Citation: *City of Whitehorse v. West*, 2016 YKTC 21

Date: 20160504
Docket: 15-05210
15-04967
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

IN THE MATTER of a ticket under the City of Whitehorse *Maintenance Bylaw* 2011-03

CITY OF WHITEHORSE

v.

DAVID WEST

Appearances:
Claire Anderson — Counsel for the City of Whitehorse
James Tucker — Counsel for the Defendant
Vida Nelson (articling student)

REASONS FOR JUDGMENT

[1] LUTHER J. (Oral): When dealing with any offence, under the *Constitution of Canada* a person has to be proven guilty beyond a reasonable doubt, whether we are dealing with a drug charge, a criminal charge, a territorial charge, or a municipal bylaw.

[2] The case of *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299, from the Supreme Court of Canada, has established three types of offences:

(i) those criminal in nature, where the prosecution has to prove a guilty intent;

(ii) strict liability ones, where a person can show that he/she exercised all due diligence or took all reasonable steps to avoid the particular occurrence; and

(iii) absolute liability offences.

[3] I would think, given the clarity of the language, the low fines, and the lack of personal shame and moral stigma, that it is likely that this is an absolute liability offence; however, even with an absolute liability offence, the prosecution still has to prove all the elements of the offence beyond a reasonable doubt. In this particular case, they have to prove beyond a reasonable doubt that Mr. David West made or caused noises or sounds which disturbed the quiet, peace, rest, enjoyment, comfort, or convenience of the neighbourhood or persons in the vicinity, contrary to s. 42 of the *Maintenance Bylaw*. The City does not have to prove that everybody was disturbed, but they do have to prove that someone was reasonably disturbed on or about 22 June 1015, 13 August 2015, 16 August 2015 and 18 August 2015.

[4] There were some undercurrents in this case. We have on the one side from the City, witnesses Ms. Luchyk, Ms. Hansen, and Mr. Mitchell, all of whom seem to be affected by this special meeting of the Condo Board at Mountain View Place which took place in the summer of 2015. The witnesses for Mr. West were not questioned as to how they lined up on these particular issues, so I can only assume that they would be considered more neutral than not.

[5] We have, for example, Martin Carroll, a man of the cloth and a chaplain at Whitehorse Correctional Centre, who lives at #408. He has never been distrubed. He has heard the drums but they have never bothered him. His place is separated by an

eight foot fence. An eight foot fence may preclude visual observation but it definitely is not going to stop sound. It may dampen it a little bit, temper it down a little bit, but it is not by any means going to eliminate the sound.

[6] As to who was at the best location to hear the sounds, the point has been made that Ms. Hansen and Mr. Mitchell of unit #203, were at the end of some sort of a tunnel and they would get the most of these sounds. Let us take a look at the locations of the other people, for example, Ms. Miller, at #515. She is more or less between the defendant and the residence occupied by Ms. Hansen and Mr. Mitchell. Ms. Mitchell was not bothered by the drumming and never heard it after 9:00 p.m.

[7] I do not think that it can be said that the defence is cherry picking their witnesses. In other words, the defence did not pick people somewhere towards the end of the trailer park and who were never going to be bothered by what comes out of #518. In fact, they presented credible people from very close to, and actually even closer to the defendant, than what the City produced. We have not heard anybody from #516, #410, or #406, for example, who were upset.

[8] The Court accepts the evidence as it is contained in Exhibit 11, the Workers' Compensation claim of Mr. West. That is not in dispute. Mr. West testified that he broke his finger and he was incapacitated for several weeks as of 7 August 2015.

[9] It is also not in dispute that the drums were moved away on the first day of September. All of the notes prepared by the City lay witness about loud drumming going on in the fall is a bunch of total nonsense. The drums were not there.

[10] As to the aspect of Mr. West drumming in the month of August, while it is possible to play the drums with one hand, it is not the type of thing that one would normally set out to do. It is only supposition that he was utilizing, or setting up, the play pad in such a way as to blast out these unruly sounds at different hours during the month of August. This was not challenged on cross-examination. We know that play pads can do an awful lot of things, but as to whether or not Mr. West was being ridiculously vindictive and setting up his play pad to annoy his neighbours, that is strictly conjecture. It does not have an air of reality to it.

[11] Thus, all charges from August are dismissed.

[12] We have to take a look at June 22 because we know that Mr. West was not incapacitated at that time and we know that he was quite capable of playing the drums on June 22. Taking a look at his logbook, we see that he, in fact, did play the drums from 6 p.m. to 6:45 p.m. on that date.

[13] The evidence of Ms. Luchyk of unit #406, is to the effect that she was bothered by what was going on as early as June 2015. She indicated that she could hear the music quite clearly from her deck. She had talked today of “all the time”. At one time, she even went there at 1:30 a.m. and he stopped and started. Was it 22 June 2015? We do not know. We do not know the time that that took place, if it took place at all. Mr. West was not cross-examined about that or for that matter even examined on that particular point. Nor do I think was Ms. Luchyk cross-examined on that point.

[14] It is also unfortunate that the sounds were never heard by the police, the bylaw people, or anyone who could be considered to be totally and professionally independent.

[15] The response of the bylaw people six days after June 22, in the evidence of Cst. Swan, seems to be a bit late in responding to this type of complaint, if the City is really concerned about it. It was disappointing that Cst. Andersen, for example, came in with no notes. He was at the scene twice and he did not know who complained. Cst. Hornblower's evidence is clear to a degree, although I was disappointed that he did not have his notebook there either, perhaps on the advice of counsel, but that was overreaching. That did not need to be done. He could have easily brought in his notebook and referred to it. I do not see any possible issue with an RCMP officer testifying fully and accurately on a municipal matter. Clearly, we know he was there three times during June, November and December. He never heard any noise. In November and December, he searched and he could not find the drums anywhere. We know the reason for that is because the drums were in a garage in Whistle Bend.

[16] Even though we are dealing with an absolute liability offence, the prosecution still has to prove each of the elements beyond a reasonable doubt, namely, that Mr. West was responsible for creating these untoward noises. The City has, quite frankly, failed, not even come close to proving this case beyond a reasonable doubt.

[17] The evidence of the three civilian City witnesses is subject to judicial criticism, based on the inaccuracy of the notes that were kept and based on what I think would be a degree of mean-spiritedness. I am going to say no more than that.

[18] In the end, the Court is going to be dismissing all four charges.

[19] Should this occur in the future, that people are complaining about noises coming from Mr. West's place, a better case will have to be presented by the municipal bylaw officers through the City prosecutor.

[20] I will not say that this was a waste of time because the air was certainly cleared, but this has not been one of the better presented cases that I have seen in my career.

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LUTHER T.C.J.