

Citation: *R. v. Tibbett*, 2006 YKTC 38

Date: 20060425
Docket: 05-00272
06-00051
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

R e g i n a

v.

Dennis Allen Tibbett

Appearances:
Noel Sinclair
Elaine Cairns

Counsel for Crown
Counsel for Defence

REASONS FOR DECISION

[1] On April 3, 2006, Dennis Tibbett was sentenced to a total of 6 months imprisonment to be served as a conditional sentence for two spousal assaults against his common law spouse, Cindy Pye. The assaults took place on August 15, 2005 and November 6, 2005.

[2] On April 12, 2006, Clara Northcott, Mr. Tibbett's conditional sentence supervisor, received a report that Mr. Tibbett had been arrested for failing to abide by his curfew and failing to keep the peace and be of good behaviour.

[3] Mr. Tibbett accepted responsibility for violating his curfew. Although he was required to remain within his residence between the hours of 9:00 p.m. and 6:00 a.m., he admitted that he left his apartment on two occasions, at approximately 2:00 a.m. and 5:00 a.m. to attend at the apartment of Tamara Vance.

[4] It is further alleged that he assaulted Cindy Pye on the evening of April 11, 2006, or in the early hours of April 12, 2006. She sought refuge that night with Tamara Vance in her apartment which was located in the same building where Mr. Tibbett lived. It is alleged that Mr. Tibbett attended that apartment on two occasions, 2:00 a.m. and 5:00 a.m., banging on the door to be let in. These circumstances constitute the allegation that he failed to keep the peace and be of good behaviour. Mr. Tibbett denies assaulting Ms. Pye and also denies banging on the door of Ms. Vance's apartment.

[5] The report of the conditional sentence supervisor was supported by a written statement given to the police by Tamara Vance, a General Occurrence Report by Constable Fradette and a Supplementary Occurrence Report by Constable Buxton-Carr.

[6] Mr. Tibbett objected to the admissibility of the police Occurrence Reports because they were not "signed statements of witnesses" as required by s. 742.6(4). The relevant provisions of the *Criminal Code* are found in ss. 742.6(4)–(6):

1. An allegation of a breach of condition must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses.
2. The report is admissible in evidence if the party intending to produce it has, before the hearing, given the offender reasonable notice and a copy of the report.
3. Service of any report referred to in subsection (4) may be proved by oral evidence given under oath by, or by the affidavit of solemn declaration of, the person claiming to have served it.

[7] After conducting a *voir dire*, I found the statements to be admissible. Clearly, the police were witnesses and could be called as such at a trial or hearing. The Occurrence Reports were prepared by the officers and could be used to refresh their memories, if required. The fact that they were prepared in

the course of the officer's duties did not preclude them from being considered "signed statements of witnesses". I found that they qualified as "signed statements of witnesses" as contemplated by s. 742.6(4).

[8] The police statements can be summarized as follows:

- The police received a report from Tamara Vance that Dennis Tibbett was banging on the door in the early morning of April 12, 2006 because Tibbett's common law spouse, Cindy Pye, was in her residence. Ms. Pye had told Ms. Vance that she had been assaulted by Mr. Tibbett earlier in the evening. Ms. Pye also told Constable Buxton-Carr that she had been assaulted by Mr. Tibbett and would provide a statement later.
- Mr. Tibbett was arrested for breaching his conditional sentence. He denied assaulting Ms. Pye. He became verbally aggressive, swearing at the officers repeatedly.
- Mr. Tibbett claimed Ms. Pye had assaulted him. At the station, he demanded that the police take a photo of the injury to his nose. Constable Buxton-Carr noted a small area of redness on the right side of Mr. Tibbett's nose.

[9] Tamara Vance's statement was provided to the police after she called 911. It provided the following information:

- Cindy Pye came to her apartment around 9:30 p.m. and asked to spend the night. She told Ms. Vance that Mr. Tibbett had pushed her around and pulled her hair and that she was bleeding.
- They both went up to Ms. Pye's apartment together about 30 minutes later. Mr. Tibbett was there and Ms. Pye spoke to him. Ms. Pye and Ms. Vance then came back to Ms. Vance's apartment and Ms. Pye went to sleep.

- Mr. Tibbett came to Ms. Vance's apartment shortly after 2:00 a.m. She told him that Ms. Pye was sleeping. Mr. Tibbett would not leave and pulled the door open. She told him to get out of her apartment, but he would not. Mr. Tibbett became rude. Ms. Vance's uncle Steven got up and got Mr. Tibbett to leave.
- Several hours later, around 5:00 a.m., Mr. Tibbett came knocking on the door again. That is when Ms. Vance called the police.
- Ms. Vance reported that Ms. Pye had an injury. Ms. Pye kept touching the top of her head and when she did, there was fresh blood on her hand.
- Ms. Pye told Ms. Vance that Mr. Tibbett was "really jealous of her". Ms. Pye said that when she and Mr. Tibbett were in Carcross at her sister's home, "there were people there who had been nice to her and he didn't like it, I guess".

[10] Mr. Tibbett's version of events was quite different.

- Early in the day, he and Ms. Pye went to Carcross to visit her sister. While there, Ms. Pye and her sister got into a fight, and Mr. Tibbett had to separate them. As a result of the fight, Mr. Tibbett noticed blood on the back of her head and helped her clean it up. According to him, the injury did not merit medical attention and that by the time they got home, Ms. Pye had calmed down.
- Mr. Tibbett started cooking supper around 9:00 p.m. Ms. Pye went downstairs, he thought perhaps to drink. His recognizance stated that they were not to be together if either was drinking. Ms. Pye and Ms. Vance came back briefly around 9:30 p.m. He asked Ms. Pye if she wanted supper and she said no. The two women then went downstairs again.

