

Citation: *R. v. V.H.*, 2008 YKTC 21

Date: 20080318
Docket: 07-00526
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Lilles

R e g i n a

v.

V.H.

Publication of information that could disclose the identity of the complainant, witness or justice system participant has been prohibited by court order pursuant to section 486.4 or 486.5 of the *Criminal Code*.

Appearances:
Noel Sinclair
Andre Roothman

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] V.H. is a 44 year-old man who has plead guilty to one count of possession of child pornography in the form of digital images, an offence contrary to section 163.1 (4) of the *Criminal Code*. The offence date was October 18, 2007.

The Facts:

[2] V.H. has had custody of his daughter T., since she was 12 years old. She was 15 years old when she discovered images of naked girls involved in sex acts on V.H.'s laptop computer. This discovery was made accidentally. At the time, she was playing a computer game on her own desktop computer and needed to download a program. She found that the password to her computer also worked

on V.H.'s laptop and when she downloaded the program she observed the pornographic images.

[3] T. disclosed what she observed at school. As a result, the police obtained and exercised a search warrant on V.H.'s residence. They found a locked cabinet with over 100 compact discs bearing titles like "Etnymphs", "Little virgins", "Lolita fix", "Ukrainian angels" and "Lolita love". In addition, there were at least a thousand images or movies on his computer with similar titles. The content of the compact discs and laptop included images that ranged from artistic photos to sex acts with other children, sex acts with adults, rape and bestiality. The children appeared to be between three and 15 years-of-age.

[4] The Crown elected to proceed by way of indictment. Section 163.1(4) provides, in the case of possession of child pornography, for a minimum penalty of 45 days and a maximum of five years custody.

V.H.'s Circumstances:

[5] V.H.'s childhood was unexceptional. He had a stable home and a rather ordinary upbringing, without any major trauma or abuse. He continues to have a good relationship with his parents but has limited contact with his brothers.

[6] Although V.H. had a slow start in school, having to repeat grades one and two, he graduated from high school at age 19. He has three years of a four-year journeyman electrical course and he had applied those skills while employed in the Northwest Territories and the Yukon. He is described by his current employer as an excellent worker.

[7] V.H. has had three significant relationships with females. The last one ended approximately three years ago. Since then, he has not sought out any other relationships, stating that he is "extremely gun shy and I don't want to have anything to do with women". His friends at the current time are all men.

[8] Although V.H. denies any emotional or drug abuse problems, others report that he has an anger management problem and abuses alcohol. He, himself, admits to having used “lots of drugs” when younger, and that about five years ago began using marijuana regularly, as it provides relief from his arthritis.

V.H.’s Understanding of the Offence:

[9] Although V.H. was cooperative with the police and admitted possession of the pornographic images, it is evident that he minimizes the seriousness of what he has done and does not understand the concerns underlying his offence. V.H. is clearly addicted to child pornography, spending up to nine hours at a time searching for and downloading from the Internet. He has collected and stored thousands of illicit images and films. Nevertheless, he denies any fascination or addiction to pornography, justifying his actions by saying that since he was paying for the Internet, he was merely getting his money’s worth. He puts collecting child pornography in the same category as collecting and downloading free music and movies. He described it as a challenge. On the other hand, by way of contradiction, he described his main interest as finding pictures of young adolescent girls and he described younger children as “cute and fun”. He insists that, unlike the members of Internet clubs that circulate pornography, “I’m not a sicko”.

[10] V.H. does not understand that all the children in the digital photos and movies he collected are the victims of his crime. Rather, he sees himself as the victim: “I haven’t hurt anyone but myself”. He is correct when he identifies T. as a victim – having lost her mother to drugs; she has now lost her father and is in the care and custody of Family and Children’s Services.

The Law:

[11] There should be no doubt that the possession of child pornography is a very serious offence. The Supreme Court of Canada in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 28 stated:

This brings us to the countervailing interest at stake in this appeal: society's interest in protecting children from the evils associated with the possession of child pornography. Just as no one denies the importance of free expression, so no one denies that child pornography involves the exploitation of children. The links between *possession* of child pornography and harm to children are arguably more attenuated than are the links between the manufacture and distribution of child pornography and harm to children. However, possession of child pornography contributes to the market for child pornography, a market which in turn drives production involving the exploitation of children. Possession of child pornography may facilitate the seduction and grooming of victims and may break down inhibitions of incite potential offences....

[12] The court went on to say at paragraph 94:

I conclude that the social science evidence adduced in this case, buttressed by experience and common sense, amply meets the *Oakes* requirement of a rational connection between the purpose of the law and the means adopted to affect this purpose. Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.

[13] In *R. v. Stroempl* (1995), 105 C.C.C. (3d) 187 at page 191, the Ontario Court of Appeal stated:

The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense possessors such as the appellant instigate the production and distribution of child pornography – and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

[14] In *R. v. Steadman*, [2001] A.J. No. 1563, Justice Gallant said as follows at paragraphs 21 and 22:

Child pornography promotes cognitive distortions. It fuels fantasies that incite offenders to offend. It is used for grooming and seducing victims. Children are abused in the production of child pornography. Child pornography is inherently harmful to children and society. That type of pornography by its very existence violates the dignity and rights of children. Harmful attitudes are reinforced by such pornography. Possession of child pornography reinforces the erroneous belief that sexual activity with children is acceptable. It fuels pedophiles' fantasies which constitutes the motivating force behind their sexually deviant behaviour.

Our courts must send the message that the existence of these images which degrade and dehumanize little children, who are not appropriate sexual partners, will not be tolerated.

