

Citation: *R. v. Lutz*, 2010 YKTC 65

Date: 20100604

Docket: 09-10102

09-10102A

09-10102B

09-10102C

09-10104

08-00214B

08-00214C

07-10105B

07-10105C

07-10105D

Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

RANDY WILLIAM LUTZ

Appearances:
Ludovic Gouaillier
Gordon Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Randy Lutz has entered to guilty pleas to seven different offences.

[2] With respect to the 267(a) offence, circumstances are that on November 22, 2009, he got into a dispute with Wayne Spring, and in the course of that dispute, struck Mr. Spring on the head with a glass jar, causing Mr. Spring to bleed from his head.

There is no further indication of medical treatment or medical injuries. Mr. Lutz was intoxicated at the time and Mr. Spring was in a somewhat loose familial relationship, having once, or at some point, been in the role of a stepfather to him.

[3] Subsequent to that, he has pled guilty to a charge that he assaulted his mother, Shirley Lutz, on December 18, 2009, by shoving her out of a vehicle and throwing her purse at her at the band office in Watson Lake. No injuries are reported and he was sober at the time.

[4] There are five breach charges, three of which stem from a probation order of 18 months imposed on him on February 4, 2009. There were terms that he abstain from the possession and consumption of alcohol, and on May 12, 2009, the RCMP in Watson Lake located him intoxicated or under the influence of alcohol while they were pursuing another investigation.

[5] Between December 15th and the 26th of January, 2010, he failed to report as he had been directed to do by his Probation Officer. He also failed to attend for the counselling at Many Rivers that he had been directed to do by his Probation Officer between the 17th of December and the 28th day of January, 2010.

[6] He had been released on an undertaking after the assault against his mother that required him to have no contact with her and not attend at her residence. RCMP, on February 10, 2010, attended at the residence of Ms. Lutz and found Mr. Lutz there, contrary to both the term that he have no contact and that he not attend at the residence. The guilty plea was to the single count of having contact. Subsequently, he had been released on a recognizance that required him to not have any contact with

Ms. Lutz. On April 2, 2010, he was found at her residence contrary to the term of the recognizance, that he also not be at the residence.

[7] Mr. Lutz has a criminal record. He has four prior entries for assault, for which he has done periods of time of 60 days, 115 days, and 21 days. He has 13 prior breach charges for breaches of various court orders, for which he has done periods of custody, up to 30 days.

[8] Crown suggested a global sentence in the eight to ten month range, stressing specific deterrence, denunciation and protection of the public, noting that Mr. Lutz has not really taken advantage of many of the opportunities that he has had to become involved in counselling. This was on the information the Crown had at the time, of course, prior to what Mr. Coffin was able to say. If Mr. Lutz is not prepared to take advantage of counselling opportunities provided to him, rehabilitation takes a lesser role, in the submission of the Crown.

[9] Mr. Coffin, for the defence, has filed some letters in support and made reference to an earlier pre-sentence report, prior to the disposition imposed February 4, 2009. It notes that Mr. Lutz is a member of the Kaska First Nation. He is currently 24 years of age. He comes from a somewhat dysfunctional family life; there's clearly unresolved issues there, unresolved issues with his mother, and with other family members.

[10] He has been in custody on these charges, continuously since May 12th of this year, and for a number of days before that, all of which, crediting at one and a half to one, prior to the amendments coming into force, and one to one afterwards, results in 40 days pre-trial custody, which can be credited to him. In custody he has taken a

dangerous goods course, an oil rig safety course, a First Aid course, is attempting to obtain his learner's licence, has attended AA, has met with, I believe, Kate Hart from the Family Violence Unit and has started the programming that he failed to do under his probation order, or, sorry, I did not mean to say that, has started the counselling that has never been completed yet. He has also got a reference to Dr. Heredia to deal with some of the underlying mental health issues that appear to be unresolved and that were noted on the earlier pre-sentence report. He had previously taken the Gathering Power program that is going to be offered next month at Whitehorse Correctional Centre.

