

Citation: *R. v. Wiebe*, 2006 YKTC 80

Date: 20060822
Docket: T.C. 05-00403
Registry: Whitehorse

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

REGINA

v.

DAVID CHARLES WIEBE

Appearances:
Noel Sinclair
Gordon Coffin

Counsel for Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] OVEREND T.C.J. (Oral): The accused, Mr. Wiebe, is 39 years of age, with a significant criminal record, mostly for property offences. Of his 64 convictions, dating back to 1985, 43 are for breaking and entering, thefts and related matters. This tends to confirm, if confirmation is required, that the accused has had a significant substance abuse problem dating back to his teenage years.

[2] For his breaking and entering offences, of which there are ten, he has served terms of imprisonment of between two months and two years six months, the latter sentence having been imposed in 2002. Mr. Wiebe, has one prior conviction for a common assault, for which he received a term of imprisonment of 14 days.

[3] He completed all of his sentences in 2004, and although not doing particularly well on statutory release, did not get into further difficulties until the charge for which he is appears for sentence today.

[4] The accused has a grade 10 education with some upgrading. While not serving terms of imprisonment, he has had some gainful employment, most recently in Haines Junction, for a good part of 2005. The accused has a history of drug abuse, admitting to being an addict by the time he was 16 and to the point of using cocaine intravenously in recent years.

[5] The accused apologized to the victim, Mr. Hewitt, in open court. This does not conform to his denial of responsibility when discussing the offence with the probation officer who prepared the pre-sentence report.

[6] While I accept that he is, perhaps, surprised at, and regrets the injuries that the victim suffered, he appears to maintain the position that the victim brought it on himself, as he, the accused, was only acting in self-defence.

[7] The injuries to Mr. Hewitt were serious, as it appears from Exhibit 1, the evidence of the victim and the victim impact statement. As a result of the repeated punches and kicks to his face, Mr. Hewitt suffered significant injuries, the most serious of which was the neurological damage affecting his balance and memory. He was off work for over four months and had continued to suffer the effects at the time of the trial in March of this year. I am, however, satisfied that today he has mostly recovered from those injuries and in his own words, "Will not suffer any lasting effects."

[8] The Crown seeks a sentence for this offence in the four to five year range. The accused, through his counsel, says that having regard for all the circumstances, that a term of imprisonment in the 20 to 24 month range is appropriate. Both counsel agree that the case authorities suggest that offences of this kind should carry a sentence between six months and six years.

[9] The law requires that I consider the principles of general deterrence, specific deterrence, denunciation and rehabilitation in crafting a sentence appropriate for this offender and this offence. The sentence should also promote a sense of responsibility in the accused for his actions and acknowledgement of the harm done. Taking those matters into consideration, the sentence must be proportionate to the gravity of the offence and the responsibility of the offender.

[10] With respect to those sentencing principles, in this case, I place less weight on the rehabilitation of Mr. Wiebe. While there clearly remains a chance for him to become a productive citizen in this society, as demonstrated by his ability to hold gainful employment and avoid trouble after his release from custody in 2004, his recognition to the probation officer that, to date, he has wasted his life, and his demonstration at the time of the offence, that he had a conscience, i.e. that there was, at least, some empathy for the victim in his contacting the police to get assistance for Mr. Hewitt, this remains a crime of violence that must be denounced, and criminal behaviour, the continuation of which must be deterred.

[11] This was a serious offence for which the accused was completely responsible. After Mr. Hewitt fell down the stairs, it was opened to the accused to leave the scene.

Rather, he took advantage of the prone position in which he found Mr. Hewitt and administered this brutal assault.

[12] I have been referred to a number of cases by both counsel. As has been said by other courts and is patently obvious, other cases can be no more than a general guide as each case must be decided on its peculiar facts, having in mind the circumstances of the offender. In this case, I take into consideration the history of the criminal behaviour, the seriousness of the assault, the impact on the victim and the failure of Mr. Wiebe to take full responsibility for the offence. Those factors mitigate against him.

[13] In his favour, unlike many of the cases of aggravated assault referred to by counsel, this assault was not premeditated. That is, although there was clearly a feeling of animosity toward the victim throughout the early evening, the assault, itself, was somewhat spontaneous in response to Mr. Hewitt having pushed the accused on the stairs.

[14] The Crown suggested in its submissions that I had found as a fact that the defendant was not in fear of Mr. Hewitt. That is not correct. I was satisfied that he was not in such fear as to bring him within s. 34(2) of the *Criminal Code*. There was a mixture, however, of emotions which prompted the assault, an assault which was spontaneous and opportunistic.

[15] Secondly, as indicated earlier, having realized the extent of beating, the defendant contacted the police to try to ensure that Mr. Hewitt got assistance.

[16] Mr. Wiebe, will you stand please. Taking everything into consideration I am sentencing you to a term of imprisonment of three years. I am aware that you have spent some time in pre-sentence custody, but at the request of your counsel, I am not taking that pre-sentence custody into consideration today.

[17] There will be a firearm prohibition for a period of ten years.

OVEREND T.C.J.