[15] A similar position was taken in *R. v. Fisher*, [2007] N.B.J. No. 129 at paragraph 16:

Some may argue that dealing sharply with those who only possess child pornography does not deal with

those who produce and distribute it. I disagree. The possession of such material has implicit in it the condoning of its production and distribution. If there were not end consumers of pornographic material involving children, there would be no purpose in its production. Sentences should be of sufficient deterrence to make the possession of this material not worth the risk. Given today's technology, although it may be much easier to access such pornography on the Internet, the risk of discovery is greater as well. Accessing this material leaves a trail that, as is the case here, can be retraced to its source. The presumed anonymity of these chat rooms and pornography sites is false. The police are now equipped and trained and motivated to follow these trails. People will be caught. Only if the result of being apprehended is sufficiently unpalatable will the end market be addressed and the reason for producing such material with its attendant irreparable harm done to children be removed.

[16] I have concluded that denunciation, general deterrence and specific deterrence are the primary considerations in sentencing V.H.

Decision:

[17] The Court of Appeal in *R. v. Missions* (2005), 232 N.S.R. (2d) 329 considered and adopted the analysis in *R. v. Oliver*, [2002] E.W.J. No. 5441 where the English Court of Appeal categorized levels of child pornography as follows (at paragraph 10):

As to the nature of the material, it will usually be desirable for sentencers to view for themselves the images involved, unless there is an agreed description of what those images depict... [W]e categorise the relevant levels as:

- (1) images depicting erotic posing with no sexual activity;
- (2) sexual activity between children, or solo masturbation by a child;
- (3) non-penetrative sexual activity between adults and children;
- (4) penetrative sexual activity between children and adults;

(5) sadism or bestiality.

[18] In that court's opinion, possession of category (1) pictures is the least serious while category (5) are the most serious.

[19] In the case at bar, I am satisfied that the pornography in the possession of V.H. falls into all five categories set out in the *Oliver* decision, including the most serious, category (5). This is a significant aggravating factor.

[20] Additional aggravating factors include the large amount of pornographic material collected over a lengthy period of time, V.H.'s minimization of his motive for collecting the prohibited digital images, his mischaracterization of himself as the victim and his inability to appreciate that the children in the digital images are the victims. I am also of the view that V.H.'s alcohol and marijuana abuse are risk factors in relation to the offence before the court.

[21] Several mitigating factors are apparent. V.H. has only one dated and unrelated criminal conviction and for all practical purposes, this is his first offence. He cooperated with the police when confronted with the search warrant. I place great weight on the fact that by pleading guilty, his daughter, T., did not have to testify against him. And to be clear, I consider V.H.'s employment record as a neutral factor – in this charge it is not a mitigating factor.

[22] I agree with Crown counsel that an appropriate sentence in this case would have been a period of incarceration of 12 months. Nevertheless, in light of his early guilty plea that spared T. from testifying against her father, I am imposing a sentence of 11 months incarceration followed by three years probation on the following terms:

1. Keep the peace and be of good behaviour and appear before the court when required to do so by the court.

2. Notify the court or the Probation Officer in advance of any change of name or address, and promptly notify the court or the Probation Officer of any change of employment or occupation.
3. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the court.
4. Report to a Probation Officer within two working days, 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 prior written permission of your Probation Officer.
6. Abide by a curfew by remaining within your place of residence between the hours of 10 p.m. and 7 a.m. daily, except with the prior written permission of your bail supervisor. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to so will be a presumptive breach of this condition.
7. Abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner.
8. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol.
9. Take such alcohol and/or drug assessment, counseling or programming as directed by your Probation Officer.

10. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts.

11. Report to the Family Violence Prevention Unit to be assessed and, attend and complete the Sexual Offender Risk Management program as directed by your Probation Officer.

12. Take such psychological assessment, counseling and programming as directed by your Probation Officer.

13. Take such other assessment, counseling and programming as directed by your Supervisor.

14. No contact directly or indirectly or communication in any way with T. and your step-daughter, A.S., except with the prior written permission of your Probation Officer and in consultation with Victim Services and Family and Children's Services.

15. Provide your Probation Officer with consent to release information with regard to your participation in any programming, counseling, employment or educational activities that you have been directed to do pursuant to this order.

16. No contact direct or indirect with persons under the age of 18 years except with the prior written permission of the Probation Officer, or while in the company of persons previously approved in writing by your probation officer.

17. You are not to possess any computer, computer software or computer peripherals such as a cell phone or any other devices capable of

downloading pictures from the Internet. You will not acquire or maintain any Internet or e-mail account.

[23] In addition, I am making the following orders:

18. Pursuant to section 490.012, V.H. will comply with the *Sex Offender Information Registration Act*. The order will be in Form 52 and require compliance for a period of 10 years.

19. Pursuant to section 161(1), V.H. is prohibited from:

- (a) attending a public park or public swimming area where persons under the age of fourteen (14) years are present or can reasonably be expected to be present, or a daycare centre, school ground, play ground or community centre;
- (b) he is prohibited from seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity that involved being in a position of trust or authority towards persons under the age of fourteen (14) years;
- (c) he is prohibited from using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of fourteen (14) years for a period of 10 years.

[24] Pursuant to section 487.051, I make an order in Form 5.03 authorizing the taking from V.H. such samples of bodily substances for the purpose of forensic DNA analysis.

[25] Pursuant to section 165.2(1), the following seized items shall be forfeited to the Crown: the laptop computer seized containing the digital pornographic images and all of the compact discs containing digital pornographic images.

[26] Finally, I was advised that several firearms were located and seized by the RCMP when they exercised the search warrant in V.H.'s home. On consent, there will be an order that these firearms will be forfeited and dealt with in the discretion of the police unless V.H. can make arrangements to transfer them to a person entitled in law to receive them within 60 days from March 6, 2008.

Lilles T.C.J.