

Citation: *R. v. Potter*, 2016 YKTC 26

Date: 20160408
Docket: 15-00153
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Lilles

REGINA

v.

JASON HARRY LORAN POTTER

Appearances:
Peter LaPriarie
Nicholas H. Weigelt
John Cliffe

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] Mr. Potter has been charged as follows:

On or about the 15th day of May, 2015 at or near the Village of Carcross in the Yukon Territory, did commit an assault on Duke Bodean Beattie, contrary to s. 266 of the *Criminal Code*.

[2] The matter was first in court on July 28, 2015, at which time the Crown reserved its election. On August 26, 2015, the Crown elected to proceed summarily and the accused entered a guilty plea to the assault charge. I am satisfied that this plea was entered as soon as practicable and that Mr. Potter should receive the benefit of an early guilty plea.

[3] Several dates had been set for sentencing but could not proceed due to scheduling and other difficulties. The sentencing hearing proceeded on April 6 and 7 in Carcross, Yukon Territory, almost 11 months after the event.

Facts

[4] Mr. Potter, the accused, has been an RCMP Constable since 2010. He was transferred from Whitehorse to Carcross in February of 2013. On the evening of May 15, 2015, Constable Potter was on duty alone when he received a call from telecoms in Whitehorse with a request that he attend a residence to remove Mr. Duke Beattie who was present and intoxicated. Telecoms advised Constable Potter that Mr. Beattie was subject to a probation order that prohibited him from possessing or consuming alcohol outside his residence. In addition, he was required to keep the peace and be of good behaviour.

[5] Constable Potter asked telecoms to contact his partner, Constable Daniel Rouleau who was on call, to assist him. They attended at the Clyde residence to remove Mr. Beattie, who they found sitting outside on a bench with a beer can within reach and several empty cans on the ground nearby. Mr. Beattie was very verbal and argumentative and far from co-operative. Mr. Beattie insisted he was not in breach of his probation order. Constable Rouleau repeatedly gave Mr. Beattie the option of being taken home or to jail in Whitehorse, but Mr. Beattie would not co-operate and continued to be argumentative. Finally the decision was made to arrest him and take him into custody. This discussion between the officers and Mr. Beattie was recorded utilizing a microphone worn by one of the officers.

[6] Mr. Beattie was placed in the back seat of the patrol car. The police vehicle was equipped with two cameras, one of which recorded Mr. Beattie in the back seat. Mr. Beattie continued to be argumentative and uncooperative. Constable Rouleau formally arrested him for breach of probation and advised him of his legal rights. A decision was made to transport Mr. Beattie to Whitehorse. No explanation was given as to why he could not be detained in the cells at the Carcross detachment.

[7] The camera and microphone recorded Mr. Beattie in the back seat and the conversation between Mr. Beattie and the constables as he was transported to Whitehorse. Although there were numerous inaudible segments in the transcript of the recording, it was possible to follow the gist of the conversation. Mr. Beattie repeatedly asked what he was charged with, and Constable Rouleau repeatedly told him that he was in breach of his probation order. At times Mr. Beattie was insulting and he complained about his handcuffs being too tight. He was obviously intoxicated and very agitated. He repeatedly kicked at the barrier between the front and back seats. Mr. Beattie then mentioned Constable Potter's wife. At that point, Constable Potter stopped the car at the side of the road, exited the vehicle, opened the back door and leaned in and over Mr. Beattie. He grabbed Mr. Beattie with his left hand near his neck or collar. In the video Constable Potter's back is towards the camera and his right shoulder moved back and forth. In my opinion, this action is consistent with a pushing action or short punches with Constable Potter's right hand.

[8] The Court was provided with a transcript of the assault by Constable Potter in the back seat of the police cruiser, in addition to the video and sound recording.

[9] The entire incident described in the transcript lasted 38 seconds. During this time Constable Rouleau told Constable Potter to stop five times, in addition to several exclamation such as “hey” and “hey it’s done”.

[10] The video showed that Mr. Beattie’s demeanour changed significantly after the assault, from vocal, argumentative and belligerent to calm and docile. It was apparent that the physical intervention by Constable Potter was significant and that it had an impact on Mr. Beattie.

