Citation: *R.* v. *Sam*, 2006 YKTC 21 Date: 20060210
Docket: T.C. 05-00242A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

REGINA

v.

JOHN WALTER SAM

Appearances:
David McWhinnie Counsel for Crown
Gordon Coffin Counsel for Defence

REASONS FOR SENTENCING

[1] FAULKNER C.J.T.C. (Oral): On November 11, 2002, following a conviction on charges contrary to s. 151(a) and 145(1) of the *Criminal Code*, John Walter Sam was declared a long-term offender.

[2] The Court sentenced Mr. Sam to 27 months in prison and he was made subject to a community supervision order, pursuant to s. 753.2 of the *Code,* for a period of 10 years following his release from imprisonment.

[3] The decision to declare Mr. Sam a long-term offender was based on his extensive and lengthy criminal history, particularly convictions for rape of a seven-year-

old girl and a sexual assault at knife point of a 14-year-old girl, in addition to the 2002 sexual touching conviction and other related convictions, including convictions for making indecent telephone calls.

[4] He has been diagnosed as suffering from antisocial personality disorder, pedophilia, other sexual dysfunctions, and an alcohol dependence disorder. He has attended various sexual offender treatment programs while incarcerated and also while on community supervision. None of this has appeared to ameliorate Mr. Sam's problems. Indeed, he has re-offended at the very same time that he has been involved in treatment programs. Not only has Mr. Sam proved intractable to treatment, it has even been suggested by some of the psychiatric personnel that have been involved with him, that such treatment may actually be making him worse.

[5] Following his sentencing in 2002, Mr. Sam served his entire sentence and was released in February 2005. The National Parole Board issued a long-term supervision certificate containing a number of conditions, including abstention from intoxicants, a requirement to follow treatment plans and psychological counselling and the avoidance of children and his victims. Also included was a condition requiring Mr. Sam to reside at the Adult Resource Centre or ARC for a period of 90 days. This condition was subsequently extended for a further 90-day period. As a result, after his release from imprisonment, Mr. Sam was returned directly to Whitehorse and admitted directly to the ARC, where he then resided.

[6] It should be noted that Mr. Sam's return to the community was a matter of sufficient concern that the police took the unusual step of notifying the public that Mr. Sam was back in Whitehorse.

[7] While at the ARC, Mr. Sam was closely supervised by community corrections officers and it appeared that he was doing well. He was cooperating with the officers, attending counselling and becoming engaged in artwork. Matters carried on in an apparent satisfactory fashion until July 22nd when Mr. Sam was given a pass to go to downtown Whitehorse to sell some artwork. He was supposed to return at 4:00 p.m. He borrowed a car and went downtown but failed to return to the ARC. Subsequently, a Canada-wide warrant was issued for his arrest.

[8] The following day, Mr. Sam was discovered holed up in the car that he had borrowed. It had been secreted in a wooded area off of Mountainview Drive in Whitehorse. When the police arrived and attempted to arrest Mr. Sam, he made a run for it. The officer gave chase and managed to tackle Mr. Sam and subdue him. He has been in custody ever since. Mr. Sam has now pleaded guilty to a charge of failing to comply with the terms of his long-term supervision order and a further charge of escaping lawful custody.

[9] After his arrest, it was discovered that Mr. Sam had shaved his moustache and pubic hair. A search of the vehicle produced a knife, a set of nail clippers and a number of condoms.

[10] The matter is now before me for disposition. I will say at once, that the sentencing considerations with respect to the offence of breaching long-term

supervision orders are somewhat singular. The British Columbia Court of Appeal in *R.* v. *S.J.D.,* [2004] B.C.J. 284 (QL), and the Alberta Court of Appeal in *R*. v. *H.P.W.,* [2003] A.J. 479 (QL), have both made it clear that the primary factor in sentencing for this offence is the protection of the public. As a result, rehabilitation, deterrence and retribution play subordinate roles to the prevention of recidivism. At the same time, as is pointed out in *R.* v. *S.J.D.:*

> …rehabilitation and effective risk management in the community serve the goal of public protection to the extent that they forestall recidivism by long-term offenders.

[11] An obvious additional consideration in sentencing is the nature of the breach. In the most egregious case the breach would involve, I suppose, a repetition of the very crimes that resulted in the long-term offender designation in the first place. At the other end of the scale, one could imagine a more or less technical breach of an ancillary clause of the supervision conditions. In the *S.J.D., supra,* case, the breach was considered to be very serious because it was found that, while the offender had not committed another sexual assault, he was engaging in exactly the sort of grooming behaviour that had led to his previous sexual assaults against children.

[12] In *H.P.W., supra,* the breach was the consumption of alcohol. While at first blush this might seem a much less serious matter, the Court nevertheless found it to be of grave concern because alcohol consumption had been a factor in all of the offender's previous crimes.

