

Citation: *R. v. Charlie*, 2010 YKTC 21

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Docket: 08-00293A
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08-00293D
Registry: Whitehorse
Heard: Old Crow

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

GENO RONALD CHARLIE

Appearances:
John Phelps
Malcolm Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Geno Charlie has entered a guilty plea to three offences, the most significant of which is a charge contrary to s. 267(b), arising from July 31, 2008. Crown proceeded indictably on this charge. An agreed statement of facts was filed, which I do not intend to repeat in detail, but it involved an assault on his common-law partner, Edna Kaye/Kyikavichik, with whom he has three children.

[2] Both parties had been drinking on that night. Mr. Charlie assaulted her in the course of the evening, causing her to incur a large bump over her right eye, swollen lips, pain in the lower back area, some facial injuries over her eye, and three fractured ribs.

[3] The circumstances of the other two offences, which were offences contrary to s. 145(3), are that on April 27, 2009, while on an undertaking before a judge, and under a requirement to abstain from the consumption of alcohol, he was located intoxicated in Whitehorse outside the Salvation Army at about 3:00 a.m. Then, having been released on a recognizance, he was located January 1, 2010 at the Westmark Hotel, also intoxicated.

[4] Mr. Charlie has approximately six and a half months of pre-trial custody for which I will give him credit of 10 months. He has a criminal record that is of considerable significance, going back to 1989 in Youth Court. There are, as Crown points out, about 15 prior offences of violence and 15 prior breaches of court orders. He has received custody in respect of a number of these. The assaults include spousal assaults that have caused bodily harm, and simple assaults that have been spousal. There is a history involving this particular complainant.

[5] Crown counsel has taken a creative approach with respect to dealing with resolution of this matter that I consider wholly appropriate in the circumstances. A conditional sentence option is not available to Mr. Charlie. Crown counsel's suggestion, with respect to a sentence of time served of 10 months on the assault, giving full credit and recognition to s. 718.2(d) and (e) of the *Criminal Code*, answers the need to craft appropriate sentences, in particular when you are dealing with individuals of First

Nations ancestry whose criminal history is largely associated with some of the issues that arise directly from the First Nations ancestry.

[6] Mr. Charlie could certainly have been facing a period of custody on s. 267(b) well in excess of time served, but when I said a wholly appropriate resolution with respect to that matter, I looked at the information that is before me with respect to Mr. Charlie.

There is a pre-sentence report that pre-dates the January 1st offence, but I have information of what he has been doing since then, as well, that supports the positive tenor of the pre-sentence report.

[7] The criminal record points out 23 times in jail, institutional incarcerations, all of which resulted from the kind of lifestyle Mr. Charlie has had for the most part until recently. He has been taking numerous steps to change the lifestyle that he had been leading before. Many of these steps have been on his own initiative and of his own accord. He spoke to the Court and he spoke eloquently and passionately, with full acceptance of responsibility for the mistakes that he has made and his criminal activity in the past; and about what he intends his life to be in the future, based not just upon what he intends to do from this day forward, but based upon, to a large extent, what he has been doing in the past year as well.

[8] He is very involved in his children's lives and, as has been pointed out, has done surprisingly well according to a number of the individuals that have dealt with him, to the extent that he has been granted time caring for his children when the foster parents, with whom they are currently placed, are unable to do so.

[9] He has avoided many of the situations that have got him into trouble in the past, such as association with friends that want to drink. He is following through with his

counselling and treatment. He is attending AA regularly. He has completed the White Bison Program while he was in custody. He completed the Alcohol and Drug Treatment at Alcohol and Drug Services in April 2009. I recognize that there have been breaches, but when you are dealing with a lifetime history of alcohol consumption and underlying issues, it is not surprising that that occurs sometimes. What is of considerable significance is there have been no substantive charges, and that is not to minimize the seriousness of the breach allegations, because the consumption of alcohol is a serious risk factor for Mr. Charlie and is the first step through a doorway that could lead him into the kind of violence we have seen in the past by his criminal record.

[10] So with respect to the s. 267(b) offence, I concur that a sentence of 10 months time served is appropriate for that offence. This is an exceptional sentence for this kind of domestic assault on an individual with whom there has been a history by an individual with the criminal record that Mr. Charlie has. It is an exceptional sentence, but it is exceptional for the right reasons, because of the efforts that Mr. Charlie has made, the steps that he has taken, the overall circumstances of his life, his children's lives, and the evidence and information that is before me. So as I have said before, I consider that this, although exceptional, gives full consideration to an application to the principles of sentencing, from denunciation and deterrence through to the importance of rehabilitation, the principles of restraint and the principle of considering all options other than incarceration for aboriginal offenders.

