

Citation: *R. v. Visser*, 2003 YKTC 103

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03-06119
03-06120A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

Regina

v.

Delmer Free Visser

Appearances:

Michael Cozens

Samantha Wellman

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] LILLES C.J.T.C. (Oral): Mr. Visser has pled to guilty to 14 offences, of which two are contraventions of the Yukon *Motor Vehicles Act*, R.S.Y. 2002, c. 153. The rest are *Criminal Code* offences.

[2] The circumstances of these offences are as follows. On October 23, 2001, Mr. Visser was convicted of the offences of resist arrest, s. 129(a), and mischief, s. 430(4), arising out of Watson Lake, for which he received a period of incarceration of 45 days plus 60 days consecutive, followed by one year of probation. The probation order came into effect upon Mr. Visser's release from custody on January 4th, 2002.

[3] Clause "d" of the probation order required Mr. Visser to:

Report immediately upon your release from the Whitehorse Correctional Centre to a Probation Officer and thereafter as and when directed by the Probation Officer.

Mr. Visser was directed by the probation officer, Duncan Netzel, to report to him twice a week, once in person and once by telephone. As of August 6th, 2002, Mr. Visser had not reported as directed since July 18th, 2002.

[4] Clause "f" of the probation order required Mr. Visser to:

Make restitution to the Clerk of the Court in trust for Kimberly Dawn Jamieson in the amount of \$3,000.00 to be paid within 6 months of the Probation Order coming into effect.

As of July 9th, 2002, there had been no payments made towards the restitution by Mr. Visser.

[5] An endorsed warrant was issued on August 12th, 2002 for Mr. Visser's arrest. He was arrested on the warrant on January 26th, 2003, and issued a Promise to Appear for February 26th, 2003. He appeared on that date and the matter was adjourned to March the 22nd, 2003. Mr. Visser was represented by duty counsel, on that appearance, acting as his agent, but a direction was issued by the Court that he appear in court on April the 9th, 2003, or alternatively have an agent appear with instructions. On April 9th, 2003, Mr. Visser did not attend court as required, either personally or by agent.

[6] On July 11, 2003, R.C.M.P. Officer Constable Wallingham was on the Alaska Highway near Burwash Landing. The officer observed a vehicle driving at a speed of 126 kilometres per hour in a 90 kilometre per hour zone. The vehicle was pulled over and the driver identified himself as a Benjamin Clark and provided a birthdate and a

driver's licence number. The R.C.M.P. officer verified this information with the Motor Vehicles Branch and issued a speeding ticket to the driver in the name of Benjamin Clark. Mr. Clark later contacted the R.C.M.P. and advised that he had not been driving the vehicle on July 11th, 2003, as he was out of the Yukon, but that he had been advised by his friend, Mr. Visser, that he had been driving and had given Mr. Clark's particulars to the R.C.M.P. When approached by the R.C.M.P., Mr. Visser acknowledged that he had in fact been driving the vehicle on July 11th, 2003, and he acknowledged that he had provided the R.C.M.P. with Mr. Clark's name. A motor vehicle check for Mr. Visser provided information that he was disqualified from driving at the time pursuant to s. 231(1.1) of the *Motor Vehicles Act*.

[7] On July 26th, 2003, the R.C.M.P. received reports from two civilians of a possible impaired driver. A description of the vehicle was provided to the R.C.M.P. Constable Bell observed a vehicle matching the description and pulled it over in front of the Westmark Klondike Inn. The driver, identified as Mr. Visser, displayed symptoms of impairment. Constable Bell suspected that Mr. Visser was impaired by alcohol and read Mr. Visser the demand to provide a sample of his breath into a roadside screening device. Mr. Visser refused to comply with the demand and did not provide a breath sample. A motor vehicles check on Mr. Visser provided information that he was disqualified from driving at that time pursuant to s. 231(1.1) of the *Motor Vehicles Act*.

