

Citation: *R. v. Witt*, 2010 YKTC 63

Date: 20100527
Docket: 08-00743
Registry: Whitehorse
Heard: Teslin

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

DIETER WITT

Appearances:
Ludovic Gouaillier
Melissa Atkinson

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Dieter Witt is before me having entered a plea of guilty to a single count of forcible confinement. The facts that have been relayed to me, however, make reference to two separate incidents. The two incidents came to the attention of the police as a result of a call on February 4, 2009. They attended at the residence of the complainant, Ms. Aster, and learned that there had been an altercation between Ms. Aster and Mr. Witt in which both had been drinking. It appears Ms. Aster attempted to call her son on the telephone and was prevented from doing so. Beer was poured over her head and she was grabbed by the throat by Mr. Witt.

[2] During the course of the investigation with respect to the circumstances of

February 4, 2009, Ms. Aster relayed to the police details of an earlier incident on January 16, 2009. On that evening, Ms. Aster and Mr. Witt had been drinking with two other individuals. An altercation between the two arose. The two other individuals left the residence; I am assuming that was so they would not be involved with what was going on. The altercation continued between Mr. Witt and Ms. Aster. I am advised that she attempted to lock herself in the bathroom but Mr. Witt flung open the door. He then -- and I should say, on the facts there was some dispute as to whether this next part actually happened in the bathroom or the living room. For the purposes of determining the appropriate sentence, Mr. Witt, it really does not matter, the specific location, so whether it was in the bathroom or in the living room is not a particular concern to me. What is a concern is the fact that Mr. Witt bound Ms. Aster's hands and feet with duct tape, and then proceeded to gag her with duct tape, as well. She remained in this condition for a number of minutes, somewhere in the 10 to 15 minute range, I am advised, although that is a little unclear as well, but there was some period of time that she remained in this condition, although Mr. Witt checked on her periodically.

[3] I am advised that the tape was removed with a sharp object. This, in turn, resulted in severe cuts to Ms. Aster's forearm and neck. The forearm injury in particular has resulted in scarring, which is still visible almost some 16 or so months later. Mr. Witt did tape up the wound on the arm, but he would not then let Ms. Aster leave or use the telephone for the remainder of the day. The incident itself, I understand, occurred in the early morning hours, around 2:00 a.m. The following evening Mr. Witt did approach Ms. Aster and apologize to her.

[4] Mr. Witt comes before the Court with a prior criminal record. On the one hand, it

is a relatively dated record. On the other hand, it does include related offences, specifically, three convictions for common assault. To Mr. Witt's credit, he was forthright with the Probation Officer who prepared the pre-sentence report in advising that those three convictions all arose within a spousal context on two separate women, neither of whom is the complainant with respect to the charge that is before me today. I believe, in addition, that the convictions for assault that are spousal in nature occurred, two in 1990 and one in 1994. Again, on the one hand, I have related behaviour which is extremely concerning; on the other hand there is a significant gap between that behaviour and the offences that bring Mr. Witt before the Court today.

[5] Mr. Witt is now 56 years of age. He has been a resident of Teslin for the past three years and a resident of the Yukon for the past seven. There is a great deal of information in the pre-sentence report before me with respect to his background and circumstances. For all intents and purposes his background appears to have included a stable upbringing, though indications are that his family is not a particularly close one. He completed Grade 12 with an additional two years in college with some indication that there have been additional courses taken since then. While he is unemployed at the moment, he appears to have some history of stable employment and he has some future plans in terms of attempting to start a business that would provide some year-round guiding with respect to outdoor activities, more specifically, fishing, and he does have some experience as a fishing guide here in the Teslin area. I am also advised by some of the Elders that he has used his efforts fishing to provide fish and some support to the community.

[6] There is also some indication of a couple of problem areas for Mr. Witt, which

cause me concern. Most notably he has a history of struggling with alcohol. Unlike most people I see, it was not a problem that developed early in life but one that appears to have developed later in life in the context of the breakdown of a fairly long-term marital relationship. So it was not until his mid to late 30s that alcohol became a significant problem for him. It is a problem which he has made some efforts to address, having attended and completed the 28-day ADS program in December of 2007. He did acquire an AA sponsor around that time and has continued to maintain contact with that sponsor. He, however, continues to struggle with alcohol and the role that it plays in his life.

