

Citation: *R. v. Kohlhauser*, 2008 YKTC 68

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08-00191
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles (via teleconference)

REGINA

v.

KEVEN KOHLHAUSER

Appearances:
Eric Marcoux
James Van Wart

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): Mr. Kohlhauser has entered guilty pleas to the following charges: One, fraud in the amount of \$49,895.26 contrary to s. 380(1) of the *Criminal Code*, June 18/07 and July 27/07; I am going to refer to this charge as the principal charge. Two, fail to attend court, s. 145(2)(a), *Criminal Code*, October 29, 2007. Three, obstruction of justice by providing a false name to the police on several occasions; that is a s. 129(a) charge between June 14 and June 17, 2008, and fail to attend court, s. 145(2)(a), on June 2, 2008.

[2] The circumstances of the principal offence are as follows: Mr. Kohlhauser was dumpster diving and found a number of blank cheques discarded by Steve's Music, a business in Whitehorse. He then entered into an elaborate and deliberate scheme involving the opening of several different bank accounts, and wrote cheques to himself using the blank cheques. The total amount of money obtained by this fraudulent scheme was \$49,895.26. Mr. Kohlhauser is a drug addict, and I have been informed that he used all of this money to purchase drugs for himself and possibly for others.

The personal circumstances of Mr. Kohlhauser:

Criminal Record

[3] Mr. Kohlhauser is 42 years of age. He has an adult criminal record dating from 1984 consisting of some 61 convictions involving theft, robbery, fraud, and break-and-enters. I am satisfied that almost all of these offences were related to his addictions. He has received sentences of incarceration for all of these offences, including a global seven-year federal sentence in 1998.

Family History

[4] Mr. Kohlhauser's parents separated when he was six years of age. He witnessed abusive behaviour between his parents and was also a victim of abusive behaviour by his father. The pre-sentence report indicates he may have been sexually abused as a child. His mother remarried an individual who abused alcohol and drugs. According to Mr. Kohlhauser, she no longer abuses drugs. She currently resides in Dawson City where she has worked, and currently works, for the Yukon Territorial Government, seasonally.

[5] Mr. Kohlhauser has lived independently since the age of 15, living in various places in the United States, Alberta, British Columbia, and more recently in the Yukon. Mr. Kohlhauser began abusing alcohol and drugs at a very young age. From his record, and his performance subsequent to his arrest on the principal charge before the Court, it is obvious that he is a hard-core addict who has been unable to give up drugs, even while under close court supervision. His drug of choice is cocaine, but he struggles with other substances as well.

[6] Mr. Kohlhauser has a limited education and has worked driving trucks, logging, construction, and as a general labourer. While in Dawson City he was in business for himself cutting and selling firewood. He was also employed by Han Construction, and more recently by Yukon Gardens. He lost those jobs because he could not stay away from drugs. To his credit, he appears to be a good worker while abstaining, and both employers would consider hiring him back.

[7] Mr. Kohlhauser has been involved in a number of relationships; none were stable. They were described in the pre-sentence report as "tumultuous" and "abusive". He appears to be attracted to and to attract females who also abuse drugs. He admits to having an explosive temper.

[8] While Mr. Kohlhauser is in custody, and was in custody, and while he is sober, he wants to stay away from drugs. He has participated in numerous programs, including residential treatment programs, and he has been involved with a number of substance abuse counsellors over the years. He has done these programs voluntarily and also under court order. He blames relationship problems for his relapses. He has

been assessed as a high risk to relapse upon his release from custody. If he relapses, I am satisfied that he will commit further criminal offences to fuel his addiction.

[9] Mr. Kohlhauser has not done well under community supervision since he was apprehended on the principal fraud charge. He has not been able to abide by his release conditions and has had difficulty attending court when required to do so. I have inferred that his performance, or lack thereof, can be attributed to alcohol and drug use.

[10] Mr. Kohlhauser's release plan involves returning to Dawson City to live with his mother. Han Construction would provide employment for him. He would attend AA and seek other community supports. He has a girlfriend in Dawson, but his pre-sentence report cautions that she is known to abuse drugs.

