Date: 20010510
Docket No.: S.C. 00-00463B
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

DELORES ROBINA GRAHAM

SUPREME COURT OF THE
MAY 15 2001
YUKON TERRITORY

JUDY HARTLING — For the Crown

KIMBERLY ELDRED — For the Defence

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

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[1] MARSHALL J. (Oral): The defendant is charged that on or between the 22nd day of August, 2000, and the 7th day of October, 2000, at or near Whitehorse, Yukon Territory, she did unlawfully commit an offence in that she, being the parent of Kara Beth Sweeney, a person under the age of 14 years, in contravention of the custody provision of a custody order in relation to the said Kara Beth Sweeney made by the Supreme Court of the Yukon Territory, with intent to deprive Kevin Victor Sweeney, having a lawful charge of Kara Beth Sweeney, of the possession of Kara Beth Sweeney, did take the said Kara Beth Sweeney, contrary to s. 282 of the *Criminal Code of Canada*.

[2] This matter concerns the child Kara Beth Sweeney, born June 19, 1998, while the defendant and Kevin Victor Sweeney were cohabiting.

[3] A brief history of the litigation between the parties is necessary. There was an application for custody by Sweeney, which was denied, in orders of September 22nd and September 30th, 1998. Custody was given to the defendant mother, with specified and reasonable and general access to the father.

[4] The mother was in a motor vehicle collision in May 2000 in British Columbia. The child was injured while the defendant was operating a motor vehicle. She was apparently incarcerated for a time as a result; her fiance, Jason Baker, was also a passenger and injured in the collision. Sweeney was called by the Fort Nelson R.C.M.P. and went there and took Kara into his care. On June 22nd, the defendant, now back in Whitehorse, insisted the child be returned to her and it was, with police assistance.

[5] In late July, Sweeney made a further application for custody. On August 1, 2000, this Court enjoined the defendant from leaving the jurisdiction of Yukon, and adjourned the custody application and the application of the defendant to permit her to remove the child to August 9th. On that day, her application to move the child to British Columbia was adjourned *sine die*. Sweeney was refused custody of Kara and was given reasonable and general access. That was confirmed; the order said "reasonable and general access, as agreed between the parties."

[6] On September 12, 2000, the Court gave sole custody to Sweeney and reasonable access to the defendant. The R.C.M.P. were given power to locate, apprehend, and deliver the child to Sweeney in Yukon.

[7] A constable from Dawson Creek, British Columbia, testified of arresting the defendant on the present charge on October 7, 2000, at Pouce Coupe near Dawson Creek. The child Kara was in her care at that time. The defendant had sought police assistance in allegations of assault by her fiance.

[8] It is clear there was an acrimonious relationship between the father and mother from the time of the pregnancy. In 1999, relations were better and access frequent. He cared for the child at times while the mother was employed. He took the child to Ontario to see relatives for a month in the summer of 1999.

[9] More disputes arose in the spring of 2000, which culminated in his second application for custody in August. He felt access was being reduced. He heard of her plans to leave Yukon. She was engaged and wanted to move to B.C.

[10] After the August 1st and 9th orders, I find that the defendant was quite aware she could not leave Yukon with Kara and was very unhappy about the orders. She spoke to her counsel, Phelps, and his partner, Cozens, while they were on the speaker phone to her. They warned her that she risked contempt of court if she left with Kara.

[11] In the last week in August, she moved to Dawson Creek to be with her fiance. She took her three children, including Kara. Dawson Creek is about 14 hours' drive from Whitehorse. They moved into a house in Pouce Coupe, on the outskirts of Dawson Creek.

[12] Between August 9th and her leaving Yukon, she had several phone conversations with her counsel about access proposals. They also spoke on September 8th. He attempted to reach her, without success, before and after the September 12th order, so he mailed a copy of the order to her on September 18th. They talked about it by telephone about one week later. She told Phelps she would call him back to discuss when she would return Kara to Whitehorse and Sweeney. She took no further steps until her arrest. She states she was deterred by going to her fiance's grandfather's funeral in Prince George soon after the telephone conversation, which took place around September 26th.

[13] As set out in *R. v. McDougall* (1990), 62 C.C.C. (3d) 174, C.R. (4th) 112, 1 O.R. (3d) 247 (C.A.), there are six elements to a charge under s. 282 of the *Criminal Code*. There is no question of proof of the first three: The defendant is a parent, Kara is under 14, and she detained the child Kara. The fourth element, detention, must be in contravention of the custody provisions of a custody order of a Canadian court. The Supreme Court of Canada has stated in *R. v. Dawson*, [1996] 3 S.C.R. 783, at page 8 of QuickLaw, as follows:

> No accused will be convicted under s. 283 unless he or she intended to deprive a person entitled to possession

> of the child of that possession. And if an accused does take a child and thereby excludes the authority of a person who has lawful care or charge of the child, with intent to deprive that person of the possession of the child, I see no reason to permit the accused to hide behind his or her status as a custodial parent or the other parent's status as an access parent.

That refers to s. 283, but that particular consideration applies, as well, to s. 282.

[14] This amounts to a statement that deprivation of possession of a child can occur to an access parent as well as a custodial parent. Here, specific access was not spelled out, but historically, Sweeney had exercised regular access, so in that context, the mother was obliged to use good faith to continue the access arrangement. I am satisfied that this ingredient is proven.

[15] A fifth element required is that the defendant must know there is an existing custody order. I see no basis, either, to have any doubt that she knew taking the child away was a violation of the order. She heard it from the judge in court and she was clearly told, by her two counsel, of its terms and the consequences. The defendant is not naive or lacking in comprehension of a matter such as this.

[16] The final ingredient is proof there was an intent to deprive Sweeney of possession of the child. I can come to no other conclusion. Although that intention was not set out in express words from her, I believe it is clear she chose to keep the child, at her leisure, with intent to keep him from his lawful access.

[17] She spoke in her testimony of violence he used against her during her pregnancy, and also of an order restraining him from contact with her while he was on bail at that time. However, there is no indication she ever sought a restraining order against him after the assault charge for which he was on bail was dismissed. There is no indication of any harm to her after the child was born. I do not believe she left for fear of her safety; she wanted a new life with her fiance.

[18] What seems particularly compelling is the fact that in late September the defendant knew an order now gave custody of Kara to Sweeney. She took no measures to return Kara, and had not done so on her arrest on October 7th. I am satisfied she intended to keep him from his legal right to access and, eventually, his legal right to custody of Kara.

[19] I have heard the arguments regarding policy, through references in the cases to policy. I agree that the section must never be used to enforce a civil breach of the law. However, I believe in this case there was a breach which the state must be concerned about. This was a breach of the peace. There was nothing inadvertent or trivial about the actions of the defendant.

[20] Stand up, Ms. Graham. I find you guilty of the charge. You can sit down.

MARSHALL J.