

SUPREME COURT OF YUKON

Citation: *R v Weatherston*,
2025 YKSC 9

Date: 20250115
S.C. No. 22-01513
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

LESLIE IAIN PAGE WEATHERSTON

Before Justice K. Wenckebach

Counsel for the Crown

Kathryn Laurie

Counsel for the Defence

Malcolm E.J. Campbell and
Johnathan Squire

This sentencing was delivered in the form of Oral Reasons on January 15, 2025. The Reasons have since been edited for publication without changing the substance.

REASONS FOR SENTENCE

[1] WENCKEBACH J. (Oral): The defendant, Leslie Iain Page Weatherston, was charged with one count of sexual assault against the complainant, Priska Wettstein. After a trial before a judge and jury, Mr. Weatherston was found guilty. Mr. Weatherston is now before me for sentencing.

[2] The evidence is that Mr. Weatherston and Ms. Wettstein were in a long-term intimate relationship lasting several years.

[3] Ms. Wettstein testified that for some time before the sexual assault she had tried to break up with Mr. Weatherston but had been unsuccessful in doing so. A few days before the assault, in an effort to finally break things off with him, Ms. Wettstein told Mr. Weatherston that she had been with someone else. Ms. Wettstein testified that Mr. Weatherston became very angry and threatened to beat the other person. She became scared at his reaction.

[4] For his part, Mr. Weatherston testified that when Ms. Wettstein told him that she had been with someone, he was sad, not angry, and made no threats against anyone. He also understood that they were still in a relationship at that point.

[5] The night of the assault, Ms. Wettstein testified that she went to Mr. Weatherston's home to get some closure. Both Ms. Wettstein's and Mr. Weatherston's testimony from then on is very similar. As soon as Ms. Wettstein walked in, Mr. Weatherston told her to take off her clothes and go into the bedroom. Ms. Wettstein testified that, based on Mr. Weatherston's reaction when she told him she had been with someone, she became afraid, froze, and did as he told her. She went into the bedroom; Mr. Weatherston followed; they both took off their clothes; and Mr. Weatherston then had sexual activity with Ms. Wettstein, including penile-vaginal penetration. Mr. Weatherston and Ms. Wettstein remained in a relationship for months afterward until Ms. Wettstein finally ended the relationship.

[6] On sentencing, the Crown seeks that Mr. Weatherston serve a term of imprisonment of 2 to 2½ years. Mr. Weatherston seeks an 18-month sentence to be served in the community.

[7] I will start by setting out some of the legal principles regarding sentencing and conditional sentences. I will then consider Mr. Weatherston's submission that he should serve a conditional sentence. And finally, I will determine the appropriate length of sentence.

[8] Turning to the legal principles of sentencing, I must apply the objectives of sentencing as set out in the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*"). The most important objectives applicable here are those of denunciation, deterrence, and rehabilitation. For crimes involving intimate partner violence, the Court's primary consideration is denunciation and deterrence. I must also impose a sentence that is proportionate. This is achieved by assessing the gravity of the offence and the degree of responsibility of the offender. As well, the Court seeks to achieve parity by ordering similar sentences for similar offences.

[9] In considering the gravity of an offence of sexual violence, the British Columbia Court of Appeal in *R v Maslehati*, 2024 BCCA 207 ("*Maslehati*"), recently noted that all forms of sexual assault are serious acts of violence. Thus, for the purposes of sentencing, it is unhelpful to label some sexual assaults as serious. Rather, the Court should focus on the circumstances surrounding the offence. The more aggravating the circumstances, the more grave the offence. Some of the factors that may elevate the severity of the sexual assault include:

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- highly invasive, violative and/or demeaning sexual conduct;
- prolonged duration and/or repeated occurrences;

- additional physical violence and/or physical injury;
- administering drugs or alcohol to incapacitate the victim, or taking advantage of incapacity;
- threats and/or the use of a weapon;
- persistence in the face of communicated non-consent, or acts intended to overcome resistance;
- more than one offender involved;
- sexual assault in the presence of children;
- the violation [occurring] in the victim's home;
- planning and/or steps taken to facilitate the offence;
- attempts to prevent disclosure or avoid detection;
- age of the victim;
- a particularly vulnerable victim;
- actual and reasonably foreseeable harms that flowed from the offence, including significant impact on the victim; and,
- breach of trust.

[10] The determination of whether the gravity of the sexual assault is elevated by aggravating circumstances "... requires an individualized and contextual assessment ..." (para. 75).