[8] On September 27th, 2003, the R.C.M.P. were attending to a residence on Rainbow Drive in the Crestview area of Whitehorse in response to complaints of a loud party and vehicles racing on the street. A green van was observed by the R.C.M.P. officers passing them and picking up individuals from the party before heading towards the Alaska Highway. The R.C.M.P. officers left Rainbow Drive and

travelled southbound on the Alaska Highway, encountering the van. The officers were unable to read the licence plate properly and pulled the vehicle over at 4:17 a.m. The driver identified himself as Benjamin Clark and provided a birthdate and a mother's maiden name to the R.C.M.P. This information was confirmed as being consistent with a Benjamin Clark. The officer detected an odour of liquor on the driver's breath and read him the demand to provide a sample of his breath into the roadside screening device. The driver provided a sample and the RSD indicated a "fail". The driver was arrested for impaired driving and transported to the R.C.M.P. detachment. Once at the detachment, the driver fled from the R.C.M.P. on foot. He was apprehended in the downtown area after a foot chase. A check of the R.C.M.P. detachment photo-booking system indicated that the driver was not Benjamin Clark. When confronted with this information, the driver identified himself as Delmer Visser. Mr. Visser subsequently provided breath samples of 100 and 90 milligrams percent. A motor vehicles' check on Mr. Visser provided information that he was disqualified from driving at the time pursuant to s. 231(1.1) of the *Motor Vehicles Act*.

[9] At the time of these offences, Mr. Visser was on a recognizance issued July 29th, 2003. Clause 3 of the recognizance required in part that Mr. Visser:

Abstain absolutely from the consumption, purchase and/or possession of alcohol....

[10] Clause 4 required Mr. Visser:

Not to leave the Burwash or Destruction Bay area without advance written permission of the Bail Supervisor.

The bail supervisor, Shayne King, had not given Mr. Visser permission to leave the Burwash or Destruction Bay area on September 23, 2003.

[11] Clause 5 required Mr. Visser to:

Abide by a curfew between the hours of 9:00 p.m. and 6:00 a.m. unless given advance written permission of (sic) the bail Supervisor.

Mr. Visser did not have the permission of his bail supervisor to be out at 4:17 a.m. on the morning of September 27th, 2003.

[12] Mr. Visser is a young adult of First Nations culture, 27 years of age, who comes before the court with 25 previous convictions, of which 20 are adult convictions. They include assault, uttering threats, drinking and driving offences, theft, mischief, and numerous process offences indicating an inability to abide by court orders. Mr. Visser's criminal history is consistent with a serious substance abuse problem. By his own admission, he started drinking at age 14. He now recognizes the need to deal with his addictions and while in the correctional centre, he completed the Substance Abuse Management program, the SAM program.

[13] A strong letter of support was received from Nettassia Southwick, a counsellor for the Kluane First Nation. It is evident from the following extracts that Mr. Visser has considerable potential, unfortunately unrealized as a result of his addictions:

I consider him to be a good friend of my family and trust him to care for my son, which is not something I trust to many individuals. During my employment as an on-staff counsellor and mediator for Kluane First Nation I have had an opportunity to become intensely familiar with the effects of alcohol on the lives of individuals who abused this particular substance. It is my opinion that Delmer has a problem with substance abuse and it is the abuse of drugs that leads to his reckless behaviour. It is my professional judgment that if Delmer received assistance in overcoming his reliance upon substances his unhealthy behaviours would resolve as well. I have seen first hand what a caring individual Delmer is. While he was in Burwash he was not only a productive member of our community but contributed to the betterment of Burwash by initiating activities like twice weekly baseball games

which were quite a success. In his position as Youth employment director Delmer showed much initiative and proved to be quite a resource. All of the youth under his direction did quite well.

[14] Ms. Southwick expresses a concern that a lengthy period of incarceration could very well be counterproductive to Mr. Visser's rehabilitation. As Mr. Visser is a relatively young adult, the court must be cognizant of the possible negative impact of a lengthy custodial disposition.

[15] Mr. Visser is obviously not without ability. He has completed Grade 12 and one year of college. He has taken courses in psychology and wants to work with young people. Ms. Southwick's report of his summer job in Burwash, indicates that he can be effective working with young people in his community, but first he must address his own issues, foremost of these being his addictions.

