

Citation: *R. v. Taylor*, 2016 YKTC 49

Date: 20160923
Docket: 15-00407
15-00407A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

DAVID PETER TAYLOR

Appearances:
Eric Marcoux
Vincent Larochelle

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] This is an application for judicial interim release pending sentencing. The facts behind this application are somewhat unusual.

[2] Mr. Taylor has pleaded guilty to having committed the offence of assault and of possession of cocaine. There are a number of other charges on the Informations before me to which not guilty pleas have been entered or no pleas.

[3] Crown and defense counsel have advised me that they have a joint position on sentence of five months custody on the assault charge and two months custody consecutive on the possession charge. There is to be a period of probation of one year to follow the time in custody on the assault charge.

[4] Mr. Taylor has been in custody on remand at the Whitehorse Correctional Centre (“WCC”) for a total of 143 days. Counsel agree that for the first 30 of these days, Mr. Taylor is entitled to receive 45 days credit. Counsel disagree, however, on the credit to be given for the remaining 113 days Mr. Taylor has been in custody on remand since June 3, 2016. Crown counsel takes the position that Mr. Taylor is limited to 1:1 credit as prior process was revoked on June 3, 2016 pursuant to a s. 524(8) application. Crown counsel relies on the decision of **R. v. Chambers**, 2014 YKCA 13 in this regard and the principle of *stare decisis*.

[5] Defence counsel takes the position that the recent decision of **R. v. Safarzadeh-Markhali**, 2016 SCC 14, has altered the landscape in which **Chambers** was decided and that I am therefore not bound to follow **Chambers**. Counsel submits that Mr. Taylor should be granted 1.5:1 credit for his time in custody.

[6] As of today’s date, were I to accede to the submission of crown counsel with respect to credit for time in custody on remand, Mr. Taylor would be entitled to have his sentence reduced by 158 days. Based on seven months custody being 212 days (rounding down), Mr. Taylor would have 54 days remaining to be served in custody, less credit for remission.

[7] Were I to determine that Mr. Taylor is entitled to 1.5:1 credit for his time in remand custody, he would be entitled to have his sentence reduced by 215 days (rounding up). Therefore, as of today, his sentence would be covered by his time served in custody and he would no longer have any time remaining to be served in custody.

[8] The application that has been filed by defence counsel seeks, on the basis of ss. 7, 11(d) and 12 of the *Canadian Charter of Rights and Freedoms*, stated briefly, an order that the provisions of s. 719(3.1), insofar as they restrict the credit Mr. Taylor is entitled to receive for his time in custody on remand to 1:1, to be unconstitutional and therefore asks that I refuse to apply it to him.

[9] The hearing of this application is set for November 8, 2016. Deadlines have been set for the filing of materials for the hearing of this application.

[10] Defense counsel seeks the release of Mr. Taylor on bail pending a determination of the application.

[11] Crown counsel is opposed to Mr. Taylor being released.

Facts

[12] The facts of the offences for which Mr. Taylor is to be sentenced are as follows:

- On July 29, 2015 the victim of the assault, Jamie Lee Johns, reported to the RCMP that Mr. Taylor had committed mischief at her place of residence. A warrant was issued for the arrest of Mr. Taylor. Based upon further information provided to the RCMP by Ms. Johns, Mr. Taylor was arrested on September 29, 2015. In the search of Mr. Taylor following his arrest he was found to be in possession of 14 g of crack cocaine. Mr. Taylor remained in custody on consent remand until he was released on October 28, 2015 following a contested show cause hearing.
- Following Mr. Taylor's non-attendance in court on March 30, 2016, a warrant for his arrest was issued.
- On May 7, 2016, Mr. Taylor assaulted Ms. Johns in her residence by punching her in the face and on the left side of her head. Ms. Johns suffered a cut lip with bleeding in her mouth and from the lip. A warrant was issued for the arrest of Mr. Taylor. He was arrested on the outstanding warrants on June 3, 2016. Mr. Taylor has remained in custody on consent remand since that date.

[13] It is to be noted that Ms. Johns and Mr. Taylor had been in a domestic relationship and have children together.

Circumstances of Mr. Taylor and Plan for Release

[14] Mr. Taylor is a 30-year-old member of the Kwanlin Dun First Nation. He has been a Whitehorse resident for his entire life. His family all reside here.

[15] His mother struggled with alcohol abuse and died in 2011. Her alcohol abuse issues contributed to her death.