[11] Defence counsel is suggesting a blended sentence that includes an additional period of custody and then an opportunity in the community to begin to take further steps towards gaining employment and becoming responsible in the community. There is a proposal that if he is able to do this at some point, he would reside under house arrest conditions at a cabin that is about two hours outside of Watson Lake and yet still has access to employment in that area.

[12] Mr. Lutz spoke, and it appears clear to me, that as he is getting older he is recognizing that his life to date has resulted in him being before the Court too many times for too many reasons. He has a long way to go but what he said is that it makes sense, if he wants to change his life, at the end of the day, it is really the choices he is going to make each time he gets an opportunity in the future as to whether he is able to actually find a different way of living that does not bring him before the Court as much as he has been.

[13] In looking at the conditions in the *Criminal Code* with respect to the imposition of

a conditional sentence and the requirements, certainly the service of the sentence in the community cannot endanger the safety of the community and it needs to be consistent with the fundamental purpose and principles of sentencing, set out in s. 718 to s. 718.2.

[14] Someone with 13 breaches, generally speaking, finds themselves in a pretty deep hole when it comes to obtaining conditional sentences because the Court needs to be satisfied that the person can comply with the court orders. Individuals who struggle from alcohol addiction or severe alcohol conditions are generally going to find themselves, again, in a difficult situation with respect to conditional sentences because they are going to have to abstain as part of the conditional sentence because the jail sentence is served in the community. So those are hurdles that Mr. Lutz is facing.

[15] The principles of sentencing set out in s. 718 to s. 718.2 try to find a balance between the need to protect society, deter individuals, denounce unlawful conduct and yet still allow for rehabilitative progress to be made in an individual's life. It requires that a principle of restraint be imposed and the imposition of custody should be as little as possible in order to achieve the overall objectives of sentencing, recognizing the seriousness of the offence and the circumstances of the offender, and the role and the interest of society in having crime appropriately dealt with.

[16] It also stresses the importance of taking into account the First Nations status of individuals and again, before me, there is not a lot with respect to the impacts of Mr. Lutz's First Nation status on him, with respect to what his parents may have gone through, but it is clear that there is a dysfunctional family and I need to be mindful of that.

[17] I am satisfied that a blended sentence can be imposed in this case because it strikes the balance between denouncing, particularly, the assaultive conduct, and yet, with respect to some of the other offences, allows an opportunity for Mr. Lutz to continue on what appears to be some progress that he has made in the last little while.

[18] The sentence is going to be as follows: With respect to the s. 267(a) offence, there is going to be a sentence of five months, less 40 days credit and that will be custody. With respect to the s. 266 offence, there is going to be a sentence of two months consecutive conditionally to be served in the community and with --

[19] MR. GOUAILLIER: I'm sorry, how much?

[20] THE COURT: Two months conditional in the community, and with respect to the five breach charges, I am going to make it simple. It is going to be a three month conditional sentence concurrent on all, so that we are not ending up with separate conditional sentences. So frankly, any breaches could result in the entirety of the three months being collapsed.

[21] So you need to understand that there is going to be five months less 40 days custody that would have you released before winter sets in.

[22] THE ACCUSED: So I had five months, you said?

[23] THE COURT: Five months from now, less 40 days custody. Then you are going to be released to do a two month conditional sentence in the community.

[24] THE ACCUSED: Oh, so I can go in the bush?

[25] THE COURT: No, the community means in the Yukon.

[26] THE ACCUSED: Oh.

[27] THE COURT: You will hear the terms in a minute, and that is going to be followed by a consecutive three month sentence on all of the other breach charges and that is going to be conditional. However, if there are breaches of any of the terms of your conditional sentence during the first two-month sentence for the assault, there is a possibility that sentence could be revoked and you could serve those two months in custody. Then there will be a further three months conditional sentence after that, and if you breach any of the terms, you can find yourself doing that entire three months in custody as well.

