

Citation: *R. v. Lutz*, 2013 YKTC 17

Date: 20130205  
Docket: 09-10104A  
11-10108A  
Registry: Watson Lake  
Heard: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Judge Luther

REGINA

v.

RANDY WILLIAM LUTZ

Appearances:  
Terri Nguyen  
Melissa Atkinson

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCING**

[1] LUTHER T.C.J. (Oral): Randy William Lutz pled guilty to breach of probation from August 16, 2011, and to a charge under s. 279.1(1)(b) of the *Criminal Code* from the 21st day of December 2011, in that he kidnapped Tanya Charlie, with the intent to cause her to be confined against her will. He also pled to a breach of probation from that date. The facts are stated in the amended Agreed Statement of Facts.

[2] The Crown is seeking an overall sentence of three-and-a-half years, or 42 months, less the time spent in custody, that is pre-sentence custody of close to 14 months. Ms. Nguyen, who is very familiar with the Watson Lake area having served as a Crown there for a considerable period of time, spoke strongly of the need for

denunciation, separation and general deterrence. General deterrence does mean something in this jurisdiction as people are generally aware of what the criminal courts are doing.

[3] Defence counsel implored me not to send this 27-year-old First Nations man to a federal penitentiary, citing *R. v. Ipeelee*, 2012 SCC 13, and s. 718.2(e) of the *Criminal Code*.

[4] The Crown was correct in its concern that people should feel safe in their residence. Here, both the offender's mother, her boyfriend, and the offender's partner, her sister and two-year-old son, witnessed the extreme aggression of this offender in the residences wherein they should have felt safe.

[5] This offender has an extensive record of 22 convictions since the summer of 2008, including at least six crimes of violence. Past victims include his ex-girlfriend, his mother and her partner, in five of the six assaults. A careful review of the Gladue report prepared by Margaret O'Brien and the lengthy Pre-Sentence Report by Sean Couch-Lacey reveals a very troubled background for Randy Lutz. The family history is rife with the all-too-common issues of substance abuse, violence, residential school adversity, poverty, family breakup, racism, despair, suicidal ideation, and quite possibly Fetal Alcohol Syndrome.

[6] The Pre-Sentence Report at page 27 states the following:

... Mr. Lutz has been unable to stop hurting his ex-spouse (complainant) or his family because he has not resolved his feelings towards them, the neglect and various forms of abuses, the loss of his childhood or the prejudice and racism that he has suffered.

[7] The kidnapping itself, while serious, was limited in location and time. None of the victims prepared a Victim Impact Statement.

[8] On page 22 of the Pre-Sentence Report, the Probation Officer, in consultation with the Victim Services Worker, revealed the following:

... the complainant wishes no ill will or harm to Mr. Lutz. After having some period of separation from Mr. Lutz the complainant has come to understand the gravity of Mr. Lutz's constant control of her, his jealousy and his anger.

... the complainant is still angry and requests that should Mr. Lutz return to the community that she does not want any form of contact with Mr. Lutz.

[9] Defence counsel has proposed a Territorial sentence followed by probation and voiced strong reservations about the offender doing his time in a federal penitentiary with hardened criminals, away from his family.

[10] Similar concerns were expressed by Mr. Justice Koke of the Ontario Supreme Court in a decision, *R. v. Addley*, 2012 ONSC 137, a decision from January 6, 2012, which was upheld by the Ontario Court of Appeal on January 25, 2013 (2013 ONCA 50). In that case, the offender was 19 years of age, and he was convicted under s. 268 of an aggravated assault in which he and another person repeatedly kicked the victim, who was 16 years of age. This was the first time that Mr. Addley was in adult court. The result of the vicious assault consisted of numerous bones around the eye being broken, requiring surgery. This led to sleeplessness, lack of concentration, headaches, a dropping out from a welding course, and paranoia on the part of the victim. The trial judge did not want to put this young man in a federal penitentiary. The sentence

imposed was 18 months and three years probation. Para. 5 from the Ontario Court of Appeal states:

We have applied the analysis mandated by *Gladue* and *Ipeelee*. We are satisfied that this sentence fully reflects those principles.

