

Citation: *R. v. Pahtayken*, 2011 YKTC 29

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Docket: 09-00157
09-00158
09-00159A
09-00647
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Cozens

REGINA

v.

KEVIN MARKUS PAHTAYKEN

Appearances:
Noel Sinclair
Nils Clarke

Appearing for the Crown
Appearing for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C. (Oral): Kevin Markus Pahtayken has entered guilty pleas to three offences. These are offences under s. 267(b) with respect to an assault against George Raymond on May 22, 2009; a s. 267(a) with respect to an assault with a table leg on Garth Brown on May 28, 2009; and an offence under s. 270 for an assault against Corrections Officer Kristin Kulachkosky that occurred on October 10, 2009.

[2] This matter is before the Court for sentencing and for a Crown application that Mr. Pahtayken be declared a long term offender. An order for a psychiatric examination

report was made on November 12, 2010, and forensic psychiatrist Dr. Lohrasbe provided an initial report dated January 13th. This report was prepared without an interview being conducted with Mr. Pahtayken as a result of his non-compliance in regard to participating in this aspect of the process. A subsequent order was made on January 14, 2011, extending the time for the assessment of Mr. Pahtayken, and Dr. Lohrasbe prepared an addendum to his initial report. The addendum was dated February 10, 2011.

[3] With respect to the s. 267(b) charge, a statement of agreed facts was prepared, as it was with respect to the other charges. I do not propose to review them in any detail. Suffice it to say that Mr. Pahtayken had been released from Whitehorse Correctional Centre at approximately 9:00 a.m. on Friday, May 22nd, on a conditional terminal temporary absence a few days prior to the expiry of his warrant of committal on a 30 day sentence for a breach of probation charge. Mr. Pahtayken went to Mr. Garth Brown's house on that day, and he confronted and assaulted Mr. Raymond, who happened to be an occupant of the residence. At the time, Mr. Pahtayken was intoxicated. He slapped and punched Mr. Raymond in the face several times, kicked him in the torso, and disrupted various objects in the trailer. Mr. Raymond only attempted to defend himself passively, and was subjected to threats by Mr. Pahtayken for his personal safety if Mr. Pahtayken ever went back to jail. Mr. Brown attempted to intervene and stop the assault. Mr. Raymond was subsequently treated for bruising to the face and head and for laceration wounds on his lip, forehead, and scalp that required sutures to close. I have seen the photographs.

[4] With respect to the s. 267(a) offence, on May 28, 2009, Mr. Pahtayken attended

at Mr. Garth Brown's residence. Mr. Pahtayken had been drinking, and he and a female companion were asked to leave by Mr. Brown. They returned to the residence later, however, and confronted and assaulted Mr. Brown. There was substantial damage caused to the trailer. During the physical confrontation between Mr. Pahtayken and Mr. Brown, Mr. Brown was punched and kicked in the legs, ribs, arms, and head. He was also struck by a chair and with a metal table leg. Mr. Brown was treated for multiple traumas, including a fractured left arm, multiple fractures to his left hand, and a fractured left leg.

[5] Finally, with respect to the s. 267 offence, while in custody on October 10, 2009, Mr. Pahtayken was involved in an incident with other inmates and several corrections officers. These inmates had been consuming alcohol within the facility, and upon Mr. Pahtayken punching one of the inmates, who was sleeping, in the chest area, the corrections officers entered into the cell to stop the assault. There was a fairly serious altercation to which one other inmate has pled guilty, basically sucker punching one of the corrections officers, causing serious damage to his nose, and, with no one person necessarily, directly able to have this incident attributed to, a broken leg to the same officer.

[6] Mr. Pahtayken approached Corrections Officer Kulachkosky with his fists clenched and told her to, "Move the fuck out of the way or I'm going to go through you." He then pushed CO Kulachkosky strongly backwards into cell bars, causing her to strike her back and head against the cell bars. The only other corrections officer to receive injuries was a separate officer and, as indicated, there was surgery for an open fracture of his nose and a broken right leg. While these injuries cannot be attributable to Mr.

