IN THE SUPREME COURT OF YUKON

Citation: *R.* v. *Chapman,* 2008 YKSC 06

Date: 20080125
S.C. No. 06-01520
Registry: Whitehorse

Between:

REGINA

And

HARVEY JASON CHAPMAN

Before: Mr. Justice L.F. Gower

Appearances:

Noel Sinclair — Counsel for the Crown
James Van Wart — Counsel for the defence

REASONS FOR SENTENCING

INTRODUCTION

[1] In this matter I am asked to make a disposition under s. 742.6(9) of the *Criminal Code* for a breach of a conditional sentence order ("CSO") imposed on October 18, 2007, by Deputy Judge Brooker of this Court, for an offence of possession of cocaine, contrary to s. 4(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. At that time, Crown counsel was seeking a conventional jail sentence of four to five months, while defence counsel sought a shorter conditional sentence of 60 to 90 days. Brooker J., with expressed reluctance, imposed a conditional sentence of 12 months and warned the offender that if the conditional sentence were to be breached and returned in front of him,

it would likely be terminated, such that he would be required to serve the balance of the term in jail.

[2] On November 8, 2007, the RCMP located Mr. Chapman at about 3 p.m. in the community of Ross River and determined that he had been drinking alcohol, in breach of his CSO. Further, while arresting him, the RCMP discovered three packages of marijuana, weighing 8 grams each, and $200 cash in his jacket pocket. Accordingly, they charged him with one count of possession of marijuana for the purpose of trafficking and one count of simple possession of marijuana.

[3] Mr. Chapman consented to being remanded in custody on both the conditional sentence breach and the two drug charges from November 9, 2007 to date, which is a total of 78 days. Pursuant to ss. 742.6 (10) and (12) of the *Criminal Code*, the CSO was suspended following his arrest on November 8th, but started running again on November 9th: see *R.* v. *Atkinson*, [2003] O.J. No. 1068 (Ont.C.A.).

[4] At the disposition hearing under s. 742.6 on January 18, 2008, Mr. Chapman admitted the circumstances of the breach. Further, he indicated that he was about to plead guilty to the charge of possession of marijuana later that day in the Yukon Territorial Court.

ISSUE

[5] The global issue on this hearing is whether I should terminate the CSO altogether, in which case Mr. Chapman would serve the balance of the 12-month term of that sentence behind bars (approximately 11 months), or whether I should suspend the CSO

for a shorter period of time and direct that he serve a portion of the unexpired conditional sentence in custody and that the CSO resume on his release from custody, with or without changes to the optional conditions. The more specific issue is whether termination would be a fit and proper disposition if it would result in the offender spending substantially more time in jail than would have been the case if he had received a conventional jail term in the first place. I reserved my decision until today in order to review the relevant case law, which I will discuss shortly.

CIRCUMSTANCES OF THE OFFENDER

[6] Mr. Chapman's circumstances are set out in the pre-sentence report filed before Brooker J. at the original sentence hearing. He is 33 years old and has spent the majority of his life in the community of Ross River. He had a positive upbringing and is still very close to his supportive parents, who both live and work in Ross River. He left school in grade 11 but has worked on his GED since then and has spent 18 months at Yukon College taking heavy duty mechanic courses.

[7] Although he has had a somewhat varied employment history, it appears that he has been able to find employment on a more or less consistent basis since leaving high school. In particular, he provides a sewage removal service within the community, which occupies him about 15 hours per week. In addition, his father advises that Mr. Chapman is in pre-apprenticeship training towards a journeyman mechanic certification. He has also worked in various capacities at the Ross River airport and done water delivery, construction and camp maintenance work.

[8] Mr. Chapman's activities in the community include being a member of the Canadian Rangers, organizing and playing recreational hockey, as well as involvement with the Volunteer Fire Department and with the Ross River Emergency Services.

[9] He was in a relationship with Mary Sidney from 1995 to 2001, and during that time the couple had two children, currently aged 10 and 5. Ms. Sidney and he remain friends and Mr. Chapman spends a great deal of time with his children and helps out with the family's finances. Although he owns a house in Ross River, it is for sale and he usually resides at his parents' home or, occasionally, at Ms. Sidney's home.

[10] Mr. Chapman has also indicated an intention to move to Whitehorse to live with his brother and his brother's wife. That is consistent with his expressed interest in returning to Yukon College to become involved in the culinary arts program, with a view to working as a camp cook.