[11] From the Yukon Territory Court of Appeal, we have a decision in *R. v. Good*, 2012 YKCA 2. This was a decision rendered on the 16th day of March 2012, approximately two weeks before *Ipeelee* came out from the Supreme Court of Canada. At para. 34, the Court of Appeal stated:

As to Ms. Good's argument that the imposition of a federal term of incarceration demonstrates neglect of her Aboriginal heritage, the sentencing judge's reasons properly emphasized her lengthy history of significant and gratuitous violence, her years of therapy with no apparent benefit, and her high risk to reoffend. In my view, read in the context of his reasons as a whole, it is apparent the sentencing judge was aware of Ms. Good's Aboriginal heritage but decided it could not justify a sentence of less than two years in these circumstances.

[12] The obvious differences between Helen June Good and Randy William Lutz are the very lengthy record that Ms. Good had, and the extent of the injury sustained by her partner, whom she had also assaulted before with injuries. In that particular case, it was a broken jaw.

[13] We have a letter of support on file from Mary-Anne Steyn, dated September 27, 2012 [as read in].

This letter is in support of Randy Lutz who has requested ongoing individual counselling while in Whitehorse Correctional Centre, and is near completion if intake forms for admission into the five-week alcohol treatment at Tsow

Tun Le Lum on Vancouver Island as soon as he is able to attend. Randy Lutz initially requested counselling in June 2012 and since that time has been consistent in his desire to make positive, constructive changes in his life, i.e. quit drinking, pursue educational courses.

[14] At page 27, para. 2 of the Pre-Sentence Report, it was stated as follows:

Kate Hart who is a counsellor with the Family Violence Prevention Unit indicates that Mr. Lutz has a big heart, can be compassionate and has the ability to trust. She further stated that she believes that Mr. Lutz has stabilized to a point where he may be able to begin to work on his childhood trauma related issues...

[15] Furthermore, there is a letter which has been filed with the Court from Ms. Hart, dated September 28, 2012. She was his counsellor for three-and-a-half years. Mr. Lutz attended 40 appointments, and appears to be aware of his risk factors, although has not been able to adequately deal with them to this point.

[16] This offender has been in pre-sentence custody for 412 days. He is not eligible for any credit beyond the one-to-one ratio: s. 719(3) and (3.1). For ease of understanding, I will round the days up to 14 months. Mr. Lutz has suffered from the physical manifestations of stress, sleeplessness, significant hair loss, drooping side of his face, and significant weight gain. Intellectually and cognitively, he functions at a fairly low level. One day, he hopes he will be forgiven by those whom he has hurt.

[17] From his record, it appears that this young man has served, what I would call, moderate periods of imprisonment at the Whitehorse Correctional Centre. To impose a sentence which would result in him going to a federal penitentiary would be an excessive step up. Taking into account all the factors of this case, the offender's

background and his present outlook, the lack of physical injuries to the victims, it is my view that the interests of justice are best served by a jail sentence of two-and-a-half years, less credit of 14 months, i.e. 16 months on the s. 279.1(1)(b) charge, and one year concurrent on the breach of probation from December 21st. That is Count 3.

[18] As to the breach of probation from August 16, 2011, the Court will impose a sentence of two months consecutive. He is not going to get a free ride on this one, as it is unrelated in time to the major charge. *R. v. Chisholm*, [1965] 4 C.C.C. 289, Ontario Court of Appeal, is still good law, and *R. v. McDonnell*, [1997] 1 S.C.R. 948, gives us further guidance. The s. 733.1 punishment would normally have been four to six months given his record, but I have reduced it to two months because of the totality principle.

[19] Given the fact of a lengthy Territorial sentence, there will be no victim fine surcharge. The Court will impose an order under s. 109 of the *Criminal Code* for ten years. There will be no order for DNA as one has already been made.

[20] There will be a period of probation for three years, which is the maximum under the *Criminal Code*. The probation terms are as follows. Statutorily:

1. Keep the peace and be of good behaviour. Appear before the Court when required to do so;
2. Notify your Probation Officer in advance of any change of name, address, and employment;
3. Report to your Probation Officer immediately upon your release from custody;

4. For the first four months --

And again, this is a realistic approach. There is no point in putting this man on an abstention clause for three years, but:

4. For the first four months you are 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;
5. Also, for the first four months, you are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
6. To take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer;
7. Having given the Court your consent, attend and complete a residential treatment program as directed by your Probation Officer;

Hopefully that program on Vancouver Island will be available to you shortly after your release from custody.