[16] Mr. Visser has pled guilty to 14 new charges committed during the period from July 2002 to September 2003. Of these offences, seven are breaches of court orders such as failing to attend court or failure to report to a probation officer. In my opinion, these charges result from and reflect Mr. Visser's drug and alcohol addiction. Two charges involve giving the police a false name when stopped. In July and September of 2003, he incurred drinking and driving offences. It goes without saying that these are serious matters, and in light of similar convictions in 1999 and 2000, it would normally attract a minimum punishment of 90 days in custody. The blood alcohol readings in the s. 253 offence were barely over the limit, .09 and .10 milligrams percent. In neither case was there any evidence of erratic driving. Mr. Visser also has three charges of driving while disqualified pursuant to s. 237 of the *Motor Vehicles Act*. His driving abstract shows two previous convictions for the same offences in 2000. The *Motor Vehicles Act* provides for a minimum punishment of six

months incarceration for third and subsequent convictions when they occur within a five-year period, and a notice is filed. However, I am not bound by these minimums as I found the notice for greater punishment served on Mr. Visser to be inadequate and inoperative.

[17] Without minimizing the seriousness of the charges before the court, I note that none involve personal injury, most are regulatory in nature, although the two drinking and driving offences had the potential to be much more serious. I mentioned earlier, however, the readings in the s. 253 matter were barely over the limit.

[18] It is important to send a message to Mr. Visser and to the community that conduct such as exhibited by Mr. Visser will not be tolerated. For a period of just over a year, he was out of control, totally disregarding the rules that society has considered to be essential for an orderly and peaceful community.

[19] I am concerned in this case that the sentence of incarceration that I impose should not be so lengthy as to be counterproductive. As I mentioned earlier, Mr. Visser is only 27 years of age and has the potential and the ability to be a contributing member of his community. The sentence I impose must allow for rehabilitation. It must not discourage him from changing his lifestyle. In court he expressed a sincere desire to change.

[20] I note, as well, that his longest previous sentence was in 2001, when he received a total sentence of four months custody and one year probation for several process offences and a mischief charge.

[21] I heard representations from Crown counsel for sentences in the 18 to 24

month range. A sentence in this range is justified when considering each of the offences separately, but s. 718.2(c) of the *Criminal Code* also requires me to take a step back and to consider the overall impact of a sentence on this offender to ensure that the combined sentence for all the offences is not too harsh or too long.

[22] This sentencing is somewhat complicated in that it involves a large number of charges, 14, and the over 70 days in pre-trial custody must be accounted for, for which I give Mr. Visser the usual two-for-one credit, for a total of 150 days or five months pre-trial custody credit. One might find a computer or at least a calculator helpful. I will, however, try to make it as simple as possible for Mr. Visser and counsel to follow the sentencing.

[23] First of all, I will say that for all the offences in total there will be a notional cumulative total sentence of 23 months incarceration. I will apply the time served to the first four offences as follows: July 4, 2002, s. 733.1(1) *Criminal Code*, one day in jail deemed served, endorse credit for 30 days pre-trial custody. July 18, 2002, s. 733.1(1) *Criminal Code*, one day in jail deemed served, endorse credit for 30 days consecutive. April 9, 2003, s. 145(2)(b) *Criminal Code*, one day in jail deemed served, endorse Information with credit for 30 days consecutive. July 11, 2003, s. 403(a) *Criminal Code*, one day jail, endorse Information, credit for 60 days incarceration consecutive. So with respect to those four charges, Mr. Visser, I have applied the pre-trial credits totaling five months. You will not have to serve any additional time for those offences.

[24] Now, additional and actual jail terms are imposed for the following offences: July 11, 2003, s. 237 *Motor Vehicles Act*, driving while disqualified, 60 days incarceration. July 26, 2003, s. 254(5) *Criminal Code*, 90 days incarceration

consecutive. I will just pause here, Mr. Visser, and indicate that the 90 days is a minimum; I cannot impose any less than that. If I can go back to the previous sentence, the s. 237 of the *Motor Vehicles Act*, I have imposed 60 days incarceration in that particular case, although, had the notice served been valid, I would have been bound to impose six months because that is what the *Motor Vehicles Act* provides.

