Citation: *R.* v. *Nieman,* 2014 YKTC 16

Date: 20140507
Docket: 13-00745B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

RICHARD NIEMAN

Appearances:
Bonnie Macdonald — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] Richard Nieman was acquitted after trial on charges alleging that he had committed two offences contrary to s. 733.1(1) of the *Criminal Code*. These are my written reasons for having acquitted Mr. Nieman on April 16, 2014.

[2] Mr. Nieman was charged as follows:

> On or between the 29th day of March and the 31st day of March, 2014, at Whitehorse, Yukon Territory, did while bound by a probation order made by Judge R. Wyant in Territorial Court at Whitehorse, Yukon Territory on the 18th day of March, 2014, fail without reasonable excuse to comply with such order, to wit: Reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer, contrary to s. 733.1(1) of the Criminal Code of Canada.

> On or between the 29th day of March and the 31st day of March, 2014, at Whitehorse, Yukon Territory, did while bound by a probation order made by Judge R. Wyant in Territorial Court at Whitehorse, Yukon Territory on the 18th day of March, 2014, fail without reasonable excuse to comply with such order, to wit: Keep the peace and be of good behaviour, contrary to s. 733.1(1) of the Criminal Code of Canada.

WITNESS EVIDENCE

[3] Dahn Casselman was Mr. Nieman's probation officer. She testified that Mr. Nieman's release from custody on March 18 had been somewhat unanticipated and there was no plan in place at that time with respect to where Mr. Nieman would be residing.

[4] After his March 18 release, Mr. Nieman was subsequently briefly incarcerated again at the Whitehorse Correctional Center ("WCC"). Ms. Casselman spoke to him on March 26, 2014, while he was still incarcerated and, pursuant to the terms of the probation order, told him that upon his release he was to reside at the Adult Resource Center (the "ARC"). She said that she did so because Mr. Nieman was having difficulties at the residences he had been living in since his original release from custody on March 18 and that the ARC was the only residency option that she could support.

[5] Ms. Casselman testified that it was her intention to have Mr. Nieman living in a place other than the ARC as soon as possible. Ms. Casselman stated that she had never known Mr. Nieman to have had a stable or solid residence.

[6] Ms. Casselman testified that the discussion on March 26 with Mr. Nieman was somewhat "heated". He told her that he did not want to reside at the ARC and that he wanted to live in Carcross with his girlfriend. He told her that the ARC was halfway to

jail and that he did not like the requirement for residents of the ARC to abstain from consuming alcohol or drugs. In particular, he stated that he was a regular, even daily, marijuana user.

[7] Mr. Nieman also said to Ms. Casselman that if he had to live at the ARC he would take off. He further told her that he would not comply with the abstention condition that residents of the ARC are required to comply with.

[8] Despite his resistance as expressed to Ms. Casselman, upon his release Mr. Nieman went to reside at the ARC as Ms. Casselman had told him to. On March 31, 2014, Ms. Casselman was advised that Mr. Nieman was not at the ARC. As a result she swore out the two-count Information that Mr. Nieman was tried on.

[9] Ms. Casselman testified that, as a general rule, residents of the ARC did not need permission from their probation officer to leave the ARC for periods of time.

[10] Ms. Casselman further testified that at the time she swore the Information, the charge for the failure to reside was on the basis of Mr. Nieman not being at the ARC on March 29, 2013 only, and the charge for failing to keep the peace and be of good behaviour was based upon his failure to reside as approved.

[11] Crown counsel called as witnesses two workers from the ARC. The first worker, Marlene Morin, testified that she called the RCMP on March 29 when she noticed that Mr. Nieman had not returned to the ARC at 10:30 p.m. as he was required to do by the rules of the ARC. She stated that each resident was required to sign out when he left and sign in when he returned.

[12] She also testified that on her two subsequent shifts, Sunday from 8:00 p.m. to Monday at 8:00 a.m. and Monday from 12:00 midnight to Sunday at 8:00 a.m., she did not see Mr. Nieman at the ARC.

[13] Ms. Morin testified that Mr. Nieman's personal belongings remained at the ARC during this time. She stated that these were in the office. She noted his name on some of the items in the office and was advised that these were Mr. Nieman's. She was unable to say whether these were all the items he owned or not.

[14] Maria Jordan testified that she noticed that Mr. Nieman had not returned to the ARC by 10:30 p.m., March 29.

[15] Neither Ms. Morin or Ms. Jordan could say when Mr. Nieman left the ARC on March 29 or what he may have had with him when he left.

SUBMISSIONS OF COUNSEL

[16] Crown counsel stated that the Crown was not seeking a conviction on the breach charge for failing to keep the peace and be of good behaviour.

[17] She submitted that Mr. Nieman should, however, be found guilty of the breach charge for failing to reside as approved. The basis for her submission is that Mr. Nieman had stated to Ms. Casselman that he did not want to live at the ARC, that he would leave there if told that he had to live there, and that he in fact left on March 29 and did not return prior to his arrest on March 31.

