Citation: *R. v. Grant*, 2022 YKTC 23

Date: 20220513
Docket: 18-00637
18-00637A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

STEPHEN DANIEL GRANT

Appearances:
Sarah Bailey — Counsel for the Crown
Gregory Johannson — Counsel for the Defence

RULING ON APPLICATION

Overview

[1] The question in issue is whether a clinical risk assessment properly forms part of a pre-sentence report where the Court has not specifically ordered the preparation of such an assessment.

[2] Mr. Stephen Grant was found guilty of a number of *Criminal Code* (the "*Code*") offences, including offences of violence (assaults, unlawful confinement, uttering threats and sexual interference) with respect to the same victim.

[3] At the request of the defence, I ordered the preparation of a pre-sentence report (the "PSR"). On the scheduled sentencing date, defence counsel advised the Court that the PSR had been prepared, and that a detailed and lengthy risk assessment had also been completed. The risk assessment had not been prepared by a probation officer, but by a member of the Forensic Complex Care Team ("FCCT"), a unit of the Health and Social Services department.

[4] Defence counsel objected to the Court receiving the risk assessment, arguing that the risk assessment constituted a search and seizure within the meaning of s. 8 of the *Charter*, and that, in these circumstances, Mr. Grant's right to silence under s. 7 is also engaged. The defence also contended that Mr. Grant did not validly waive his rights prior to the interviews for the risk assessment.

[5] The Crown submitted that although the risk assessment was completed by another agency of the Yukon Government, this should not invalidate it. The process to prepare the risk assessment was essentially the same as has been done for years in this jurisdiction. The Crown contended that the information in the risk assessment was highly relevant, and should not be discarded lightly.

[6] I held, with reasons to follow, that the risk assessment was not admissible. These are my reasons.

Analysis

[7] In this jurisdiction, as stipulated by s. 721(1) of the *Code*, PSRs are prepared by probation officers, who, typically, conduct interviews and review relevant information in

the process of preparing these reports. Probation officers are employees of Yukon Community Corrections ("YCC"), a branch of the Department of Justice. It has been the practice in the Yukon for many years for trained probation officers to assess risk of offenders by administering criminogenic risk assessment tools such as the Level of Service/Case Management Inventory (LS/CMI), or actuarial assessment tools such as the Static-99R, and then reporting the results in a PSR. These reports are completed to help inform the Court as to the offender's relative degree of risk for recidivism, and the corresponding need for supervision. A summary of the assessment administered by the probation officer and the results, generally, make up a small part of the PSR.

[8] In the matter before me, Mr. Grant was directed by his probation officer to attend to appointments with a member of "FCCT". As noted, FCCT is part of the Mental Wellness and Substance Use Branch, Health and Social Services. I understand that this unit provides assessment and treatment services to clients who have been found to have committed offences of violence. After the referral to FCCT, Mr. Grant signed documents, which purportedly permitted FCCT to share assessments with YCC. Counsel for Mr. Grant contends that the purported consent documents signed by Mr. Grant allowing for the transfer or sharing of this information do not meet the test in ***R.*** v. ***Wills***, [1992] 7 O.R. (3d) 337 (C.A.), for a valid waiver of an individual's s. 8 *Charter* rights. Therefore, Mr. Grant was subjected to an unauthorized search and seizure. As indicated, the defence also maintains that in these circumstances, the government contravened Mr. Grant's s. 7 *Charter* right to silence.

[9] Although the defence has raised interesting *Charter* arguments, I am of the view that this matter may be decided without resolving those specific issues.

[10] A PSR provides relevant information about the offender to assist the Court in crafting a fit and just sentence tailored for that offender. Section 721 of the *Code* speaks to the content of PSRs. It provides, in part, that:

> 721(1) …where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730.
> …
>
> 721(3) Unless otherwise specified by the court, the report must, wherever possible, contain information on the following matters:
>
> (a) the offender's age, maturity, character, behaviour, attitude and willingness to make amends;
>
> (b) subject to subsection 119(2) of the *Youth Criminal Justice Act*, the history of previous dispositions under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, the history of previous sentences under the *Youth Criminal Justice Act*, and of previous findings of guilt under this Act and any other Act of Parliament;
>
> (c) the history of any alternative measures used to deal with the offender, and the offender's response to those measures; and
>
> (d) any matter required, by any regulation made under subsection (2), to be included in the report.
>
> (4) The report must also contain information on any other matter required by the court, after hearing argument from the prosecutor and the offender, to be included in the report, subject to any contrary regulation made under subsection (2). [emphasis added]

[11] Section 724 stipulates, in part:

> …
>
> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> …
>
> b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
>
> (c) either party may cross-examine any witness called by the other party;
>
> …

[12] There are no regulations in the Yukon regarding types of offences which may require a PSR, or the content and form of a PSR.

[13] It has long been held that the purpose of a PSR is to provide information that allows a court to better understand an offender's situation in life. Under the former s. 735 of the *Code*, which provided more limited direction to the court in terms of PSR content, the Court of Appeal in ***R.*** v. ***Bartkow***, [1978] 24 N.S.R. (2d) 518 (C.A.), at para. 10, concluded:

> … Their function is to supply a picture of the accused as a person in society – his background, family, education, employment record, his physical and mental health, his associates and social activities, and his potentialities and motivations. …

See also ***R.*** v. ***Purchase***, [1992] 127 N.S.R. (2d) 392 (S.C.)**.**

[14] Following the introduction of s. 721 of the *Code* in 1995, the Court in ***R.*** v. ***Junkert***, 2010 ONCA 549, at para. 59, explained that a PSR is "…to be an accurate, independent and balanced assessment of an offender, his background and

his prospects for the future…" (See also ***R.*** v. ***Chaaban***, 2011 ABPC 310, at para. 48; ***R.*** v. ***Wharry***, 2007 ABQB 462, at para. 59).

