

Citation: *R. v. Phelps*, 2025 YKTC 40

Date: 20250311
Docket: 22-00727
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Justice E. A. Hughes

REX

v.

DERON JOSEPH PHELPS

Appearances:
Reagan Rankin
Luke Faught

Counsel for the Crown
Counsel for the Defence

This decision was delivered from the Bench in the form of Oral Reasons. The Reasons have since been edited without changing the substance.

REASONS FOR SENTENCE

[1] HUGHES T.C.J. (Oral): On September 12, 2024, Mr. Phelps pled guilty to one count of being in possession of a loaded restricted firearm pursuant to s. 95(a) of the *Criminal Code* (“Code”).

[2] Briefly, the facts are that on December 31, 2022, at 2:07 a.m., Mr. Phelps walked into a bar in Whitehorse. Fortunately, one of the bouncers observed a yellow item sticking out of Mr. Phelps’ front pants pocket. Believing it to be a Taser, the bouncer stopped Mr. Phelps and took the item from him. The item was not a Taser but an unknown model 3-D printed Glock semiautomatic firearm. The firearm was loaded with

six 9 mm cartridges, one of which was chambered. Mr. Phelps was detained by the bouncers.

[3] The RCMP were called within approximately three minutes of Mr. Phelps entering the bar. Upon arrival of the RCMP, Mr. Phelps was then taken into police custody. He indicated he was sorry and was cooperative with the police throughout. Mr. Phelps told the police he was carrying the gun because he felt threatened by people who sold drugs. At this time of Mr. Phelps' life, he was using drugs.

[4] Mr. Phelps did not have a possession or acquisition licence ("PAL") nor could he have had one for this type of firearm, which is a prohibited firearm. Reasons for that include that it has no serial number and cannot be traced.

[5] The Crown seeks a period of incarceration. The Crown acknowledges the range of sentences for an offence like this is very broad, including a provincial sentence. However, the Crown submits a conditional sentence order ("CSO"), while available for this offence, should not be imposed, in that Mr. Phelps has continued to use cocaine — or, at least, at some level — and he may have a greater issue with alcohol than he realizes.

[6] The Crown's authorities set out sentencing principles to be considered in sentencing for an offence like this.

[7] The defence submits a conditional sentence order of two years less a day is a fit sentence in that this case has many facts which fall within the definition of exceptional

circumstances as defined by the British Columbia Court of Appeal in *R. v. Voong*, 2015 BCCA 285 at para. 59, which term allows for a non-penitentiary sentence.

[8] I note, however, that the British Columbia Court of Appeal in *R. v. Ellis*, 2022 BCCA 278 at para. 118 said this:

Exceptional circumstances are not required to justify a departure from the *Smith* range ...

— just parenthetically, the *Smith* range is dealing with drug trafficking here —

... including a sentence that is substantially below 18 months' imprisonment or even non-carceral. Justice Fitch emphasized this point in *Choi* ...:

[22] ... This case was argued, in the trial court and on appeal, on the footing that the trial judge was required to find exceptional circumstances to impose a sentence below the bottom end of the range identified in *Smith*. Neither counsel referred to *R. v. Parranto*, 2021 SCC 46 at para. 40 [*Parranto*], where the Court emphasized that an appellate court should not artificially constrain the ability of the sentencing judge to impose a proportionate sentence by requiring a demonstration of “exceptional circumstances” when departing from a range (see also *Friesen* at paras. 111-112.)

...

[24] *Friesen* and *Parranto* provide helpful analytical clarity in cases where exceptional circumstances are raised as justifying a departure from a generally applicable range. The task of the sentencing judge in such cases is not to determine whether the offender has met some ill-defined exceptional circumstances threshold test, but to fashion a proportionate sentence.

[Emphasis added.]

[9] Regardless of what is said in *Ellis*, the factors that were identified by Mr. Faught are relevant in determining a fit sentence, meaning a proportional sentence. If I find that a sentence of two years less a day is appropriate, I must consider whether that term may be served in the community under a conditional sentence order pursuant to s. 742 of the *Code*.

[10] Section 718 of the *Code* sets out the purposes of sentencing and any sentence imposed must have one or more of the listed objectives, which include denunciation; deterrence, both general and specific; and rehabilitation.

[11] I agree with counsel that the primary sentencing objectives in sentencing for this offence are deterrence and denunciation because of the serious and dangerous nature of firearms themselves.

[12] In addition, s. 718.1 of the *Code* sets out the fundamental principle of sentencing, which is proportionality, meaning a sentence must be proportionate to the gravity of the offence and the moral culpability of the offender. It is fair to say that, due to the individualized nature of the sentencing process, the range identified in submissions for this sort of offence is very broad. It is clear, though, that the low end of the range does appear to be two years less a day to three years.

