

Citation: *R. v. Simons*, 2006 YKTC 14

Date: 20060113
Docket: T.C. 05-00566
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

REGINA

v.

NORMAN SIMONS

Appearances:
Kevin Drolet
Malcolm Campbell

Counsel for Crown
Counsel for defence

REASONS FOR JUDGMENT

[1] LILLES T.C.J. (Oral): Mr. Simons was brought before the Court for breach of a conditional sentence order made on February 1, 2002, in Prince Albert, Saskatchewan. This matter was heard by me a week ago, on January 6, 2006. At that time, the Crown filed a consent by the Attorney General of Canada to proceed with the breach of conditional sentence in the Yukon. As both the circumstances of the breach and Mr. Simons' personal circumstances were somewhat unusual, I reserved my formal decision for one week, to today's date, to permit me to prepare written reasons.

[2] Mr. Simons was convicted of the following offences on February 1, 2002. First, on January 31, 2002, the offence was possession of marijuana for the purpose of

trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, 1996, c. 19. Secondly, on October 4, 2001, possession of marijuana for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. Thirdly, on October 4, 2001, possession of cannabis resin for the purpose of trafficking, contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. And fourthly, October 4, 2001, possession of \$1,875.10, proceeds of crime, contrary to s. 8(1) of the *Controlled Drugs and Substances Act*.

[3] Now, at the time of the January 31, 2002 charge, Mr. Simons was on a recognizance for his earlier drug possession charges and that resulted in a further charge in October -- a further charge of breach of recognizance, contrary to s. 145(3).

[4] Now, at the time of the February 1, 2002 sentencing, Mr. Simons had a limited criminal record. It is unusual in that he had no record until 1993, when he was 56 years of age. He was then convicted for possessing marijuana. In 1996, when he was 62 years of age, he was convicted of cultivating a narcotic. Again, in 1998, he pled guilty to producing a scheduled substance, and in 1999, he pled guilty to four drug infractions, including trafficking. On this last occasion, he received a nine-month conditional sentence, which he apparently completed successfully. His previous convictions, then, were all drug related.

[5] The two years less one day conditional sentence imposed on February 1, 2002, in relation to the charges outlined above, was appealed by the Crown as being too lenient. The Court of Appeal agreed, in general, stating:

We accept largely Crown counsel's contention that this sentence is demonstrably unfit but for one factor: the health of Mr. Simons's wife and her need for his 24-hour care.

[6] That decision indicates that Mr. Simons' wife was very ill, suffered from a number of serious illnesses and was heavily medicated. Although there was expert medical evidence that marijuana use by Mrs. Simons was contraindicated and even potentially dangerous, Mr. Simons explained his possession of marijuana, in part, as being used to relieve his wife's pain.

[7] Mr. Simons served the first ten months of his conditional sentence in his home successfully, while monitored by an electronic bracelet. When his ten-month electronic monitoring term expired on December 1, 2002, he was instructed to report to his supervisor during the week of December 16, 2002. He failed to do so. He was not heard of again by the justice system until he was identified by the police in Whitehorse, Yukon on December 19, 2005. As Mr. Simons is not charged with any new offences, the issue before the Court is how to deal with the breach of his conditional sentence order, mainly failing to report during the period December 21, 2002 until his arrest, December 19, 2005, a period of three years.

[8] Mr. Simons indicated through counsel that he left Saskatchewan in December 2002 because of his wife's serious illness and because she wanted to spend the rest of her life in British Columbia. He said that he did not believe that the correctional authorities would give him permission to move, so he went without telling them. When his wife subsequently passed away, he did not turn himself in, although his ostensible reason for leaving Saskatchewan without permission was no longer an operating factor. He said he was too emotionally distraught to make the right decision.

[9] It is apparent that Mr. Simons himself is currently in very poor health. He has a serious bronchial condition, gets winded after walking a very short distance and is using a puffer to relieve his symptoms. He told the Court that he came to the Yukon in December 2005 because a friend told him that the air was dry here and that would be good for his bronchitis.

[10] The circumstances of Mr. Simons' apprehension are also unusual. On December 19, 2005, he was the occupant of a room at the Airline Inn on the Alaska Highway. A woman and a two-year-old child were in the room with him when two intruders sprayed him with bear spray and removed a safe, apparently containing money. Mr. Simons went to the hospital to get cleaned up. The police interviewed him and did a warrant check and discovered that he had been AWOL from his conditional sentence for a period of three years. He was arrested on December 19th and has remained in custody on consent until this matter could be dealt with.

