Citation: *R. v. Kuhl*, 2018 YKTC 35

Date: 20180921
Docket: 16-00606
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Ruddy

REGINA

v.

MURRAY LLOYD KUHL

Appearances:
Leo Lane — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON APPLICATION

[1] On March 13, 2018, Mr. Kuhl was sentenced by His Honour Judge Cozens to serve an intermittent sentence of 90 days in relation to a conviction for operating a motor vehicle with a blood alcohol concentration in excess of the legal limit, and thereby causing bodily harm. The intermittent sentence and accompanying probation order require Mr. Kuhl to serve his sentence on consecutive weekends from Friday at 7:00 p.m. to Monday at 7:00 a.m. commencing June 29, 2018.

[2] Mr. Kuhl filed an application on August 10, 2018 seeking to vary the terms of his intermittent sentence to allow for him to attend a family wedding in Ontario, on September 1, 2018. Specifically, he is seeking an order not to have to serve his

sentence over the weekend of August 31, 2018 through September 3, 2018. In making this request, Mr. Kuhl is not seeking to reduce the duration of his 90-day sentence, but rather to change the terms of serving the sentence to exempt the aforementioned weekend. In practical terms, this would require him to serve an additional weekend at what would otherwise have been the end of his sentence.

[3] At the hearing of the application, counsel for Mr. Kuhl indicated that he was seeking a further variation in relation to the serving of his intermittent sentence. Specifically, he would like to report to serve his sentence on Fridays at 6:00 p.m. for release on Mondays at 6:00 a.m. The rationale for this request is that Mr. Kuhl is a substitute teacher and requests for substitutes come as early as 6:15 a.m. on schooldays. Again, his request would not alter the duration of his sentence.

[4] As a preliminary matter, Crown took the position that the Territorial Court of Yukon has no jurisdiction to vary the intermittent sentence as requested. If the Court does have jurisdiction, Crown takes no issue with the requested variation regarding reporting and release times, but opposes the requested variation to attend the family wedding.

[5] Mr. Kuhl's application was heard on August 15, 2018. At that time, I found that the Territorial Court did have jurisdiction to vary an intermittent sentence, and made both of the requested variations to the warrant of committal and accompanying probation order, but indicated that I would provide written reasons for my ruling. These are my reasons.

Jurisdiction to vary an intermittent sentence

[6] As a statutory rather than a constitutional court, the authority of judges of the Territorial Court of Yukon derives from statute, "conferred either expressly or by necessary implication" (see *R. v. Doyle,* [1977] 1 S.C.R. 597 at page 603). It is clear that there is no express authority to vary an intermittent sentence in the *Criminal Code*, with the exception of subsections 732(2) and (3), which authorize the court to order that an intermittent sentence be served on consecutive days in certain circumstances. The question then is whether authority to amend can be said to have been conferred by necessary implication. Courts across Canada have reached differing conclusions on this point.

[7] Crown relies on the decisions of *R. v. Germaine* (1980), 39 N.S.R. (2d) 177 (C.A.), *R. v. Crocker* (2012), 327 Nfld. & P.E.I.R. 352 (Nfld. P.C.), and *R. v. Denny*, 2014 NSPC 58, in arguing that the court does not have jurisdiction to vary an intermittent sentence. Counsel for Mr. Kuhl relies on the decisions of *R. v. E.K.,* 2012 BCPC 132, and *R. v. Raczkowski*, 2013 BCSC 2528, in support of her position that this court does have jurisdiction to amend the intermittent sentence.

[8] In *Germaine*, the respondent was sentenced to a term of 90 days to be served intermittently on weekends. Three weeks later the sentencing judge amended the probation order accompanying the intermittent sentence to omit the requirement to serve the intermittent sentence for one weekend, require a period of 30 days to be served continuously immediately following the omitted weekend, and ordering that the remaining 18 days be served on subsequent weekends. Apparently, no warrant of

committal had been prepared in relation to the custodial portion of the sentence as required, so just the probation order was amended.

