Citation: *R. v. Couch*, 2022 YKTC 40

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Docket: 21-00334A
21-00334B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Killeen

REX

v.

ANDREW COUCH

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Megan Seiling — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR SENTENCE

[1] KILLEEN T.C.J. (Oral): Sir, I know you and your lawyer have discussed this at length. I am going to make some remarks that will be much more abbreviated than would otherwise be the case because I know that you understand what is coming.

[2] You have pled guilty to some very serious charges. The crimes that you have pled to include the sexual assault, and I think it is well understood sexual activity with a “child” — and I use that word carefully — is a serious crime.

[3] The problem with sexual activity with a child — an adult doing this — is that it amounts strictly to exploitation. Society, broadly is set up so that we have families, institutions, and safeguards to protect children. Most people in society do what can be done to keep young people safe because we look at their level of development, their ability to understand things, the fact that emotional maturity may not come for a very long time, and we have, through all of our institutions, looked at what can be done to keep children safe because, ideally, that is what we want. We want children to grow up in a safe environment, a loving environment as well, but in an environment where they are protected from those who might otherwise prey upon them and leave them in a position where they become less likely to develop into an adult who is capable of making their developmental decisions in an appropriate way.

[4] What troubles me about your case is that we now have, and I should, for the purpose of the record, review quickly the Agreed Statement of Facts.

[5] The complainant in this matter was 12 years of age at a time when you were 22. You had initially — I am summarizing — met the complainant through her [redacted], with whom you were in a relationship. After the relationship had ended, you began to spend time with the complainant.

[6] By December of 2019, you were requesting that she send you naked pictures of herself in exchange for money. Between December 2019 and June 10, 2021, she sent you pictures of different parts of her naked body on approximately eight separate occasions, sending three or four pictures at a time.

[7] Between December 2019 and December 2020, on two occasions, she agreed to perform oral sex on you, at your request, in exchange for money.

[8] Starting December 2019, after she had turned 13, the two of you began discussing having vaginal intercourse. You eventually agreed that you would pay her $500 to have vaginal intercourse with her once and then would pay $200 for any subsequent incidents of intercourse.

[9] On one occasion, you had vaginal intercourse at your residence. At that time, she was 13 or 14 and you were 23 or 24. You paid her $500 for that.

[10] Over the course of time, you had paid her between $1,100 and $1,700 in accordance with an agreement for vaginal intercourse, oral sex, and sending naked pictures. You also asked for naked pictures which are specified in the Agreed Statement of Facts, and I do not have to get into them.

[11] My profound concern about this is the exploitive nature of what you did has likely caused significant, if not irreparable harm, to this young person. I cannot imagine what it would be like to develop and, at the age of 12 or 13, have as part of your life performing sexual services for others for payment of a fee. I can only hope that she is able to put all of this into a proper context and receive assistance for it. My guess is that she may be damaged for the rest of her life.

[12] The Supreme Court has expressed its concern about these types of situations. For years, courts perhaps looked at sexual offences with children in a way that did not fully reflect the long-term seriousness impact of these types of offences on them. The

fact that there was an agreement to do this and the fact that physical or other coercion was not used does not in any way mitigate this offence. It is a crime to have sexual contact with a child when you are an adult. I cannot describe it as anything other than the most exploitive nature of an event that could occur.

[13] It is more serious, as well, because of the fact that you had, in some fashion, cajoled her into providing you with naked photographs of herself. That is related but a separate sort of issue. The problem with naked photographs is that an image that should never be exploited has been put out there. I only hope that they have been destroyed.

[14] I have heard commentaries from victims, often in submissions, where the victims of child pornography will say that one of the problems of having been exploited in that fashion is that they never quite know who has looked at their naked photographs. There is nothing to suggest that you have shared those, but it is a troubling matter, indeed.