[11] The most disconcerting aspect of the pre-sentence report was the apparent unwillingness of Mr. Chapman to acknowledge that he has an alcohol or drug problem. This was despite his admissions that he has been smoking marijuana since age 16 and using hard drugs since 1999. He also gave inconsistent information to the author of the pre-sentence report about his alcohol consumption, and did not think that alcohol was the cause of any problems in his personal life. He similarly denied any problems with drugs. However, both of his parents seemed concerned about Mr. Chapman's heavy drinking habits as recently as the summer of 2007. Further, on two occasions, when he met with the author of the pre-sentence report, he smelled heavily of alcohol and had bloodshot eyes, admitting to having been drinking the night before and being in a semi-hangover

state. In addition, Ms. Sidney verified that drugs have been problematic for Mr. Chapman and that she would like to see him pursue treatment for his substance abuse issues. Finally, Mr. Chapman admitted consuming drugs, cocaine in particular, while on bail awaiting his sentencing on October 18, 2007, and prior to that sentencing, he had not taken part in any substance abuse treatment or counselling.

[12] Indeed, the author of the pre-sentence report indicated that what stood out most prominently in the preparation of that report was Mr. Chapman's lack of insight into this issue. At p. 8, he stated:

> "He stipulated that neither drugs or alcohol are problems in his life when drugs clearly are and alcohol is probable [as written] since he has indicated that alcohol sometimes leads to his use of hard drugs. Further, he has no intention of voluntarily becoming involved with treatment or counselling."

[13] In addition, Mr. Chapman now has a criminal record with a total of 12 convictions, including the cocaine possession offence for which he was sentenced by Brooker J. Those convictions also include driving over .08 in 2006, possession of a scheduled substance in 1999 and possession of a narcotic in 1995. Further, he has just pled guilty to the charge of possession of marijuana, as the substantive offence which underlies the breach of this CSO. Those offences are all directly related to drug and alcohol usage, and I would think it likely that most, if not all, of the other convictions on his record are similarly related.

[14] On the positive side, at the hearing before me, Mr. Chapman filed letters of support from his father and three other community members. Those letters indicate that Mr. Chapman has been helpful to one particular individual by installing a new floor and

assisting with the operation and maintenance of her furnace and plumbing. He is also described as a “valuable asset” to the Volunteer Fire Department and an organizer and volunteer with the local hockey arena and annual hockey tournament. In addition, there is a letter from a day care in Ross River confirming that Mr. Chapman can perform 50 hours of the 75 hours of community service ordered by Brooker J. at the day care.

[15] Mr. Chapman also filed a certificate of participation in the “Commitment to Change” program, which he completed at the Whitehorse Correctional Centre over the period from December 19, 2007 to January 11, 2008. The course is described as a 20-hour program which enables participants to explore their errors in thinking and to consider tactics and consequences that lead them to destructive behaviours. Defence counsel stressed that Mr. Chapman’s participation in this program was entirely voluntary and is a significant indicator of the impact that his recent period of custody, in remand, has had upon him. He submitted that Mr. Chapman has apparently had a change of heart regarding his attitude towards substance abuse and is now serious about enrolling and attending a 28-day residential treatment program in Whitehorse, which is scheduled to commence on February 17, 2008. Defence counsel also submitted that there is an Alcoholics Anonymous meeting in Ross River about once a week and that Mr. Chapman is prepared to attend such meetings.

[16] I asked Mr. Chapman if he had anything to say on his own behalf before proceeding with the disposition. In summary, the tone of his comments were that this most recent period of custody, and particularly the Commitment to Change program, have allowed him to clear his thinking with respect to his substance abuse issues. He now professes to want to pursue a clean and sober lifestyle upon his release. For his

sake, I certainly hope he is sincere and committed in that regard, as his criminal record to date, the contents of the pre-sentence report and the circumstances of this breach all indicate to me that Mr. Chapman very likely has an addiction to either drugs or alcohol, or both, and that the sooner he can begin to deal constructively with that problem the better.

ANALYSIS

[17] Section 742.6(9) of the *Criminal Code* provides:

> "Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may
>
> (a) take no action;
> (b) change the optional conditions;
> (c) suspend the conditional sentence order and direct
>
> (i) that the offender serve in custody a portion of the unexpired sentence, and
> (ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
>
> (d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence."

