

Citation: *R. v. Clarke*, 2013 YKTC 118

Date: 20130219
Docket: 11-00503A
Registry: Whitehorse

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

REGINA

v.

THOMAS GEORGE CLARKE

Appearances:
Ludovic Gouaillier
Richard Fowler

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C. (Oral): Thomas Clarke has entered a guilty plea to having committed an offence under s. 267(b) of the *Criminal Code*. Crown had originally laid a charge under s. 268, and then had a new Information placed before the Court with the s. 267(b) charge and proceeded to make a summary election on that.

[2] The circumstances were that Mr. Clarke came to the home of his girlfriend in the early hours of October 15, 2011. He came into the residence and he observed his girlfriend, Corrine Silverfox, and the victim, Mr. Reginald Clements, smoking crack cocaine together. Mr. Clarke proceeded to administer numerous blows to Mr. Clements' body and head area, causing significant injuries. There was external bruising and abrasions noted in the photographs that were filed, and then there was what is referred

to as apparent parenchymal hematoma to the right frontal lobe, which caused bruising and bleeding on the surface of the brain. Mr. Clements was hospitalized for two weeks, and in the victim impact statement certainly sets out some significant and ongoing problems that have resulted from the assault. There is no question that the injuries were significant.

[3] After the assault occurred, Mr. Clarke and Ms. Silverfox did not appreciate the seriousness of the injuries. Mr. Clements was unconscious and in and out of consciousness for several hours, until it became apparent that he had been injured quite badly, at which point in time Mr. Clarke took Mr. Clements to the hospital.

[4] Crown and defence have agreed on a length of sentence of 18 months. The difference on the actual sentence, which I note is the maximum sentence available on a summary conviction election to a s. 267(b), comes down to the issue of the sentence being served conditionally in the community. Defence counsel's position is that an 18-month sentence served conditionally in the community is an appropriate disposition, recognizing that a sentence can perhaps be longer if it is served conditionally than if it is served in straight custody. Crown's position is that 18 months would be an appropriate straight custody sentence, as I understand it. So defence is seeking that the sentence be served conditionally in the community. Crown, while not opposing it necessarily, certainly expressed concerns, given the nature of the offence and the circumstances in which it occurred.

[5] Mr. Clarke is 49 years of age. A Pre-Sentence Report has been filed that can only be characterized in almost all respects as being an extremely positive report. He

does have a criminal record, a mischief and a cause disturbance conviction in 1985; an assault conviction in 1986, for which he received a \$75 fine; a causing a disturbance conviction in 1987, for which he received a \$200 fine, and an assault conviction in 1994, for which he received a \$250 fine. He has no criminal convictions since then.

[6] He has a good family background. His social circle involves individuals not involved with the criminal justice system. He has a very strong work history. He does not have alcohol or drug dependency or addiction issues. With respect to the circumstances on the night of the assault, it does not appear that Mr. Clarke was intoxicated at the time.

[7] The Criminogenic Risk Assessment, using the Yukon Offender Supervision Inventory, indicates that he is at a low risk. As it is defined in the report, he has a low criminal history risk rating and he has a low level of criminogenic needs, all of which come together to indicate that Mr. Clarke is at a low risk of re-offending in the future. He is noted by the author of the Pre-Sentence Report to be a good candidate for a community disposition.

[8] He has been on bail conditions since his arrest. I have a recognizance from December 24, 2011. The original process indicates that at least since December of 2011, he has been on a recognizance that has standard conditions: an abstain clause, a no contact, not only with the victim but with Ms. Silverfox, a curfew between the hours of 9:00 p.m. and 7:00 a.m., which I understand has been extended by the permission of the Probation Officer to go to 11:00, all of which I have every indication to believe Mr. Clarke has been fully compliant with. It appears, from the record, that Mr. Clarke,

notwithstanding that the offence occurred on October 11, was not actually arrested and brought before the Court until the day before, December 23, I believe, which explains why the recognizance starts from that date.

[9] MR. GOUAILLIER: There was a delay in the investigation.