- Mr. Tibbett admits going to Ms. Vance's door around 2:00 a.m. in the morning, to see how Ms. Pye was. He wanted to check on her injury. He said he did not go into the apartment. He was told by Steven, Ms. Vance's uncle, that Ms. Pye was alright and sleeping, and so he left. He denies banging on the door, going into the apartment or being asked to leave.
- Mr. Tibbett returned to his apartment and went to sleep. He woke up around 5:00 a.m. and again returned to Ms. Vance's apartment to check up on Ms. Pye. He said he thought people would be up by this time. He said he knocked on the door, and was told that Ms. Pye was sleeping. The door was never opened. He left. Shortly thereafter he was arrested.

[11] Mr. Tibbett's version of the events is not credible, as it contains factual inconsistencies as well as logical inconsistencies. I prefer the evidence of Tamara Vance, an independent and unbiased witness. In fact, she is a relative of Mr. Tibbett's. There was no suggestion that she had any bias or animosity towards him.

[12] The fact that Ms. Pye removed herself to Ms. Vance's apartment in the early evening is consistent with an altercation between Ms. Pye and Mr. Tibbett. There is no independent evidence suggesting she had been drinking.

[13] Ms. Pye had a head injury. When she touched her head, Ms. Vance saw fresh blood on her hand. This is consistent with a recent injury, not one that took place hours earlier in Carcross as claimed by Mr. Tibbett.

[14] Mr. Tibbett's explanation that he attended at Ms. Vance's apartment at 2:00 a.m. and 5:00 a.m. to see if Ms. Pye was alright is not believable. Nor is his assertion that he thought people might be up and about at 5:00 a.m., justifying his attendance at that time.

[15] Mr. Tibbett's relationship with Ms. Pye has been a violent one. He has been convicted of assaulting her a total of five times. I am satisfied that his attendance at the Vance apartment was not benign, that he was rude as asserted by Ms. Vance, that he was asked to leave by her but would not until her uncle, Steven, told Mr. Tibbett to leave. I am satisfied that Mr. Tibbett attended at the Vance apartment because of his jealous and controlling behaviour towards Ms. Pye.

[16] On the facts before me, I am satisfied on a balance of probabilities that Mr. Tibbett breached his curfew by attending the Vance residence at 2:00 a.m. and 5:00 a.m.

[17] I am further satisfied that by attending at the Vance residence at 2:00 a.m., being rude and refusing to leave the Vance apartment, and then attending again at 5:00 a.m. and knocking on the door, that he failed to keep the peace. In my view, this constituted a "disruption or disturbance of public tranquility, peace and order".

[18] By breaching his curfew, a court order, he also failed to be of good behaviour.

[19] In the absence of any information about the public being disturbed, I am not satisfied that Mr. Tibbett's swearing at the police when arrested constituted a failure to keep the peace.

[20] I am satisfied that there was an altercation between Mr. Tibbett and Ms. Pye earlier in the evening after they returned from Carcross. Mr. Tibbett said Ms. Pye assaulted him. Constable Buxton-Carr observed some redness on the side of his nose. Ms. Pye told Tamara Vance and Constable Buxton-Carr that she had been assaulted by Mr. Tibbett. No circumstances surrounding the alleged assaults were provided. Was it a consensual altercation? Did Mr. Tibbett act in self defence? Was Ms. Pye assaulted by Mr. Tibbett? In the absence of any information or circumstances concerning the altercation, it is not

possible to conclude that Mr. Tibbett assaulted Ms. Pye. While both Ms. Pye and Mr. Tibbett reported an assault, this amounts to a “legal opinion” on their part. What is missing are the circumstances of the alleged assault that would permit the court to conclude, on a balance of probabilities, that an assault rather than a consensual fight, had occurred.

[21] I also note that the information in the statements concerning the assault of Ms. Pye was hearsay or second hand information. In a trial, absent special circumstances, neither Constable Buxton-Carr nor Ms. Vance would be allowed to testify as to what Ms. Pye told them for the truth of what was said. The Crown cannot use s. 742.6(4)-(5) to admit otherwise inadmissible hearsay evidence.

[22] In the result, I find that Mr. Tibbett failed to keep the peace and be of good behaviour. Although I am unable to make a finding of assault in the absence of admissible information about the altercation, I am satisfied an altercation took place between Ms. Pye and Mr. Tibbett. I am also satisfied that Mr. Tibbett’s attendance at 2:00 a.m. and 5:00 a.m. at Ms. Vance’s apartment was not out of concern for Ms. Pye, but rather a symptom of his jealousy and controlling behaviour. I note that these breaches occurred less than two weeks into his six-month conditional sentence of imprisonment for spousal assault.

[23] Where an offender breaches a condition of his conditional sentence without reasonable excuse, there should be a presumption that the offender serve the remainder of his sentence in jail: *R. v. Proulx*, [2000] 1 S.C.R. 61. That is not to suggest that every breach should result in the termination of the conditional sentence. In this case, the breaches established by the Crown are not the most serious. In these circumstances, taking into account Mr. Tibbett’s criminal record, I hereby suspend his conditional sentence order for a period of three (3) months from the date of the hearing, April 21, 2006.

[24] In addition, I am amending Mr. Tibbett's conditional sentence order as follows:

(5) Reside as directed by your conditional sentence supervisor.

(6) Abide by a curfew by remaining within your place of residence between the hours of 6:00 p.m. and 6:00 a.m. daily, except as permitted by the supervisor in writing, such permission to be carried on your person and made available to a peace officer on request. You will answer the telephone and come to the door for curfew checks. Failure to do so will be a presumptive breach of this order.

(11) Have no contact directly or indirectly with Cindy Pye.

Lilles T.C.J.