

Citation: *R. v. Harper*, 2009 YKTC 17

Date: 20090212  
Docket: 06-00149F  
06-00149E  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: His Honour Judge Lilles

REGINA

v.

JASON DION HARPER

**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:  
Melissa Atkinson  
Nils Clarke

Counsel for Crown  
Counsel for Defence

**REASONS FOR SENTENCING**

[1] LILLES T.C.J. (Oral): This is the matter of Jason Harper. Mr. Harper has pled guilty to two charges before the Court. One, s. 151(a), that he did touch J.W., a person under the age of 14, with a part of his body, his penis, contrary to 151(a) of the *Criminal Code*, on September 24, 2005, and, two, s. 145(3), that he failed to comply with a recognizance, namely abstain absolutely from the consumption of alcohol, on December 21, 2008.

[2] Counsel have agreed that Mr. Harper has been in pre-trial custody on these matters for a total for six months. As he was in segregation for most of this time period,

he is entitled to double-credit, a credit for 12 months pre-trial custody in total.

[3] I indicated to counsel that I will be filing more detailed, written reasons for the decision I am about to pronounce. There is some urgency in giving my judgment today, as Mr. Harper's brother is in Whitehorse today and is able to provide transportation back to Pelly.

[4] With respect to the s. 151(a) charge, an appropriate sentence in all of the circumstances is six months custody. I credit him with six months of pre-trial custody. His sentence will be one day in jail, deemed served today. In addition, he will be placed on probation for a period of 24 months on terms that I will set out later.

[5] With respect to the s. 145(3) charge, an appropriate sentence in all of the circumstances is two weeks in custody, consecutive. I credit him with two weeks pre-trial custody. His sentence will be one day in jail, deemed served today.

[6] The sentences imposed are less than would be expected if the accused was not suffering from fetal alcohol spectrum disorder. The written reasons to be filed will explain more fully the application of s. 718.1, the fundamental principles of sentencing, to this accused, and why his degree of responsibility for the offences is reduced, due to his significant cognitive limitations.

[7] The terms of the two-year probation order attached to the s. 151 offence are as follows:

1. You must keep the peace and be of good behaviour.

Do not do anything that will get you in trouble with the police.

2. You must come to Court when the judge or your probation officer tells you to.
3. You must tell your probation officer if you go to live somewhere else, change your name or change jobs.
4. You must meet with your probation officer or another person named by your probation officer, in person or by telephone, when he or she tells you.

If you are going to be late or cannot make the meeting, you must telephone your probation officer and ask for another meeting time. Do you understand that?

[8] THE ACCUSED: Yeah.

[9] THE COURT:

5. You will do the best you can to:
  - (a) stay away from people who are drinking;
  - (b) not drink any alcohol, meaning beer, wine or liquor;
  - (c) stay away from the liquor store, off-sales and bars;
  - (d) meet with counsellors when your probation officer tells you to;
  - (e) find work;
  - (f) not talk to or hang out with people your probation officer says you should stay away from;
  - (g) not to be alone with females under the age of 16 or any females who are drunk;
  - (h) stay away from and not talk to J.W.

The preface to all of these conditions that I have set out is "You will do the best you can

to.”

6. You will live in your brother’s house in Pelly, and stay there unless your probation officer tells you you can live somewhere else. Your brother is the boss of that house. When he tells you what to do around the house, you will do the best you can do what he says.

For example, doing chores, cutting wood, cleaning your room and the house and coming home at night at a time he tells you to. Do you understand that?

[10] THE ACCUSED: Yeah.

[11] THE COURT:

7. It is important for your probation officer to talk to your doctor and your counsellors. You will sign a paper that will allow your doctor and counsellors to tell your probation officer how well you are doing.
8. You will attend court in Pelly Crossing on March 3, 2009, at 11:00 a.m. for a review of your performance under this probation order. You will also participate in any planning session conducted in court.

This Court respectfully requests the probation officer to invite individuals who can contribute to the planning process to attend court at this date. The planning session may include but not be limited to support and supervision for Mr. Harper in the community, job opportunities, skills and development, recreational activities and possible contributions by family members and the Pelly First Nation. Possible sources of funding to provide additional supervision each day by FASSY or the community should also be explored.