[28] A global sentence is ten months, which is at the higher end of what the Crown suggested but it is because part of it is conditional.

[29] THE ACCUSED: Yeah.

[30] THE COURT: Half of it is conditional. It will be followed by a period of probation of one year. Now the terms of the conditional sentence are going to be:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a Supervisor immediately upon your release from custody and thereafter when required by the Supervisor and in a manner directed by the Supervisor;

4. Remain within the Yukon Territory unless you have written permission from your Supervisor or the Court and notify the Supervisor or the Court in advance of any change of name or address, and promptly notify the Court or the Supervisor of any change of employment or occupation;
5. You will be required to reside at the cabin belonging to Ms. Charlie's mother or as otherwise directed by your Supervisor and not change that residence without the prior written permission of your Supervisor;
6. At all times you are to remain within your place of residence except with the prior written permission of your Supervisor; or in the company of such persons as may be approved by your Supervisor;
7. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition.

[31] What this means is that it is house arrest but your Supervisor can give you permission to be away for any number of reasons which will almost, without exception, include employment and counselling. But if you are doing well, there will be other exceptions granted, and there is ability to have the terms reviewed and if it seems more appropriate for a curfew or something else at some point in time and if the Supervisor recommends it, then there is a chance that the house arrest can be changed for part of any one of the two separate times you are going to be on conditional sentences or perhaps for the entirety of the second one, but that is how it is going to start, it is house arrest.

[32] THE ACCUSED: Okay.

[33] THE COURT: But again, you explain what you are going to need permission for, if you have work, if you have other legitimate things you need to do, and your Supervisor can give you permission of that.

8. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
9. You are to not attend any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol;
10. You are to take such alcohol and drug assessment, counselling or programming as directed by your Supervisor;
11. You are to take such psychological assessment, counselling and programming as directed by your Supervisor; and to take such other assessment, counselling or programming as directed by your Supervisor;
12. You are to have no contact directly or indirectly or communication in any way with Shirley Lutz when you have consumed, are consuming, or are under the influence of alcohol;

[34] So it is not a straight no contact. Now you are not allowed to drink, but if you drink and you have contact, you have a significantly worse problem.

[35] THE ACCUSED: Yes.

[36] THE COURT: I am not going to put a blanket no contact unless the Crown has some submissions on that.

[37] MR. GOUAILLIER: No, given the circumstances.

[38] THE COURT: Okay. Your --

[39] MR. GOUAILLIER: I'm sorry, no, I don't think it's requested by -- I don't think the complainant --

[40] THE COURT: By Mr. Spring? I did not hear anything about him but.

[41] MR. GOUAILLIER: No. And I just don't know if -- don't see. That is something I didn't have a chance to canvas with our Crown witness. Or perhaps a no contact unless permission is --

[42] THE COURT: Except with the permission?

[43] MR. GOUAILLIER: Yes, that would just -- I mean.

[44] THE COURT: Sure. It makes sense to cover that off.

12. No contact directly or indirectly or communication in any way with Shirley Lutz, except with the prior written permission of your Supervisor;

Then there will be the second clause:

13. No contact in any event, when you have consumed, are consuming or under the influence of liquor.
14. You are to participate in such educational or life skills programming as directed by your Supervisor;
15. You are to make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts;

Now, if that requires you to leave your residence to do that, you are going to have to get permission to leave to do it.

16. You are to provide your Supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this conditional sentence order.

[45] This is going to be the same for both conditional sentences. I am not making any changes at this point in time.

[46] This will be followed by a period of probation, as I have said, of one year. The terms will be:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the Court or Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;
4. Report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the Probation Officer;
5. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;

6. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner;
7. Not attend any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol;
8. Take such alcohol and drug assessment, counselling, or programming as directed by your Probation Officer;
9. Take such psychological assessment, counselling, and programming as directed by your Probation Officer;
10. Take such other assessment, counselling or programming as directed by your Probation Officer;
11. Participate in such educational or life skills programming as directed by your Probation Officer;
12. Make reasonable efforts to find and maintain suitable employment; provide your Probation Officer with all necessary details concerning your efforts;
13. Provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this probation order.

