Citation: *R. v. L.P.*, 2016 YKTC 53

Date: 20160914
Docket: 15-03582B
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

L.P.

Publication of identifying information is prohibited by sections 110(1) and 111(1) of the *Youth Criminal Justice Act*.

Appearances:
Paul Battin — Counsel for the Crown
Nils F.N. Clarke — Counsel for the Defence
(Agent for Vincent Larochelle)

REASONS FOR SENTENCE

[1] COZENS J. (Oral): L.P. has entered a guilty plea to having committed the offence of assault causing bodily harm, contrary to s. 267(b) of the *Criminal Code*. The circumstances are set out in an Agreed Statement of Facts as follows.

> On September 28, 2015, A.W., B.L., and T.B. were walking on the trail behind Vanier Catholic School in Whitehorse, Yukon. The three youth were heading towards the Super A grocery store while on their lunch break. As they were walking, they observed three other male youths sitting on a slab of cement. A.W. recognized one of the males as L.P.; L.P., who went to another high school, F.H. Collins. L.P. shouted at A.W., asking him if he wanted to fight. A.W. and his friends kept walking and tried to ignore him. L.P. and his two friends then followed A.W. and his friends down the hill. L.P. told A.W. not to walk away from him. L.P.

> walked towards A.W. with his fists up. L.P. punched A.W. in the forehead, knocking him to the ground. L.P. punched A.W. in the head multiple times. B.L. intervened to pull L.P. off of A.W. and someone came from behind and choked B.L. while he was trying to intervene, causing him to pass out. A.W. suffered a concussion, resulting in recurring headaches and fatigue.

[2] Crown counsel submits that an appropriate sentence is a probation order in the 18- to 24-month range; defence counsel submits that a conditional discharge would be an appropriate disposition. Counsel submits that the length of time that L.P. should be bound by conditions should be for 12 months, although, in oral submissions, my recollection was that counsel had agreed that 18 months would also be an appropriate disposition.

Pre-Sentence Report

[3] L.P. is 16 years old. He is a citizen of the Carcross Tagish First Nation. His parents ended their on-and-off-again relationship when L.P. was approximately 10 years old. L.P. resides with his mother, but maintains a good relationship with his father, who lives in a different community.

[4] L.P. grew up in a home in which there was a lot of drinking. He states that he was in foster care for approximately two years when he was between five and seven years of age, although Family and Children's Services records indicate he was formally in foster care for a period of six months only. L.P. and his family attended family treatment after he returned to the home.

[5] L.P. left home to attend high school in Whitehorse. After Grade 9, he stayed in Whitehorse in residence for one and one half years, before returning home and

attending a pilot individual learning centre. He returned to Whitehorse to attempt finishing high school, but was unable to. He states that he wishes to attend high school in Whitehorse this September in order to continue his work on his Grade 10 and 11 programming, although his plans for residence are fairly unclear.

[6] L.P. has worked for his First Nation as part of the trail crew, making and clearing mountain bike trails on Montana Mountain and has been hired to do so again this summer.

[7] L.P. first drank alcohol at the age of 15 and smoked marijuana at the age of 12. He states that he is not presently using either alcohol or drugs. He recognizes the negative impact that alcohol consumption has had on his life. He also states that he is not drinking alcohol in support of his mother, who had at the time of sentencing recently attended alcohol treatment and had quit drinking.

[8] L.P. expressed regret for his lack of motivation, having been kicked out of school, and his involvement in the court process. He states that he feels depressed much of the time. He accepts full responsibility for having committed the assault and regrets his actions. He is apologetic to the victim.

[9] L.P. scores on the Youth Level of Service/Case Management Inventory as being at a low overall risk, although he needs improvement in the areas of education, employment, leisure, and recreation in order to minimize his risk in these factors.

Analysis

[10] I agree with counsel that a period of custody, while available, is not necessary and that an appropriate disposition is one that would have L.P. serve his sentence in the community while subject to conditions. The issue in this case is whether the conditions should be pursuant to a conditional discharge or attached to a probation order.

