

Citation: *R. v. Lilley*, 2004 YKTC 38

Date: 20040505
Docket: T.C. No. 03-00251
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Barnett

Regina

v.

Diane Sharon Lilley

Appearances:
Ludovic Gouaillier
Nils Clarke

Counsel for the Crown
Counsel for the Accused

REASONS FOR SENTENCING

[1] BARNETT T.C.J. (Oral): Diane Lilley is in court today to be sentenced on a charge that arose on the 4th of August 2003 here in Carmacks, a charge of assault with a weapon.

[2] I want to say at the outset that in my view, this case is truly exceptional, and I say that, having been a judge for more than 30 years, presiding in a great many communities similar to Carmacks and having presided in Carmacks on a few previous occasions and throughout the Yukon for more than 20 years.

[3] Diane Lilley is 42 years old. Her history is outlined in a very comprehensive pre-sentence report authored by Mr. Gord Sutton, who has been a probation officer in the Yukon for some number of years. The report is clearly very sympathetic towards Ms. Lilley. Some of the information in the report cannot be independently verified, but a large amount of information in this report is verified and it tells the story of a woman who has had a life characterized by continuous trauma, the sort of life that most people would just shake their head at in disbelief, unhappily if one is a judge presiding in Yukon communities, and not only in Yukon communities. I have read too many reports that were somewhat similar to this, but this report is truly exceptional. Ms. Lilley has suffered a lot of abuse during the course of her life.

[4] She has found herself before the courts to be sentenced for offences committed by her on quite a number of previous occasions, and those offences have included two serious assaults committed upon men who were previously her partner.

[5] What happened with this particular offence, very briefly, she and Michael Silverfox were in a relationship from 1997 until, Mr. Sutton says in his pre-sentence report, 2001, but I have heard that this offence happened in 2003, and so the relationship was not fully terminated, if it had ended at all. It was an abusive relationship. It was characterized by alcohol abuse on the part of both parties, drug abuse and a lot of violence. On this occasion, they were both

intoxicated. An argument escalated and Ms. Lilley stabbed Mr. Silverfox with a knife. At first it was thought that he might have suffered life-threatening injuries. He was Medevac-ed to Whitehorse. His victim impact statement says that he was in the hospital for only a couple of days and he got nine or ten stitches. Ms. Lilley did not disagree when I suggested to her that she came very close to facing a manslaughter charge and conviction, but Mr. Silverfox, I am told, made a complete recovery. He was only in the hospital for a couple of days, he said.

[6] I am told by Constable Blackjack that Mr. Silverfox still lives in the Carmacks area. He is a member of the same band as Ms. Lilley and he is known in the community as quiet and shy man except when he has been drinking. He, I am told, like Ms. Lilley, has a great problem with alcohol abuse.

[7] The pre-sentence report does, as I previously said, support the proposition that when it comes to sentencing Ms. Lilley, this truly can be said to be an exceptional case. When I say that, I of course have in mind the *Gladue* decision from the Supreme Court of Canada. I am quickly reminded of that case when I note that Ms. Lilley's son is in a relationship with a woman whose surname is Gladue. I don't know that there is any connection, but the *Gladue* case is something that a judge must, should, and I have no hesitation in keeping in mind this afternoon.

[8] Counsel are agreed that the circumstances in Ms. Lilley's history, including of course her court history, really do require that there be a sentence of imprisonment, in my view. Taking into account, as I do, circumstances which I think are truly exceptional, and they include of course the obviously real and sincere efforts that Ms. Lilley has made to turn things around -- the word judges use is rehabilitate -- but she has made real efforts to turn her life around since the events of August 4, 2003 and those are part of the exceptional circumstances. I am persuaded that she is not just telling Mr. Sutton a good number of things that she is going to do. She has gone out and done many of these things. It's not just window dressing. Taking all that into account, in my view, a proper sentence would be five months to be served conditionally and it is to be followed by a probation order for a period of three years.

[9] Now, I want to say something more about exceptional circumstances. I am well aware of a policy that has prevailed not only in the Yukon but very specifically in the Yukon for a number of years now, where when persons wish to go to a treatment facility, they cannot go and be funded by the federal government if they are going only because a judge ordered them. Moreover, the policy, as I understand it, is that their attendance will not be funded if that person is serving a conditional sentence or if that person is on probation, but counsel tell me that a woman in Whitehorse not so very long ago stood up and told members of the Yukon legal community that she is authorized to make exceptions to that

general policy in exceptional cases, and it is my suggestion to her that this truly is an exceptional case.

