that the duration of prohibition order begins on the day on which the order was made, and that follows the impaired driving cases and driving disqualifications, the *R. v. Johnson* case, [1996] B.C.J. No.

2508 (C.A.), that the prohibition driving disqualification starts the day the order was made. So I believe this one has to start today. It can run in excess of ten years, to cover that period.

[34] THE COURT: Where are you referring to?

[35] MR. COZENS: Section 109(2)(a)(i).

[36] THE COURT: I understand what you are saying, and it begins on the day the order is made and it ends ten years after the release from probation, or what you say, the release from --

[37] MR. COZENS: The minimum that it can be is ten years from today, and it can run while a person is in custody.

[38] THE COURT: Right. Right.

[39] MR. COZENS: But you can make it longer if you wish to.

[40] THE COURT: Just to make it clear, I am just saying that it should run ten years from the date of the completion of the probation, but I agree with you, it starts now, according to the section.

[41] MR. COZENS: And finally, the victim fine surcharge.

[42] THE COURT: What are you seeking?

[43] MR. COZENS: It's just the mandatory -- I think it's a \$50 victim fine charge; \$100 victim fine surcharge. I'm just bringing it up for the Court to decide whether it will or will not be applied.

[44] THE COURT: Well, I do not see any reason that the surcharge should not apply. So there will be a victim fine surcharge of \$100.

[45] MS. HILL: Two matters, My Lord. First, on the victim fine surcharge, I think Mr. Reiner probably needs some time to pay that.

[46] THE COURT: I am sure he does. What does he want? How much time does he seek?

[47] MS. HILL: Three months.

[48] MR. COZENS: No issue, My Lord.

[49] THE COURT: So the victim fine surcharge will be payable three months from today.

[50] MS. HILL: Thank you. I realize that the Court has imposed house arrest and I note that the Court has not permitted any other exceptions besides the five hours a week for exercise. Mr. Reiner has asked me to ask the Court whether there is any possibility of further exception with written permission of Ms. Treusch. He tells Ms. Charlie is graduating on Saturday. He hoped to attend that with the permission, and I understand there's a potlatch in Ms. Charlie's family in approximately one month's time. I realize that that is an exception to the house arrest rule, but.

[51] THE COURT: I will leave it to the discretion of Ms. Treusch to grant written permission to attend those two events.

[52] MS. HILL: That would be an addition term with permission of Ms. Treush.

[53] THE COURT: It should be an additional term, then.

[54] MS. HILL: Thank you.

[55] THE COURT: Anything further, Mr. Cozens.

[56] MR. COZENS: No, My Lord.

[57] THE COURT: Thank you.



VEALE J.