[47] Do you have any questions about any of these terms, Mr. Lutz? They will be explained to you again but if you have any now.

[48] THE ACCUSED: No, that's good, that's great.

[49] THE COURT: All right. It is one more year to kick-start the rest of what you are going to do with your life.

[50] MR. COFFIN: I have a question about the no contact. Does that -- so it's absolutely no contact except with permission for both Wayne and Shirley or just Wayne?

[51] THE COURT: I had mentioned Shirley because Mr. Spring appears to be someone that this is a one off, right. Or I do not know. I am open.

[52] MR. GOUAILLIER: Yes, I mean in terms of both parties, my comment was meant to address both parties.

[53] THE COURT: Mr. Spring.

[54] MR. GOUAILLIER: And I mean if there is a -- I understand the nature of the dynamic between Shirley Lutz and Mr. Lutz. So it's likely that there will be contact whether -- so that should be managed, but perhaps just to be on the safe side, I would say 80 percent sure if she was here, she would say that she wishes to have contact, but again.

[55] THE COURT: Hers is only with permission and in no case under the influence of alcohol. So there is no issue with that one. The question is whether Mr. Spring should be included on one as well.

[56] MR. GOUAILLIER: Well, and that's what I was saying. Perhaps similarly for Mr. Spring.

[57] MR. COFFIN: I don't see that as a problem.

[58] THE COURT: We will just add on both terms, Shirley Lutz or Wayne Spring. Okay. So no contact with either of them unless you have permission, and that will be on the conditional sentences. I did not put that on the probation order for either one. So it is on the conditional sentences, unless you have permission and never, if you are under the influence of alcohol, which as I have said, you are not allowed to be anyway.

[59] This is a s. 267(a) offence, DNA order is mandatory.

[60] MR. GOUALLIER: Yes, I was going to -- yes, I was going to mention.

[61] THE COURT: Right. So there will be a DNA order, you will have to provide a sample of your DNA; it is pretty straight forward and it is mandatory under the law for the s. 267(a) offence.

[62] Firearms prohibition, Crown has proceeded summarily. Are there any particular concerns in that regard? Are you seeking it?

[63] MR. GOUAILLIER: No, usually, I sometimes make -- the record for violence in this case is starting to get longer but I have no indication that firearms were ever involved.

[64] THE COURT: He is going to be in the bush for a while.

[65] MR. GOUAILLIER: And yeah, I mean the Crown is --

[66] MR. COFFIN: One hopes.

[67] THE COURT: Yes, I am not going to impose a firearms prohibition but if you ever want to be involved in hunting, maybe some of the other culturally significant aspects related to your First Nation, your record has now got six offences of violence, you can pretty much guarantee that the Crown's likely to be seeking a firearms prohibition next time, and the significance of that may not impact you now but it could. So this is a good time to turn your life around.

[68] THE ACCUSED: Because I go -- I go out guiding once in a while, too.

[69] THE COURT: Right now you are not on a firearms prohibition.

[70] THE ACCUSED: Okay.

[71] THE COURT: What I am saying is you could have been on this, but even though firearms might not have been a part of any of the offences of violence you have, because you have six prior convictions for violence now, the Crown is likely to seek one. You could lose a lot more. I mean compared to what else you could lose, that is not that significant, but it is not insignificant either. It is not being imposed in this case. Any guiding you want to do, if it is on the conditional sentence, is going to need to be with the permission of your conditional sentence supervisor.

[72] Victim fine surcharges will be waived. The remaining counts?

[73] MR. GOUAILLIER: There will be a stay of proceedings, Your Honour, on all remaining counts.