[25] I have dealt with the July 11, 2003, the s. 237 charge. I have dealt with the July 26, 2003 charge, that is the s. 254(5) charge. For the July 26, 2003 charge, a further s. 237 *Motor Vehicles Act* charge, that is driving while disqualified, I impose a period of incarceration of 90 days consecutive. With respect to September 27, 2003, the s. 253(b) charge, it is a *Criminal Code* charge for impaired driving, over .08, 90 days incarceration consecutive. The September 27, 2003, the s. 237 *Motor Vehicles Act* driving while intoxicated, 90 days consecutive.

[26] These actual jail terms, Mr. Visser, total 14 months actual incarceration. You are familiar with the process and the opportunity to reduce your sentence by at least a third, by being of good behaviour, so you can do those calculations for yourself.

[27] Now, the following charges remain to be considered. I will deal with them separately. September 27, 2003, there is the s. 145(1)(a) *Criminal Code* and the three s. 145(3) *Criminal Code* offences for a total of four offences. I am going to deal with those by imposing 60 days incarceration on each concurrent to each other, but consecutive to all the rest. Also, the September 27, 2003, the s. 403 charge, 60 days consecutive. So for these two charges, there is a total of 120 days or a further four months incarceration.

[28] However, I am prepared to allow Mr. Visser to serve the sentences on these

last offences that I have just referred to, conditionally, in the community, for the following reasons:

- 1) None of the offences before the court today are personal violence offences.
- 2) Mr. Visser has the support of his family, his stepmother is here today, and I am advised that they visit him regularly at the WCC.
- 3) I was moved by Mr. Visser's motivation and determination to deal with his substance abuse problem. He understands that he, at this point, cannot drink at all and certainly the orders that I am going to make will preclude him from so doing.
- 4) I am also impressed by the fact that while in WCC, he successfully completed the SAM program and has enrolled in additional programming.
- 5) I am concerned about the cumulative impact of the actual custody if he served all of the sentences in jail.

[29] Looking at all of the circumstances before me, I am satisfied that allowing him to serve the last four months of his sentence conditionally in the community will not endanger the safety of the community.

[30] THE ACCUSED: That will be in the bush on Brooks Brook, right, not in Burwash?

[31] THE COURT: This will be wherever you and your probation officer or supervisor consider to be appropriate.

[32] THE ACCUSED: That will be (indiscernible).

[33] THE COURT: Well, that is something you will work out with your supervisor and your family members.

[34] So this conditional sentence order, you will see that when you go to sign this order that there are a number of statutory terms prescribed by the *Criminal Code*; I cannot alter those. The terms that I am imposing are the following:

- a) That you are to reside at such place as approved in advance by your conditional sentence supervisor.
- b) That you are to abstain absolutely from the possession, consumption and purchase of alcohol or non-prescription drugs. In this regard, you are to submit to random breath or urine sampling as directed by your supervisor or as demanded by a peace officer.
- c) That you are not to attend at any licensed bar or tavern or any other premise whose primary business is the sale of alcoholic beverages.
- d) That you are to participate and complete such substance abuse programs as directed by your supervisor.
- e) That you are to use your best efforts to obtain and maintain employment, except to the extent that you are involved in upgrading for your formal education or are otherwise excused by your supervisor.
- f) That you are to abide by a curfew by remaining within your residence as follows:
 - i. for the first 30 days of your conditional sentence, you are to remain within your residence between the hours of 6:00 p.m. and 6:00 a.m.;
 - ii. for the second 30 days, between the hours of 7:00 p.m. and 6:00 a.m.;

- iii. for the next 30 days, 8:00 p.m. until 6:00 a.m.; and,
- iv. for the balance of your term, the final 30 days, 9:00 p.m. until 6:00 a.m.