[11] In the circumstances, the Crown submitted that the balance of Mr. Simons' conditional sentence should be terminated and that he be required to serve the balance, some 12 months, in custody. Mr. Simons' position, through his counsel, is that the time spent in remand, some three weeks, is a sufficient response and that he should be allowed to serve the remainder of his conditional sentence in the community.

[12] This Court's disposition of the matter must send a clear message that court orders and conditional sentences, in particular, must be taken seriously by offenders. Mr. Simons was AWOL for three years. Ignoring Mr. Simons' flaunting of the court order would erode the integrity of the conditional sentencing regime. As a matter of policy, an

offender should not be rewarded for taking flight. To the contrary, he or she should be discouraged from doing so, see *R. v. Millward*, 2000 ABCA 308 (QL), a decision of Chief Justice Fraser.

[13] On the other hand, there are several mitigating factors in this case. Mr. Simon has a limited criminal record, his first offence occurring in 1993 when he was 56 years old. All of his convictions relate to possessing and/or trafficking in marijuana or marijuana resin, a soft drug compared to some of the others that this Court sees.

[14] When he absconded in 2002, his wife was dying. I accept that he went to B.C. on her account. She subsequently passed away. During the three years that he was AWOL, Mr. Simons did not commit any further criminal offences. Although I did not have a medical report, it appeared to me, from Mr. Simons' last appearance in Court, that he himself is not in good health.

[15] Finally, apart from short periods upon arrest in remand, Mr. Simon has not spent any time in actual jail.

[16] However, the most important consideration in making the decision I am going to make is that Mr. Larry Kwiat, a chaplain at the Whitehorse Correctional Centre, was present in Court with Mr. Simons at his last appearance and is prepared to allow Mr. Simons to reside with him at his residence on the Alaska Highway. Mr. Kwiat has assisted the Court in similar ways in the past. He is known as being strict in his supervision of offenders and has in the past demonstrated a readiness to report any violations of court orders to the authorities. If it were not for Mr. Kwiat's involvement and

offer of assistance, I would be giving serious consideration to collapsing Mr. Simons' conditional sentence entirely.

[17] In the circumstances, Mr. Simons' conditional sentence will be suspended for a period of four months, effective the last court appearance, which was January 6, 2006, which time he will serve in custody at the Whitehorse Correctional Centre. Thereafter, his conditional sentence will resume on the following strict terms of house arrest. The statutory terms will apply. In addition, he shall:

1. Take such substance abuse assessment counselling, programming, and treatment, including attending residential treatment and abide by the rules of that residence as and when directed by your conditional sentence supervisor.
2. Abstain absolutely from the possession, consumption or purchase of alcohol, non-prescription drugs and other intoxicating substances, as outlined in Schedule 1-8 of the *Controlled Drugs and Substances Act* and submit to breathalyzer and urine analysis upon demand by a peace officer who has reason to believe that you have failed to comply with this condition.
3. Have no contact directly or indirectly with any person known to you as being involved in using or selling illegal drugs.
4. Reside at the residence of Larry Kwiat at Kilometre 1444 Alaska Highway, Ibex Valley, and abide by the rules of that residence and not change that residence without the prior

written permission of the conditional sentence supervisor. You are to abide by a curfew by remaining within your place of residence, including the grounds immediately contiguous to that residence, between the hours of 2:00 p.m. and 10:00 a.m. daily, unless in the actual presence of Larry Kwiat or other responsible adult designated by the conditional sentence supervisor, or unless you have received the prior written permission of the conditional supervisor. That written permission shall be carried on your person and made available for inspection upon request by a peace officer at all times when you are away from the residence.

5. Not attend at any licensed bar, tavern or off-sales or at any other premise whose primary purpose is the sale of alcoholic beverages.
6. Answer the door or telephone during reasonable hours of your curfew. Failure to do so will be a presumptive breach of your conditional sentence order.

[18] Mr. Campbell, is there anything in that conditional sentence that creates a problem for Mr. Simons?

[19] MR. CAMPBELL: If I could just have a moment.

[20] THE COURT: Okay. While you are doing that, can I ask Crown counsel, anything that you want to add or suggest that should be modified?

(Discussion with counsel regarding outstanding term of conditional sentence)

[21] MR. DROLET: Those conditions are acceptable.

[22] THE COURT: I do not think there is anything further I need to do then?

[23] MR. CAMPBELL: No, thank you, Your Honour.

[24] THE COURT: Thank you.

LILLES T.C.J.