

Citation: *R. v. Tutin*, 2014 YKTC 26

Date: 20140528
Docket: 13-00038A
Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Schmidt

REGINA

v.

DONALD STEPHEN TUTIN

Appearances:
Leo Lane
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] SCHMIDT T.C.J. (Oral): This is an oral judgment after a guilty plea where evidence was heard with respect to sentencing. Possibly a more nuanced and intricate discussion of the principles that have been raised would be preferred in a written judgment but unfortunately the Court does not have the time for that, given that I am only here one or two weeks per year. But I have taken some time to consider the cases that were handed up, a Pre-Sentence Report, the two exhibits, and I have had an opportunity to view the video exhibit in court a number of times.

[2] Earlier, I had a discussion with the Crown about their interpretation of the video, which was a fight and somewhat blurry, but certainly some things can be made out clearly. The Crown interprets it one way and it can be interpreted that way quite easily. However, we have had the evidence of the accused who explained the motions in the

video and that gives it another flavour. He does not in any way try to minimize the fact that he acted excessively, but he does explain some of the moves that were made during that very brief incident.

[3] The Crown was asked if they could call the other party, the complainant, but the complainant has been asked to come to court and refuses. So the debate on what occurred could go on forever but it will not be determinative in much of the way the Dempsey-Tunney fight of 1927 is still being debated and nobody has really determined what happened.

[4] On a straight evidentiary point of view, the Court can review the video, as it has done, interpretations can be put forward, but the uncontroverted explanation by the accused as to why certain parts of the body were responding in certain ways has to be accepted. He does not deny the punches. He does not deny that they were wrong. But he explains when he went to pick up the complainant and carry him physically out of the bar, as it was his job to do, the grasping of his hands together to hold the complainant in -- I do not know the move -- some sort of bear hug to physically take him out the door, he broke his finger causing him to twist and lose his grip, causing the complainant to fall on the floor where he was concussed. Nothing further happened.

[5] So that is a brief explanation of what has occurred in the courtroom today.

[6] I will go now to the incident. Mr. Tutin was a doorman at a local bar in Whitehorse. There was a frequenter of that bar, Mr. Lindstrom, who was not only a frequenter of that bar but frequently got intoxicated and frequently was asked to leave or was escorted out of the bar. It was his local, I guess, and it seemed to work out okay.

He was rude and obnoxious to staff throughout but they were able to control it and this went on.

[7] On this particular night, he was rude and obnoxious to the server and the server asked him to leave and went outside to find Mr. Tutin, who was out back having a break, to come in and assist because she was too busy with her tables to spend the time getting Mr. Lindstrom out of the bar. That was accomplished successfully.

Mr. Tutin came over and asked him to leave and went through what he describes as his escalation of demands until Mr. Lindstrom did finally leave. There was no physical contact.

[8] Mr. Lindstrom came back into the bar to assist an old gentleman from Old Crow, who happened to be with him or who he was at the bar with, in leaving. And you can see in the video he is an old, slow moving man. That took some time. Mr. Lindstrom came to the table where the old man was and asked him to come and then Mr. Lindstrom walked back to the door, which was reasonable because he knew he should not have been in there. But what he did do -- and I accept this evidence because it is the only evidence that we have -- in coaxing the old man to come out, he also shouted across the bar to Mr. Tutin and called him a number of very provocative things.

[9] Mr. Tutin and Mr. Lindstrom were not strangers to each other. Mr. Lindstrom had married into the family, and married into Mr. Tutin's, and that had split up, and Mr. Lindstrom knew some ways to get under the skin of Mr. Tutin and he employed them on this occasion.

[10] Mr. Tutin freely admits, both by his guilty plea in Court and to the Probation Officer who did the Pre-Sentence Report, that he lost it. And the video clearly shows that he lost it. Mr. Tutin pushed Mr. Lindstrom hard enough that Mr. Lindstrom hit the door and bounced back in at which time Mr. Tutin pursued Mr. Lindstrom into the foyer, a very small area, and both Mr. Lindstrom and Mr. Tutin engaged at that point, grabbing each other by the shirt and pulling back their fists to strike each other or threaten each other.

[11] Mr. Tutin says that Mr. Lindstrom's hand came around his neck in a motion which Mr. Tutin perceived to be a precursor to Mr. Lindstrom punching him in the face with the fist that was already raised. Mr. Tutin knows that to be the next move to a punch. He has seen, in his 12 years' experience, enough bar room fighting and street fighting to know that this was something that was going to escalate the fight, so he punched first, and he punched Mr. Lindstrom twice. It is possible that he never needed to punch Mr. Lindstrom, but he did.