[10] THE COURT: One issue that arises that gives Crown some concern in the context of the Pre-Sentence Report is what appears to be perhaps Mr. Clarke's attempt to justify, to some extent, the assault, by putting some of the blame on Mr. Clements for being in Mr. Clarke's girlfriend's residence smoking cocaine with her. Now, Mr. Clarke has spoken and said that he is sorry for what has happened and sorry for the harm that he caused. I also note that, on page 7 of the report, under the "Attitude and Willingness to Make Amends," Mr. Clarke talks about the context of what took place and his views that perhaps he saw Mr. Clements as somewhat of a predator, but he does say [as read in]:

I feel terrible about how all this went down, this whole issue. It really affected me in a big way.

After being asked if he felt his actions were wrong, Mr. Clarke conveyed:

Well, I guess it was; it was one of those things that happened so fast. I just hate being in a situation like that. I wish it never happened is really all I can say.

[11] I want to make it clear that, outside of smoking crack cocaine, which is illegal, Mr. Clements had not actually done anything that would justify the view that he was a predator. So I want to make that clear, that maybe what Mr. Clarke thought is certainly, as his counsel says, not at all an excuse for what took place and for the assault that

followed, and I accept that Mr. Clarke does appreciate and understand that. Ms. Silverfox had struggled, as I understand it, with some previous addiction issues, and Mr. Clarke had experienced in his life previous difficulties when others he knew struggled with addiction issues, and he clearly reacted in a context that, far from justifying or even excusing in any extent what he did, is still a context that exists nonetheless. But there were numerous ways of handling it that were better. His actions were not justified and Mr. Clements cannot be blamed for what happened in any way.

[12] This was a serious assault that took place somewhat spontaneously over a brief period of time by an individual whose life, notwithstanding the dated and minimal record, has otherwise been a pro-social life. I accept that Mr. Clarke does not have any ingrained anti-social attitudes, in that he is not an individual that I would expect to come before the courts in future. I accept that he is at a low risk of re-offending.

[13] When I look at s. 742.1, given that the sentence is less than two years, I need to be satisfied that the safety of the community would not be endangered and that a conditional sentence would be consistent with the fundamental purpose and principles of sentencing.

[14] Now, I have no issue that the safety of the community would not be endangered if Mr. Clarke were to be allowed to serve his sentence in the community. He has been in the community since the date this occurred and has not shown himself to pose any risk of danger to the community. He has complied with the conditions and he is assessed at a low risk. The fundamental purpose and principles of sentencing involve a balancing of a number of competing interests. Clearly, in offences of violence such as

this, denunciation and deterrence are serious concerns. The courts have been clear that denunciation and deterrence can be accomplished, even in offences of significant violence, through conditional sentences on terms that reflect society's concern and denunciation for these types of offences.

[15] Rehabilitation is always a factor for consideration in the court where there is any basis for belief that an individual can live a pro-social life. Now, rehabilitation in the context of Mr. Clarke, based on everything in the Pre-Sentence Report and what I have seen, does not mean changing a way of life to a better way of life. It is more of an integration or maintaining of the otherwise pro-social life that he has lived, and a sentence cannot be imposed that would unnecessarily frustrate what has otherwise been a pro-social life in order to give what would then be undue weight to the principles of denunciation and deterrence.

[16] I do not propose to go over the cases that were filed. They set out many of the principles and sentences imposed for offences of violence. At the end of the day, a sentence is a very individualized process and the purposes and principles of sentencing need to be considered and applied in the context of the individual person and in the circumstances of the offence.

[17] In all the circumstances, I am satisfied that the sentence of 18 months is within the range of sentences that is appropriate, and that it is appropriate for Mr. Clarke to serve his sentence in the community conditionally.

[18] The terms of the conditional sentence will be as follows: You will:

1. 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. Remain within the Yukon Territory unless you have written permission from your Supervisor or the Court;
5. Notify the Supervisor or the Court in advance of any change of name, address, and promptly notify the Court or the Supervisor of any change of employment or occupation;
6. Reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;
7. For the first six months of this order, you are to remain within your place of residence, except with the prior written permission of your Supervisor for purposes of employment and such other purposes as your Supervisor deems appropriate;

The reason I am doing what is called house arrest in this case is that the denunciatory, punitive and deterrent effect of a conditional sentence is primarily met through the strictness of the conditions. Now, the norm that we see on sentences in the Yukon is house arrest on conditional sentences, generally for the entire duration of the sentences. Occasionally there are curfew terms on the order instead. That said, there is a discretionary component to the house arrest conditions in the Yukon because of the nature of the supervision we have that allows individuals, for legitimate purposes, to be outside of the residence, and those legitimate purposes do not necessarily only include

work. They can include other purposes. They remain within the discretion of the Supervisor and it is this Court's practice to rely on the Supervisors that we have.