[15] The type of sentence that the Court has to impose, then, has to include a significant term of incarceration. I have to say, at first blush, looking at this, I might have been inclined to impose a more substantial term of incarceration than is being proposed by counsel because *R. v. Friesen*, 2020 SCC 9, a decision from the Supreme Court, in the last few years, clearly has directed me to do that.

[16] But I know that denouncing your crime and deterring you and others is not the only thing that I am to look at. I also have to consider your background. You come before the Court with no record, which is a significant factor. You are a young man.

The rest of the information about you included in the pre-sentence report points to the difficulties that have existed in your life. Nobody has suggested that they justify what you did, but I do think they are important for me to consider in terms of understanding what is necessary to get a message through to you as well as other members of the public.

[17] I have to look at the fact that you have pled guilty. I know that your guilty plea, by law, is an expression of remorse. I have placed considerable weight upon your guilty plea because I know that absent of your guilty plea, we might have had a situation where a young girl would be further victimized, in the sense of having to appear before a court and testify about the most intimate acts in circumstances that, no doubt, would have had a very troubling effect upon her — perhaps victimizing her yet again. Therefore, I have placed considerable weight upon your guilty plea.

[18] I also have considered the significant information contained in the report of Dr. Lohrasbe, which is a very comprehensive report. It does contain information which might be viewed as inconsistent or dubious, but ultimately an experienced psychiatrist who, by agreement is an expert in the field, has analyzed the situation and come to certain conclusions. I am not going to go through them on the record. The report is there in evidence. I know that the information contained there will be received by the Correctional Service of Canada and I expect that they will place considerable weight upon that extensive report in deciding the type of treatment that you should be receiving.

[19] You had made some comments earlier. The comments are important to me in the sense that they give me some sense that you are far more aware of the nature of the problem that has caused these crimes to occur. That speaks to what I would describe as an enhanced prospect for rehabilitation because, frankly, it is only when you begin to understand what motivates you that you can expect the treatment might be successful.

[20] Your comments had also raised an issue which I think counsel have adequately addressed in terms of my concern about the long-term protection of the public.

[21] In the result, I intend to follow the recommendation that has been put before the Court. It is, in my view, an appropriate sentence. It is a harsh sentence in the sense that you, a young man with a variety of frailties that have been described, are going to go to a penitentiary. It is, however, entirely fitting, given the crimes that you have committed.

[22] On Count 1, the child pornography count, I am imposing a term of incarceration of 12 months.

[23] Madam Crown, you have not actually dealt with 2 and 3. I expect they will be stayed or withdrawn at the end of this?

[24] MS. SEILING: Yes, that's correct.

[25] THE COURT: Which are you going to do; withdraw them?

[26] MS. SEILING: We'll be withdrawing them.

[27] THE COURT: Thanks.

[28] On Count 4, the count under s. 151, I am imposing a term of incarceration of 24 months. That 24 months is consecutive to the 12 months earlier imposed, bringing us to the total of 36 months.

[29] On Count 5, communication with a person under the age of 18 for a sexual service, I am imposing a term of incarceration of 12 months, which will be concurrent to the s. 151 matter.

[30] On Count 6, fail to comply with a condition of an undertaking, I am going to impose a term of incarceration of 45 days. That term of incarceration is also concurrent to the sentences at 4 and 5, meaning, that in total, the term of incarceration from today's date is three years.

[31] I am also making some other orders.

[32] You are required to provide a sample of your DNA. It is a primary order. The order will require that the sample be given on, theoretically, 1, 4, and 5, although I expect one sample to be taken. I am going to require that the sample is to be provided to the Correctional Service of Canada by no later than November 30, 2022. I am providing that time because I know that there will be a period of time before transfer and then I want to make certain that he is in an institution where the sample can be taken as required.

[33] You are going to be bound by the provisions of the *Sexual Offender Information Registration Act* for a period of 20 years from your release from incarceration. That

order will be given to you at some point and you will be, I am sure, reminded when you are released on parole what the conditions require.

[34] Pursuant to s. 109, I am going to make an order that, for a period of two years from the date of your release from custody, you are prohibited from having in your possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance.