Pahtayken, it is clear that he was involved and a party in the underlying incident that led to the serious injuries taking place. I keep in mind that he is being sentenced with respect to the assault against Corrections Officer Kulachkosky, and not as the primary player with respect to the injuries suffered by the other corrections officer. It is part of the context in which this occurred, however.

[7] Counsel have come before me with a joint submission, both with respect to sentence and the long term offender declaration. The submission before me is that a global sentence of five and a half years for these offences, less three years credit for Mr. Pahtayken's time in custody, be imposed. Counsel noted that these charges arose prior to the amendments to the *Criminal Code*, which have altered the pre-trial custody regime.

[8] The suggested sentence by Crown is that, on the s. 267(b) charge, there would be two years less one day; on the s. 267(a), there would be 30 months consecutive; and on the s. 270, there would be 12 months consecutive.

[9] Counsel have both agreed that the long term offender declaration be made with respect to Mr. Pahtayken, and a ten-year period of supervision be imposed. This is the maximum that can be imposed. The requirements for the imposition of a long term offender designation are set out in s. 753.1(1) of the *Criminal Code*, which states that:

The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

[10] With respect to the first criteria, it is clear that a sentence of two years or more is appropriate with respect to the assault against Garth Brown. Mr. Pahtayken has a significant history of violent offending. His criminal record of 83 prior convictions for *Criminal Code* and drug offences includes 21 offences of violence. The most significant of these are as follows: a 1990 assault with intent to steal, for which he received a sentence of 15 months; a 1991 robbery for which he received a sentence of 26 months; a 1994 robbery, for which he received a sentence of 30 months; a 1995 assault causing bodily harm, for which he received a 15 month sentence; two robberies in 1996, for which he received five years concurrent; a 2001 assault with intent to steal, for which he received 18 months consecutive to the time being served for the robbery; and in 2008, s. 279, s. 264.1(1) and s. 266 offences, for which he received a sentence of one year.

[11] The assault on Mr. Brown was a violent assault which has had a considerable impact upon the victim, as noted in the victim impact statement. It was made days after the May 22nd assault, and in the same residence. The principles of denunciation, deterrence, and the safety and protection of the public require that a substantial period of imprisonment be imposed, and the only way to do so is to separate Mr. Pahtayken from the public. It is to be noted that the only significant break in his criminal record of violence was when he was incarcerated for the five years and 18 months consecutive in the late 1990s. I do not know the circumstances of the offence for which he received the 18 months and where it took place, but I note it is consecutive to time being served

already in the robbery. So I am satisfied the first criteria is met.

[12] The second criteria: It is clear to me that both from Mr. Pahtayken's past and from the reports prepared by Dr. Lohrasbe that there is a substantial risk that Mr. Pahtayken will reoffend. In assessing the risk of reoffending, Dr. Lohrasbe used the HCR-20, which:

... is an empirically-based clinical guide, useful in forensic psychiatric practice in a variety of settings.

... [it] organizes 'risk factors' or 'risk items' into past, present, and future. Its 10 Historical factors obviously concern the *past*. The 5 Clinical items are meant to reflect *present*, dynamic (changeable) correlates of violence. The *future* is addressed through the 5 Risk Management items, which focus attention on situational post-assessment issues that may aggravate or mitigate risk. Hence, the HCR-20 takes its name from these three scales; **H**istorical, **C**linical, **R**isk Management; and from the number of items (20).

Each item in the HCR-20 is a *risk factor*. Individual risk factors include actions, attitudes, symptoms, etc., which are associated with a heightened risk for future violent offending. The clinician doing a risk assessment has the task of considering all available information when coming to an opinion as to whether that risk factor is present or absent in the person being assessed.

All other things being equal, the greater the number of risk factors present, the greater the risk for future violence.

These are all from page 16 of the report.

[13] Dr. Lohrasbe concluded that "Mr. Pahtayken is at a high risk for acts of serious violence," and based on what I have read and heard from counsel, I am satisfied that that risk is there and the second criteria is met.