[11] I will now set out the legal principles pertaining to conditional sentences.

[12] For a conditional sentence to be possible, two preconditions must be met:

- first, the appropriate range of Mr. Weatherston’s sentence must be more than probation but less than two years’ imprisonment;
- second, I must be satisfied that the community would not be endangered if Mr. Weatherston were to serve his sentence in the community.

[13] If those preconditions are met, I must then determine whether a conditional sentence is appropriate given the objectives of sentencing (*Criminal Code*, s. 742.1).

[14] A conditional sentence is possible even where the primary objectives in sentencing are denunciation and deterrence, as conditional sentences can be as onerous as a jail term (*R v Proulx*, [2000] 1 SCR 61 at para. 41). Additionally, the Court should not presumptively set aside the possibility of a conditional sentence simply because the offence is one of sexual violence (para. 81).

[15] Nevertheless, the British Columbia Court of Appeal has affirmed that conditional sentence orders will not generally be appropriate for sexual assaults with aggravating circumstances (para. 105). There may be an argument that this principle is not applicable in the Yukon. In British Columbia, the range of sentences for sexual assaults with aggravating circumstances starts at two years. In contrast, the range of sentences in the Yukon, at least as identified for victims who are asleep or incapacitated, starts at 12 months (*R v Rosenthal*, 2015 YKCA 1 at para. 7 (“*Rosenthal*”). One could argue that, given the difference in ranges, there is more room in the Yukon for conditional sentences in sexual offences with aggravating circumstances than in British Columbia.

[16] However, in *Maslehati*, the British Columbia Court of Appeal explained that even where a sentence of less than two years is appropriate, a conditional sentence will still “rarely” be appropriate. This is because denunciation and deterrence are paramount in

these cases, and incarceration usually provides greater denunciation than a conditional sentence. The Court stated at para. 115:

... In my view, the need to denunciate sexual violence is “so pressing” that in the absence of diminished moral blameworthiness or compelling mitigation, incarceration is generally required to express society’s condemnation of the conduct. [citations omitted]

[17] I will now turn to the facts in this case.

[18] I will begin by determining whether a conditional sentence order should be imposed. To do so, I must first consider the appropriate range of sentence for Mr. Weatherston.

[19] I conclude that an appropriate range is more than probation and less than two years.

[20] The Crown submits that the range of sentences of sexual assault with these facts is between 12 to 30 months, and cites *R v White*, 2008 YKSC 34 (“*White*”); *Rosenthal*; and *R v BAL*, 2022 YKTC 11 (“*BAL*”), in support of her submission.

[21] Defence counsel argues that *White*, *Rosenthal*, and *BAL* are distinguishable. In those cases, the complainant was unconscious or asleep when the assaults commenced. Given these particularly aggravating factors, defence states the sentence range is higher than at the case at bar.

[22] I am not convinced by defence counsel’s argument and conclude the range of sentence is, as Crown states, 12 to 30 months. I do not take from *White*, *Rosenthal*, and *BAL* that this range is only for cases in which the complainant is asleep or unconscious. Rather, I conclude that, where there are aggravating factors that elevate the gravity of the sexual assault, the range of sentence is 12 to 30 months.

[23] I am supported in my analysis by *R v Amin*, 2023 YKSC 75 (“*Amin*”), another case from the Yukon. In that case, the complainant was conscious during the sexual assault but there were other aggravating circumstances that elevated the severity of the offence. Duncan C.J., who was the trial judge, accepted that *White*, *Rosenthal*, and *BAL* applied to the facts before her. Implicit in the determination is the conclusion that *White*, *Rosenthal*, and *BAL* is not limited to situations in which the complainant was asleep or unconscious.

[24] Here, there are aggravating factors that elevate the gravity of the offence. The sexual assault occurred in the context of an intimate partner relationship. As well, the sexual activity included penile-vaginal penetration. Finally, Mr. Weatherston slapped Ms. Wettstein during the sexual activity. While the slap did not cause any physical harm, it was demeaning.

[25] Taking the aggravating circumstances together with the other circumstances, I conclude that the aggravating factors elevate the gravity of the sexual assault. Thus, the range of sentences starts at 12 months. I also conclude that, given the facts of the case, a penitentiary sentence is not necessary. Mr. Weatherston is a first-time offender, at 52 years old. He lives a pro-social life and contributes to the community. While the circumstances of the offence elevate the gravity of the assault, the circumstances of the offender means that an appropriate sentence here is less than two years.