[12] Mr. Harper's counsel has asked me to impose a publication ban in relation to any information or evidence that could identify his client. His concern is that labelling him as suffering from FASD and as a sexual offender could have a negative impact, such as limiting his job opportunities or increasing the likelihood of Mr. Harper becoming a victim.

[13] The starting point in any adult proceeding is a presumption of openness. In certain situations, the disclosure of the identity of persons involved in court matters can be restricted by statute. For example, in the *Youth Criminal Justice Act* the identities of young offenders, complainants and witnesses are protected, and in the *Criminal Code* the identity of complainants and witnesses in sexual offences are also protected.

[14] There is a further judicial discretion to restrict publication, but it is linked to "prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk." See *Dagenais et al.* [2004] S.C.C. 43. Further, any such risk must be real, substantial and well-grounded in the evidence. The onus is on the applicant. It should not be a matter of speculation by the judge.

[15] In this case the evidentiary threshold has not been met.

[16] A recent case involved a female youth suffering from fetal alcohol syndrome. She was tried and sentenced as an adult. She was of aboriginal descent. She was victimized as a child. She had no previous record. The application to restrict publication was denied. See *R. v. Bird*, [2008] A.J. No. 609, Queen's Bench.

[17] In the circumstances, I decline to make the order requested and direct that the

interim order I made at the beginning of the hearing be vacated.

[18] In the circumstances, the victim fine surcharges are waived.

[19] The application for a DNA order is granted in the normal terms.

[20] Similarly, the application for a firearms prohibition will also be granted in the normal terms for a period of ten years.

[21] I indicated earlier, and I would like the record to show, that I also recommend that this matter, the firearm matter, be reconsidered upon application by Jason at some point in the future, when he has demonstrated a significant period of stability.

[22] My discretion with respect to the Sex Offender Registry is extremely limited. In the circumstances, I grant that order as well for a period of ten years.

(Discussion with counsel)

[23] THE COURT: Yes. I am going to direct, Madam Court Reporter, that although this is an interim decision that is going to be followed by a fuller, more complete decision, that a transcript of this be prepared in an expedited fashion, so that it would be available to counsel, to Jason's probation officer and for the court review in three weeks time.

[24] MS. ATKINSON: Your Honour, I just raise a rather academic question with respect to the provision "Do your best to," that list, you know, stay away from people who are drinking, not to drink alcohol. And just out of a pure question of when -- the difficulty in prosecuting matters when you have something like that is -- that raise a

reasonable excuse that, in fact, he did his best, but was found under the influence of alcohol?

[25] THE COURT: That is right. That is the whole point of this order.

[26] MS. ATKINSON: But is he able to say, you know, "I did my best, but -- and that was" --

[27] THE COURT: Well, it is going to be measured by the Court. The evidence is going to be brought to the Court, probably by the probation officer, who will then set out a course of conduct which will demonstrate that he is basically thumbing his nose at the probation officer and the requirements to do his best. So it is specifically designed so that incidental breaches will not be prosecuted. They will be, however, in the probation order and form the basis for discussion and teaching and learning for him if there are incidental and occasional slips. That is the whole intention of this order.

[28] We have all, I think, been in court time and time again with individuals with Jason's handicap. Often we see three or four or five substantive offences, not the most serious offences, but accompanying them will be another twenty process offences. If we had a more complete assessment of that individual's abilities, as we happen to have here, there probably should have been acquittals on most of those process offences. Had detailed information with respect to Jason's disability been available to the Court and to counsel, I am confident that many of the convictions on Jason's record would not be there.

[29] So I am making it very clear that in this particular case it would be inappropriate

to prosecute this individual based on incidental slips, unless it can be demonstrated that he has given up trying to abide by the order.

[30] So you are quite right with your observation, Ms. Atkinson, but that was specifically my intention in this particular case. The intention is to move the responsibility away from you, as a Crown, and away from the courts and move it to the probation officer, the community, the counsellors and the treatment people, to address these issues in a non-punitive setting.

[31] Repeated punitive interventions by the court, in this case and in the many FASD cases that we deal with, have no remedial impact due to the cognitive deficiencies associated with severe FASD.

[32] Anything further?

[33] MS. ATKINSON: Nothing further.

[34] MR. CLARKE: There's one additional charge. There's one charge.

[35] THE CLERK: Count 2.

[36] MS. ATKINSON: Crown directs a stay of proceedings.

[37] THE COURT: Thank you.

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LILLES T.C.J.