[11] Section 42(2) of the *Youth Criminal Justice Act,* S.C. 2002, c. 1 ("*YCJA*"), which sets out the sentencing options for a young offender, reads in part as follows:

> (c) by order direct that the young person be discharged on any conditions that the court considers appropriate and may require the young person to report to and be supervised by the provincial director;
>
> …
>
> (k) place the young person on probation in accordance with sections 55 and 56 (conditions and other matters related to probation orders) for a specified period not exceeding two years;

[12] Crown counsel opposes a discharge being granted because of the circumstances of the offence. In particular, he notes the unprovoked nature of the offence and the gravity of harm caused to the victim. Further, he submits that L.P. has not made sufficient progress in his steps towards rehabilitation to justify the granting of a discharge.

[13] Defence counsel submits that there is little distinction between a probation order and a discharge under the *YCJA* and that one particular benefit of a discharge, as compared to a probation order, is the more limited period of access to the youth record

following a discharge. He submits that in the circumstances, his client should be entitled to the benefit of this lesser period of access.

[14] I note that no victim impact statement has been filed. I understand that the victim has put this event behind him and has focused on moving ahead in his life. He had no wish to file a victim impact statement. As a result of the concussion he suffered, the victim missed at least three months of work. He had to stop participating in certain school activities, including volleyball.

Case Law

[15] Counsel have provided me a number of cases which clearly set out the governing principles for the granting of a discharge under the *YCJA* and the distinction between a discharge and a probation order.

[16] I do not wish to re-invent the wheel, so to speak, as I believe that these judgments have provided a comprehensive analysis of the law in this regard. It is clear in law that the test for the granting of a discharge on conditions in the *YCJA* is not the same as the test for a conditional discharge for an adult offender, and the test for an absolute discharge under the *YCJA* is also not to be applied. In particular, the issue of whether the granting of a discharge is not contrary to the public interest does not form part of the test for a discharge on conditions under the *YCJA*, noting the comments of the Nova Scotia Court of Appeal in *R. v. P.J.S.*, 2008 NSCA 111.

[17] In *P.J.S.* at para. 15, the Court also refers to the impact of a discharge versus a probation order, noting that s. 119(2)(f) of the *YCJA* allows for a period of access of

three years from the date of the imposition of the discharge. The period of access following the imposition of a probation order is a period of three years, in the case of a summary offence, from the date of the completion of the sentence. In addition, a subsequent youth or adult conviction does not impact upon the period of access applicable to a discharge, contrary to what occurs in respect of a probation order.

[18] I note the comments of Duncan J. in *R. v. R.P.*, 2004 ONCJ 190, where he considered at length, in paras. 6 to 12, the comments of Harris J. in the *Youth Criminal Justice Act Manual* (loose leaf)(Aurora: Canada Law Book, 2003) at page 4-29 with respect to the nature and impact of a discharge. Duncan J. states in para. 8 that:

> ...under the *YCJA*, a discharge is not an alternative to conviction. No offender is convicted; on the other hand, all offenders receive a youth record. What then is the legal effect of a *YCJA* discharge? Why is it an order coveted by defence counsel and often opposed by the Crown?

[19] In summary, in paras. 11 and 12, in part, Duncan J. states:

> ...Unlike adult discharges, where there is a clearly identifiable public interest in maintaining the deterrent and denunciatory value of a criminal record, there is no similar identifiable public interest in what can only be seen as the technical and scarcely known workings of the "record access period" provisions of the Act. It is hard to imagine that it was intended to be a pivotal issue in youth sentencing. I think it is likely that the draftsman simply borrowed discharges from adult sentencing law and failed to consider whether they had any real meaning in the youth system where the "conviction vs no conviction" distinction has not been carried forward.
>
> However, it is not open to a court to simply dismiss a statutory provision as being the result of a mistake, or lack of thorough consideration. I am obliged to give effect to the legislation and that effect is - as Harris has stated in the above underlined passage (subject to the caveats)...