[26] The next precondition to consider is if the community would be endangered if Mr. Weatherston were to serve a conditional sentence.

[27] I conclude that the community would not be endangered if I were to make a conditional sentence order.

[28] Defence counsel submits that Mr. Weatherston is at low risk to reoffend. He notes that, after the sexual assault, Ms. Wettstein and Mr. Weatherston continued in a relationship, but no other incidents arose. Mr. Weatherston's lifestyle indicates he is unlikely to offend again. Moreover, his doctor also concludes he is at low risk of reoffending.

[29] I also conclude Mr. Weatherston is at low risk to reoffend. In coming to this conclusion, however, I have not relied on the doctor's statement about Mr. Weatherston's likelihood of reoffending. The doctor who made the statement is Mr. Weatherston's treating physician. He was not called as an expert. His evidence that Mr. Weatherston is at low risk of re-offence is improper opinion evidence.

[30] Instead, I come to this conclusion on the basis of Mr. Weatherston's history and current lifestyle. My conclusions are drawn from both the pre-sentence report and Mr. Weatherston's doctor's letter. I say this because there are inconsistencies between what Mr. Weatherston told his doctor and what he told his bail supervisor. I have reconciled the inconsistencies by accepting the facts that are most positive to Mr. Weatherston.

[31] Mr. Weatherston had a largely unremarkable childhood and had a supportive family, although he did go through a traumatic incident. He is involved with pro-social peers. He has worked consistently, even though currently his business is doing poorly. He does not drink or take drugs. He has mental health issues which he has worked to address. That he has lived for some 50 years without coming into conflict with the law is indicative that he can do so again despite this conviction.

[32] The final question is whether a conditional sentence is appropriate.

[33] I conclude that it is not appropriate. I have already noted that there are several aggravating circumstances to the sexual assault. The sexual assault also had an overwhelmingly negative impact on Ms. Wettstein. Her victim impact statement describes well how the assault continues to have an impact on her to this day and shows the effects surviving a sexual assault can have when it takes place in an intimate relationship.

[34] Defence counsel submits that, despite the gravity of the offence, a conditional sentence is appropriate because Mr. Weatherston is less morally blameworthy. Specifically, Mr. Weatherston's state of mind at the time of the offence minimizes his moral blameworthiness.

[35] Considering an offender's state of mind at the time of the offence is a part of determining the offender's moral blameworthiness. The factors used to determine an offender's moral blameworthiness that are pertinent here are:

- the offender's motives or reasons for committing their offence;
- their awareness of the legal and moral wrongfulness of their conduct; and
- their awareness of the actual or reasonably foreseeable harms that would arise from the offence.

(*R v CK*, 2023 BCCA 468 at para. 71)

[36] Defence counsel essentially submits that, because Ms. Wettstein froze and simply did what Mr. Weatherston told her to do, Mr. Weatherston did not know that Ms. Wettstein was not consenting. He did not therefore know that his conduct was legally or morally wrong, that his actions would result in harm, and he did not have any motive.

[37] This argument relies on the conclusion that Mr. Weatherston had a mistaken belief in Ms. Wettstein's consent. The issue of mistaken belief in communicated consent first arose at trial. Defence counsel submitted that there was evidence that Ms. Wettstein communicated her consent, including by her actions and behaviour. I declined to put mistaken belief in communicated consent before the jury, however. I concluded there was no air of reality with regard to whether Mr. Weatherston took reasonable steps to ascertain Ms. Wettstein's consent. I did not, however, find as a fact that Mr. Weatherston believed that Ms. Wettstein consented. It was also unnecessary for the jury to decide this question to find Mr. Weatherston guilty. There is therefore no implicit finding by the jury that Mr. Weatherston believed Ms. Wettstein consented.

[38] I must therefore make my own determination about whether Mr. Weatherston believed Ms. Wettstein consented.

[39] First, Mr. Weatherston slapped Ms. Wettstein during the sexual activity. There is no evidence that Mr. Weatherston believed Ms. Wettstein consented to being slapped. I conclude that Mr. Weatherston did not mistakenly believe that Ms. Wettstein consented to that aspect of sexual activity.

