

Citation: *R. v. Wiersema*, 2009 YKTC 6

Date: 20090109
Docket: 08-00494B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

NICHOLAS LESLEY JOSEF WIERSEMA

Appearances:
Noel Sinclair
Lynn MacDiarmid

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J.(Oral): Nicholas Wiersema has entered guilty pleas to three offences. One is that on October 21, 2008, he committed the offence of assault against Jason Gallant and Trisha Peterson. The second is that, on that same date, he assaulted Constable Terra Taylor while she was engaged in the execution of her duty, and that he also uttered a threat against Constable Taylor and other police officers.

[2] The circumstances, and Mr. Wiersema has little recollection of these events but is accepting responsibility for them, are that shortly after coming to the Yukon he went over to a residence where some individuals were, these being Lisa and Jason Gallant and Trisha Peterson. He brought alcohol with him. He drank the alcohol very quickly, chugging it, as I understand, and then "flipped out."

[3] He grabbed Ms. Peterson and was banging her head on the floor. When Mr. Gallant intervened he punched him in the face repeatedly, causing him to suffer a swollen lip, bloody nose and bruised right eye. Lisa Gallant intervened, striking Mr. Wiersema, and he left on foot.

[4] RCMP, on the way to the complaint from the residence, observed a male who subsequently was identified as Mr. Wiersema, outside walking, partially clothed, in minus five degree weather. They pulled over and Mr. Wiersema took off running. He was eventually confronted by Constable Taylor and another officer.

[5] The RCMP at that time had some safety concerns because of a report, that turned out not to, in fact, be accurate, that he may have a firearm. They commanded him to go to the ground. He continued to approach them but was subsequently handcuffed, arrested and then identified as the individual that was the subject of the complaint from the residence.

[6] While being placed in the police cruiser, Mr. Wiersema directed comments towards Constable Taylor to the effect of: "I'm a blood. I'm a blood. You will pay. I know who the RCMP are. I have friends." While in the police cruiser he was smashing his head on the silent patrolman and continued to shout loudly. He was bleeding profusely from his face as a result of striking his head on the silent patrolman. He told the police officers that he was HIV positive, that he would infect them. He was spitting on the silent patrolman and in other directions. A spit hood was placed on him because of concerns about his spitting, in particular the fact that it was intermingled with the bleeding from his face.

[7] Mr. Wiersema continued to struggle. He was taken out of the police cruiser into the cells, placed in the restraint chair. He spit through the spit hood, striking Constable Taylor with some of the moisture from his spit, with the majority of it being blocked by the spit hood. As I understand it from defence counsel, Mr. Wiersema in fact does not have HIV or any other communicable disease and there is no evidence from the Crown, in fact, that Constable Taylor was injured as a result of having the spit strike her or that she suffers from any communicable disease as a result.

[8] Mr. Wiersema has spent approximately 73 or 74 days in custody. Since the date of this offence he was released for a brief period of time at the YARC, but that did not work out and he has been back in custody.

[9] Crown counsel, noting the record of Mr. Wiersema, which is primarily made up of Youth Justice Court convictions and three convictions from one date as an adult, suggests that a global sentence of ten months would be appropriate. Defence counsel is suggesting that perhaps it could be a global sentence of seven or eight months, putting forward that the range would be seven to ten months.

[10] I note that the youth record includes an uttering threats when Mr. Wiersema was 12 years of age, a subsequent uttering threats several years later as a youth, and then an assault as a youth. He has an uttering threats and an assault with a weapon as an adult, for which he received a six-month conditional sentence order, six months concurrent, and then, on a breach charge, one year conditional sentence concurrent from September 5, 2007. That conditional sentence, as I understand it, was collapsed and he has almost completed the 12-month period of probation that attached to that disposition.

[11] Mr. Wiersema is 20 years of age. He is a young man. It is clear that he suffers from some mental health issues. There has been a mental status examination and risk assessment completed by Craig Dempsey. It is noted that while he does not appear to suffer from an organic disorder such as schizophrenia, he has traits and features consistent with major depressive disorder. This also includes reviews of documented psychological history and psychological testing results.

[12] He is noted to have elevated scales on the DSM-IV related to depression, paranoia and anxiety, alcohol and drug abuse and aggressiveness. He has suicidal and homicidal ideation and attempts, self deprecation, and sleep and appetite disturbances. He suffers from symptoms consistent with post traumatic stress related to abuse and neglect as a child.