[9] The Appeal Division held that while then s. 664(3) allowed for variation of a probation order, "there is no provision empowering a trial judge to vary an order directing the service of a custodial sentence on an intermittent basis" (para. 5). The Court concluded that there was therefore no jurisdiction to make the variation. The decision does not consider or address the question of implied jurisdiction.

[10] Following *Germaine*, the *Criminal Code* was amended to allow the court to order, per s. 732(2), that an intermittent sentence be served on continuous days. In *Denny*, Atwood J. applied the *Germaine* decision and held that the authority to vary set out in s. 732(2) did not extend to varying the serving times of an intermittent sentence. The question of implied jurisdiction is addressed in the decision by adopting the reasoning of Gorman J. in *Crocker*.

[11] Mr. Crocker had been sentenced to serve an intermittent sentence that would allow for employment during a specified period. Unforeseen circumstances beyond Mr. Crocker's control changed the employment dates such that the intermittent sentence as originally ordered no longer accommodated the employment period.

[12] Gorman J. noted the lack of an express provision conferring jurisdiction to vary, and found as follows:

> I conclude that once a trial judge imposes an intermittent sentence he or she is *functus*, except for applications made pursuant to section 732(2) or section 732.2(3) of the *Criminal Code*. In the absence of a statutory provision providing the jurisdiction to vary the time at which an intermittent

> sentence is to be served, this Court cannot do so. To apply the doctrine of implied jurisdiction to create a statutory authority which Parliament decided not to create would extend that doctrine well beyond the scope delineated in ***Cunningham***. It would result in the judicial creation of substantive and procedural rights and would constitute an order which would extend well beyond the court's ability to control its own process… (para. 18)

[13] In *E.K.,* the British Columbia Provincial Court takes a contrary view in considering Mr. K.'s application to vary the serving times of his intermittent sentence to accommodate scheduled visits with his children. Gouge J. references the Supreme Court of Canada decision in *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, as support for the proposition that jurisdiction can be conferred by "necessary implication" where failure to read in the power or jurisdiction would "'wholly frustrate' the purpose of the statute, or would render it 'absurd'." (para. 28)

[14] Noting that the requested variation would serve a compelling public interest and would not impair any statutory objective, Gouge J. concludes that:

> … where one or more statutory objectives would be advanced, and none impaired, by granting the order, it seems to me that the purpose of the statute would be frustrated (although perhaps not "wholly frustrated") if the power to make the order could not be inferred by necessary implication. I do not think that the phrase "wholly frustrated" should be applied literally. I think it is fair to say that an interpretation of a statute which leads to a consequence directly opposite to the stated objective of the statute is one which "wholly frustrates" the purpose of the statute, and should be rejected on that ground. (para 29)

[15] He further concludes, applying a reasonable person standard, that it would be absurd to believe that any member of Parliament would have intended the court not to

have the power to amend intermittent sentences to reflect changes in circumstances affecting family reunification or employment schedules.

[16] The British Columbia Supreme Court adopted the reasoning in *E.K.* in the decision of *Raczkowski*, involving a 90-day intermittent sentence to be served from Friday at 7:00 p.m. to Sunday at 7:00 p.m. At the time the sentence was imposed, neither defence counsel nor the judge were aware that Mr. Raczkowski exercised access to his child on Sundays. An application was made, to vary the release time to Sunday at 7:00 a.m. to accommodate the visitation. The application was made on the understanding that it would take Mr. Raczkowski longer to complete the sentence with the variation, but would allow for him to see his child.

[17] In referencing the finding in *E.K.* that authority to vary was conferred by necessary implication, Schultes J. notes:

> …The necessity is to fulfill the obvious purpose of the intermittent sentence provisions of allowing offenders to maintain their employment and other important connections despite having received a jail sentence. To deny such an authority where a change in circumstances since the sentence was originally imposed made a variation necessary would be to frustrate that purpose and create absurd results. … (para. 9)

[18] The Court also references the decision of the B.C. County Court in *R. v. Jules*, [1988] B.C.J. No. 1605 (C.C.), which held the power to vary an intermittent sentence to be a corollary of the express authority to vary the accompanying probation order. While Schultes J. goes on to find the power to vary to be within the court's inherent jurisdiction, a finding which would not apply to statutory courts, it is notable that he

found that the decisions of "*E.K.* and *Jules* are persuasive enough authorities on their own to establish there is jurisdiction to vary".