[16] Mr. Taylor was placed in a foster home when he was young, again, in some degree related to his mother's struggles with alcohol. This was a positive non-aboriginal foster home placement. At the age of 13, however, Mr. Taylor ran away from the foster home, in part at least, to try to connect with his biological family. He resided in Group Homes until the age of 18. He was able to connect with his step-father, Pat Sterriah, his step-siblings and his biological sister. These individuals were present in court in support of Mr. Taylor for the bail hearing.

[17] Mr. Taylor is connected to the social worker who is involved in the circumstances of Mr. Taylor's five children.

[18] Mr. Taylor has struggled with alcohol and drug abuse issues. Defence counsel submits that Mr. Taylor suffers from Fetal Alcohol Spectrum Disorder ("FASD"). He points to the ongoing connection Mr. Taylor has made with the Fetal Alcohol Spectrum Society Yukon ("FASSY"). He concedes that Mr. Taylor has not been formally

diagnosed as suffering from FASD but submits that his client is prepared to participate in such an assessment.

[19] As a youth Mr. Taylor was convicted of the following:

- 2000 - fail to comply with undertaking;
- 2002 - possession of property obtained by crime;
 - break & enter & theft (348(1));
 - break & enter & commit (348(1)(b));
 - fail to attend court;
 - fail to comply with recognizance (x2); and
 - fail to comply with disposition.
- 2003 - break and enter (348(1)(b));
 - fail to comply with disposition (x2);
 - mischief under \$5000 (x2); and
 - theft under 5000.

[20] As an adult he was convicted of the following offences:

- 2004 - fail to comply with recognizance/undertaking (x2);
- 2008 - fail to comply with undertaking/recognizance (x2);
 - fail to attend court; and
 - assault.
- 2009 - sexual assault; and
 - fail to comply with undertaking;
- 2011 - breach of probation.
- 2012 - breach of probation; and

- uttering threats;

2013 - sexual assault.

[21] The plan put forward by Mr. Taylor is as follows:

- He will reside at the home of Pat Sterriah, at #203 – 37 Lewes Blvd., in Whitehorse. Mr. Sterriah has maintained his sobriety from alcohol for over 25 years. He does not use hard drugs. He has no criminal record. He was involved in the raising of Mr. Taylor from a young age and maintained some degree of contact after Mr. Taylor was removed from the home. Mr. Sterriah has advised defence counsel that he is committed to helping Mr. Taylor maintain his sobriety.
- Mr. Taylor plans to seek assistance through Alcohol and Drug Services for his substance abuse issues, including applying for residential treatment. His last attempt to enter into the 28-day treatment program failed due to Mr. Taylor's relapse.
- Mr. Taylor is hoping to obtain employment at the demolition project for the FH Collins High School, where his sister's boyfriend is working and has advised Mr. Taylor that there may be work opportunities for him.
- Mr. Taylor also intends to enrol in Yukon College in order to enter into the Culinary Arts program offered there.
- During his time in remand custody, Mr. Taylor has taken programming, including the *For the Sake of the Children* program, the *I am a Kind Man* program and a program designed to assist individuals in making decisions. He has also taken upgrading course offered through Yukon College at WCC.
- Mr. Taylor states that he is committed to working on his alcohol and drug abuse issues, in large part in order to re-connect with his five children.

[22] Crown counsel is opposed to Mr. Taylor's release, primarily, as I understand it, on the basis that **Chambers** is binding authority on this court and has not been impacted by the **Markhali** decision. As such, although Mr. Taylor is entitled to bring his *Charter* application, until **Chambers** has been overruled, Mr. Taylor should serve the remainder of his sentence in custody on the basis of the existing law in the Yukon. He

also points to “slippery slope” concerns that other offenders also impacted by s. 719(3.1) in regard to s. 524 applications as per the **Chambers** decision, will also bring bail applications pending their sentencing hearing in order to argue the issue.

[23] In addition, Crown counsel has provided information from Ms. Johns, who is aware of this bail application proceeding today, that she is afraid of Mr. Taylor being released into the community.

[24] Crown counsel notes that this is a reverse onus situation and, having been convicted, Mr. Taylor no longer enjoys the presumption of innocence.

Decision

[25] I find that, in the unusual circumstances of this case, Mr. Taylor should be released pending the outcome of the *Charter* application and the conclusion of the sentencing hearing.

[26] Firstly, I have no concerns in regard to the primary grounds, notwithstanding the convictions for failing to attend court. Mr. Taylor’s history, present support and plans are all entirely connected to the Yukon. There is no where he would likely be able to go. In addition, given the fairly limited period of further custody he could face if unsuccessful in his application, there is not, in my mind, a great incentive for Mr. Taylor to flee the jurisdiction.