[13] I note at this point that he spent most of his life in Ontario, in care, in a stable foster home until he was approximately nine years of age, and then a number of others, as he has reported to his counsel, from the age of nine to 18, not meeting his biological parents, in any meaningful way at least, until he was 18, and shortly after developing a relationship with his father in June of 2008. His father died in July.

[14] He is noted to have concurrent personality disorders including anti-social personality disorder, which is characterized by his repeated violations of the law, impulsivity, aggressiveness, disregard for his safety and the safety of others, and lack of remorse. This is compounded by his abuse of alcohol and drugs.

[15] I note that Mr. Wiersema spoke today and indicated remorse for the offences that he has committed. Really, the true indicator of remorse in an individual is a change in

behaviour, and so while I am in no way saying I do not accept Mr. Wiersema's expressions of remorse today, the reality is that what we say really only gains meaning from what we do. If remorse is truly felt by Mr. Wiersema, then he will take steps in the future to ensure that he does not find himself in the same situation where others have been the victim of his offences.

[16] The risk assessment of Mr. Wiersema notes him to be at a high risk for future violence. At the same time, Mr. Dempsey notes that he is amenable to treatment and this should be encouraged, and that he will require community support in order to be successful. External supervision should be considered.

[17] I note that Mr. Wiersema is the father of a child who is about to turn one. He is married, although separated at this time. While in custody, he has done some educational upgrading, some anger management counselling, and continues to see a counsellor related to his mental health issues from Mr. Dempsey's office. He has an appointment set up with Dr. Heredia, which in fact was one of the recommendations made by Mr. Dempsey. As I understand it, Dr. Heredia has been unavailable to some extent over the last while, which is why that has not yet taken place.

[18] I have also been informed that he is prepared to start the White Buffalo program at WCC, which is approximately a 12-week program that will deal with issues related to drug abuse.

[19] Crown counsel has filed a case out of the Alberta Court of Queen's Bench, *R. v. Ali*, 2006 ABQB 805. There is a comment in that case, which certainly I accept, quoting:

The offence charged is one that causes much concern in the law

enforcement community, and the Courts have on occasion stepped in to deliver seemingly harsh penalties to protect officers who have to deal regularly with situations that may bring them into contact with various diseases that can be passed through bodily substances.

[20] *Ali* was a case where the accused individual had spit upon the special constable that was dealing with him at the time. It is true that the moral culpability would be greater if in fact Mr. Wiersema did have a communicable disease and, as Crown has noted, would likely have been reflected by a more serious charge, such as assault bodily harm or aggravated assault. There are other aspects of spitting on police officers, such as the uncertainty, fear and anxiety the officer may feel when they are spit upon because they do not know exactly whether they have now been subjected to the possibility of contracting a communicable disease. There is an impact on officers that walk into situations to try to detain, arrest or control the situation where, in order to protect themselves, they may end up considering the use of a greater degree of force than would otherwise be necessary in order to ensure that they are protected. This type of behaviour, because of the potential life-threatening consequences of what, to some people, might not seem to be as significant as attempting to strike an officer with hands, feet or something that is being used as a weapon, in fact, in many ways is more serious. So sentences need to reflect denunciation of this kind of conduct for a very legitimate, social purpose.

[21] Within the *Ali* case is the *R. v. Bunbury* case, [1998] Y.J. No. 228, from the Yukon Territorial Court, which is somewhat similar to the case at bar. This was a guilty plea that involved an assault against Mr. Bunbury's sister, in which he swung her around, struck her in the face a number of times and caused her to have a nosebleed.

He struck one officer in the face, bit another officer in the cheek and spit at all three officers. He received a global sentence of one year. Certainly I do not have access to any further information about Mr. Bunbury, such as his criminal record at the time, his age and other factors, but it is still, nonetheless, a Yukon Territory court that provides some sense of a range that would be appropriate in certain circumstances.

[22] The sentence that I will impose is, interestingly enough, what Mr. Wiersema himself had suggested, although I had come to that idea in my mind prior to his input, which would be a sentence, giving him all benefit that I can, of nine months in custody. There will be a credit of four months time served. So there will be an additional five months in custody.