[19] In considering the conflicting authorities before me, I prefer the reasoning in the *E.K.* and *Raczkowski* decisions.

[20] In *R. v. Middleton*, 2009 SCC 21, the Supreme Court of Canada noted that intermittent sentences "strike a legislative balance between the denunciatory and deterrent functions of 'real jail time' and the rehabilitative functions of preserving the offender's employment, family relationships and responsibilities, and obligations to the community." It would be entirely absurd in my view to conclude that the power to craft a sentence to balance the objectives set out in *Middleton* would not necessarily include the power to amend when the very circumstances upon which the serving of the sentence was based have changed.

[21] It is equally absurd to think that Parliament would intend that intermittent sentences only reflect circumstances known at the time of sentencing, and cannot be adjusted to reflect changes in circumstances even where changes are unforeseeable and beyond the offender's control. Such an interpretation would, in my view, wholly frustrate the very intention and purpose of the intermittent sentence.

[22] Accordingly, adopting the reasoning in *E.K.* and *Raczkowski*, I find that this Court does, by necessary implication, have the power to vary an intermittent sentence.

Requests to vary

[23] As noted, Mr. Kuhl sought two variations to the reporting and release requirements of his intermittent sentence, neither of which affect the duration of the sentence imposed.

[24] With respect to the request to vary the reporting and release times to ensure Mr. Kuhl's availability for requests for substitute teaching, Crown did not oppose the variation beyond questioning the court's jurisdiction. As the requested variation falls squarely within the *Middleton* objectives, namely accommodating the offender's employment, I had little difficulty in making the requested variation to amend the reporting time to 6:00 p.m. on Fridays and the release time to 6:00 a.m. on Mondays.

[25] With respect to the request to vary the intermittent sentence to allow Mr. Kuhl to attend a family wedding in Ontario, Crown argued that the preservation of family relationships should relate only to 'nuclear' family and not extended family. He further submitted that the denial of liberty inherent in a custodial sentence should "pinch" if the sentence is to have a deterrent effect.

[26] I am advised that the wedding in question is that of Mr. Kuhl's first cousin who was also his best friend growing up. Mr. Kuhl comes from a close and supportive family, the majority of whom, including his parents and sister, reside in Ontario. He has no family in the Yukon.

[27] I would disagree that the preservation of family relationships should extend only to immediate family. Any familial relationships that are supportive and positive in nature

enhance the objective of rehabilitation and should be encouraged. Attendance at the family wedding will allow Mr. Kuhl to reconnect with his supports in a more direct way then is normally possible given the geographical distance. I fail to see how attendance at the wedding to reconnect with his family would undermine the deterrent effect of the sentence in any way when it will not reduce the amount of time that Mr. Kuhl will ultimately serve in custody. It will simply delay the serving of the sentence by one weekend.

[28] In addition, had the family wedding been known at the time of sentencing, I expect the sentencing judge would have had little difficulty in structuring the intermittent sentence to accommodate attendance at the wedding.

[29] If, as I have found, the court has, by necessary implication, the jurisdiction to vary an intermittent sentence to accommodate circumstances not known at the time of sentencing, there is nothing to suggest that the jurisdiction should only be used in limited or exigent circumstances. If the requested variation would likely have been accommodated at the time of sentencing, I see no reason why it should not be accommodated by way of a variation once it becomes known.

[30] Accordingly, for these reasons, I granted Mr. Kuhl's request to vary the serving of his intermittent sentence to allow for him to attend his cousin's wedding in Ontario.

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RUDDY T.C.J.