[10] I am not going to order Ms. Lilley to attend at a treatment centre. It isn't necessary that I make such an order. She tells me that she seriously wishes to go to a particular treatment centre in the Nanaimo area. It is a little beyond my ability to pronounce the name of that treatment centre, which is for aboriginal persons who have alcohol and other substance abuse problems and who have had problems in their lives which have given rise to those problems, persons who have been the victims of abuse. She has looked into this particular treatment centre. She says she wants to go there, and I think that this is a case where it is necessary that there be not only a conditional sentence, but that be followed by an extended period of probation, and I truly hope that Ms. Stewart, who will be getting a copy of this transcript, will read it, will think about it carefully and will sense, as I do, that these are exceptional circumstances where Ms. Lilley's attendance at a treatment centre, the one that she wants to go to, should be authorized and funded.

[11] I am giving the court reporter the slip of paper which has the name of the treatment centre spelled out on it so that he can put the name of that treatment centre into the transcript which he is going to be preparing.

[12] MR. CLARKE: Your Honour, I apologize for interrupting. I suspect the crafting of the terms will take a little while. My client is requesting a two-minute personal adjournment.

[13] THE COURT: That is fair enough.

[14] THE CLERK: Order in the court. We will take a brief adjournment at this time.

(Proceedings adjourned)

(Proceedings reconvened)

[15] THE COURT: So I have said that there is to be a five-month conditional sentence. That is to be followed by a period of probation for three years. There will be terms in the Conditional Sentence Order and there will be terms in the Probation Order. I am not inclined to think that they should be different terms.

[16] There are statutory terms that must be included in any conditional sentence order and statutory terms that must be included in any probation order. Those terms, of course, are included in these orders, but the special conditions will apply.

[17] First, Ms. Lilley, you are not to have any deliberate contact with Michael Silverfox. This means that you must never allow him to enter your home and that you must never enter the place where he resides. Since he wants to stay away from you, he says, and you fear him, you say, I don't expect that will cause you any difficulty. This is a small community and encounters simply are inevitable, but don't get back together with him at your place or at his place or anywhere else.

[18] There will be a condition, and I read it out previously, but I think I need to read it out again, and that will be -- and I make this condition because your record of violence, both inflicted by you and upon you in previous relationships, causes me to think that this is a condition which may seriously be helpful in keeping the peace and it is not meant to be unfairly intrusive. It reads:

Not to enter into any marriage, common-law relationship, domestic partnership, intimate relationship or cohabit with any other person without having first introduced that person to your supervising probation officer. This introduction requires that you and the other person together meet with the probation officer and that you remain in attendance at the meeting for such time as may reasonably be required by the probation officer.

Although this is not part of the probation term, just so that everybody understands very clearly, this term is intended to apply not to every casual encounter, every casual acquaintance, but to relationships which appear to be developing on a continuing basis. And I don't think I need to say more than that.

[19] There will be a condition, Ms. Lilley, that you are not to possess any firearm and that you are never to be in possession of any knife or any other instrument or thing capable of being used as a weapon in circumstances which demonstrate that it was your intention to use it as a weapon.

[20] There has been a suggestion that house arrest might be appropriate. I happen to believe that most conditional sentences should be accompanied by meaningful house arrest terms, but in this case I am not ordering any house arrest and I am not ordering any curfew, and I have some reasons for doing that. One is that Ms. Lilley is a woman with a real work history and a woman who wants to get work over the summer months. I think she is employed at the Price of Time, but we are coming up to the time of year when in the Yukon people may not work what people down south would think of as normal hours because it's daylight up here for a very long time, and I think that house arrest or curfew terms would perhaps be reasonably considered a little too much in those circumstances. My other reason is that it is my hope that Ms. Lilley may be able to get into a treatment centre very soon, and I would not wish an order made by myself to make that unreasonably difficult. So there will not be a house arrest term. The other factor is that I am ordering a much longer period of probation than counsel suggested, and to be fair, I think no house and no curfew.

[21] There will be conditions in this order that I believe, Ms. Lilley, you will be able to comply with. In your existing recognizance there has been a condition

that you are to abstain absolutely from the purchase of liquor and consumption and possession, and you have been able to live with that term?

[22] MS. LILLEY: Yes, I've been doing really well with myself lately.

[23] THE COURT: That same term will be repeated as Mr. Sutton suggests in the Probation Order.

[24] Mr. Sutton suggests a condition that you are to participate in assessment counselling and treatment for substance abuse as directed by a conditional sentence supervisor. That condition should be part of the conditional sentence and with the required change of word from conditional sentence supervisor to supervising probation officer repeated in the Probation Order also and, similarly, the requirement that Mr. Sutton suggests that you participate in assessment counselling and treatment for anger management and also to participate in other assessment counselling and treatment as directed by the conditional sentence supervisor and in due course by the supervising probation officer.

[25] I don't believe, Mr. Clarke, that any other conditions are required in the probation order.

[26] I am required to make an order for DNA testing, Ms. Lilley, and Mr. Clarke agrees that that order should be made.

[27] Finally, Ms. Lilley, I am required to make an order and I do make an order in the words of the *Criminal Code* which prohibit you from being in possession of any firearm, ammunition, explosive substances and the other things mentioned in the section of the *Criminal Code* for a period of 10 years. There is already an order in effect, but this will extend the duration. As I read Mr. Sutton's report, Ms. Lilley, you are not a person who needs a gun to go out hunting. Am I correct?