[13] I begin my analysis with my identification of the aggravating and mitigating factors.

[14] The aggravating factors are these:

1. The location of the offence: Mr. Phelps had a loaded handgun in a bar, which is a public place.
2. Of the six live rounds loaded in the firearm — and I appreciate that is part of the offence — one was chambered.
3. As observed by courts, including in *R. v. Chin*, 2009 ABCA 226 at para. 10, the offence itself is “inherently dangerous.”

[15] The mitigating factors are much more numerous, and I have identified them as these:

1. The guilty plea itself, albeit it is not an early guilty plea.
2. Mr. Phelps is a youthful offender. He was 20 years of age at the time of the offence and turned 23 just two days ago.
3. He had no criminal record at the time of the offence and is just about finished now, from a guilty plea to obstruction of a peace officer in April of 2024, his 12-month probation, which, as I understand, he has successfully completed.
4. He is fortunate in that he has great support of family and friends, as evidenced by the letters filed in the pre-sentence report. The letters and pre-sentence report all speak to Mr. Phelps’ past and what changes they have seen. The letters of Thea Carey and Jade Simonson are particularly compelling in that both authors first knew Mr. Phelps before his

rehabilitation began and advised they wanted nothing to do with him at that time. As Ms. Simonson has said since, her having to deal with Mr. Phelps by allowing him to rent from her, has been a great decision on her part.

5. He is genuinely remorseful. He indicated to the author of the pre-sentence report that his decision to take the firearm was stupid. He has apologized to his own family, and he has acknowledged and understands the seriousness of the offence.
6. He has turned his life around, as set out in the pre-sentence report and the letters. We see that, after dropping out of Grade 12 in 2020, he obtained his GED in 2024. He has left his prior anti-social behaviour behind, as described in the pre-sentence report. He is working full-time with PVB Construction and has begun working towards his Red Seal in carpentry. In addition, he has gained insight into his prior substance abuse issues and has engaged in addictions programming. It is clear that this is an area he must continue to work on, especially in regard to alcohol, but regardless, he has taken rehabilitative steps. Lastly, the Level of Service / Case Management Inventory assessment places Mr. Phelps at a very low risk of re-offending.
7. He is the primary caregiver to his son C., who is four years old. The Court has received information that the mother of the child is unable to parent C.

due to her health and substance abuse issues, thus Mr. Phelps is his only provider and caregiver.

8. Lastly, this offence was not committed in conjunction with other criminal activity, for example, drug trafficking, meaning Mr. Phelps was not carrying a firearm as a tool of his criminal trade.

[16] In assessing proportionality, I acknowledge this is a serious offence. However, I do not place Mr. Phelps' moral culpability at the high end of the scale. While it was a stupid decision on his part to have taken a loaded firearm to a bar — and acknowledged as such by him — and as the Crown set out, this could have had tragic consequences, fortunately, the firearm was seized within three minutes of Mr. Phelps being in the bar. The offence was not committed in conjunction with other criminal activities. Also, Mr. Phelps made this decision at a time in his life which might be described as “out of control” due to his drug and alcohol use. This is not an excuse for his conduct but provides a context to my characterization of his moral culpability.

[17] I am satisfied Mr. Phelps' rehabilitation will continue, in that he has demonstrated insight into his past anti-social conduct. In addition, he has substantial family and extended family support. Further, he has made significant strides in his own rehabilitation over the past year, which includes the counselling and his probation officer's assessment that he is at low risk to reoffend. Lastly, the letters of support, the support of his employer and mentor, JJ Phelps-Van Bibber, are also truly important in coming to this conclusion.

[18] Thus, Mr. Phelps' rehabilitation, which I foresee as continued rehabilitation, his lower moral culpability, and the other mitigating factors identified lead me to impose a sentence that is at the low end of the range, that being two years less a day.

[19] I next must consider if this sentence is to be served in a territorial jail or under a conditional sentence order pursuant to s. 742.1 of the *Code*. A conditional sentence order is available in that the offence in question has no minimum sentence and the sentence to be imposed is less than two years. However, I must also be satisfied of two other criteria:

1. that Mr. Phelps serving the sentence in the community would not endanger the community; and
2. it would be consistent with the fundamental purpose and principles of sentencing set out in the *Criminal Code*.

[20] I am satisfied that, should I impose a conditional sentence order on Mr. Phelps, the community would not be endangered. I make this finding based on the significant strides he has made in his own rehabilitation; Ms. Simonson's rules upon Mr. Phelps — which are not unlike a conditional sentence order and which he has complied with; and the fact that he was reassessed at a low risk to reoffend. In addition, I can impose conditions which will support both rehabilitation and continue to lower the risk of reoffending.

[21] In addition, should Mr. Phelps reoffend, the offence most likely to be committed is possession of cocaine, which is not an offence which has a high gravity of danger to the community. The gravity of danger is to Mr. Phelps himself.