[7] Of particular concern to me is the fact that there are differing reports in the pre-sentence report with respect to the degree to which he may still be using. To his credit, he has been honest with the fact that there have been slips in his using alcohol over the past almost year and a half while he has been on conditions. There have not been charges that have flowed from that. So it is important that I recognize that he is relatively forthright about that. On the other hand, there are concerns when I consider the fact that Mr. Witt reports his last slip as having been three months ago, but the report of a friend of his indicates that in fact he was under the influence a few days before the report. So I do have some concerns about the degree to which alcohol continues to be a problem for Mr. Witt, although I do accept that he recognizes that it is a problem and that he is making efforts to address it.

[8] I should note that the issue of alcohol is of particular importance because apparently Mr. Witt, while under the influence, is a completely different individual than he otherwise is. Reports are that when he is sober and not using he is a contributing

member of this community, but I am advised that there is a distinct shift in his personality when he is under the influence. That is a cause of concern for me when I consider the issue of public safety, and hopefully, Mr. Witt, it is a significant cause for concern for you as well. It is not just a question of your using and making stupid choices; it is a question of your becoming, in effect, almost a different person that may do things that you would not consider doing when you are sober.

[9] The other area of significant concern for me is the fact that this is not what one could describe as an isolated or out-of-character incident when one considers the fact that Mr. Witt has a related criminal history for violence within a spousal context, although again noting that there is a somewhat significant gap between his earlier convictions and the charges that bring him before the Court today. But when I consider the nature of this offence which, quite frankly, is a serious and very disturbing offence, what causes me particular concern is the impact on the victim in this particular case.

[10] I do have a victim impact statement, portions of which are not relevant or appropriate for these proceedings, and I have disregarded those, but it does clearly indicate to me the sense of fear and helplessness that Ms. Aster felt during this incident, and also the impact that it has had on her since.

[11] There is some issue raised in the pre-sentence report, and on the record here today, about the impact that some of Ms. Aster's behaviour may well have had on some of these incidents and how things unfolded. The only thing I would say, Mr. Witt, is whatever she might have done, the choice that you made to bind her in the way that you did is grossly inappropriate and disturbing, and not warranted, by any stretch of the

imagination. I am very concerned by the statement in the pre-sentence report in which the Probation Officer asked you whether you believed what you had done was wrong, and your response was that you did not know what else you could have done. There are any number of things you could have done, starting with picking up the phone and calling the police, which might have been, quite frankly, the easiest thing to do. The second is the one you have already identified of leaving. But the fact is you did not choose any of those options. You instead chose one which, in my view, is profoundly disturbing and also has had a lasting impact on the victim. So I have to weigh all of the factors before me to consider what an appropriate resolution is when I consider both the positives and the negatives in this particular case.

[12] It may well be appropriate now to detail those a little more before passing sentence. On the aggravating side we do have, as I said, an extremely serious offence. The facts encompass two incidents of violence; there was prolonged behaviour; there were lasting injuries, and, of course, it was spousal in nature, which is a statutorily aggravating factor that I am required to consider, and lastly, the related criminal record.

[13] On the mitigating side, we do have the guilty plea which has resulted, I accept, in Ms. Aster not having to testify in circumstances that likely would have been difficult. I also accept that Mr. Witt does have some degree of insight and knowledge about, in particular, alcohol and the negative impact that that has had on his life. He has, by and large, performed well while on release conditions. There have not been any breach charges even though there have been some admissions of drinking. He has been honest about those but there have been no charges, and he has otherwise performed

well. There have been no substantive incidents, no breaches of the no-contact order, things that would have been of particular concern to me. So he has done fairly well on his release conditions.

[14] I also consider as a significant mitigating factor the fact that this matter has been adjourned and delayed a significant number of times, which then put Mr. Witt in the position of being on conditions on a pre-trial basis much longer than would have been normal and, as has been conceded by the Crown, none of those adjournments of previous trial dates can be laid at Mr. Witt's door. So I do consider that as a factor in mitigation, in particular noting that the original conditions were quite restrictive, and even though there were some amendments made over time to reduce some of those restrictions, he did remain under some significant conditions for an extended period of time.