[27] With respect to the secondary ground concerns, certainly Mr. Taylor’s criminal history indicates that he has had difficulty complying with court orders. In addition there

are four offences of violence, including two sexual assaults. I can understand why Ms. Johns is concerned about the release of Mr. Taylor.

[28] However, were I to bifurcate the sentencing process and sentence Mr. Taylor for the offence of assault only at this time, even were Mr. Taylor to be unsuccessful in his *Charter* application, he could be sentenced to the five months jointly submitted for the assault on the basis of time served.

[29] Further, were I not to bifurcate the sentencing process, while it is true that Ms. Johns would be protected for the next 54 days, (less, in all likelihood 18 days for remission credit), if Mr. Taylor is unsuccessful in his bail application, she would receive the same protection for the same period of time, albeit at a different date.

[30] We are not talking about a potentially substantial period of protection through custody, such as would perhaps be the case in circumstances where it was uncertain when a charge of assault in a domestic situation would resolve, either through trial or guilty plea. While the presumption of innocence is certainly absent, the acceptance of responsibility exists in this case, unlike the circumstances that exist in most bail applications. Further, the bail to be imposed can, in light of the acceptance of responsibility by Mr. Taylor, include terms that he attend for assessment, counselling and programming. In the absence of such an acceptance of responsibility, such terms are not often imposed, in particular as the assessment, counselling and programming would relate to the underlying substantive offence and rely on an acceptance of responsibility in order to be effective.

[31] I find that any potential for the risk of Mr. Taylor re-offending, given that 100 percent certainty is rarely, if ever achievable, is not sufficient to justify his detention in custody. In particular, I am satisfied that the release conditions that I will impose on Mr. Taylor will provide Ms. Johns as much, or perhaps even more, protection than she would have under the probation order soon to be in place. This will also be for a longer period of time, given that the conclusion of the sentencing hearing will now be after the probation order would have already begun to run, assuming that I were to accede to the joint submission for one year of probation.¹

[32] In regard to the tertiary grounds, I find that the administration of justice would be negatively impacted if Mr. Taylor is not released from custody on bail today.

[33] Mr. Taylor is of Aboriginal ancestry and has certainly been impacted by the alcohol issues his mother struggled with. As per *R. v. Magill*, 2013 YKTC 8, and other jurisprudence, it is clear that the application of *Gladue* principles (*R. v. Gladue*, [1999] 1 S.C.R. 688) is a consideration at the bail stage. I acknowledge that I have little before me with regard to Mr. Taylor's Aboriginal ancestry and, as such, am cautious not to presume too much in that regard. Mr. Taylor will end up serving as much time in custody as he is, in law, required to serve, regardless of whether he is successful or unsuccessful in his *Charter* application. This, of course, is on the basis that I accede to the joint submission of counsel, which I certainly see no reason not to. I am cognizant of the Crown's concern that, if Mr. Taylor is doing very well in the community, it would

¹*This is premised on the delay in the sentencing hearing due to the Charter application. Were Mr. Taylor to be detained in custody pending the outcome of the Charter application, there would be little incentive for him to pursue this application as he would have served his sentence in full and been released from custody at a much earlier date by simple proceeding to sentencing.*

be difficult to then, if he were unsuccessful in his *Charter* application, return him to jail for 54 days and interfere with his progress towards rehabilitation.

[34] To me, that is a matter better left for another day rather than engaging in speculation at this time. Certainly, if the circumstances warrant it at the time, a further custodial disposition of 54 days to be served conditionally in the community could be imposed rather than incarceration at WCC. This would, of course, not be entirely in accord with the joint submission that has been placed before me. Regardless, the appropriateness of such a disposition is a matter better to be left to the sentencing hearing.

[35] To accede to Crown counsel's submission, Mr. Taylor could end up serving an additional 36 days in actual custody (assuming remission credit of 18 days), all of which could be time in addition to what he is sentenced to at the conclusion of the sentencing hearing. In other words, this would be time in custody not warranted for the offences Mr. Taylor has committed.²

[36] While 36 days may not appear to be substantial, a day in jail is a day in jail and should not be assumed to be of little consequence to an individual. I find that to allow this to potentially happen would be inconsistent with what has been stated in **Gladue**, **R. v. Ipeelee**, 2012 SCC 13, and numerous other cases addressing the need to apply the law in a manner which recognizes the over-incarceration of Aboriginal individuals