Your supervisor may make exceptions to your curfew in writing and in advance, where you are in the direct company of a responsible adult person approved by the supervisor or for employment, education, family or cultural reasons. At reasonable hours during your curfew you are to answer the telephone and the door to your residence; failure to do so will be a presumptive breach of your conditional sentence.

- g) You are to disclose all amounts of sources of income to your supervisor and make reasonable payments towards the restitution order in the amount of \$3,000, as and when directed by your supervisor, in favour of Kimberly Dawn Jamieson, such payments to be made in trust to the Territorial Court.

[35] The conditional sentence will be followed by 12 months probation. Madam Clerk, these will attach to the two drinking and driving offences.

[36] The compulsory statutory conditions of the probation order shall apply. In addition:

- a) You will report to a probation officer when and in a manner directed by your probation officer.
- b) You are to abstain absolutely from the possession, consumption or purchase of alcohol and non-prescription drugs. Should a peace officer have a reasonable suspicion to believe that you are in breach of this provision, you will comply with a demand for a breath, urine or blood sample for the purposes of analysis.

- c) You are not to attend any licensed bar, tavern or any other premise whose purpose is the sale of alcohol.
- d) You are to participate and complete such substance abuse programming as directed by your probation officer.
- e) You are to disclose all amounts and sources of income to your probation officer and make reasonable payments towards the restitution order in the amount of \$3,000, as directed by your supervisor, in favour of Kimberly Dawn Jamieson, such payments to be made in trust to the Territorial Court.

[37] I direct that Mr. Visser return to this court for a review of his performance during the first month of his conditional sentence and a time directed by his supervisor.

[38] Pursuant to s. 259 of the *Criminal Code*, Mr. Visser is prohibited from operating a motor vehicle on any road, street or highway anywhere in Canada for a period of three years.

[39] Mr. Visser, the Yukon Driver Control Board may require a longer suspension. I can tell you now that if you want to get your licence back, you need to demonstrate to them that you have been actively engaged in alcohol counselling and programming, and that you have abstained from consuming alcohol for a lengthy period of time.

[40] Mr. Cozens, as you can see, I have incorporated restitution into the conditional sentence and probation orders. In addition, I am making a free-standing restitution order pursuant to s. 538(1) of the *Criminal Code*. There will be restitution order in the amount of \$3,000 in favour of Kimberly Dawn Jamieson, which is identified in

Information number 01-10046A.

[41] Are there any questions from counsel?

[42] MS. WELLMAN: The victim fine surcharge?

[43] THE COURT: The victim fine surcharge will be waived in the circumstances.

[44] Anything in the terms, Ms. Wellman, that you think will be problematic for your client? And, Crown, is there anything that should be in either of those orders that I have not included.

[45] MR. COZENS: If I could just have a moment. No, those are satisfactory. The only thing I had noticed when Your Honour started to read the reasons for decision, I think we had heard that you initially said two convictions under the *Motor Vehicles Act* and you later said three. I just wanted to make sure that there is three as well.

[46] THE COURT: Sorry, there are three convictions. Thank you.

[47] MS. WELLMAN: I have nothing to add.

[48] MR. COZENS: There will be a stay of proceedings on all remaining *Criminal Code* charges.

[49] THE COURT: Thank you.

[50] Mr. Visser, you heard the submissions by the Crown.

[51] THE ACCUSED: Yes.

[52] THE COURT: You recognize that there is an element here of giving you a break, and that does not mean it is going to be easy, because the conditional sentence -- are you familiar with a conditional sentence?

[53] THE ACCUSED: (Indiscernible).

[54] THE COURT: There will be curfew checks, there will probably be random urine tests. If you are ten minutes late on your curfew, they do a check, you are in jail; that is the way a conditional sentence works.

[55] A conditional sentence also gives you an opportunity to follow up on what you told me last day. All of these terms support your plan. If you cannot do it now, I am afraid --

[56] THE ACCUSED: I want to do it, and it is just by myself, it is not for anybody else.

[57] THE COURT: Absolutely, this is your opportunity. You have got some strong supports, you can do this, learn from it, become a better

person and get on with the rest of your life. Good luck to you, Sir.

LILLES C.J.T.C.