

Citation: *R. v. Boya*, 2006 YKTC 22

Date: 20060217
Docket: T.C. 04-10062
05-10043A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

REGINA

v.

CLARENCE DONALD BOYA

Appearances:
Edith Campbell
Keith Parkkari

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] FAULKNER C.J.T.C. (Oral): On July 30, 2005, in Watson Lake, Yukon, the offender, Donald Boya, stayed the night at the home of his sister and her partner, a Mr. MacKay (sic). A number of other people also spent the night, including S.P., a 14-year-old girl who was very intoxicated and passed out on a couch in the living room of the home. During the night, Mr. Boya assaulted the girl by pulling down her pants and underwear and climbing on top of her. He was surprised by Mr. MacKay, who pulled him off S.P.

[2] At some other time in the night, Mr. Boya went to another room in the house where V.A. awoke to find Mr. Boya on her bed fondling her breasts. She jumped up and Mr. Boya left the room. Mr. Boya did not accept responsibility for these offences, but was, in fact, found guilty after trial, where both victims were required to testify.

[3] Earlier, on the 15th of February of 2005, Mr. Boya had again been staying at another person's house. That house was occupied by a Mr. Gilbert Labine. Mr. Labine initially gave Mr. Boya permission to stay there, but later asked him to leave because Mr. Boya was drinking alcohol. As a result of being asked to leave and being shown the door, Mr. Boya grabbed Mr. Labine and there was a scuffle. During the course of the scuffle, Mr. Labine was pulled to the floor and received some bruises and scratches.

[4] In the case of the assault on Mr. Labine, Mr. Boya was initially charged with assault causing bodily harm. Ultimately, he entered a guilty plea to a charge of common assault.

[5] The two sexual assaults and the common assault are now before me for disposition. With respect to disposition, the Crown seeks a sentence in the range of 18 to 24 months and a lengthy probation order with respect to the sexual assaults, and seeks a 30-day custodial sentence on the s. 266 charge. On behalf of Mr. Boya, Mr. Parkkari contended for a global sentence in the range of 12 to 14 months.

[6] The mitigating factors with respect to the offender and the offences can be stated quickly. Firstly, it is obvious that Mr. Boya's criminal history may well be the product, at least in part, of a very difficult upbringing and a lengthy battle he has waged with alcohol addiction. Secondly, as Mr. Parkkari pointed out, both sexual assaults were brief and

were not completed, in the sense that there was no completed act of sexual intercourse in either case. However, it is clear that in both cases, Mr. Boya's discovery prevented matters from proceeding further than they did.

[7] The catalogue of aggravating factors is somewhat longer. Firstly, Mr. Boya has a very extensive prior criminal record, and that record includes 12 prior assault convictions and numerous process offences. However, it must be noted that none of the assault convictions are for sexual assault. Secondly, it is an aggravating factor that Mr. Boya was on probation when these offences were committed. Third, there is the obvious aggravating factor that there were two separate sexual assaults on the one night. Fourth, it is equally obvious that Mr. Boya was not dissuaded from the second assault by his discovery in the midst of the first. Fifth, one of the victims was only 14 years of age and was a relative of the offender. Sixth, both victims were incapacitated, one by alcohol consumption and the other by serious illness.

[8] Given the limited time available to me, I will not attempt to provide a searching analysis of the numerous sentencing precedents that were provided by counsel, and for which I thank counsel, but I will only state my conclusions in regard to the matters.

[9] First, with respect to the quantum of sentence, it must be noted that this sort of sexual assault is all too common in this Territory and keeping in mind all of the principles of sentencing as enumerated in the *Code* and in the cases, *R. v. Gladue*, [1993] Y.J. No. 218, not the least of them, there is, with respect to offences such as this, in my view, an overarching need to denounce and deter such egregious conduct. At the end of the day, the cases, particularly the decision of the Yukon Territory Court of

Appeal in *R. v. G.C.S.*, [1998] Y.J. No. 77, suggests that the range of sentence contended for by the Crown is entirely appropriate here, especially considering that, in this case, there were two sexual assaults.

[10] The other matter to be considered is the matter of pre-trial custody. Mr. Boya has been in custody some five months. It appears that for the first month, Mr. Boya was not able to access privileges available to sentenced inmates, but he has been offered, and has taken advantage of, comparable opportunities since that time. In the circumstances and as urged by Mr. Parkkari, I credit Mr. Boya for two months or two for one credit for the first month he spent in custody and six months or the rate of one point five to one for the remaining four months, for a total credit of eight months for pre-trial custody.

[11] In the result, with respect to the two charges of sexual assault, I sentence Mr. Boya to 21 months concurrent for each of those sexual assaults and one month consecutive for the common assault, for a total of 22 months. Allowing eight months credit for the pre-trial custody leaves a remanet of 14 months yet to be served.

[12] I have been asked to consider a conditional sentence on the premise that such a sentence might be suitable, provided Mr. Boya could serve that sentence while a resident at the Adult Resource Centre or ARC. Given this offender's record and particularly noting the large number of breach offences, given the fact that Mr. Boya was on probation at the time of the commission of these offences, I conclude that a conditional sentence would not be appropriate, as public safety could not be assured. Additionally, in my view, a conditional sentence would not meet the objectives of

sentencing in these circumstances, given the need to deter and denounce the sort of conduct complained of in this case.

[13] Following Mr. Boya's release from custody, he will be subject to a probation order for a period of two years. The terms of the order will be that he will:

1. Keep the peace and be of good behaviour.
2. Appear before the Court as and when required to do so.
3. Notify the probation officer in advance of any change of name or address and promptly notify his probation officer of any change of occupation or employment.
4. Report to a probation officer immediately upon his release from imprisonment and thereafter as and when directed and in the matter directed by the probation officer.
5. Abstain absolutely from possession or consumption of alcohol or controlled drugs or substances, except in accordance with a prescription provided to him by a qualified medical practitioner.
6. Reside at such place as the probation officer may direct, including but not limited to, residential facilities such as a half-way house and while so a resident, will abide by the rules of that residence.
7. Not change his address without the prior written permission of a probation officer.
8. He will have no contact directly or indirectly with V.A. or S.P.
9. He will attend and participate in such assessment, counselling and treatment as directed by the probation officer, including but not

limited to sex offender treatment and residential alcohol and drug counselling treatment.

10. He will attend for such other assessment, counselling or treatment as may be directed by the probation officer.

[14] Additionally, I direct that the accused provide samples of bodily substances for the purposes of DNA analysis and banking. I direct that he comply with the provisions of the *Sex Offender's Information Registration Act* for a period of 20 years. The offender is prohibited from the possession of firearms, prohibited or restricted weapons, ammunition or explosives for a period of 10 years.

[15] The Crown, having proceeded by indictment with respect to the sexual assault matters, the surcharge in each case is \$100, and with respect to the assault charge, Crown proceeded summarily, the surcharge is \$50. Those sums are payable forthwith. In default, the period of default to be served concurrently.

[16] MS. CAMPBELL: I think that there is one outstanding matter, the breach of probation and the Crown directs a stay of proceeding on that charge, Your Honour.

[17] MR. PARKKARI: Just for clarification for the record, I believe it is Mr. McLeod, not Mr. McKay.

[18] THE COURT: I am sorry, Mr. McLeod.