[23] This will be followed by a period of probation, which is one of the reasons why I have reduced it from the ten months sought by the Crown, which was clearly a sentence that could easily have been imposed. I understand that Mr. Wiersema will be leaving the Yukon Territory. He was only here briefly before these events occurred and in fact had voluntarily checked himself into the Whitehorse General Hospital for three days because of some mental health concerns that he had, and was released from there the day before these events occurred. So I understand that this probation order will likely be transferred back to Winnipeg, where I understand he intends to reside. Upon his release Mr. Wiersema will, of course, have to take the appropriate steps to comply with this order and ensure that it is in fact transferred.

[24] Subject to anything counsel may say, the terms of the probation order will be:

- (a) To keep the peace and be of good behaviour;

- (b) To appear before the Court when required to do so by the Court,
- (c) To notify the probation officer in advance of any change of name or address and promptly notify the probation officer of any change of employment or occupation;
- (d) To report to a probation officer immediately upon your release from custody and thereafter when and in the manner directed by the probation officer;
- (e) To reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer;
- (f) To 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;
- (g) To not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
- (h) To take such alcohol and drug assessment, counselling or programming as directed by your probation officer.

[25] Have you discussed whether your client is willing to attend a residential treatment program with him?

[26] MS. MACDIARMID: No, not to any great degree.

[27] THE COURT: Has he given any thought to that himself?

[28] MS. MACDIARMID: No. I understand from speaking to Mr. Wiersema, before coming here he had made some arrangements. He's been in contact with his

counsellor and apparently there's a 21-day program that he may be able to attend almost immediately upon his return to Winnipeg that had already been set up.

[29] THE COURT: So it appears he is prepared to do that if he's directed to do that by a probation officer?

[30] MS. MACDIARMID: Yes, that's right.

[31] THE COURT: You are consenting to do that?

[32] THE ACCUSED: Yes, I am.

[33] THE COURT: Well, then that term would further read:

- (h) In having given the Court your consent, to attend and complete a residential treatment program as directed by your probation officer.
- (i) To take such psychological assessment, counselling and programming as directed by your probation officer.
- (j) To take such other assessment, counselling and programming as directed by your probation officer.

[34] I am not certain whether no contact orders are required. He will be here for a brief period of time before he goes, but that is not a concern for the Crown?

[35] MR. SINCLAIR: The Crown is not concerned about that.

[36] THE COURT:

- (k) To participate in such educational or life skills programming as directed by your probation officer;

- (l) To make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts;
- (m) To provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you've been directed to do pursuant to this probation order;
- (n) To not have in your possession any firearm, ammunition, explosive substance or weapon.

[37] Does your client have a place to reside for the brief period of time that he will be out before he is able to affect a transfer of this order?

[38] THE ACCUSED: Yes, Your Honour.

[39] MS. MACDIARMID: Well, he does still have some acquaintances in Whitehorse and the person that he was residing with when he came here is still available. I think his intention is to leave very quickly, perhaps within a couple of days, because I understood he could probably contact a probation officer before he's released and discuss his options at that time.

[40] THE COURT: Here is what I am thinking about, imposing a curfew for the period of time that he is in Whitehorse. Period.

[41] MS. MACDIARMID: I don't think there will be any issue with respect to a curfew in Whitehorse. He has indicated he hopes to be here only a matter of days,

perhaps one day. He wants to take the first available bus.

[42] THE COURT: There will be a curfew clause, that will read:

- (o) While residing in Whitehorse, Yukon, to abide by a curfew by remaining within your place of residence between the hours of 9:00 p.m. and 7:00 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.

Again, as is stated, this is only while residing in Whitehorse.

[43] This is a secondary designated offence for DNA.

[44] MR. SINCLAIR: The Crown seeks the order, having regard to the existing criminal record and the relatively unintrusive nature of the testing itself. As well, it attracts your attention under s. 109, or pardon me, 110, for a discretionary prohibition. I see that he's already on a prohibition and I don't see any harm in adding to that. I mean, given the psychological information that's included in the report, I don't know if there's any information that would support an order under s. 113 granting him permission to use firearms for subsistence purposes. And just with respect to the probation order, I missed the term of the order.

[45] THE COURT: Twelve months. I probably did not say it.

[46] MR. SINCLAIR: And was there an abstain clause?