² This presumes that there was an agreement between counsel to release Mr. Taylor on bail after 36 days pending the conclusion of the sentencing hearing. Otherwise Mr. Taylor would have to abandon his application and proceed to sentencing, or agree to remain in custody beyond the time Crown and defence counsel submit is appropriate, simply in order to have the legal issue resolved.

and offenders. This is not a case where we are talking about reducing a sentence or finding an alternative to a custodial disposition on the basis of an offender's Aboriginal ancestry. This is a case where, ultimately, we are dealing with a strictly legal issue as to the allowable credit for time in remand custody. This issue will be resolved following the hearing of the application. Today's judicial interim release hearing is about whether Mr. Taylor spends his time waiting for this legal issue to be resolved in custody or in the community.

[37] If Mr. Taylor is released on bail and loses his application, he can serve the remainder of his sentence in custody at WCC. He just does it later rather than now. If he is not released on bail and is successful in his application, he will serve an additional minimum 36 days in custody at WCC which he should not have. How does the justice system compensate him for that? There is no unfairness in his release on bail pending a determination of the *Charter* issues. There is clearly unfairness if he serves 36 days in custody that he should not have. The administration of justice requires fairness and so do Canadians with respect to their justice system. In my mind the tertiary grounds require that Mr. Taylor be released on bail and would be offended if he is not.

[38] In deciding that Mr. Taylor should be released, I have not embarked upon any analysis, one way or the other, of whether I am bound to apply s. 719(3.1) insofar as the s. 524(8) order, as per **Chambers**, restricts Mr. Taylor's credit time in custody to 1:1. I disagree that in these circumstances and in light of the pending *Charter* application, I must act as though **Chambers** is settled law such that Mr. Taylor must serve his sentence in full, as calculated on the basis of **Chambers**, despite bring a *Charter* application challenging s. 719(3.1) of the *Code*. The law is not so static that it cannot be

allowed to develop. *Charter* applications such as the one before me in this case are such means through which the law is able to remain alive to the issues before the courts. There is a risk of prejudice to Mr. Taylor in this case if I were to accede to Crown's submission to the above effect.

[39] In my opinion, there is also a risk of prejudice to the administration of justice were I to do so.

[40] Mr. Taylor will be released on a recognizance as follows:

Mr. Sterriah will act as surety. There will be an amount of \$250.00 non-cash deposit.

1. Remain within the Yukon unless you obtain written permission from your Bail Supervisor;
2. Report to a Bail Supervisor immediately upon your release from custody and thereafter, when and in the manner directed by the Bail Supervisor;
3. Reside at the residence of Pat Sterriah at #203 – 37 Lewes Blvd., Whitehorse, Yukon and abide by the rules of the residence.
4. Abide by a curfew by being inside your residence between 11:00 p.m. and 6:00 a.m. daily, except with the prior written permission of your Bail Supervisor or except in the actual

presence of Pat Sterriah or another responsible adult approved in advance by your Bail Supervisor. You will answer the door or telephone for curfew checks. Failure to do so during reasonable hours will be a presumptive breach of this condition;

5. Not possess or consume alcohol or controlled drugs or substances that have not been prescribed for you by a medical doctor;
6. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
7. Attend and actively participate in all assessment and counselling programs as directed by your Bail Supervisor, and complete them to the satisfaction of your Bail Supervisor for the following issues: substance abuse, alcohol abuse, spousal violence, psychological issues and any issues identified by your Bail Supervisor, and provide consents to release information to your Bail Supervisor regarding your participation in any program you have been directed to do pursuant to this condition;
8. Participate in an FASD assessment as directed by your Bail Supervisor and provide consents to release information to

your Bail Supervisor regarding your participation in this assessment;

9. Have no contact directly or indirectly or communication in any way with Jamie Lee Johns except with the prior written permission of your Bail Supervisor in consultation with Victim Services and Family and Children's Services;
10. Remain 25 metres away from any known place of residence, employment, or education of Jamie Lee Johns except with the prior written permission of your Bail Supervisor in consultation with Victim Services and Family and Children's Services;
11. Participate in such educational or life skills programming as directed by your Bail Supervisor and provide your Bail Supervisor with consents to release information in relation to your participation in any programs you have been directed to do pursuant to this condition;
12. Make reasonable efforts to find and maintain suitable employment and provide your Bail Supervisor with all necessary details concerning your efforts;
13. Not possess any firearm, ammunition, explosive substance or any weapon as defined by the *Criminal Code* except as

required by your employment or except with the prior written permission of your Bail Supervisor.

COZENS T.C.J.