Carcross

[11] Carcross has a three-person RCMP detachment, consisting of a corporal and two constables. This detachment provides policing for Carcross (400 people) and nearby Tagish (300 people). Due to rotating holidays and training programs, the detachment was normally staffed by only two officers, as was the case on May 15, 2015. Those two officers, while technically working six days on and three days off, in reality had to cover 24 hours, seven days a week.

[12] According to Corporal Peters, Carcross is one of the busiest communities in the Yukon from a policing standpoint. It is a stressful place to work compared to other communities, due to the high work load and number of criminal charges. Alcohol and drug abuse result in a disproportionate number of serious assault charges.

[13] A serious threat was made against the lives of the police officers in Carcross in early 2015, with the result that video cameras were installed in their homes and both Constables Potter and Rouleau were allowed to carry their firearms while off duty.

[14] Constable Potter's house is close to several problem houses in the community. As a result of a sexual comment directed at his wife while she was outside in the yard, a privacy fence was provided for the Potters' home.

[15] Constable Rouleau testified that he had received eight direct threats since he was stationed in Carcross. As a result, he was concerned about his own safety and the safety of his family, and he said that Constable Potter had similar concerns. Constable Rouleau confirmed that the work load in Carcross is unrealistically heavy.

[16] It is apparent that the detachment in Carcross was, at the relevant time, understaffed considering the demands imposed by the community. This work-related stress, combined with the legitimate safety concerns for his family and himself, did, over time, exert a physical and emotional price on Constable Potter.

Duke Beattie

[17] Mr. Beattie has had very extensive involvement with police on an ongoing basis and this would have been known to Constable Potter. In particular, he had been involved with drug use and possession, violent offences and failure to comply with court orders.

[18] Mr. Beattie lived very close to the Potter residence. A person, believed to be Mr. Beattie, directed a comment which was both sexual and violent towards Constable Potter's wife when she was outside in the yard. Due to the Potters proximity to problem houses in the Carcross community, he was able to get a fence built to provide some privacy.

[19] Although Constable Rouleau said he did not see any cuts or bruises on Mr. Beattie's face, several photographs were entered as exhibits. These indicated a trace of dried blood in Mr. Beattie's left ear, a small cut on his lower lip and a bruise in his jaw area. While Mr. Beattie also complained of some dizziness and blurred vision, a subsequent optometry report indicated his ocular health to be normal but advised that Mr. Beattie should monitor and report any adverse changes. Similarly, a CT scan of Mr. Beattie's head and neck did not reveal any abnormalities.

[20] The Crown did not allege any lasting injuries as a result of the assault.

Constable Potter

[21] Constable Potter is 38 years old and has been a member of the RCMP for almost five years. His first posting was to Whitehorse in 2010 and he was transferred to Carcross in February, 2013.

[22] Prior to joining the RCMP, Constable Potter obtained certificates in Forestry Resources, Conservation Enforcement, as a Fish and Wildlife technician and in Occupational Health and Safety related to forestry. He worked as a conservation officer in the field between 2006 and 2010. He went to RCMP depot in 2010.

[23] Constable Potter is in a stable relationship, his second marriage, and has two children and two stepchildren. He is the principal wage earner in his family.

[24] Corporal Peters was out of town and could not be reached by telephone at the time of the assault. Shortly after his return to Carcross, Constable Potter advised him

that an incident occurred over the weekend, stating that he had assaulted a prisoner and left the video of the incident with Corporal Peters.

[25] Corporal Peters gave a glowing description of Constable Potter's performance as a police officer. He described Constable Potter as one of the best police officers he has ever worked with and who has all the best attributes. According to Corporal Peters, Constable Potter has a good interface with the public and receives positive feedback from the community. Corporal Peters has no worries about Constable Potter on or off shift as he knows that Constable Potter will make the right decisions and generally describes Constable Potter as a low maintenance employee.

[26] Corporal Peters' opinion is supported by Constable Potter's detailed "Performance Evaluation and Learning Plan" that was filed with the Court as an exhibit. It is very positive in every aspect of performance as a police officer. With respect to people skills, the evaluation states:

Cst. Potter continues to be a well-liked member of the detachment and the community. Members of the community continue to recognize his calm demeanour, and he is able to diffuse many potentially violent situations by communicating with people.