[47] THE COURT: Yes. There was an abstain clause and a not attend

clause.

[48] MR. SINCLAIR: And as well, I wondered if the Court would think it worthwhile to include a clause requiring Mr. Wiersema to provide consent to his medical or psychiatric counselling professional to release information to his probation officer for a requirement that they report to the probation officer any circumstances which suggested to them that Mr. Wiersema was going to deviate from the required conditions. I mean, I don't know if you can compel the medical people in his order, but.

[49] THE COURT: I am looking. The release of information clause captures programming, counselling, which would include, I would assume, the psychological counselling and programming that he takes, to provide releases with regard to his participation in any of those. Are you concerned that that would not cover the release of any reports or documents that might be prepared?

[50] MR. SINCLAIR: I just want to make sure there's no impediment to the probation supervisor communicating with the mental health side of the treatment team, and medical professionals, in my experience, are extremely cautious about disclosing information unless it is explicit that they are permitted to do so.

[51] THE COURT: Would it be sufficient if I were to add the words under the release clause, "medical treatment for mental health issues"?

[52] MR. SINCLAIR: Sure.

[53] THE COURT: Do you have an issue with that?

[54] MS. MACDIARMID: No. Mr. Wiersema tells me he routinely provides those consents and will continue to do so.

[55] THE COURT: So those words will be added to the release of information clause: "programming, counselling, employment, educational activities or medical treatment for mental health issues that you have been directed" -- no, actually, you know what, I am going to leave that clause as it is. I am going to add a second clause:

- (p) To provide your probation officer with consents to release information with regard to any medical treatment you have received for mental health issues.

He cannot be directed by the probation officer to take the medical treatment, so that clause would be unworkable. I do not believe I have the jurisdiction to order him to take the medical treatment, but I would certainly encourage him to do so as he may find that proper diagnosis and proper medical treatment for that will prevent him from finding himself in this situation again.

[56] MR. SINCLAIR: I think before we got into that discussion, I had interrupted your deliberation concerning the DNA order and the firearms prohibition orders.

[57] THE COURT: I was waiting to hear what defence counsel --

[58] MS. MACDIARMID: Yes, with respect to the DNA, I am advised that Mr. Wiersema has already provided that, so --

[59] THE COURT: On the 267(a) charge.

[60] MS. MACDIARMID: That's right. There's no real concern there. But I do have a concern with respect to the s. 110 in that there was no weapon used in this offence and he's already prohibited for a period of five years.

[61] THE COURT: Until 2012.

[62] MS. MACDIARMID: Yes, so any order you would make would have to be lengthier than that. I would just suggest --

[63] THE COURT: An order on parallel to it and --

[64] MS. MACDIARMID: -- or a parallel order. It would have no real effect. I would just -- because of the fact no weapon was used in these offences and he's already subjected, I would just suggest it's not necessary.

[65] THE COURT: Well, there will be an order for DNA as the s. 266 is a secondary designated offence. While he is, I would expect and his counsel has submitted, subject to that order as a result of the 267(a), and I would presume that that was done and filed and properly taken, it is minimally intrusive and this would ensure in fact that in the event that anything had gone awry with respect to the first order and taking of sample, there would nonetheless remain a sample as a result of these charges. I would have done it in any event based on the criminal record and based on the particular circumstances of Mr. Wiersema and these offences.

[66] I agree with defence counsel. He is currently under a five-year firearms

prohibition from 2007. While there was no weapon used in this offence, in the absence of the other order being in place, I may well, nonetheless, have placed him on a firearms prohibition, but I am satisfied that the remaining almost four years on the other order is sufficient. Certainly, if Mr. Wiersema stays away from the legal system and from criminal offences, that issue should not raise its head. If in fact he does not change his course of behaviour and deal with the underlying issues he has, he will likely find himself in a position where a further firearms prohibition could well end up being imposed pursuant to another offence that could well be committed.

[67] The victim fine surcharges will be waived. Anything further, counsel?

[68] MR. SINCLAIR: Nothing from the Crown.

[69] THE CLERK: On Count 2, Your Honour?

[70] MR. SINCLAIR: A stay of proceedings.

[71] THE COURT: The other Information was already stayed. Mr. Wiersema, I wish you the best --

[72] THE ACCUSED: Thank you.

[73] THE COURT: -- and encourage you to do what you know you need to do.