[12] He then grabbed Mr. Lindstrom, from the back, around the stomach area and that is where the next incident occurred where Mr. Lindstrom was taken to the floor in one way or another that I have already described and suffered an injury. He received seven stitches for his injury.

[13] That was the end of the situation. The paramedics were called. Since that time, Mr. Tutin has taken some time off work. Mr. Lindstrom has been permanently banned from this bar that was his former local. Mr. Lindstrom did not give a victim impact statement. He would not. But in the discussions that he has had with other people that

have been relayed to me, he appears to be most upset that he is barred from this bar. Apparently, he is not particularly sensitive to the fact that being rude and obnoxious to the staff is not what the staff wishes to see and hear when they are doing their duties at their work.

[14] The Crown is seeking jail time of six to nine months and a year of probation to follow with numerous conditions of curfew and some 14 conditions that have been outlined.

[15] The Court needs to take a careful look at the life of Mr. Tutin as it is described in the Pre-Sentence Report. I will attempt to do that at this point. It is in the record in any event.

[16] Mr. Tutin is an Aboriginal person. He has relatives in Old Crow, where he has resided. His life started with his parents and he lived with them for a short period of time. But for some reason or another -- he does not know the details of all this -- when he was very young, he was sent to live in Alaska with a paternal aunt and her husband. He does not know why that happened. He lived there for a few years. It was a reasonably happy time, although there are some suggestions of impropriety on the part of the aunt and her husband.

[17] Some time when he was 13, he was taken back to Smithers, British Columbia, and deposited with his mother, who appeared to be living by herself at that time. Some years of neglect followed. The only positive thing in all this was that he knew how to get into the house, where the refrigerator was, and that there was a bed there for him. Other than that, the parenting was absent.

[18] After a couple of years, he moved on his own -- so he would be about 15 -- to Dawson City, where he knew his father to be, and he stayed there with his father. Again, with no particular parenting but a place to live. He spent two years there. Then he was 17. Still, he did not have a home; still, he did not have parents. So he relocated to Old Crow because he had some maternal relatives there.

[19] In Old Crow, when he was still a youth, he got into some trouble and he went to jail on a charge as a youth of sexual interference. He got 30 days on each charge. He served two months and 15 days, and then had probation for 12 months. Shortly after getting out of jail, it appeared that he was involved in a dine-and-dash situation, according to the record, and he received three months in jail and two months in probation. I suppose this is now as an adult because he was 18 years old. That was in 1998.

[20] This offence occurred in 2013. What happened in that time? Well, he says he was scared straight by that adult jail sentence. And he has been straight; there are no criminal convictions. He found a woman. He has been with her for the past 12 years. He is now 35 years of age. They have a good relationship. They work with each other's strengths and weaknesses. He says that his weakness is in education and, of course, he did not even complete grade 10 because of all of the disruption in his life and the lack of adults in his life to raise him in a way that he should have been raised. He has been acting as a parent to the two children of his partner of 12 years. She, he says, is the brains of the outfit.

[21] The Crown has made negative comment on that, saying that it is a good interpretation that he thinks he is the muscle and she is the brains, and that describes his attitude towards things. But it is not unlike the way my wife describes our relationship. It does not take much muscle, if you look at me, to make those kinds of comments. It may be just that you can get the ketchup bottle cap off. I am not attempting to make light, but I am disagreeing with the Crown's interpretation of that comment in the Pre-Sentence Report and what might be made of it.

[22] There is nothing between 1998, when he had this dine-and-dash incident, and 2013, when he used excessive force in the execution of his duties, to indicate that he considers himself to be an enforcer or angry person. He has shown himself to be a good citizen. He has worked in one industry for 12 years. He does not really like it, he wishes he could move on, but he does not have the ability to move on because of his education and possibly this very ancient criminal record.

[23] He has been described by Exhibit 3, Employer's letter, to be "... a good employee ... did his job well ... he showed a lack of better judgment in this particular incident." The letter says:

... The club and bar scene can be very difficult and stressful, situations can arise very quickly which can be dangerous and volatile, ... Don has always been willing to put himself at harms way in order to protect staff and patrons.

[24] There is much to be said about that for 12 years to be in that kind of a situation with no backup and to have done it well. Described by one of the waitstaff that was being abused by Mr. Lindstrom, she has worked with Mr. Tutin for some time, and says

that he has never shown any violent nature and she considers him to be a teddy bear sort of person, even though he is large and strong.