[18] She stated that Mr. Nieman had been directed to live at the ARC only, and that he had no place else to go. She stated that it was unclear exactly what possessions Mr.

Nieman had left behind at the ARC so it cannot be presumed that he left belongings there because he intended to return.

[19] As such Mr. Nieman was not residing at an approved residence.

[20] Defense counsel submitted that the Crown did not prove that Mr. Nieman was no longer residing at the ARC as he had been told to do by Ms. Casselman. The Crown did not prove that Mr. Nieman had no intent to return.

ANALYSIS

[21] I find that the Crown has not met its onus to prove beyond a reasonable doubt that Mr. Nieman had failed to reside at an approved residence. It is clear that he left the ARC on March 29 at some point. It is also clear that he left his belongings there. The Crown cannot rely on the lack of specifics as to what belongings were left at the ARC as supporting the Crown's case that Mr. Nieman was no longer residing as approved. It is not Mr. Nieman's responsibility to adduce evidence as to what belongings he left there. The Crown could have called evidence as to what belongings were left in the ARC and where they were left. The Crown could also have called evidence as to what time Mr. Nieman left the ARC on March 29 and what, if any, belongings he took with him.

[22] "Residence" has been described as "a person's permanent dwelling, dwelling-place or abode" (***R. v. McCormick*** (1991), 65 C.C.C. (3d) 247, at p. 250). I find that the Crown has not proven, beyond a reasonable doubt, that the ARC was no longer Mr. Nieman's residence on the dates of March 29 – 31.

[23] I agree with the reasoning of Kirkpatrick J. (as she then was) in the decision of ***R. v. J.E.***, [1994] B.C.J. No. 575 (S.C), that "…the temporary absence of a person, if there exists an intention to return, does not terminate his residence".

[24] In ***J.E.*** the accused in fact did return to his residence after being away for several days. In overturning the trial judge's conviction, the Kirkpatrick J. stated as follows in para. 16:

> With great respect to the learned trial judge, I conclude that the appellant was not in breach of his undertaking to reside where directed. It is clear that the appellant intended to return to the Maples, or alternatively, to the Midway, because he did so. His temporary absence cannot, in my view, be construed to mean that his residence at those institutions was thereby terminated. In the circumstances of this case, where the absence from the residence is temporary, that is, of relatively short duration, then the appellant's residence was unchanged. To find otherwise would, in my opinion, mean that the residence undertaking amounted to a form of house arrest.

[25] Mr. Nieman did not testify nor did he adduce any evidence to demonstrate that he returned or intended to return to the ARC. Therefore this case differs somewhat from ***J.E.*** in that respect. However, the Crown bears the burden of proving beyond a reasonable doubt that Mr. Nieman changed his residence; Mr. Nieman does not need to prove otherwise. While the Crown could possibly have established the commission of the offence through circumstantial evidence, I find that the Crown has not done so.

[26] Mr. Nieman left his belongings at the ARC. I do not know which belongings he left at the ARC; it could have been only a few of the belongings he brought with him or it could have been everything he brought. I have no evidence as to when he left the ARC and whether he took any belongings with him.

[27] If the Crown wished me to infer from the circumstances, as they pertain to the belongings left behind, that Mr. Nieman did not intend to return, the Crown needed to adduce some additional evidence. The only reasonable inference I can draw on the facts before me is that he intended to return to the ARC at some point.

[28] In saying this, I find that there is insufficient evidence to allow me to infer otherwise. I recognize the evidence that Mr. Nieman was gone for two days and had said to Ms. Casselman, at the time he was told he would have to go to the ARC, that he didn't want to go there and he would leave if told that he had to. I am simply am not prepared to find this evidence so compelling as to draw the inference the Crown submits I should. Despite what Mr. Nieman said to Ms. Casselman, Mr. Nieman did go to the ARC as he was told to do. There is no evidence before me that Mr. Nieman was residing at any other particular place or that he took any of his belongings with him when he left the ARC.

[29] As a final comment, I note that the probation order required Mr. Nieman to "reside as approved" and not to "reside as directed". The probation orders in the Yukon Territory commonly allow for one or the other of these terms to be imposed. The *Criminal Code* does not include a clause that specifically refers to a probation officer having the power to require an offender to either reside as "approved" or as "directed". The power to do so lies within s. 732.1(h) which allows a court to require an offender to "comply with such other reasonable conditions as the court considers desirable…for protecting society and for facilitating the offender's successful integration into the community."

[30] While it was pointed out to me that Mr. Nieman was bound by a “reside as approved” term on his probation order, and not a “reside as directed” term, the submissions of counsel did not really address the distinction in any meaningful way. While there may be a difference between the two terms from a practical point of view, insofar as there may be a shift with respect to whether the offender or the probation officer has the responsibility to find a suitable residence for the offender, and the extent to which the offender has an element of choice in determining residency, the issue of whether there is a legal difference that could impact upon whether an offence has been committed or not based upon an allegation of a failure to reside, is not an issue I am required to decide. As such, I decline to comment further on this point.

[31] Mr. Nieman is acquitted of both charges.

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COZENS T.C.J.