-- and this is referring to para. 9 in the decision --

> ...to re-constitute the discharge decision as turning on a patently peripheral and unimportant question relating to record access periods. In turn, the effect of having set such a hollow test is to create a situation where the test will almost always be met. As discussed above, there is no significant deterrent value or other public stake in "record access periods". Consequently it would be rare if ever that a court could conclude that it would be contrary to the public interest to grant a discharge.

[20] In para. 16 of the *P.J.S.* case, the Court refers to the comments of Duncan J. in paras. 14 to 16, although I note in the case itself it actually appears to be paras. 14 to 17, which is one number different than what it appears to be in the actual decision:

> [16] Other than the record, and the period of access to it, the practical differences between a conditional discharge and probation are not that significant, as described by Duncan, J. in R. v. R.P., *supra*,:
>
> > 14 If I am correct in the above conclusion that the discharge test will almost always be met (particularly in the case of conditional discharges), then candidates for non-custodial sanctions such as probation will usually be eligible for a discharge as well. The question then arises as to whether youth sentencing principles provide any guidance to assist the youth court in choosing between a discharge and other non-custodial disposition. Those sentencing principles are set out in section 38 and in turn are to be read in the context of the general principles of youth justice contained in section 3 of the Act. To roughly summarize, those principles call for sentences that are meaningful (38(1); 3(1)(a)(iii)) and proportionate to the offence and the degree of the offender's responsibility (38(2)(c); 38(2)(e)(iii); 3(1)(b)(ii)); that hold the youth accountable (38(1); 3(2)(C)); that repair harm done to others and the community:

(38(2)(e)(iii); 3(1)(c)(ii)) that promote the offender's rehabilitation (38(2)(e)(ii); (3(1)(b)(i)) and also protect the public (38(1)).

15 Dealing with the last point first - rehabilitation and public protection - there is a striking similarity between probation (42(2)(k)) and a discharge on conditions (42(2)(C)). In both cases the offender is out of custody, is under the supervision of the court, is subject to and bound to comply with conditions and is liable to prosecution for breach. Any differences are largely, if not completely, technical. It seems to me that whatever protective, restorative or rehabilitative value is possessed by the one sanction is also shared by the other and there is no distinction between the two sanctions in their ability to serve these principles of youth sentencing. The sentencing court can get where it wants to go with either.

16 However there are also the principles that a youth sentence be meaningful, proportional and hold the youth accountable. There is a perception that a youth conditional discharge is a significantly more lenient disposition than youth probation -- and therefore it might be argued that, in many cases, a discharge would not give effect to these principles. The Crown's frequent opposition to discharges, I think, is based on this perception. The perception of leniency may be fostered by the structure of section 42 of the Act that suggests a hierarchy of sanctions with conditional discharges at the lower end. But I think the perception is mainly caused by judges and lawyers habitually - and wrongly - thinking in adult terms when dealing with youth matters. As discussed above, the "big break" of no criminal record that is the central feature of an adult discharge is not part of the youth scheme. The discharge advantage to an offending youth is miniscule. In my view, it is incorrect to consider that a youth conditional discharge under 42(2)(C) is necessarily a more lenient disposition than a youth probation order under 42(2)(K). Rather, it is the length of the term and the conditions

> that are imposed that determine the strictness/leniency of the sanction and not the vehicle, - probation or discharge - that is used. The leniency of a conditional discharge per se as compared to probation is largely misperceived and over-stated in youth matters. Properly viewed, there is no reason why the principles of proportionality and accountability cannot be achieved as effectively through a discharge as probation.