[18] The legal issue in this disposition hearing arises from a passage in *R.* v. *Proulx*, 2000 SCC 5, where Lamer C.J., speaking for the Supreme Court of Canada, said that a breach of a conditional sentence should be presumptively dealt with by a termination of that sentence, requiring the offender to spend the remainder of the sentence behind bars. In particular, at paras. 38 and 39, Lamer C.J. stated:

> "The punitive nature of the conditional sentence should also inform the treatment of breaches of conditions. As I have already discussed, the maximum penalty for breach of probation is potentially more severe than that for breach of a

> conditional sentence. In practice, however, breaches of conditional sentences may be punished more severely than breaches of probation. Without commenting on the constitutionality of these provisions, I note that breaches of conditional sentence need only be proved on a balance of probabilities, pursuant to s. 742.6(9), whereas breaches of probation must be proved beyond a reasonable doubt.
>
> More importantly, where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. This constant threat of incarceration will help to ensure that the offender complies with the conditions imposed: see R. v. Brady (1998), 121 C.C.C. (3d) 504 (Alta. C.A.); J. V. Roberts, "Conditional Sentencing: Sword of Damocles or Pandora's Box?" (1997), 2 Can. Crim. L. Rev. 183. It also assists in distinguishing the conditional sentence from probation by making the consequences of a breach of condition more severe." (emphasis added)

[19] While that presumption has been well noted by the Yukon courts on a number of occasions, I am informed by defence counsel that it is rarely applied in practice. In the Yukon Territorial Court, defence counsel suggests that termination of a conditional sentence for an initial or even a second breach is rare. That would also seem to be consistent with the dispositions from this Court: see, for example *R.* v. *D.K.J.*, 2000 YTSC 16; *R.* v. *Goodman*, 2005 YKSC 70; *R.* v. *Blanchard*, 2006 YKSC 34; and *R.* v. *Morgan*, 2007 YKSC 39.

[20] The issue of potential termination becomes particularly acute where the length of the conditional sentence significantly exceeds the amount of actual jail time which might otherwise have been imposed, either pursuant to the submissions of counsel or on the court's own motion. Clearly, *Proulx* allowed that a conditional sentence of imprisonment may be longer than a conventional jail sentence, considering that it is seen as less onerous in nature. At para. 102, Lamer C.J. stated:

> "… Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation. This is particularly so when onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances. …" (my emphasis)

[21] In *R. v. Talman*, 2005 BCCA 279, Saunders J.A., speaking for the British Columbia Court of Appeal, acknowledged this principle, but also noted that a sentencing judge must be cognizant that the offender is vulnerable to serving the entire sentence in jail in the event of a breach, and that a conditional sentence does not attract reduction through parole: *R*. v. *Ursel* (2000), 96 B.C.A.C. 241.

[22] The Court in *Talman* was asked in particular to comment on the issue of the proportionality of the conditional sentence, in comparison to that which would be appropriate if the sentence had been custodial. At para. 12, Saunders J.A. stated:

> "… I do not think that a rule of thumb exists for the proportionality between an appropriate custodial sentence and a conditional sentence. That relationship will depend very much on the circumstances of the offence and the offender. The proportionality, additionally, may bear upon the severity of any disposition of the court in response to breach of the conditional sentence. I would suggest that the greater the length of conditional sentence, the less may be a response to breach [as written] of the order." (my emphasis)

[23] On the facts in *Talman*, the 25-year-old offender was drug-addicted and sentenced to an 18-month conditional sentence for a drug-related theft. The range of the conventional imprisonment sought by the Crown was six to eight months. The sentencing judge was impressed by the offender's stated intention to immediately begin participation in a residential substance abuse treatment program and thus imposed the conditional

sentence. However, a few days after the offender received that sentence, he was breached for failing to report to his probation officer. The judge suspended the conditional sentence for a period of six months for the breach. The Court of Appeal concluded that six months was unfit and that two months was appropriate. At para. 17, Saunders J.A. stated:

> "As I have earlier indicated, where the length of the conditional sentence itself it [as written] substantial in comparison to the length of custodial sentence that might be appropriate, I consider that any suspension of the sentence should take that factor into consideration. The circumstances of the breach of course will be reflected in the length of the suspension of the sentence. …"

Saunders J.A. concluded by bearing in mind that, after the suspension was over, there was still a substantial portion of the conditional sentence to be completed, during which another breach may attract yet a further suspension of all or a portion of the remaining sentence.