[14] The third criteria: After interviewing Mr. Pahtayken, Dr. Lohrasbe concluded that

three diagnoses were applicable: Antisocial Personality Disorder, Alcohol and Drug Abuse, and Adult ADHD. Dr. Lohrasbe concluded in his summary that:

1. [In addition to Mr. Pahtayken being] at high risk for acts of serious violence.
2. [That] there is current information to offer cautious optimism that the risk can be reduced with available treatment methods.
3. With appropriate treatment, there is a reasonable possibility that the risk he poses can then be managed in the community with available resources.
4. [And] the lengthiest possible period of parole will assist in risk management in the long-term future.

[15] Dr. Lohrasbe noted Mr. Pahtayken to be polite and cooperative in the assessment process and clearly of good intelligence, with no difficulty grasping abstract concepts. He noted that Mr. Pahtayken exhibited no psychotic features whatsoever. He noted him not to be overtly controlling or manipulative during the interviews, nor did Dr. Lohrasbe encounter any explicit attempts at deception. He stated that:

Overall, while there were many instances of equivocation and shifting of moral responsibility, Mr. Pahtayken did not come across as an especially minimizing or evasive man (the basis for comparison being the group of men I have assessed for similar proceedings).

Mr. Pahtayken made no attempts to portray himself in an especially positive light. He acknowledged his extensive criminal history and its associated antisocial lifestyle. He acknowledged that he had been a self-centered and irresponsible man who has contributed little to his family or society as a whole. He agreed that he has been persistently aggressive and violent. Although such acknowledgment is ultimately unavoidable for Mr. Pahtayken, given the documented history, it is not always forthcoming from offenders no matter what stage of proceedings they are at or what sentences they face. In my view, it is a positive

prognostic feature in this case.

[16] Dr. Lohrasbe's report details Mr. Pahtayken's young life. It is clear that Mr. Pahtayken suffered significant and horrific abuse. His paternal grandmother "appears to have been the only consistently supportive and caring adult during his childhood." Mr. Pahtayken began consuming alcohol at the age of six. This alcohol was provided by his father. He began to use marihuana at the age of eight, again, provided by his father. He made suicide attempts with pills at the age of seven or eight. His life has been marked throughout with addiction to alcohol and/or drugs of one kind or another. He found a new criminal and drug abusing peer group at the age of 14, with whom he quickly identified and his lifestyle became one of substance abuse, supported through criminal activity. He has known little, since he was a teenager, of what it is like to live a normal life, and has basically lived an antisocial and criminal lifestyle since then.

[17] Mr. Pahtayken is now 44 years of age, a First Nations individual, and Dr. Lohrasbe notes that despite this background he currently appears to have made some positive progress towards lessening his risk factors.

[18] On page 9 of Dr. Lohrasbe's February report, after interviewing Mr. Pahtayken and noting that his conclusions with respect to the HCR-20 were unchanged, that the risk factors, however, were altered on the C1 component, "Lack of Insight." He noted this to be "partially present" in Mr. Pahtayken's case as his "self-awareness appears to have improved since last documented." On the C2, "Negative Attitudes," this was also noted as being:

partially present, as there appears to have been some shift from [Mr. Pahtayken's] prior belligerence and allegiance to

the 'con code'.

C4 on "Impulsivity," this was noted as being "clearly present."

[19] Dr. Lohrasbe goes on to state that:

Overall there are some tentative positive indicators among dynamic risk factors, primarily related to greater awareness of where he is at this stage in his life; Mr. Pahtayken is very conscious of his aging, and his life slipping by. I was also struck by his grasp of the hard fact that he faces lengthy and potentially indeterminate incarceration, and that he will be given very little leeway in the community if and when he is given another opportunity. His file has comments indicating that he has had that knowledge before, but it appears to have 'sunk in' to a deeper level.