[13] In this case, the breach was being AWOL from the community corrections facility where Mr. Sam was required to reside. This might be considered to be unrelated to his

offences. Nevertheless, in my view, the breach was serious because, as in *H.P.W., supra*, the condition breached was central to the management of the offender in the community.

[14] The condition to reside in a community residential or correctional facility is not one that is normally imposed in a community supervision order because it could be viewed as effectively incarcerating an offender who is supposed to be supervised in a community, thus blurring the distinction between the long-term offender and dangerous offender designations. Nevertheless, it was imposed in this case and, as Ms. Northcott, who was in charge of the offender's supervision testified, she considered such a requirement absolutely vital if Mr. Sam was to be successfully supervised in the community. Apart from anything else, it is obvious that the offender cannot be successfully supervised in the community if the authorities do not know where he is, but in Mr. Sam's case, the concerns, based on his history and resistance to treatment, ran much deeper. The need to keep this offender closely supervised is all the more obvious in this case because he appeared, right up to the moment he disappeared, to be doing well and, if anything, improving in his response to counselling and supervision.

[15] There is also, in my view, good reason to believe that what occurred here was more than Mr. Sam simply going AWOL. When found, Mr. Sam had a knife, had shaved his moustache and pubic hair, and had a set of nail clippers and a number of condoms. From this, it might be fairly assumed that he had much more on his mind than simply staying away from the ARC.

[16] In fixing an appropriate sentence, regard must also be had to the fact that the *Code* provides for a 10-year maximum sentence for a breach. This is a clear indication that such breaches are considered to be quite a different matter than a breach of probation order, for example.

[17] I should mention that I was referred to one other sentencing case. In *R*. v. *Maynard,* [2003] N.J. No.15 (QL), the offender received an effective sentence of six months for uttering a threat and four months for breaching a long-term supervision order. The offender was mentally retarded and the Court found he had uttered the threats almost as a plea for help or as a means of getting himself back into a closed institutional setting. It should also be noted that the threat, although a serious matter, was not related to Maynard's offending behaviour, as in *S.J.D., supra,* or *H.P.W., supra.* Moreover, there was no suggestion that enforcement of the particular term of the long-term supervision certificate was vital to Maynard's management in the community.

[18] The Crown has suggested, and I agree, that the circumstances here fall somewhere between those outlined in *H.P.W., supra,* and those in *S.J.D., supra.*

[19] Taking all of the factors into account, I am of the opinion that a fit sentence for this breach is a sentence of imprisonment for a period of two years. With respect to the charge of escaping lawful custody, the sentence I impose is three months to be served consecutively.

[20] There is an additional significant matter requiring consideration by the Court, and that is the fact that Mr. Sam has spent some seven and a half months in pre-trial custody. It appears that during most, if not all, of this time, he has been in segregation.

It further appears that the bulk of the long delay in getting this matter to trial was the result of the Crown's ultimately fruitless endeavour to obtain expert evidence respecting some items that were found in Mr. Sam's possession at the time of his arrest. These items were some knotted strings or cords.

[21] In the circumstances, in my view, Mr. Sam is entitled to a full two-for-one credit for the remand time that he has spent, for a total of 15 months. In the result, there is a remanet of one year left to serve.

[22] I should add at this point that I am alive to Mr. Coffin's submission that since the sentence I impose will be served in a penitentiary, Mr. Sam will, of necessity, be taken away from the counselling and other supports he had developed while in Whitehorse. However, as the cases have made clear, in these circumstances, considerations of public safety trump offender rehabilitation. In any event, I am far from convinced that Mr. Sam was genuinely engaged in these rehabilitative efforts while at the ARC and there is no evidence before me that these efforts have been any more successful since he has been in custody at WCC.

[23] The law provides that the running of the community supervision order is normally suspended while the offender is in custody and I see no reason to order otherwise in this case.

[24] The surcharges are waived.

[25] MR. MCWHINNIE: There was one matter that came up at the conclusion of the last day’s proceedings, Your Honour. One of the items that was taken from

Mr. Sam in the course of these events was a set of carving tools that he uses in his artwork. It does not appear that these are going to be required any further in this particular matter. Would Your Honour be disposed to grant an order that they be released to him? I expect he will want to take them with him to the institution for --

[26] THE COURT: They should be returned to Mr. Sam.

[27] MR. MCWHINNIE: Thank you. The balance of the exhibits could be released to the RCMP at the end of the 30 days, if there is no appeal.

[28] THE COURT: Mr. Coffin?

[29] MR. COFFIN: That's fine.

[30] THE COURT: So ordered.

[31] THE CLERK: And the remaining charges, Your Honour?

[32] THE COURT: Oh yes, the remaining --

[33] MR. MCWHINNIE: They will be stayed.

[34] THE COURT: Thank you.

_____

FAULKNER C.J.T.C.