[15] So that being said, the question for me is what is the appropriate sentence? Crown is suggesting a jail sentence in the range of six to nine months, to be followed by a probationary term of nine to twelve months. Defence did not take issue with the range that was being proposed in light of the nature of the offence, but is suggesting that Mr. Witt is an appropriate candidate to be allowed to serve his sentence conditionally within the community. In terms of considering whether or not a conditional sentence is appropriate, I am mindful of the pre-requisites for a conditional sentence set out in the *Code*, namely that the sentence has to be one which falls under two years, and this one does, in this case. There cannot be any mandatory minimums, and there are not, in this case. I also need to be satisfied that to allow Mr. Witt to serve his sentence conditionally within the community would not endanger the community and

that it would also be consistent with the fundamental purposes and principles of sentencing set out in the *Criminal Code*.

[16] When I balance all of the factors that are before me today, on balance, I have reached the conclusion that in this particular case a conditional sentence would be appropriate. I reached that position, Mr. Witt, somewhat ironically, because of the fact that you have been on conditions for such a long period of time and that there have not been any problems while you have been under those. So while the delay has been very frustrating for you, at the end of the day there is an ultimate benefit, because I believe if we had been doing this sentencing closer to the offence I would be hard-pressed to reach the conclusion that a conditional sentence is appropriate. But you do now have that demonstrated period of time, which satisfies me that you are capable of following conditions and that if you are placed on conditions within the community, you will not endanger the community. The other thing that I factored in, quite frankly, is simply the delay. This is a significant delay and I think that it is appropriate that there be some recompense for the fact that it has taken so long for us to get to this point.

[17] In terms of the length of that sentence, however, because it is conditional, I would place it at the higher end of the range. So you do get the benefit of serving it within the community, provided you comply with all of the conditions, but it will be a nine-month sentence. If I required you to serve it in custody I likely would have considered a shorter term, but in this particular case, I am satisfied that a nine-month conditional sentence is appropriate. I am going to have that followed by a nine-month probationary term. I would have gone longer in the probationary term if you were in custody, actual custody, but in this case what you are getting is a little bit longer of a jail

term in the community and a little bit shorter probation order.

[18] The terms and conditions of the conditional sentence order are going to be as follows:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;
3. That you report to a Supervisor immediately and thereafter when required by the Supervisor and in the manner directed by the Supervisor;

So you will want to start that reporting relationship right now.

4. That you remain within the Yukon Territory unless you have written permission from your Supervisor and notify the Supervisor in advance of any change of name or address, and promptly notify the Supervisor of any change of employment or occupation;
5. That you reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;
6. That you abstain absolutely from the possession or consumption of alcohol;
7. That you not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
8. That you take such alcohol assessment, counselling or programming as directed by your Supervisor;
9. That you take such other assessment, counselling and programming including, but not limited to, spousal abuse programming, as and when

- directed by your Supervisor;
10. That you have no contact, directly or indirectly, or communication in any way with Doreen Aster except with the prior written permission of your Supervisor;
 11. That you make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts;
 12. That you provide your Supervisor with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this conditional sentence order.

[19] That leaves me the issue of house arrest curfew. Now, Ms. Atkinson, you did not make any submissions on that. The normal starting point is that it would be a house arrest situation with the ability of the Supervisor to make exceptions as and where necessary, in writing. Do you have any submissions in particular that you want to make on that issue?

[20] MS. ATKINSON: Just a moment. Yes, I have just spoken to him about that, and he's built a working relationship with Mr. King and says that he can, if need be, when and if he starts up his business, communicate that with him and have written permission and work out those terms and be able to work within those parameters.

[21] THE COURT: Okay. Is there an issue with written permission requirements, given the distance?

[22] MR. KING: No, there's no issue. It's -- it will have to be -- we're going to have to -- it'll be a work in progress that way because Mr. Witt, well right now, resides across the lake in a wall tent, but his intention, once he starts his business, is living on his boat, so that could be any number of places at any time.