[21] I agree with the comments of Duncan J. This said, the sentence to be imposed, whether a discharge or a probation order, must take into account and be in accordance with the declaration of principle and the purposes and principles of sentencing as set out in ss. 3 and 38 of the *YCJA*. In particular, s. 38(1) of the *YCJA* reads that:

> The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

[22] The notion of meaningful consequences does not mean that the consequences are required to be harsher, more restrictive, and/or punitive. They must be meaningful and that requires that the consequences of a youth sentence serve to promote the objectives and purposes of sentencing under the *YCJA*, which is a markedly different process than the sentencing of an adult offender, as stated in s. 3(1)(b)(i) and (ii) of the *YCJA*:

> 3(1)(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

> (i) rehabilitation and reintegration,
>
> (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
>
> ...

[23] In considering the issue of a discharge versus probation, Gorman J. in *R. v. P.H.,* (2012) 331 Nfld. & P.E.I.R. 166, (Nfld. P.C.) states the following in para. 19:

> In terms of young offenders, the distinction between a discharge with conditions and a period of probation is minimal except for access to records (see section 119 of the *Youth Criminal Justice Act* and *R. v. P.J.M.*, [2009] A.J. No. 813 (P.C.)). Having said this, the imposition of a discharge does reflect a court's view of the seriousness of an offence whether applied to an adult or a young offender. In the latter instance, section 38 of the *Youth Criminal Justice Act* indicates that the sentencing principle of proportionality must be considered. Though proportionality does not play the central role in sentencing young offenders as it does with adults, its presence does require that a judicial distinction be made between a discharge with conditions and a period of probation. In this case, the seriousness of the offence and its consequences for the victim militate against resort to the discharge provision.

[24] *P.H.* was a case in which the offender flicked a lighter at an individual who had gasoline spilled on him, causing significant injuries to the victim. The offender had fled the scene and the victim suffered second degree burns to his face, neck, torso and right back and permanent scarring. The charge in that case was criminal negligence causing bodily harm.

[25] This is the question before me: Does the seriousness of the offence and the consequences for the victim make a discharge an inappropriate disposition?

[26] Certainly the unprovoked attack upon the victim, the severity of the violence, and the significant harm caused to the victim are factors that would militate against the imposition of a discharge. Unlike in some of the cases filed, specific deterrence and denunciation are now factors to be considered in this case due to the incorporation of these principles of sentencing in the 2012 amendments to the *YCJA.*

[27] I appreciate the notion that the granting of a discharge in a case where bodily harm has been caused by the commission of the offence could be perceived as the Court taking a view that the offence is not serious. This is certainly more the case where a discharge is granted to an adult pursuant to s. 730 of the *Code*. In such cases, the adult offender is provided an opportunity to avoid the consequences of a conviction being entered and thus having a criminal record.

[28] In cases of significant violence, particularly where bodily harm is caused, it is often viewed as necessary that a conviction be entered and the offender receive a criminal record.

[29] In cases under the *YCJA*, however, regardless of whether a discharge or probation order is the disposition under s. 82 of the *Act*, the youth is deemed not to have been found guilty or convicted upon the expiry of the sentence order. The real impact, therefore, is in the access to the record and the consequences that can flow from the commission of a further offence.

[30] As stated in *P.J.S.*, at the end of para. 15:

> ...Of more importance is s. 119(9) which in effect converts a youth record to an adult record if an adult offence is

> committed during the period of access and the original sentence was not a discharge.

[31] I am mindful of the principle of restraint and of the requirement to impose the least restrictive sentence available that accords with the purpose and principles of sentencing under the *YCJA*; in particular, ss. 3 and 38.

[32] I am also mindful of the requirement to pay attention to the particular circumstances of Aboriginal offenders. L.P. is a youthful Aboriginal individual before the courts, having committed his first *Criminal Code* offence. He was raised in somewhat difficult circumstances, which, while certainly not as dire as in many cases before this Court, nonetheless still reflect what is all too often seen in Aboriginal communities and individuals that come before this Court. This is a factor that I must take into account. He is remorseful and has taken some steps towards addressing the factors that contribute to the commission of this offence. Certainly his progress towards a pro-social life has not been exhaustive and perfect, in the sense that he has done everything that he could. He is a youth and progress must be measured accordingly. However, he has been moving in the correct direction.