[22] Lastly, I must consider whether a conditional sentence order in this case is consistent with the fundamental principles of sentencing. Firearm offences are serious offences. However, the Supreme Court in *R. v. Proulx*, 2000 SCC 5 has said s. 742.1 does not exclude any offences from a conditional sentence order nor does the principle of proportionality. *Proulx* also states a conditional sentence order can provide a significant amount of denunciation and deterrence when onerous conditions are imposed. Onerous means punitive, and that an offender should be confined to their home except when working or fulfilling conditions of their sentence, like treatment or community service.

[23] Deterrence can also be addressed through a conditional sentence order. *Proulx* further tells us that a conditional sentence order can meet the restorative and rehabilitative aspects of sentencing. As I said at the outset, I am of the view that a conditional sentence order of two years less a day with onerous conditions does meet the principles of sentencing and therefore, Mr. Phelps, I sentence you to two years less a day to be served in the community followed by two years' probation.

[24] The *Criminal Code* requires I impose five mandatory conditions. They are these, that:

1. You shall keep the peace and be of good behaviour;

2. You shall appear before the court when required to do so by the court;
3. You are to report to a Supervisor within two working days after me having made this order, and thereafter, when required by the Supervisor and in the manner directed by the Supervisor;
4. You shall remain within the jurisdiction of the court, meaning within the Yukon, unless written permission to go outside the jurisdiction is obtained from the court or your Supervisor; and
5. You must notify the court or your Supervisor in advance of any change of name or address, and promptly notify the court or Supervisor of any change in employment or occupation.

[25] In addition, to meet the principles of sentencing, I impose the following additional conditions:

1. You shall abstain from the consumption of drugs except in accordance with a medical prescription, of alcohol or any intoxicating substance for the period of the conditional sentence order;
2. You will abstain from owning, possessing, or carrying a weapon, understanding that I will also make a further order about you possessing any weapons;
3. You will perform 100 hours of community service within the first 18 months of that conditional sentence order. I am not ordering the maximum

number of hours, as: you are employed full-time; you are working long hours on occasion; and you are a single parent — a single parent, meaning that, currently, there is no other caregiver other than you for C;

4. You shall attend for such assessment, treatment, and counselling as directed by your Supervisor; and
5. You will be under house arrest for the first 12 months of your conditional sentence. The only exceptions are these: to and from your employment, and you must provide your hours to your Supervisor; to and from meetings with your Supervisor; to and from any assessment, treatment, or counselling directed by your Supervisor; to or from the community service directed by your Supervisor; and, as well, you shall have a four-hour window for shopping for necessities of life, matters of that sort, and you can work out with your Supervisor on what day of the week and what four hours that will be for. One more exception to the house arrest, is for any other matter, as pre-approved by your Supervisor and in written form that we have not thought of, including for medical emergencies for you or C.

[26] For the last 12-month remainder of the conditional sentence order, they are to be the same except I am allowing for one exception: you may take C. to one activity per week for a maximum of three hours — but it must be pre-approved by your Supervisor.

[27] These conditions are denunciatory, as well as they have a deterrent effect. If you were in jail, you could not take C. anywhere. Certainly, in the first 12 months, you will have to make arrangements for him to go to birthday parties, play dates, matters of that

sort, any activities that you understandably enrol him in. But it has a deterrent effect to others in the community in that they will know that you are not able to go out and do these things with C. for those first 12 months, understanding that this truly is jail in the community.

[28] In terms of the probation, probation has the same mandatory conditions as the conditional sentence order. In addition, I am directing that:

- You will report as directed;
- You will take such assessment, treatment, and counselling as directed;
and
- You will abstain from the consumption of non-prescription drugs.

[29] I am warning you, Mr. Phelps, of this. The Supreme Court of Canada has said in the *Proulx* decision that a breach should begin with the presumption that the sentencing judge will collapse the conditional sentence order and send you to jail. Understand that is my position.

[30] Now, there are some ancillary orders that must be made, and I will also ask both counsel if I have missed anything in regards to the CSO conditions, but the ancillary orders are these:

- there will be a DNA order;
- there will be a s. 490 forfeiture order of the seized firearm as well as the other items seized in the search; and

- there will be a 10-year s. 109 weapons prohibition order.

[DISCUSSIONS]

[31] Yes, it will be that you carry a copy of the CSO, and that is actually in many ways to your benefit, Mr. Phelps, as opposed to police's benefit because if they think you should not be out, you can show them right then and there that you do, or get a letter from your Supervisor advising that you have this ability to go to and from to do your community service.

[DISCUSSIONS]

[32] Given your current employment status, I will impose a victim surcharge of \$200, which will be payable within six months.


HUGHES T.C.J.