[23] THE COURT: So even the policing is going to be somewhat difficult, is it?

[24] MR. KING: Yes.

[25] THE COURT: Okay. Is it easier all around, particularly for you from an enforcement perspective, if I do a straight restrictive curfew as opposed to a house arrest kind of situation?

[26] MR. KING: Yes.

[27] THE COURT: I would not normally do that. The law does say that the starting point is house arrest except for exceptional circumstances. Given that we are in a community where it would make enforcement somewhat easier to have defined times, and also, given the fact again that there has been significant delay with respect to this matter; I am satisfied that that is sufficiently exceptional to warrant a curfew as opposed to a house arrest, as I believe that will be easier for everyone to manage. But because it is a conditional sentence and a jail sentence, it is going to be a restrictive curfew, Mr. Witt.

13. That you be in your place of residence between the hours of 7:00 p.m. and 7:00 a.m. except with the prior written permission of your Supervisor.

So make sure you get permission first if there is some reason you need to be out outside of those hours, and it would also be in your best interests to make sure, if you are moving from place to place, there is a reside as directed but you want to make sure that everybody is aware of where you are going to be so that you are not looking at a conditional sentence breach because you are on your boat and they think you are in the wall tent. Okay?

[28] Any other issues or concerns as it relates to the conditional sentence conditions? No? Okay.

[29] The probationary term is going to be for a period of nine months, as I said. It is going to be on the following terms and conditions. Again, the statutory terms that I am required to include, Mr. Witt, are:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;
3. That you notify the Probation Officer in advance of any change of name or address and promptly notify the Probation Officer of any change of employment or occupation;

The primary goal that I have with respect to the probation order is programming and treatment, so there will not be a reside condition. There will be a condition:

4. That you report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the Probation Officer;

There will not be a curfew clause. I am not going to include the abstain clause on the probation order, but I am going to include a condition:

5. That you take such alcohol assessment, counselling and programming as directed by your Probation Officer;
6. That you take such other assessment, counselling and programming, including, but not limited to, spousal abuse programming as and when directed by your Probation Officer;
7. That you provide your Probation Officer with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this order;
8. That you have no contact, directly or indirectly, or communication in any way with Doreen Aster except with the prior written permission of your Probation Officer.

So other than the no contact, it is primarily just counselling conditions and reporting conditions to assist you in addressing some of the issues that have brought you here.

[30] Any issues or concerns on the probation conditions?

[31] MR. GOUAILLIER: No.

[32] THE COURT: He is not employed at the moment. I will waive the victim fine surcharges.

[33] The offence that is before me is what we call a primary designated offence for the DNA provisions of the *Code*. What that means is that I am required to make the

order, unless there are exceptional circumstances that persuade me otherwise, which there are not in this case, so I order that you provide such samples of your blood as are necessary for DNA testing and banking.

[34] It is a discretionary offence for a firearms prohibition. I believe in this particular case, I am of the view that it would be appropriate that there be at least a period of time where Mr. Witt does not have access to firearms. So what I am going to do is I will add a condition to the conditional sentence order that for the period of the time of the conditional sentence order you are not to have in your possession any firearms or ammunition. Is that a potential business issue if he gets the business up and running?

[35] THE ACCUSED: Not really, no.

[36] THE COURT: So it will be for the period of the conditional sentence but I will not do a separate, lengthy prohibition order. The remaining counts?

[37] MR. GOUAILLIER: There will be a stay of proceedings, Your Honour.

[38] THE COURT: Thank you. Mr. Witt, there is going to be two orders that you need to sign. You can start on your reporting with your Supervisor while those are being prepared. They will then be read to you. If you have any confusion about any of the conditions, make sure you speak to your Supervisor or your counsel so that you are clear on what is expected, because a conditional sentence is a jail sentence. If you breach, you go to jail and there is potential that you would have to

serve the remainder of your sentence in jail. So you need to be aware of that, that they will be looking for strict compliance. Okay?

[39] THE ACCUSED: Okay.

RUDDY C.J.T.C.