[33] It can be said that there may be a greater deterrent effect to a probation order in that an adult conviction within the access period set out in s. 119 would mean that disposition is deemed a conviction and would become a criminal record. While this is possibly true, I am also satisfied that L.P. has accepted responsibility for what he has done and is unlikely to commit such an offence in the future. Specific deterrence is not a significant factor in my mind.

[34] It can also be said that the consequences of a future offence; in particular, a minor one, could be disproportionate in that the conversion of a s. 267(b) offence into an adult record would have a negative impact upon L.P. that is disproportionate. This, in my mind, is a greater consideration where specific deterrence is not a significant factor in the sentencing of a youth in the circumstances of a particular case. I am mindful that certainly such an impact could be avoided if L.P. does not commit a criminal offence as an adult within the applicable period of time that the record is accessible.

[35] I am satisfied that a discharge on conditions accords, in the circumstances of this case, with the appropriate principles and purposes of sentencing. The length of the discharge will be 18 months.

[36] I am satisfied that the sentence that I am imposing reflects the seriousness of the offence, the harm caused to the victim, denunciation of the offence and, to the extent necessary, will also deter L.P. from the commission of further offences in the future.

[37] I do not consider it necessary for the purposes of specific deterrence or denunciation to hold the risk of a s. 267(b) offence becoming an adult record over L.P.'s head.

[38] I am also satisfied that denunciation and deterrence can be accomplished through the substance of the sentence itself and the conditions imposed and not necessarily be limited by the perception others may hold of the sentence.

[39] It is the conditions to be imposed upon L.P. that reflect the seriousness of the offence and not the length of access to the record or the perception that probation signifies a more serious view of the offence by the Court. That does not mean, however, that in certain circumstances a probationary order cannot achieve a denunciation and deterrent impact greater than a discharge. Each case stands on its own set of circumstances.

[40] With respect to the conditions to be imposed, I concur with the reasoning of Fradsham J. in *R. v. P.J.M.*, 2009 ABPC 207, that the Court is not limited in the conditions to be imposed such that a condition to keep the peace and be of good behaviour is not necessarily available, noting the footnote to para. 14, which is taking a contrary position to that of Whelan J. in *R. v. M.S.S.,* 2008 SKPC 5.

[41] Again, the conditions should be those that are appropriate and considered necessary in the circumstances of the case before the Court. A requirement to keep the peace and be of good behaviour may, in some circumstances, be warranted.

[42] In this case, I am satisfied that the following conditions are appropriate, and these are the conditions that will be imposed — again, this is over a period of 18 months:

1. You will report to your Youth Probation Officer within two working days, and thereafter when and in the manner directed by your Youth Probation Officer;

2. You will reside as approved by your Youth Probation Officer and abide by the rules of the residence;

3. You will attend and actively participate in all assessment and counselling programs as directed by your Youth Probation Officer and complete them to the satisfaction of your Youth Probation Officer for:

any issues identified by your Youth Probation Officer

and provide consents to release information to your Youth Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

4. You are to have no contact directly or indirectly with A.W., except with the prior written permission of your Youth Probation Officer;

5. You are to remain 25 metres away from any known place of residence, employment or education of A.W., except with the prior written permission of your Youth Probation Officer;

6. You will perform 60 hours of community service, as directed by your Youth Probation Officer or such other person as your Youth Probation Officer may designate. Any hours spent in programming may be applied to community service at the discretion of your Youth Probation Officer;

7. You will participate in such educational or life skills programming as directed by your Youth Probation Officer and provide your Youth Probation

Officer with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this condition;

8. You are to make reasonable efforts to find and maintain suitable employment and provide your Youth Probation Officer with all necessary details concerning your efforts.

[43] There will be a DNA order. It is a primary designated offence. I am not going to make a firearms prohibition order in the circumstances.

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COZENS T.C.J.