[24] In a subsequent decision of the British Columbia Court of Appeal in *R.* v. *Langley*, 2005 BCCA 478, a 19-year-old drug-addicted offender appealed from the termination of an 18-month conditional sentence imposed for the offence of breaking and entering and committing theft. The offender pled guilty to that offence on February 1, 2005. On April 27, 2005, the conditional sentence was terminated for his breach of three conditions a week earlier: consuming drugs, breach of curfew, and failing to reside where directed. The judge at the disposition hearing noted the presumption in *Proulx* and the offender's criminal record, which included 15 previous breaches of court orders and undertakings. He indicated that he had no faith in the offender's capacity to obey conditions designed to prevent further criminality and resolve his drug addiction. He also noted that the

offender's family support had disappeared. Accordingly, he terminated the 18-month conditional sentence.

[25] The Court of Appeal considered the factors relevant to the exercise of a court's discretion under s. 742.6(9) of the *Criminal Code*. The Court acknowledged, at para. 4, that the presumption in *Proulx* is the "starting point" in any application for termination of a conditional sentence. Further, at para. 5, the Court noted its earlier decision in *R.* v. *Lutz* (1997), 121 C.C.C. (3d) 216, which admonished that the public's acceptance of conditional sentences requires that "breaches must be promptly pursued and sternly dealt with". And, while the Court in *Langley* referred to the "wide ranging discretion" of the sentencing judge under s. 742.6(9), it also said that this discretion is not "absolute" (see paras. 5 and 7). Moreover, at para. 6, the Court said that not every unexcused breach can result in termination of the conditional sentence:

> "… Otherwise, as the Supreme Court of Canada recognized in Proulx, by creating a rebuttable presumption of termination upon breach, Parliament would not have provided the options of taking no action, changing the optional conditions, and suspending the conditional sentence order. …"

At para. 7, the Court continued:

> "The absence of specific guidelines for the exercise of the discretion given by this section of the Code provides flexibility for courts to fashion a disposition appropriate to each offender and the circumstances of the breach so that the mandated purposes of sentencing can be achieved and the public protected from further criminal activity. With that flexibility comes the obligation to explain the factors taken into account in exercising the wide-ranging discretion and the reasons for selecting the particular disposition. So too comes the obligation on the offender in breach to establish that sentencing principles can be met with a disposition other than termination."

[26] The Court's remarks immediately above reflect what was said in *Proulx,* at para. 82, about the importance of tailoring the punishment to the offence and the offender, to ensure that it is proportional:

> "This Court has held on a number of occasions that sentencing is an individualized process, in which the trial judge has considerable discretion in fashioning a fit sentence. The rationale behind this approach stems from the principle of proportionality, the fundamental principle of sentencing, which provides that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the "punishment fits the crime". …" (see also paras. 113 and 115) (my emphasis).

[27] Thus, at para. 13 of *Langley*, after briefly reviewing a number of appellate authorities following *Proulx*, the Court of Appeal suggested that:

> "… the task of the court at a disposition hearing is to consider the nature of the offence; the nature, circumstances, and timing of the breach; any subsequent criminal conduct and sentences for that conduct; changes in the plan for community supervision; the effect of termination on the appropriateness of the sentence for the original offence; and the offender's previous criminal record, in determining whether the presumption of termination for breach is to be applied. If the presumption is rebutted, the court then is to ask itself which of the other three options is appropriate, having regard to those same factors. I do not understand the list of factors to be closed."

[28] With emphasis on the particular circumstances of that case, the Court refused to disturb the termination of the conditional sentence, noting the weight which the sentencing judge gave to the offender's previous criminal record, his apparent inability to obey conditions, and his lack of family support.

[29] In the case of Mr. Chapman, he clearly has family support and has no history of breaching court orders (that is until now). In addition, he has an albeit new-found commitment to pursuing a clean and sober lifestyle. If he is able to do that, then I trust that he will continue to be a valuable and contributing member of the Ross River community. If he does not, then he will almost certainly end up back behind bars for longer and longer periods of time. As was noted in *Langley*, while neither rehabilitation nor deterrence are much served by a jail sentence for a drug addict, that is precisely what happened to the offender in that case.