[11] Now Crown counsel is suggesting that there be a conditional sentence of four months imposed in respect of the two abstain breaches. Defence counsel concurs that a conditional sentence is appropriate, but suggests that it could be two months. I note

that on the criminal record that has been filed, the last fail to comply with a probation order in 2007 was 60 days. There was 90 days conditional on one earlier that year for a breach.

[12] I am looking at this as a global sentence and I am satisfied that there should be an additional period of incarceration. I am satisfied that it should be 60 days on each consecutive to each other, however, and I am satisfied that it can be served conditionally in the community.

[13] Again, the pre-sentence report considers Mr. Charlie to be a suitable candidate for a community disposition. All the information before me would indicate that he continues to be, since that report was prepared, a suitable candidate for community disposition, and more than just suitable, a contributing individual to the lives of his family and potentially to his community. I accept his comments in support as sincere, based not only on how he said them, but what he has done in the past to give them substance and meaning.

[14] The terms of the conditional sentence will be:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a Supervisor immediately and thereafter when required by the Supervisor and in the manner directed by the Supervisor.
4. You are to sign in with the RCMP once per week or as directed by your Supervisor;
5. Remain within the Yukon Territory unless you have written permission from Supervisor or the Court;

6. Notify the Supervisor or the Court in advance of any change of name or address, and promptly notify the Court or the Supervisor of any change of employment or occupation;
7. Reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;
8. At all times you are to remain within your place of residence except with the prior written permission of your Supervisor. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;

[15] Now, to elaborate on that clause, this is a wide-open permission exception. I am not going to restrict your hours beyond that because of the nature of what you are doing in this community, with respect to work, with respect to counselling and with respect to involvement in your children's lives. This is a case where I am satisfied that, in consultation and communication with your Conditional Sentence Supervisor, that you can be given the kind of exceptions that will allow you to pursue the positive path you are on with respect to all your efforts in counselling, all your efforts in employment, and all your efforts to involve yourself in your children's lives so that they can perhaps follow a much better and easier path than the one that you have followed in the last few years. So yes, it is house arrest, but it is a house arrest with the ability for you to have exceptions that will continue to comply with what you have done to show that your life has turned and you are on, and have already started on, a different pathway. I am not going to put any further directions on the permission exception

because I believe that all of the work and counselling and other activities that you need to do can be arranged through that blank written permission.

9. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with the prescription given to you by a qualified medical practitioner;
10. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
11. You are to take such alcohol and drug assessment, counselling or programming as directed by your Supervisor;
12. You are to take such other assessment, counselling and programming as directed by your Supervisor.

I am satisfied that that covers off any counselling with respect to domestic violence and relationship issues.

13. You are to have no contact directly or indirectly or communication in any way with Edna Kaye/Kyikavichik except with the prior written permission of your Supervisor in consultation with Victim Services and Family and Children's Services;
14. You are to provide your conditional sentence Supervisor with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this conditional sentence order.

[16] I am satisfied that the exceptions that are necessary can be made with that written permission, which again requires communication. I am satisfied that you are

providing financial support and assistance to your children as you are best able to right now, so I am not going to make that part of the court order. You are doing it already. I have every reason to believe you will continue to do that and you do not need me to tell you to.

[17] Those are all the terms on the conditional sentence. I have not addressed the probation yet.

[18] MR. PHELPS: I apologize, did you mention not to attend any bars or taverns?

[19] THE COURT: Yes, I did.

[20] MR. PHELPS: Thank you.

[21] THE COURT: So those are the terms of the conditional sentence order. Anything from you, Mr. Campbell?

[22] MR. CAMPBELL: No.

[23] THE COURT: That is fine. With respect to -- do you have any questions on any of those terms, Mr. Charlie?

[24] THE ACCUSED: No.

