

Citation: *R. v. Nolan*, 2007 YKTC 8

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Docket: T.C. 05-00078
06-00346A
06-00404A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Foisy

REGINA

v.

KERRY ELAINE NOLAN

Appearances:
Kevin Komosky
Malcolm Campbell

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] FOISY T.C.J. (Oral): This has been a long sentencing hearing and while I cannot repeat all the points made in the excellent submissions of both counsel, I have attempted to bear them in mind when coming to my decision.

[2] The accused has pled guilty to five charges as follows: theft under \$5,000, assault occasioning bodily harm, aggravated assault, breaking and entering into a dwelling home and committing an assault, and breach of recognizance. In context, all of these are very serious offences.

[3] Ms. Nolan is 34 years old, has three children, is reputed to be intelligent and certainly appears to be so, is motivated and presents herself well. After arguments, Crown counsel asked for a global penitentiary sentence of three to five years. Mr. Campbell for the defence has asked for a sentence of under two years to be served conditionally in the community. While the Crown's submission for a penitentiary sentence in this case is understandable, I am of the view that, in this particular case and with this particular accused, a Territorial sentence is appropriate.

[4] It is true that Ms. Nolan was in a position of trust when the theft under \$5,000 was committed. The break and enter and assault was a home invasion, as was the assault occasioning bodily harm. The second assault was planned. She was on terms of release, which she breached in committing the break and enter and the second assault. She had her sons with her in the car when she committed the first assault.

[5] On the other hand, in mitigation, she entered early guilty pleas. This must mean a significant and real credit on the global sentence, otherwise we would not get any guilty pleas. Some of the charges were very evident and easy to prove, others not so easy. She has no previous criminal record. She has served approximately five months in custody prior to this hearing. Luckily, the injuries suffered by the victim were superficial.

[6] The circumstances of the "home invasions" were related to the concern she had over her very young daughter, who was in the father's care and custody, the father being the victim in these charges. Her actions were wrong and criminal; however, it does give some non-excusable degree of understanding for these acts. Also, given all

the circumstances and because of the lengthy counselling and treatment that I conclude she will require, she will need the assistance and structure that a lengthy probation order will provide. This is not available in the case of a penitentiary sentence.

[7] Accordingly, I will impose a global sentence of two years less a day.

[8] Because of the time in custody, particularly since she spent time in seclusion because of problems at the jail with another inmate that required supervision, she was put in seclusion so the other inmate could be under supervision. Also, to my knowledge, all programs available to men in the jail are not available to women. Accordingly, I grant her a two-for-one credit for the five months that she has spent in jail, for a total of 10 months.

[9] Now, the question is, should the sentence be a conditional sentence. For the following reasons, I think not. In my view, a release into the community at this time would present a danger to the community. I say this, firstly, because she is, according to the probation officer, at medium risk to re-offend. She needs more structure and help to overcome her problems. Secondly, she did have some problems in jail, which indicated to me that she was still having problems with anger management. Thirdly, she breached her condition of release and assaulted twice, the very person that she was not to have any contact with. Fourthly, she tends to minimize her serious problems with cocaine and alcohol, and I get this from the medical report. Fifthly, the pre-sentence report and the medical reports make it clear that, for some time at least, structured therapy would be beneficial.

[10] I just read a little bit from page 12 of the medical report, which information I have used to come to this conclusion:

Similarly, an analysis of her MCMI-11 validity profile indicated that Ms. Nolan may have exaggerated the level of her psychological problems.

Further down the report goes on:

Although she did acknowledge the use of alcohol and drugs, Ms. Nolan appeared to minimize the extent of her dependency. Additionally, her negative attitude towards treatment, her resistance to psychological interpretations of her behaviour, and her tendency to blame others, may indicate a poor prognosis for a change in therapy at this time.