[20] With respect to treatability, Dr. Lohrasbe states on page 10 that:

Those dynamic factors provide for some cautious optimism regarding his treatability. It can be said that Mr. Pahtayken is at present strongly motivated, even if his motivation is largely based on fear and self-preservation rather than a profound emotional shift. The latter, while highly desirable to sustain offenders through the long periods of change required, is lamentably not that common.

He has the intellectual capacity to learn and appears to be motivated to do so, driven by self-interest.

Due to the likely presence of some degree of ADHD he may benefit from small doses of medications.

In my view, he would benefit from individual therapy to prepare him and make him more receptive for the group experience.

He has strengths including an artistic talent that he can use to reestablish cultural and spiritual connections with other First Nations men who have made the transition into prosocial living. ... If he is to find a new life-path, he needs a new core identity. Such a transformation has philosophical and spiritual components, and his cultural and spiritual roots offer the best hope for such a shift in his way of being. Different approaches to therapy focus on different contents

of experience, i.e., some therapies focus on early childhood experiences and the emotional self, some on learning, some on personal growth and integration, and some on inner experience and spiritual development. In my experience with First Nations offenders with long histories of severe violence, the last is a crucial, necessary ingredient (although not a sufficient one) for the kind of sustained change required to stay away from a life of crime and violence.

[21] Mr. Pahtayken hovers at or near the edge of being declared a dangerous offender, but there yet remains a reasonable possibility that the risk Mr. Pahtayken poses can, through supervision and treatment, be managed in the community.

[22] I conclude, therefore, that all the pre-conditions for declaring Mr. Pahtayken a long-term offender have been met in this case, and I hereby find Mr. Pahtayken to be a long-term offender.

[23] With respect to the sentences to be imposed for the index offences, counsel have provided authorities in support of the sentencing position they have jointly submitted. I will not review these cases in this decision; suffice it to say, that I find that the joint submission is well within the range of appropriate sentence, taking into account the sentencing criteria set out in s. 718 to 718.2 of the *Criminal Code*. Counsel have, obviously, put a considerable effort into arriving at this joint submission with respect to the sentence to be imposed, and agreement on the long-term offender declaration.

[24] For the May 22, 2009, assault on George Raymond, the sentence will be two years less one day, noted as being time served. For the October 10, 2009, assault on a Peace Officer, the sentence will be 12 months consecutive, also noted as being time served. For the May 22nd assault on Garth Brown, the sentence will be a further 30

months incarceration in a federal penitentiary.

[25] The length of the long-term offender order will be the maximum of ten years.

This is the recommendation proposed by Dr. Lohrasbe and, in the circumstances before me, clearly appropriate.

[26] The victim fine surcharges will be waived.

[27] There will be an order pursuant to s. 109 of the *Criminal Code*, prohibiting Mr. Pahtayken from possessing any firearm, crossbow, restricted weapon, ammunition, and explosive substance for a period of life.

[28] There will be an order that he provide a sample of his DNA.

[29] As for the Crown application, there will be an order that a copy of all reports given by psychiatrists, psychologists, criminologists, and other experts, and any observations of the Court with respect to the reasons for the finding, together with copies of the statement of agreed facts filed November 12, 2010, in relation to court file 09-00158, 09-00159A and 09-00647, be forwarded to the Correctional Service of Canada for information.

[30] Is there anything with respect to what I have said so far that counsel wish to address?

[31] MR. SINCLAIR: I note that s. 760 also compels the Court to order a transcript of the trial of the offender, which I take to include the sentencing proceedings. So I am going to ask the Court to order a transcript of the proceedings today, to be

included with the material going to CSC.

[32] THE COURT: There will be, pursuant to s. 760, an order that a copy of today's proceedings be provided to the Correctional Service of Canada. I believe that all the other aspects were dealt with, with what I had previously said.

[33] The remaining charges that are before the docket?

[34] MR. SINCLAIR: Crown directs a stay of proceedings.

[35] THE COURT: All right. I believe that concludes everything here.

Thank you, counsel, for all the work that went into this.

COZENS C.J.T.C.