[25] The criminal courts mostly deal in failure: people's failure and their own. It might be shocking to hear, that being said, but in the 40 years that I have been in the criminal justice system, 33 years as a judge, I have seen the courts fail over and over and over again. Every time we get a criminal record handed out, which is daily and many times a day, it documents a failure. Pages and pages of courts giving sentences that fail, and people continue to be involved in the justice system.

[26] And I only say that because we need to, at some point, put our experience together and celebrate success when we see it, which is so rare we forget that we have to celebrate success. And in this case, we have a story of success. Here is a person who has been failed by all the adults in his life, except perhaps for a brief period of time with an aunt and her husband. Everybody has failed all along the way. He has seen what they are and who they are, and he is determined not to be that. And he is not. He has seen his mother, who is neglectful and drunk and shiftless; he has seen his father, who has no interest in him and drinks; he has seen a maternal aunt's husband who left him in a car while he went to the bar and drank when he was a small boy. He has seen all of those things and he said: I am not going to do that. And he has not. He does not drink, except perhaps in small quantities. All of the evidence we have before us is this man is not a drinker. He is not a carouser. He is not a fighter. He is not any of those things that he looked at the people around him that were failing him were. And when he started to go down that road and was brought short by the justice system, the justice system, for a change, had a success story. He got it and he followed through. He is

35 years old. He is not any of the things that we would have expected him to be if we look at the other people that come before us.

[27] Now, do we take this man, who, on one occasion, after all the successes that he has had and all these failures of other persons, an Aboriginal person, and do we say: Well, sorry, we are wiping all that out because we are going to make a statement that any bartender no matter the provocation or the experience that they have had, no matter their temperament, we are going to throw him in jail for six or nine months so that all the other bartenders will know that they can never do this. That will be another failure.

[28] First of all, it will fail to deter other bartenders. I was a bartender. I understand this stuff. I understand the dynamics around the bars. Sentencing this man to jail is not going to change any of that. It is not going to change one incident in the future.

[29] For us to try to uphold some principle of denunciation and deterrence that we do hold and we do it on a daily basis, in this particular case, just for the sake of it, is wrong because of the things that I have just said. It is taking all that success that this man has applied because of his own initiative and his own lessons learned from the justice system and dashing it and saying: That was worthless; those 16 years of good living and being a responsible citizen are worth nothing to us. That is just wrong.

[30] And it is wrong on another level because it will discourage him. And maybe we will produce the kind of thing we might think we have, a violent man, by sending him to jail, but that is wrong, too.

[31] This can be dealt with in an entirely different way. If I had a complete freehand I would give him a discharge, but I do not think I have a complete freehand. I think some of the principles of denunciation have to come into it. I think a discharge would be appropriate because it is in the public interests to recognize a person who has overcome the things that he has overcome and been a good citizen. I think that is in the interests of the public. There are other interests to be served as the Crown has argued, but they can be served by a probationary sentence which gives him any assistance that he might need in the future to continue on the path that he is on.

[32] I am going to give him a suspended sentence for a period of one year. The defence has suggested instead of a jail sentence, I should give him a conditional sentence. But I cannot give him a conditional sentence if I am not sending him to jail. It is not a case where he should go to jail. So a conditional sentence, which is a jail sentence, is not appropriate either. This is a suspended sentence for rehabilitation and assistance. It is suspended for the deterrent effect rather than conditionally discharged. So he will have this on his record as well as the 1998 offence.

[33] The terms of his probation are as follows:

1. You are to keep the peace and be of good behaviour.
2. You are to appear before the Court when required to do so by the Court.
3. You are to remain within the Yukon Territory unless you have the written permission from your Probation Officer or the Court.

4. You are to take such other assessment, counselling, and programming, as directed by the Probation Officer.
5. You are not to have any contact, directly or indirectly, or any communication in any way with Calvin Lindstrom.
6. You are to perform 50 hours of community work service, as directed by the Probation Officer or any such other person as the Probation Officer may designate.
7. You are to provide the Probation Officer with consent to release information with regard to your participation in any program, counselling, employment, or educational activities that you have been directed to do pursuant to this Probation Order.

[34] Those are the terms on sentencing.

[35] I am not making an order for firearms. There is nothing in here that gives me any indication that that order is necessary or appropriate.

[36] THE CLERK: Is the community service [indiscernible - away from microphone] on the Probation Order?

[37] THE COURT: No, community service is to be completed within four months.

[38] MR. LANE: DNA order, sir?

[39] THE COURT: No DNA order is required in this circumstance.

[40] All right. Thank you. Good luck to you.

SCHMIDT T.C.J.