[35] Counsel did not refer to this but I think, in the circumstances, it will not be contentious. During the period of time that you are serving your sentence, you are not to have any contact or communicate directly or indirectly with the complainant — s. 743.21.

[36] I am going to direct that upon your release from custody, you are to be bound by an order under s. 161 of the *Code*. The order is going to prohibit you from being within 100 metres of any dwelling-house in which the victim of this matter resides or any school that she might be attending.

[37] Pursuant to s. 161(1)(b), I am going to prohibit you from seeking, obtaining, or continuing any employment, whether or not the employment is renumerated, or becoming or being a volunteer in any capacity, that involves being in a position of trust or authority towards a person under the age of 16 years.

[38] Under s. 161(1)(c), I am going to direct that you are not to have any contact — including communicating by any means — with a person under the age of 16 years, unless the contact is incidental contact related to the employment of that child — so, for

example, if you go to a store and there is a 15-year-old working there, you are entitled to be there — or if the child is in the company of an adult who is not known to you — which would mean, for example, if you meet a 15-year-old on a street and she is walking down the street with her mother and the mother begins contact with you, you would be entitled to communicate — or the 15-year-old is a relative of yours and the communication is monitored by another relative who is aware of this conviction.

[39] I am going to make an order under s. 161(1)(d), also for five years, that you are not to use the Internet or other digital network for the purpose of communicating with any person under the age of 16 or for viewing material that depicts sexual activity.

[40] I am going to require that upon demand, you are to allow a member of the police or, if necessary, the parole service, to inspect your communications devices for the purpose of determining whether or not you have complied with that order.

[41] I am going to stop, counsel, and just try to explain the last two.

[42] Given that he could be anywhere after parole is over, I do not know that there is any mechanism that we can put in place to monitor things. He is not subject to parole; he is not going to be subject to probation. I will leave it then, with the above wording, given that the police can enforce this clause if needed.

[43] With respect to the search clause, again, I am not prepared to make an order simply barring him from use of the Internet. Part of that is, I know, it has become almost impossible for people to complete many of the tasks of daily living without access to the Internet. It would be impossible to apply for a job. It would be impossible to find a job. It

would probably be impossible to communicate even with parole services without the use of an Internet connection. However, the balance, which I hope to strike, is I do not want it used for the potential of grooming a child or viewing further pornography. If an officer comes upon him and learns of the existence of the clause, the officer would be entitled to check the phone at any time without the necessary requirement of establishing that reasonable and probable grounds exist to believe that an offence has been committed in that fashion. My hope is that Mr. Couch will understand that there is a mechanism for enforcement and a serious consequence.

[44] Any comments on those two clauses?

[45] MR. ROOTHMAN: No, I think that is workable, Your Honour.

[46] THE COURT: Thank you.

[47] Ms. Seiling?

[48] MS. SEILING: Yes, nothing, Your Honour.

[49] THE COURT: Costs and surcharge are waived in connection with all of this.

[50] I have considered the circumstances involving the relatively recent arrest. They are not going to attract an additional sentence nor are they going to attract a reduction of the agreed sentence for any time that he has served in custody over the last several days.

[51] Anything I have missed?

[52] MS. SEILING: No, I think Your Honour just noted that the one thing we hadn't mentioned, that my friend and I were in agreement, that Mr. Couch wouldn't receive any credit for time served.

[53] THE COURT: I did not give him any. I just explained why.

[54] MS. SEILING: Yes, just clarifying that.

[55] Thank you. That's all for the Crown.

[THE COURT ADDRESSES THE ACCUSED]

[56] THE CLERK: Your Honour, just the other matter on the "B" …

[57] MS. SEILING: Yes, Crown is going to be withdrawing any of the remaining charges, included in the Information.

[58] THE COURT: Yes, so 2 and 3 are withdrawn, and the other Information is withdrawn as well.

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KILLEEN T.C.J.