8. For the next three months of this order, you must abide by a curfew by remaining within your place of residence between the hours of 9:00 p.m. and 7:00 a.m. daily, except with the prior written permission of your Supervisor, and for the next three months of the order you are to abide by a curfew by remaining within your place of residence between the hours of 11:00 p.m. and 7:00 a.m. daily;

[19] In consideration of the amount of time that you have already been on a curfew, I am not going to impose a curfew for the final six months of the order. If, in fact, there are any problems or concerns that arise, they will arise within the first year. The Court can deal with those accordingly. I do not anticipate any.

[20] With respect to the house arrest and curfew conditions:

9. You must present yourself at the door or answer the telephone during reasonable hours in order to ensure that you are in compliance with this condition with respect to the house arrest, or for curfew checks during the curfew portion. Failure to do so will be a presumptive breach of this condition;
10. You are to abstain absolutely from the possession or consumption of alcohol, controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner;

11. You are to not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
12. You are to take such assessment, counselling and programming as directed by your Supervisor;
13. You are to have no contact directly or indirectly or communication in any way with Reginald Clements, except with the prior written permission of your supervisor in consultation with Victim Services;
14. You are to not attend at or within 50 metres of the residence of Reginald Clements except with the prior written permission of your Supervisor in consultation with Victim Services;
15. You are to provide your 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.

[21] Those are all the terms that were suggested on the Conditional Sentence Order.

Is there any submission on those terms?

[22] For nine months after the Conditional Sentence Order there will be a period of probation that requires you to:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do by the Court;
3. Notify the Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer of any change of employment or occupation;

4. Report to a Probation Officer immediately upon completion of your Conditional Sentence, and thereafter when and in the manner directed by the Probation Officer;
5. Take such assessment, counselling and programming as directed by your Probation Officer;
6. Have no contact directly or indirectly or communication in any way with Reginald Clements except with the prior written permission of your Probation Officer in consultation with Victim Services;
7. Not attend at or within 50 metres of the residence of Reginald Clements except with the prior written permission of your Probation Officer in consultation with Victim Services; and
8. 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.

[23] Those are the terms that I intend to impose in the Probation Order. Any submissions?

[24] MR. FOWLER: Thank you very much, Your Honour, nothing to add.

[25] THE COURT: With respect to the issue of restitution that was raised by the Crown, I appreciate that Mr. Clements has suffered significant consequences, and some of those consequences may well be monetary. He has indicated that he has not been able to work since this took place. I simply do not have a sufficient evidentiary foundation to properly quantify or assess what those damages would be and make an

order. That does not, of course, foreclose the possibility of Mr. Clements seeking what civil remedies he has, which would be potentially available to him upon a sufficient evidentiary foundation.

[26] With respect to DNA, this is a primary designated offence; there will be an order that a sample of DNA be provided. This is a discretionary firearms prohibition. In the circumstances, I am not going to impose one. I do not consider it to be necessary or even appropriate in this case, in the circumstances of this offence and this offender.

[27] The Victim Fine Surcharge will be imposed. It is \$50. How much time would your client need to pay that?

[28] MR. FOWLER: He is asking for a couple of weeks but maybe just make it a month, out of an abundance of caution.

[29] THE COURT: Thirty days time to pay.

[30] MR. FOWLER: Thank you.

[31] THE COURT: Anything further?

[32] MR. GOUAILLER: That is it.

[33] THE COURT: All right.

[34] MR. GOUAILLIER: Well, just perhaps to confirm that the original Information has been either stayed or --

[35] THE CLERK: Yes, October 12th [indiscernible].

[36] MR. GOUAILLIER: Thank you.

[37] MR. FOWLER: Thank you, Madam Clerk.

COZENS C.J.T.C.