He demonstrates the core values of the RCMP of respect and compassion, which are also invaluable in a small community.

Code of Conduct Disciplinary Hearing

[27] Constable Potter was subjected to an internal independent investigation and disciplinary hearing.

[28] The assault on Mr. Beattie, which Constable Potter acknowledged, constituted a contravention of the RCMP Code of Conduct. The disposition of the hearing required Constable Potter:

1. To provide a written apology to Mr. Beattie by February 19, 2016;
2. To forfeit 20 days' pay (about \$7,000.00);
3. To be ineligible for promotion for two years from the date of the incident; and
4. To be transferred out of Carcross.

[29] While this is a civil sanction, it is imposed as a direct consequence of the assault on Mr. Beattie by Constable Potter. It can have both a general and specific deterrent effect.

[30] In addition, Constable Potter continued to be responsible for the rent of his residence in Carcross for a period of time, although prohibited from living in Carcross. This may be viewed as a monetary penalty, having the same effect as a fine.

Dr. Baskerville

[31] Dr. Shannon Baskerville has 16 years' experience as a clinical psychologist. On June 4, 2015, she met Constable Potter in an appointment initiated by him. Since that time, she has seen him 22 times, with each appointment lasting about one hour. She has also viewed the video of the assault on Mr. Beattie. Dr. Baskerville prepared a Psychological Assessment Report in September 2015 after nine psychotherapy sessions.

[32] Dr. Baskerville concluded that Constable Potter was exhibiting an adjustment disorder with mixed anxiety and depressed mood as well as some symptoms of acute stress disorder. These conditions were affecting him on May 15, but become worse immediately thereafter. She identified the threats to his family and himself in Carcross and a threat to his life in January 2015 as causal factors. Moreover, as Carcross was a very busy and understaffed community, Constable Potter was required to work long hours with no opportunity to get a break from the stress that he was experiencing. She continues to see him, but he is now doing much better.

The Law

[33] The Crown submits that an appropriate disposition in this case would be a suspended sentence with conditions. The defence position is that an absolute discharge is appropriate. Both counsels have filed books of authorities consisting of a total of 17 cases for the defence and 11 cases for the Crown. It is not necessary to refer to them all as the relevant principles are repeated and in others the factual circumstances are different from those at bar. For example, cases involving serious bodily harm, weapons or assault by two or more individuals acting in concert are distinguishable.

[34] The defence position relies on the interpretation and application of s. 730. (1) of the *Criminal Code*.

Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the

accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[35] *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450, (B.C.C.A.), established the following principles in applying this section.

- (1) The section may be used in respect or *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
- (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
- (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
- (4) The second condition precedent is that the court must consider that a grant of discharge is not contrary to the public interest.
- (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
- (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

[36] These principles were expanded upon in *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53 (Ont. C.A.), at para. 17 (QL):

...The granting of some form of discharge must be “in the best interests of the accused”. I take this to mean that deterrence of the offender himself is

not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation order. Nor is his rehabilitation through correctional or treatment centres, except to the same extent. Normally he will be a person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions. It must not be “contrary to the public interest” to grant some form of discharge. One element thereby brought in will be the necessity or otherwise of a sentence which will be a deterrent to others who may be minded to commit a like offence – a standard part of the criteria for sentencing.

[37] The circumstances of this case raise the question whether police officers who commit offences are treated differently when considering a discharge on sentencing.

Are police officers subject to a higher standard? The court in *R. v. Cusack*, (1978), 26 N.C.R. (2d) 379 (C.A.) answered this question as follows (para. 13 QL):

In my opinion the paramount consideration in this case is the protection of the public from offences of this sort being committed by persons who are given special authority by our law to deal with individual members of society, and to deter such persons from acting in breach of their trust. All citizens must have confidence that police officers who are vested with substantial rights of interference with individual liberties exercise these rights with scrupulous propriety, and that any failure to so act will result not only in dismissal from the position of trust but also in the imposition of substantial punishment.

[38] The cases have uniformly held that a police officer is a public servant who has a duty to maintain the law, and as such general deterrence is an important factor in assuring the protection of the public.