[11] A psychological assessment was filed with the court. It largely confirmed the information found in the pre-sentence report. There is no evidence that Mr. Kohlhauser is suffering from a major mental illness.

[12] Although Mr. Kohlhauser would like to make restitution, his work record suggests that full restitution may not be possible. The impact of this loss on the victim could be substantial. I have been advised, however, that the banks involved have decided to assume the losses, thus sparing the victim from his consequences. Any restitution will have to be made to the banks instead.

Case Law

[13] The cases filed by the Crown, by enunciating general principles of sentencing, were all employee/employer breach-of-trust cases. In all of these cases, the Court

placed considerable weight on the breach of trust that was involved. As a result, the actual sentences imposed were not particularly helpful in determining the sentence in this case.

[14] The case of *R. v. D.P.*, [2004] N.W.T.J. No. 73, Supreme Court, was filed by defence counsel. In addition to charges of trafficking and possession, D.P. pled guilty to using forged documents and fraud to deplete her common-law partner's bank account of \$18,000. D.P. was 41 years old and a cocaine addict. Although a breach of trust was involved, it appears that the Court did not treat it as such. She received a sentence of one year incarceration for the fraud consecutive to the sentence for the drug charges.

[15] The facts of *R. v. Harder*, [2002] B.C.J. No. 536, are different from the case at bar. The amounts involved were significantly less. A large amount, \$17,500, was transferred to Harder's account but she was unable to spend it, and I assume or infer that it was recovered. The other amount involved was \$5,700. There are also some other charges. She received a global sentence of 16 months. The Court of Appeal affirmed the sentence.

[16] In *R. v. Janzen*, [2001] O.J. No. 4380, the accused fraudulently used credit cards to obtain \$9,378.50. He received a six-month conditional sentence of imprisonment. He had a limited record consisting of one previous conviction. He was 48 years old, had two children, ran a business, and was able to make restitution.

[17] I have also considered the following cases which I consider to be on point: *R. v. Turcotte*, [1995] B.C.J. No. 1631, B.C. Court of Appeal. In this case, the accused stole some cheques and defrauded a business of approximately \$5,000. None of the money

was recovered. The accused was a drug addict. A sentence of 15 months imprisonment followed by eight months probation was upheld on appeal. The accused was 28 years of age.

[18] *R. v. G.P.R.*, [2005] B.C.J. No. 2438, B.C. Court of Appeal: The accused obtained a loan of \$25,000 from a bank by passing himself off as another person. The funds were never recovered. The accused was 23 years old, had a young family, and had a job. The Court of Appeal upheld a sentence of 10 months incarceration.

[19] *R. v. Bibeau*, [1995] B.C.J. No. 2656, B.C. Court of Appeal: The accused committed frauds totalling \$9,400, and was also convicted of theft of a motor vehicle. He needed money for his addiction. He was 43 years old. He had a difficult upbringing. The Court of Appeal upheld a sentence of two years less a day.

[20] The cases reviewed make several points.

1. Courts of appeal view offences contrary to s. 380 of the *Criminal Code* as being serious, and as calling for a presumptive, significant jail sentence;
2. In cases involving less money than in the case at bar, significant jail terms over 12 months are commonly ordered;
3. Drug addictions are often involved in these frauds and in the cases reviewed drug addiction was not considered as either a mitigating or aggravating factor;
4. Lack of or limited criminal record will be a mitigating factor; a lengthy criminal record will be an aggravating factor. Restitution, actual or perspective, is considered a mitigating factor.