[40] Aside from the slap, the sexual activity must be viewed within the context of the days preceding it. In their last encounter, Ms. Wettstein had told Mr. Weatherston that she had been with someone else. In the decision on whether mistaken belief in communicated consent should be put to the jury, I determined that to find that Ms. Wettstein did not consent to the sexual activity of the night, the jury must also have concluded that Mr. Weatherston had reacted angrily and threateningly to Ms. Wettstein in response to her revelation. On the night of the sexual activity, upon Ms. Wettstein's

arrival at Mr. Weatherston's home, he told her to go to the bedroom and take off her clothes.

[41] Even if Mr. Weatherston did not understand the extent of Ms. Wettstein's fear, he knew how he himself had reacted during their previous interaction. Mr. Weatherston and Ms. Wettstein had not cleared the air about this significantly negative interaction, nor can it be said that the relationship was in good shape.

[42] I conclude that, in this context, he was at the very least reckless in proceeding as he did. Mr. Weatherston's state of mind at the time of the offence does not, therefore, diminish his moral blameworthiness. Mr. Weatherston's moral blameworthiness is high. He has many mitigating factors, but there is nothing compelling about them to warrant imposing a conditional sentence.

[43] Defence counsel has also proposed a conditional sentence that, in some ways, maximizes the elements of denunciation and deterrence. Mr. Weatherston would be on house arrest for the full sentence, he would provide a donation to the local women's shelter and would take part in community service.

[44] However, I conclude that the need to denounce sexual violence is so pressing that a conditional sentence would not be appropriate to meet the sentencing objectives.

[45] Having determined that a jail sentence is necessary, I must now consider the length of sentence.

[46] There is one case that was filed which is most similar to the circumstances here. In *Amin*, the offender was convicted of four counts of sexual assault. In one of the instances, Mr. Amin assaulted a former romantic partner in her home. There was penile-vaginal penetration. The victim protested and cried during the assault. Although

Mr. Amin could suffer immigration consequences from his conviction and sentence, the trial judge concluded that they did not justify a sentence outside the range.

[47] Mr. Amin's personal circumstances were also similar to those of Mr. Weatherston. He was a first-time offender who had complied with all release conditions and had been steadily employed. He had support of his friends and family. The Court compared the facts to those in *White*, *Rosenthal*, and *BAL* and, stating the gravity of the offence and the offender was in the middle of the range, imposed a 20-month sentence on that count.

[48] I have taken into account both the similarities and differences between this case and that of *Amin*, and particularly that Mr. Amin was convicted on several counts.

[49] I also conclude, however, that, given the offence and the offender, a sentence closer to the middle of the range is appropriate here, as it was in *Amin*. I have determined that an appropriate sentence is 18 months.

[50] I will now address the ancillary orders.

[51] I will make the mandatory DNA order under s. 487.051 of the *Criminal Code* and the mandatory firearms prohibition order for 10 years and restricted prohibition for life.

[52] The Crown also asked that I impose a *Sex Offender Information Registration Act*, SC 2004, c 10 ("*SOIRA*"), order. A *SOIRA* order requires the offender to register with the police.

[53] Defence submits that a *SOIRA* order is not necessary.

[54] In *Amin*, Duncan C.J. provided a fulsome analysis of *SOIRA* orders. While there is a presumption that a *SOIRA* order will be imposed, the Court has the discretion to not make the order if one of two conditions are met:

- first, there would be no connection between making the order and assisting the police in preventing and investigating offences of a sexual nature; or
- the impact on the offender, including on their privacy and liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature (*Criminal Code*, s. 490.012(3)).

[55] The factors used to determine whether a *SOIRA* order should be made that are relevant here are:

- the nature and seriousness of the designated offence;
- the nature and circumstances of the relationship between the offender and the victim;
- the personal characteristics and circumstances of the offender; and
- the offender's criminal history, including the length of time they have been at liberty without committing a crime (s. 490.12(4)).

[56] I have already stated that the sexual assault has aggravating circumstances elevating the gravity of the offence, including that the parties were in an intimate relationship. Ms. Wettstein has suffered profound psychological harm. However, as I have also noted, Mr. Weatherston leads a pro-social life, and I have concluded he is at low risk to reoffend.

[57] I conclude that there is an insufficient connection between making the order and assisting the police with their tasks in preventing and investigating offences of sexual violence. I therefore decline to make an order under *SOIRA*.

[58] Mr. Weatherston, on the sole count of sexual assault, I impose a sentence of incarceration of 18 months. There will also be a DNA and a 10-year firearms prohibition order.

[DISCUSSIONS]

[59] I will waive the fine surcharge.

WENCKEBACH J.