[39] Police officers, as a matter of public policy, are held to a higher standard, as stated in *R. v. Sweet*, 2007 BCPC 240:

[31] The public places a great deal of trust in police officers. Police officers are allowed to do things which other citizens cannot do. They are allowed to carry weapons. They can enter private property and even in

some circumstances break the law which other citizens cannot do. The public pays them and provides them with appropriate training. Not all citizens are suited to be police officers. Those with low levels of tolerance or high levels of frustration are hopefully weeded out early on.

[40] Some of the cases filed by counsel involved officers who committed assaults after being provoked. Some involved guilty pleas, others were found guilty after trial. The sentences imposed range from absolute discharge to jail time.

[41] The aggravating factors in this case include the following:

1. At the time of the offence, Constable Potter was on duty and the victim was in police custody. These circumstances constituted a breach of authority as defined in s. 718.2 (iii) of the *Criminal Code*;
2. The victim was handcuffed and defenceless;
3. The injuries to the victim included bruises and a small cut.

[42] The mitigating factors as they relate to the assault include the following:

1. The assault was not premeditated, and occurred spontaneously in the heat of the moment;
2. Constable Potter's actions were provoked by the victims mention of Constable Potter's wife, which he interpreted as a threat;
3. The assault was not prolonged, and lasted for 38 seconds;
4. The victim's injuries were not serious or long lasting.

[43] A number of mitigating factors relate directly to the accused:

1. Constable Potter took responsibility for the assault on Mr. Beattie in a timely manner, initially by disclosing the incident and providing the videos to his immediate superior, Corporal Peters, and then by entering a guilty plea to this criminal charge as soon as practicable.

2. The evidence is clear and convincing that the assault on Mr. Beattie was inconsistent with the character and past behaviour of Constable Potter.
3. The incident, which lasted 38 seconds, was not premeditated and was triggered by the confluence of a number unique factors, including the accumulated stress of threats to himself and his family over time, the understaffing of the Carcross detachment and resulting emotional and physical exhaustion, and Mr. Beattie's behaviour, including his reference to Constable Potter's wife, which he interpreted as a threat.
4. Dr. Baskerville concluded that on May 15, Constable Potter was exhibiting an adjustment disorder with mixed anxiety and depressed mood as well as some symptoms of acute stress disorder.
5. The performance evaluations of Constable Potter's performance prior to the incident were extremely positive and indicate that he can and will be an exemplary police officer.
6. Mr. Beattie received a bruise in his jaw area and a cut on his lower lip. Although additional tests were conducted, his injuries appeared to be transitory in nature.
7. Constable Potter has been diligent in seeking professional assistance for his psychological issues which I find are work related. He has seen Dr. Baskerville 22 times and is now doing much better. He is now back working full time.
8. The Code of conduct Disciplinary Hearing and the employment related sanctions imposed are not a substitute for criminal sanctions. Nevertheless, they are relevant and can be considered by this Court as mitigating.

Conclusion

[44] As the circumstances involve a breach of trust and authority by a police officer on duty and an assault on a victim who is handcuffed and in custody, the imposition of an absolute discharge would not be in the public interest.

[45] I have concluded that the appropriate disposition in this case is a conditional discharge. Dr. Baskerville's evidence that Constable Potter was suffering from an

adjustment disorder with mixed anxiety and depressed mood as well as symptoms of acute stress disorder resulting from his workload in Carcross is an important factor in reaching this conclusion. Constable Potter will be discharged upon the following conditions in a probation order of 9 months duration:

1. The statutory terms will apply;
2. Report to a Probation Officer within 10 working days for the sole purpose of completing 40 hours of community service under the supervision of a Probation Officer within the first six month of this order;
3. Participate in such psychological counselling as may be recommended by your psychologist, Dr. Baskerville;
4. Report to court in Carcross on November 29, 2016 at 10:00 am for a review of your performance under this order. Provide the court with a letter from Dr. Baskerville outlining your participation in counselling and her recommendations for termination or continuation of such counselling.

[46] In the circumstances, there will be no DNA order or weapons order. There will be a victim surcharge of \$100.

LILLES T.C.J.