[15] As described in ***R.*** v. ***Gardiner***, [1982] 2 S.C.R. 368, a sentencing judge has a "…wide latitude as to the sources and types of evidence upon which to base…" their sentence.

[16] Although the inclusion of actuarial risk assessments has been accepted by courts in this jurisdiction and elsewhere (e.g***. R.*** v. ***M.T.***, 2018 YKTC 3, at paras. 19 and 35; ***R.*** v. ***Knaack***, 2018 YKTC 6, at paras. 18 and 20; ***R.*** v. ***Prasad,*** 2018 YKTC 21, at paras. 29 and 34***; R.*** v. ***Peters***, 2005 YKSC 46, at paras. 12-14; ***R.*** v. ***Oldford***, 2009 NLTD 124, at para. 18), a different view has been taken in some circumstances by other courts (e.g. ***R.*** v. ***Hildebrandt***, 2005 SKPC 35, at paras. 27-33; ***R.*** v. ***Elliott***, 2004 NSPC 71, at paras. 16-18).

[17] In ***Hildebrandt***, the Court did not accept the results of the risk assessment prepared by the probation officer, and, instead, ordered a psychological assessment to receive a qualified assessment. The concerns regarding the initial risk assessment contained in the PSR included the manner in which the risk assessment tools were employed, and the fact that the Court had no information as to the qualifications of the probation officer who administered them (paras. 27-39).

[18] In ***R.*** v. ***Blackwell***, 2007 BCSC 1486, the Court considered whether it had the jurisdiction to order a psychiatric assessment pursuant to ss. 721(4) and 723(3). The offender did not consent to an assessment, arguing that he could not be compelled to provide conscriptive evidence to assist the Court in determining a fit sentence. After an

extensive review of the case law in this area, the Court noted that other courts had limited the use of assessments to circumstances in which a logical nexus existed between the assessment sought and the matter under consideration (para. 30). In ordering the psychiatric report, the Court took into account its broad discretion to receive potentially relevant information regarding the offences and the offender. Also, the sentencing judge explained that the offender would be invited to participate in the assessment, but could not be compelled to do so. If the offender declined to participate, a more limited assessment could be completed through the examination of collateral material (paras. 6 and 37).

[19] The Crown asks me to consider the information compiled in the risk assessment, because it is pertinent, and because s. 721(3) is permissive, and should not be read as specifying that only the factors enunciated in that section be addressed in the PSR. Additionally, the Crown submits that I should consider case law regarding PSRs in the youth criminal justice sphere.

[20] I do not agree with the Crown's submission that the case at bar is similar to youth sentencing cases, such as ***R.*** v. ***J.D.***, 2020 PESC 11, where the Court declined to direct the provincial director not to include or reference a previously completed sexual deviance assessment in the PSR. The *Youth Criminal Justice Act*, S.C. 2002, c. 1, provisions which provide the provincial director powers to include in a PSR information that the director deems relevant, cannot, in my view, be read into the *Code*.

[21] On the other hand, I agree with the Crown that it is important for a sentencing judge to receive pertinent information at a sentencing hearing to assist in developing a fit and just sentence. As stated in ***R.*** v. ***Jones***, [1994] 2 S.C.R. 229 at p. 289-290:

> As with all sentencing, both the public interest in safety and the general sentencing interest of developing the most appropriate penalty for the particular offender dictate the greatest possible range of information on which to make an accurate evaluation of the danger posed by the offender.

[22] The difficulty in the case at bar is that this type of risk assessment, completed by a clinical counsellor, was neither ordered nor contemplated by the Court. If the Court and counsel had been provided with information that the probation officer wished to refer Mr. Grant to a clinical counsellor with the FTTC for the purposes of a 16-page risk assessment, the matter could have been addressed pursuant to s. 721(4), after hearing argument from the Crown and the defence. The Court in ***R.*** v. ***C.P.***, [1999] O.J. No. 3509 (Ct. J.), at para. 18, spoke to this issue:

> Section 721(3) clearly sets out that the probation officer may be directed by the court not to report on certain issues. Nothing suggests that counsel may not raise the question of the contents of a probation officers report and, as noted, s. 721(4) also permits counsel to debate what should be included by way of supplementary information. Hence, the proper mechanism is not for either party to await receipt of the report and then to raise concerns about its contents. Such a procedure offends judicial economy.

[23] However, in the case at bar, in the absence of any information about a clinical risk assessment or the process contemplated, counsel were not in a position to raise this issue with the Court when the report was ordered. Additionally, but importantly, Mr. Grant did not receive legal advice from his lawyer regarding the risk assessment.

As a result, he would not have been in a position to give fully informed consent to participate in the assessment. Nor would he have been aware of his right to decline to participate as noted in the ***Blackwell*** decision.

[24] The risk assessment prepared in this matter was not the standard actuarial assessment, but a clinical assessment more akin to a psychological assessment, and which should only have been ordered after argument by counsel and consideration of Mr. Grant's willingness to participate.

[25] There are a number of court decisions where sentencing judges have either disregarded inappropriate portions of a PSR (see, for example, ***R.*** v. ***Green***, 2006 ONCJ 364, at para. 16; ***Chaaban***, at paras. 55 and 60; ***Wharry***, at para. 60), or have rejected the PSR in its totality and ordered a new report (***Purchase***, at paras. 2, 3, and 14).

[26] For the reasons set out above, I conclude that it would be inappropriate for me to consider the clinical risk assessment that has been prepared in this matter. Accordingly, the clinical risk assessment is not admissible in these proceedings.

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CHISHOLM T.C.J.