8. To take such other assessment, counselling and programming as directed by your Probation Officer;
9. 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 have been directed to do pursuant to this probation order;

10. Not contact directly or indirectly or communicate in any manner with Tanya Charlie, except with her prior written permission witnessed by the signature of your Probation Officer and the Victim Services Worker;
11. Not contact or communicate in any manner with Shirley Lutz, Wayne Spring, and Naomi Charlie if there is any alcohol in your body;

[21] Those would be my main concerns in terms of probation. Did the Crown have any other concerns?

[SUBMISSIONS RE NO CONTACT ORDER]

[22] THE COURT: So you are suggesting, "except with the prior written permission of the Probation Officer in consultation with Victim Services"?

[FURTHER SUBMISSIONS RE CONTACT ORDER]

[23] THE COURT: Then if, over the course of time, she wants to have contact, she could contact the Probation Officer, and it would come back to court for a hearing, rather than delegating that power to the Probation Officer?

[24] MS. NGUYEN: Yes.

[25] THE COURT: Do you see that as an extra protection?

[26] MS. NGUYEN: I do, quite frankly. That extra process ensures there are more people involved and therefore less pressure to be placed on her. I am not suggesting to you that Mr. Esler, who is the Probation Officer that works in Watson Lake and lives there, would do anything inappropriate, but it is that many more people, that



many more eyes on the situation, and, frankly, Mr. Esler is often in a situation where he is not aware of the same things that the Crown's office or the RCMP might be aware of.

[27] THE COURT: Again, given the nature of the crime and the fact that the complainant has been previously victimized, I am going to accede to the Crown's request and there will be a blanket condition that there be no contact or communication with the victim, and if it turns out that both of them reasonably want to re-establish contact, she will have to go through that extra process as described by the Crown.

[28] MS. NGUYEN: And if there could be a not attend her residence as well?

[29] THE COURT: Yes.

12. Not attend at or within 30 metres of the residence of the victim, Tanya Charlie;

[30] MS. NGUYEN: And also there should be not attend the residences of the others that you have named, if he has been drinking to any degree either.

[31] THE COURT: Okay.

13. Not attend at or within 30 metres of the residence of Shirley Lutz, Wayne Spring and Naomi Charlie if there is any alcohol in your body.

[32] THE COURT: Ms. Atkinson, do you have any concerns on any of these orders?

[33] MS. ATKINSON: No. May I just have one moment?

[34] THE CLERK: Condition on all counts, Your Honour?

[35] THE COURT: Just on the s. 279, Count 4.

[SUBMISSIONS BY THE CROWN RE DNA ORDER]

[36] THE COURT: So I will reverse my order, then, on the DNA; under s. 487.04 of the *Criminal Code*, as s. 279 is a primary designated offence, and as there may be a problem with any past samples, but, if indeed, the sample from the past is still a valid sample, then there is no need to take another sample.

[SUBMISSIONS RE CURFEW PROVISION]

[37] THE COURT: Well, what I will do then is, for the first two months, not be outside his residence between midnight and 6:00 a.m. except with the prior written permission of the Probation Officer. I have not put in a condition that he stay within the Yukon Territory. That will not be necessary, but what I will say, though, is that he is not to leave the Yukon Territory without the prior written permission of the Probation Officer. So, in other words, if this program is all set up for Vancouver Island, the Probation Officer, of course, will give his permission to that, and away goes Mr. Lutz.

[38] THE CLERK: The remaining counts, Your Honour?

[39] MS. NGUYEN: Those are withdrawn -- sorry, those are stayed, Madam Clerk.

[40] THE COURT: Mr. Lutz, will you stand, please. In this case, the Crown was looking for a federal sentence. I listened to what you had to say yesterday, and I reviewed the case authorities, a couple of which I talked about today in my decision. I have decided not to send you to a federal penitentiary. This will give you an opportunity to continue to make some progress at the Whitehorse Correctional Centre and to get your life stabilized, not only to recognize what the risk factors are, but to actually come up with an effective way of dealing with them. You have some really good people who are helping you, and I want you to do your utmost to turn things around; otherwise, it is just going to be a wasted life for you, coming in and out of jail. You have an excellent opportunity now to reverse that, and I truly hope that you do that.

---

LUTHER T.C.J.