[25] THE COURT: Okay. With respect to the probation order, the probation order will be for 18 months. The terms of the order will be:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;

3. Notify the Court or Probation Officer in advance of any change of name or address, and promptly notify the Court or Probation Officer of any change of employment or occupation;
4. You are to report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the matter directed by the Probation Officer.
5. You are to sign in with the RCMP once per week or as directed by your Probation Officer;
6. You are to reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
7. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with the prescription given to you by a qualified medical practitioner;
8. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
9. You are to take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer;
10. You are to take such other assessment, counselling or programming as directed by your Probation Officer;
11. You are to have no contact directly or indirectly or communication in any way with Edna Kaye/Kyikavichik except with the prior written permission of

your Probation Officer in consultation with Victim Services and Family and Children's Services;

12. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this probation order.

[26] I have not included education or employment in either the conditional sentence order or the probation order. Does anyone have any submissions on those? I will leave those off. I will not include them.

[27] MR. CAMPBELL: Is there a staff member, like a receptionist at the RCMP station here?

[28] UNIDENTIFIED SPEAKER: Not right now, there's not.

[29] MR. CAMPBELL: I guess my only concern is if the RCMP or --

[30] THE COURT: How about report to, would that be sufficient? Instead of sign in, if no one is there and he can keep trying?

[31] THE ACCUSED: Phone that 5555?

[32] THE COURT: Would that work if he calls or is it necessary that he keeps trying to come back and find them there, because obviously if he is on house arrest, it is going to be only set times he can do it.

[33] COLLEEN GEDDES: Your Honour, Mr. Charlie will call 5555, which is the Whitehorse telephones and they'll contact us on our radios.

[34] THE COURT: Right.

[35] COLLEEN GEDDES: And then we can either sign him in over the phone or he meets us at the office. So it's worked out like that in the past.

[36] THE COURT: Okay. Well, then sign in would cover it because he can sign in that way without actually having to attend necessarily, right? So that should be no problem as worded then.

[37] I am going to attach the probation order to all the offences, okay?

[38] Now, with respect to any of the terms of this order and the length of it, Mr. Charlie, if you continue to do well, some of these terms, including on the conditional sentence, can be subject to change. Okay? You start here; it does not have to stay here. I am going to direct that a review of the conditional sentence order take place on March 30th. So anything that needs to be changed then, we can deal with it at that point in time. I am not saying it will be, but at least there is a review and we will find out how things are going on that date. I have every reason to believe that they should be going well.

[39] There will be, of course, the mandatory DNA order, as this is a primary designated offence, and there will be a mandatory order under s. 109 of the *Criminal Code* prohibiting you from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substances for -- there is a prior conviction for s. 267. Is the 10 years available or does it have to be more? I am just reading the section.

[40] MR. CAMPBELL: There doesn't appear to be any increase.

[41] MR. PHELPS: It would appear that we're stuck under ss. (3).

[42] THE COURT: That is what I am looking at, because this is not a first conviction for a similar offence, correct?

[43] MR. PHELPS: Yes. That is my read of it.

[44] THE COURT: So this is for life.

[45] MR. PHELPS: It would be for life, is my read, Your Honour.

[46] THE COURT: Yes.

[47] MR. PHELPS: There is the possibility under s. 113, if he continues to do well, that he can pursue --

[48] THE COURT: That he can bring an application with respect to that order at some time in the future if the circumstances warrant it.

[49] Victim Fine Surcharges are waived. The remaining charges?

[50] MR. PHELPS: Stayed, thank you.

[51] THE COURT: I believe that covers everything. I wish you well, Mr. Charlie.

[52] THE ACCUSED: Could I say something?

[53] THE COURT: You can.

[54] THE ACCUSED: Like -- like I'm a person that goes from the land and stuff and I usually go alone and I am prohibited from weapons, and I had a cross-bow last year, but the cops said I was allowed to have it but they made a mistake, they

said a compound bow. Is a compound bow illegal too or what, because I need to protect myself, right? And a crossbow has a trigger, right, so I need to know that.

[55] THE COURT: You can speak to Mr. Campbell, but.

[56] MR. CAMPBELL: Yeah, I'm just looking that up.

[57] THE COURT: I am pretty sure that a bow that is a regular bow does not fall within s. 109, but do not take me for legal advice on that. I am familiar with other individuals on lifetime prohibitions under s. 109 who nonetheless hunt with a regular bow, not a crossbow.

[58] THE ACCUSED: You got to learn sometime.

[59] THE COURT: It is, to my knowledge, that should be fine, but it is always safe to check with those that enforce the law.

[60] THE ACCUSED: Okay, thanks.

[61] THE COURT: At the first stage. All right.

COZENS T.C.J.