[21] I have addressed my mind to s. 718, 718.1, and 718.2 of the *Criminal Code*. I note the following aggravating factors:

1. Mr. Kohlhauser has a significant related record as an adult, consisting of 61 previous convictions;
2. Mr. Kohlhauser's offending behaviour is triggered by an acute addiction of drugs, primarily cocaine. It is a longstanding addiction, one that he has tried unsuccessfully to address by treatment and counselling over the years. He would be high-risk to relapse and reoffend, if released;
3. Mr. Kohlhauser is 43 years of age. His addiction and behaviour is now, unfortunately, well-established and will be difficult to overcome;
4. The principal offence before the Court was not an isolated, impulsive, one-time occurrence; rather, it was a rather sophisticated scheme carried over a period of time, albeit a short period of time. None of the monies obtained by fraud were recovered. It is unlikely that Mr. Kohlhauser will be able to provide full restitution within a reasonable time, although partial restitution should be possible;
5. The impact of a fraud of this size on a small business will invariably have a significant impact on that business. On the fact of this case, however, the small business was spared that impact and the brunt of the fraud will be felt by the banks. I note, however, that all citizens, or most citizens, who use the banks, indirectly pay for these kinds of frauds, either by the interest they receive, or lack of interest they receive, for money deposited, or by the interest they pay on loans and mortgages.

[22] I consider the following mitigating factors:

1. Mr. Kohlhauser had a difficult childhood where he was exposed to and was a victim of violence and abuse. On the other hand, he is now 42 years of age and of average intelligence, and society expects an individual over time to address such issues with counselling and programming;
2. Mr. Kohlhauser has entered an early guilty plea, or I should say early guilty pleas, to the charges before the Court. This has saved both the police and the courts considerable time, effort, and monies;
3. Mr. Kohlhauser is sincere about wanting to escape his addiction. Unfortunately, as his recent performance indicates, he has been unable to do so, even with the support and structure of the Community Wellness Court;
4. Mr. Kohlhauser is sincere about making restitution, but as I have mentioned, in my opinion full restitution may not be possible.

[23] In order of importance, I find the following principles of sentencing to be applicable in the fact of this case: specific deterrence, general deterrence, and rehabilitation.

[24] Mr. Kohlhauser's criminal history and performance subsequent to the principal offence preclude consideration of a conditional sentence. Counsel did not suggest that I consider a conditional sentence. Mr. Kohlhauser's release plan does not instil me with full confidence in his continued sobriety. The pre-sentence report is concerned that his girlfriend in Dawson is a drug user. As a judge sitting in Dawson over 20 years, I'm prepared to take judicial notice of the fact that most social activities in Dawson involve

alcohol consumption. On the positive side, he has been promised work in Dawson by Han Construction. He states that he has stayed away from drugs for a lengthy period of time in the past while living in Dawson, although alcohol was a problem for him at that time. Dawson City does not have the programming available in Whitehorse. He does, however, have family there, and some friends, and a prospective employer. He also has support people who wrote support letters for him.

[25] Specific deterrence must be a significant consideration in the sentence Mr. Kohlhauser receives. A drug addict like Mr. Kohlhauser, who defrauds, robs, and commits thefts to support his drug habit, does considerable harm to innocent individuals and businesses in our communities. I am not so naïve as to believe that Mr. Kohlhauser has not committed additional crimes to obtain drugs for which he has not been apprehended.

[26] Our courts of appeal have strongly enunciated the principle of general deterrence in cases involving significant fraud. See, for example, *R. v. Reid*, [2004] Y.J. No. 3, Court of Appeal. Incarceration is the principal tool used by the justice system to effect general deterrence. Finally, if Mr. Kohlhauser is to become a productive citizen, he must commit to rehabilitation. When he is ready, the justice system can help him in part by supervising him in the community, and by providing opportunities for counselling and treatment.

The Sentence

[27] Mr. Kohlhauser has spent a total of nine months in pre-trial custody. Counsel are in agreement that he should be given the usual credit of 1.5 times, resulting in 13.5

months pre-trial credit. In addition, he spent three months at the YARC, that being the Yukon Adult Residential Centre, where he was subjected to curfews, random drug tests, and mandatory programming. I am persuaded that he should receive some credit toward time served for his stay at the YARC. Using a multiplier of .5, resulting in an additional 1.5 months credit, for a total of 15 months pre-trial credit for time served.