[28] MS. LILLEY: Well, I do a lot of times because I go out with my aunt and my uncle and we do go for moose.

[29] THE COURT: You go for moose.

[30] MS. LILLEY: Yes.

[31] THE COURT: But who has the gun?

[32] MS. LILLEY: Well, in the last 10 years my uncle has, but I've been doing work for him.

[33] THE COURT: You have been going with him and he has been doing the shooting?

[34] MS. LILLEY: Yes.

[35] THE COURT: So that hasn't been impossible for you?

[36] MS. LILLEY: No, no.

[37] THE COURT: And you don't have a gun at the present time?

[38] MS. LILLEY: No, no.

[39] THE COURT: I think I am required to give you a period of 24 hours in which to surrender any of those things that you might remember you have to the RCMP here in Carmacks, but that is not the case.

[40] Mr. Clarke?

[41] MR. CLARKE: A few things. The first was it is Your Honour's intention that all the terms that you have set out apply both to the conditional sentence and to the Probation Order?

[42] THE COURT: Yes.

[43] MR. CLARKE: Secondly, with respect to our submission -- Crown and Defence's submission on the firearms issue, and I appreciate based on the responses you have received from my client that it may not be a large issue, but

our submission was -- or suggestion was that a firearm prohibition apply to both the conditional sentence -- the period of the conditional sentence and the period of the Probation Order. The Order isn't mandatory otherwise. The 10-year Order is not mandatory.

[44] THE COURT: If it is not mandatory, I am prepared to say, if counsel agree, that the firearms prohibition only applies during the period of the Probation Order.

[45] MR. GOUAILLIER: It is not mandatory and it is true that we ---

[46] THE COURT: There is an existing Order which still runs for a few years ---

[47] MR. GOUAILLIER: Mind you, I understand that Ms. Lilley might need firearms, but ---

[48] THE COURT: You can forget what I said about a firearms prohibition order, but I did say that it is a condition in the Probation Order.

[49] MR. CLARKE: That is fine.

[50] The other issue, I understand, based on all the information the Court has before it, that alcohol and Ms. Lilley don't mix, however -- and Your Honour hears these submissions frequently, I am sure -- it would, I would imagine, pose a fairly significant challenge to Ms. Lilley to remain completely abstinent for the three-year period of the Probation Order.

[51] THE COURT: And my suggestion would be, Mr. Clarke, that after she has gone to a treatment centre, that if she wishes to come back to court and ask a judge if he or she would reconsider some of this, that she should do that, and I would not be seized with hearing any such application, but I think that it should be left on that basis, that if she wishes to come back ---

[52] MR. CLARKE: That is certainly fair, Your Honour. On the surface, Ms. Lilley should likely remain abstinent from alcohol at this time anyway.

[53] THE COURT: Ms. Lilley, you have to stick around, please.

[54] MS. LILLEY: Okay.

[55] THE COURT: There is no victim fine surcharge for this matter.

[56] I just want to close by saying that I could have taken a good deal less time to give my Reasons for Sentencing, Ms. Lilley, and I was quite deliberate in

taking some time and some care to say that I truly believe that this is a case where a court can properly read the circumstances of Ms. Lilley and this offence as being honestly exceptional. I am well aware of the concerns about violent offences, particularly violent offences in domestic situations in the Yukon and I am well aware of cases in the Yukon which have given rise to controversy after judges had dealt with them and, very particularly, I am well aware of the circumstances involved in Daniel Morris' case. When I say that I believe Ms. Lilley's circumstances are exceptional and that this report falls well outside any sort of norm, I mean it. I have treated this case as an exceptional case and I hope that Ms. Stewart, when this transcript reaches her desk, will be persuaded to view it as I have done. That of course is a decision for her to make, not for me to make. I am not questioning general policy. I am simply expressing the hope that she can find reason to make an exception so that Ms. Lilley can get to the treatment centre in Nanaimo early, not when it is too late to do anybody any good.

[57] Mr. Sutton, thank you for the time that you took to ---

[58] MR. SUTTON: I am just wondering if when the transcript is going to be provided to Ms. Stewart, we can get a copy.

[59] THE COURT: I have ordered the transcript, and what I intend to do, Mr. Sutton, is when the transcript is received in the Court Registry, I want the

court clerk to get it to your office, Mr. Sutton, and I want you, if you will, please, Sir, to see that it reaches Ms. Stewart's desk.

[60] Thank you.

[61] MR. CLARKE: Thank you, Your Honour.

[62] THE COURT: Mr. Sutton, I think it goes without saying, but in any event, when you send Ms. Stewart the transcript, you will please send her a copy of your pre-sentence report also?

[63] MR. SUTTON: Yes.

BARNETT T.C.J.