CONCLUSION

[30] Mr. Chapman, please stand.

[31] I concede that, at the outset of reviewing this case, I was prepared to give serious consideration to termination of the conditional sentence, largely because of the circumstances of the breach, your criminal record and your apparent unwillingness to deal with your substance abuse problem. However, upon further reflection, I feel that the length of the CSO of 12 months, in proportion to the four to five months of true jail time originally sought by the Crown, together with your positive change in attitude and your community support, all indicate to me that an appropriate disposition in this case would be to suspend the conditional sentence and direct you to serve a portion of the unexpired sentence in custody, which will be roughly equivalent to the 78 days you have already served.

[32] Having said that, it is also my intention that the length of the suspension should be in addition to the sentence imposed upon you for the offence of possession marijuana on November 8, 2007, which I am informed was a jail term of six days commencing January

18, 2008. I want to ensure that you are punished separately for the breach and for the underlying offence. In these circumstances, I expect s. 742.7(1) would apply, such that the running of the CSO was suspended during that six-day sentence, in which case your remand time to date does not include whatever period of imprisonment you actually served on the marijuana possession offence, less any applicable statutory remission. Therefore, in order to achieve my desired result, I will suspend the conditional sentence and direct that you serve 78 days of the unexpired sentence in custody, but you are only to be credited with the remand time to date, which was interrupted by the six-day sentence. Accordingly, you will have to serve a few days more before your release, however I will leave the calculation to the correctional authorities. I further direct that the CSO resume on your release from custody, with a couple of changes to the optional conditions, which I will address shortly.

[33] This will allow for your release prior to the commencement of the 28-day residential substance abuse program in Whitehorse on February 17, 2008. While you confirmed your intention to participate in this program, you appeared confused about what you need to do in order to complete your registration and enrolment. However, based on what I heard from your conditional sentence supervisor, Nicole Comin, and yourself, I expect that Ms. Comin will be directing you to attend this program, pursuant to condition # 8 of the CSO and that you will take whatever steps are required by her in order to ensure that you are eligible to commence that program on that date. I do not want this opportunity missed, if at all possible.

[34] Further, in order to guide you down the road of recovery, I am adding a condition to the CSO which requires you to attend Alcoholics Anonymous (AA) meetings once per

week, while you are residing in Ross River, and either AA or Narcotics Anonymous (NA) meetings at least three times per week, if you should move to Whitehorse. If for any reason, an AA meeting is not held once each week in Ross River, I direct you to obtain a note from a local AA member or alcohol counsellor verifying such cancellation and provide that to your sentence supervisor. I do not expect that problem to arise in Whitehorse, since there are several regularly held AA and NA meetings here each week.

[35] Mr. Chapman, I would generally encourage you to make the best possible use of the AA or NA programs wherever you reside, as they are freely available and virtually unconditional sources of continuing and ongoing support to assist you on a daily basis as you struggle with your recovery.

[36] Finally, it was brought to my attention that the condition of house arrest has been very difficult for the sentence supervisor to monitor. Condition # 6 specifies a curfew for the first six months of the sentence, which requires the offender to remain in his parents' home in Ross River 24 hours a day, except when working, or attending medical or dental appointments, and for two hours each on Saturday and Sunday afternoons for personal or family business. The supervision problem arises because Mr. Chapman's sewage removal business, to date, has required him to be essentially on call and, although he only works a total of about 15 hours per week in this employment, in practice he performs this service at various times of the day and on various days of the week. Therefore, he could be outside his residence at virtually any time with the seeming excuse that he was "participating in employment", in the words of the CSO. However, it is not strictly necessary that Mr. Chapman continue to operate his sewage business on this basis. I

note that his father has been successfully operating the business in Mr. Chapman's absence by performing these services within a single day each week.

[37] Mr. Chapman, I therefore expect you will be able to make similar arrangements and advise your sentence supervisor which week day you will be carrying on the sewage removal service. For the balance of the week, unless you obtain other employment and notify your supervisor accordingly, I expect that you will be bound by the terms of the house arrest, subject to any other absences which may be excused by the terms of the existing CSO. To make this change enforceable, I amend condition # 6 to add the words "as specified in writing by your conditional sentence supervisor", after the words "participating in employment."

[38] You may be seated.

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GOWER J.