[28] I am unable to accede to defence counsel's submission that Mr. Kohlhauser be sentenced to time served. To do so would be inconsistent with the directions given by the Court of Appeal. On the other hand, I will also be sentencing Mr. Kohlhauser to a lengthy period of probation with strict terms, and on that basis it would be appropriate to reduce the period of actual incarceration that would have otherwise been ordered.

[29] In all of the circumstances, an appropriate sentence for the s. 380(1) charge would have been three years incarceration. Taking into account the 15 months credit for time served, I sentence Mr. Kohlhauser to nine months custody on that charge.

[30] With respect to the obstruction of justice, s. 129(a) charge, the sentence will be one month incarceration consecutive.

[31] With respect to each of the fail to attend court charges, contrary to s. 145(2)(a), the sentence will be one month incarceration on each count, concurrent to each other and consecutive to the other sentences imposed.

[32] By my calculation, the total period of additional incarceration ordered is eleven months.

[33] There will also be a two-year probation order attached to the s. 380(1) fraud charge. Before I indicate what those terms are, I want to hear from Crown counsel with respect to the banks that were victims of this fraud. Can Crown counsel advise me at this time?

[34] MR. MARCOUX: Yes, I was not able to get that information, Your Honour, at this point. I know for sure the Royal Bank is one of them, but we still have to assess the others.

[35] THE COURT: Okay. Well, what we are going to do then is we are going to -- how much time do you think you need?

[36] MR. MARCOUX: Perhaps one more week.

[37] THE COURT: If you will make arrangements with -- well, perhaps, Madam Clerk, what we can do is we can nominally adjourn the restitution portion to next week.

(Discussion re scheduling for restitution portion)

[38] THE COURT: Let me say that at that time there will be a free-standing restitution order made pursuant to s. 738 of the *Criminal Code*. As well there will be some restitution component part of the probation order. Now, I am going to deal with the probation order at this time, with the exception of the term dealing with restitution.

(Further discussion re scheduling)

[39] THE COURT: So the terms of the probation order, it will be a two-year probation order, are:

1. Keep the peace and be of good behaviour, and appear before the Court when required to do so by the Court;

I am adding the following, however:

With the assistance of your probation officer, you will arrange to appear before a Territorial Court judge for a review of your performance under this probation order within three months of your release from Whitehorse Correctional Centre;

2. Remain within the Yukon Territory unless you have the written permission from your probation officer or the Court;
3. Notify the probation officer in advance of any change of name, address, and promptly notify the probation officer of any change of employment or occupation;
4. Report to a probation officer within two working days immediately upon your release from custody and thereafter when required by the probation officer and in the manner directed by the probation officer;
5. Reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer;
6. For the first six months of this order, abide by a curfew by remaining within your place of residence between the hours of 9:00 p.m. and 6:30 a.m. daily, except with the prior written permission of your probation officer. 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;

7. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner. You are to provide a sample of your breath or urine for the purposes of analysis upon demand by a peace officer who has reasonable grounds to believe that you may have failed to comply with this condition;
8. Not attend any bar, tavern, off-sales, or other commercial premises whose primary purpose is the sale of alcohol;
9. Attend such alcohol and/or drug assessment, counselling, or programming as directed by your supervisor, and attend and complete the residential treatment programming as directed by the supervisor;
10. Obtain such other assessment , counselling, and programming as directed by your supervisor including but not limited to the Spousal Abuse Program.

[40] Counsel, can you explain to me why clause 11 is in this order?

[41] MR. MARCOUX: The first name is the main complainant in this file.

[42] THE COURT: Yes.

[43] MR. MARCOUX: The other names, I wonder -- I wonder. I will actually be seeking only a no-contact order for the first name.

[44] THE COURT: Yes. Well, I note that the accused, Mr. Kohlhauser, does not know who Mr. Hare is, and would not recognize him if he saw him. That would not preclude my making the order, because --

[45] MR. MARCOUX: On one occasion, Your Honour, Mr. Hare, he saw Mr. Kohlhauser in the Royal Bank at the same time he was there, and he advised me that he wishes to have such a condition.

[46] THE COURT: Yes, but you understand that only clause 11 requires knowledge by the accused that the person he has been communicating with is Steve Hare.

[47] MR. MARCOUX: That's correct.

[48] THE COURT: That would be a defence if there is an inadvertent communication, an innocent communication.

[49] MR. MARCOUX: That's correct.

[50] THE COURT: Right. So:

11. Not contact directly or indirectly communicate in any way with Steve Hare, except with the prior written permission of your probation officer.

[51] Now I will indicate to you clause 12, the structure of the restitution clause in the probation order, and, Madam Clerk, could you make a note of that. It is going to read as follows:

12. Use reasonable efforts to make restitution --

And then to -- and we will fill that in when Crown counsel provides me with that information:

-- by disclosing and providing evidence of all income received through employment or business to your probation officer, and promptly paying at least one quarter of the net amount received to the Territorial Court, in trust, for the aforesaid victims. All amounts paid will be divided pro rata among the victims, based on the amount owed to each victim;

13. Make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts;
14. Provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment, or educational activities that you have been directed to do pursuant to this probation order.

[52] Now I do not know why clause 15 is there, the Home Hardware; can counsel advise?

[53] MR. MARCOUX: I think there might have been a cheque that was exchanged there, but we -- I would not be seeking that condition.

[54] THE COURT: Thank you. Just with respect to or suggestions with respect to that probation order?

[55] MR. VAN WART: Nothing from defence.

[56] MR. MARCOUX: Just the -- just for clarity purposes, Your Honour, you mentioned that the restitution amount would be one quarter of the total amount?

[57] THE COURT: Let me read this to you again.

[58] MR. MARCOUX: Yes.

[59] THE COURT: I will paraphrase it. Under clause 12, he is to disclose all monies he receives to his probation officer by way of employment or business, and he is to then promptly pay at least one quarter of monies received into Territorial Court in trust for the victims. In other words, I am setting a minimum threshold of payments he has to make out of any income he receives.

[60] MR. MARCOUX: Okay.

[61] THE COURT: There will be restitution. Perhaps I can add they are paying at least a quarter of the amount received to the Territorial Court in trust for the aforesaid victims, to a maximum of, and that maximum will be the amount of the fraud, the \$49,895.26.

[62] So what I am attempting to do there, counsel, is to ensure that he makes some contribution towards his restitution, while he is on probation, from all monies he receives by way of income or employment or business.

[63] MR. MARCOUX: Thank you.

[64] THE COURT: Anything else, Mr. Van Wart?

[65] MR. VAN WART: No, Your Honour.

[66] THE COURT: I am going to suggest, Madam Clerk, that a draft of this probation order be prepared for next week, so that counsel will have it in front of them and we can then look directly at the term that needs to be completed.

[67] THE CLERK: Yes, Your Honour. Remaining counts?

[68] THE COURT: Yes, and actually before we speak to the remaining counts, unless counsel have any objections, my inclination would be to waive the victim fine surcharges. Any objection to that?

[69] MR. MARCOUX: I have no -- no comments on that.

[70] THE COURT: Thank you.

[71] MR. VAN WART: No, no, no objection at all.

[72] THE COURT: Sorry, Madam Clerk, what were you saying? There was the other counts; Crown counsel?

[73] MR. MARCOUX: Yes.

[74] THE COURT: The outstanding counts?

[75] MR. MARCOUX: Yes, I would ask the clerk to enter a stay of proceedings.

[76] THE COURT: Thank you. Now, is there anything else that we can or should be doing on this file before we reconvene only to address the victims of the restitution?

[77] MR. MARCOUX: Not that I see, no.

[78] THE CLERK: I can confirm that that date of September 17th at 9:00 a.m. will work for you.

[79] THE COURT: Okay. I think that is it then, Madam Clerk.

[80] THE CLERK: Thank you.

[81] THE COURT: Thank you, counsel, for your assistance. This has not been the most straightforward of cases. There were a lot of, I would say, conflicting information that falls one way and the other, and I am grateful to you for your assistance in this matter. Thank you.

[82] MR. MARCOUX: Thank you.

[83] THE COURT: We will see you next week.

LILLES T.C.J.