[11] Accordingly, the sentence I now impose is two years less a day, from which I will credit her with 10 months served. For the balance of the 14 months, it is broken down as follows: For the aggravated assault, 14 months. For the break and enter and commit, 12 months concurrent. For the assaults occasioning bodily harm, 12 months concurrent. For the theft under, three months concurrent, and for the breach of recognizance, three months concurrent, for a total of 14 months.

[12] I decline to apply the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729, as I agree with the Crown in this case that the same delict does not apply to the two charges, that is, of the aggravated assault and of breaking and entering and committing an assault.

[13] In addition, there will be an order for DNA testing, as this is mandatory in this case. There will be a lifetime firearms prohibition under the *Criminal Code*. There will also be a compensation order under the *Criminal Code* for repayment to the victim of the theft of \$2,500.

[14] In addition, there will be a probation order for a period of three years. I am following, somewhat, the outline given by the probation officer in the pre-sentence report.

1. Keep the peace and be of good behaviour.
2. Appear before the Court when required to do so by the Court.
3. Remain within the Yukon Territory unless you have written permission from your probation officer or the Court.
4. Notify the probation officer in advance of any change of name, address and promptly notify the probation officer of any change of employment or occupation.
5. Report to the probation officer immediately upon your release from custody, and thereafter when required by the probation officer, and in the manner directed by the probation officer.
6. Reside as approved by your probation officer, and abide by the rules of the residence and not change that residence without the prior written permission of the probation officer.
7. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner.
Provide a sample of your breath or urine for the purpose of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition.

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, counselling or programming as directed by your probation officer.
10. Attend to complete a residential treatment program as directed by your probation officer.
11. Report to the Family Violence Prevention Unit to be assessed and attend and complete the Women and Violence Program as directed by your probation officer.
12. Take such psychological assessment, counselling and programming as directed by your probation officer.
13. Take such other assessment, counselling and programming as directed by your probation officer.
14. Have no contact directly or indirectly or communication in any way with Alex Reykdal, except with the prior permission of your probation officer and in consultation with Victim Services and Family and Children Services, or as allowed by a Supreme Court order.
15. Not attend at or within 50 metres of the residence of Alex Reykdal.
16. Participate in such educational or life skills programming or make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts.

17. Provide your probation officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this probation order.

[15] Anything else, gentlemen, with respect to the probation order?

[16] MR. CAMPBELL: Your Honour, just with respect to the abstain clause, the way it is ordered in the PSR would be appropriate for a conditional sentence, but as a term of the probation order, the provision on samples, in my submission, would offend the principle in *R. v. Shoker* (2004), 192 C.C.C. (3d) 176.

[17] THE COURT: That is probably true.

[18] MR. KOMOSKY: I would agree with my friend.

[19] THE COURT: All right. So that provision will be amended to read:

7. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner.

[20] MR. KOMOSKY: Your Honour, given Ms. Nolan's concerns with alcohol and drugs, I wonder if a curfew would be appropriate it, as it is a probation order, not a conditional sentence, probably less restrictive than the 6:00 p.m. to the 8:00 a.m. that was suggested in the PSR, but I still think a curfew would be of benefit.

[21] MR. CAMPBELL: I would disagree. The curfew is generally seen as punishment. That is why it is in conditional sentence terms as opposed to a probation order, which is therapeutic, and frankly, I see little therapeutic value in a curfew for someone who has no prior record and who is 34 years old. She has children, she is going to have to attend --

[22] THE COURT: I tend to agree. I think she will have served her jail term and she will be under some pretty tight constraints in the probation order as it is. I would not depose a curfew. Anything else?

[23] MR. CAMPBELL: I would ask that the victim fine surcharge be waived.

[24] THE COURT: Under the circumstances and in view of the fact that she is going to be in prison for some time, I will waive it. Anything else?

[25] MR. KOMOSKY: If the remaining counts could be withdrawn.

[26] THE COURT: Sorry?

[27] MR. KOMOSKY: If the remaining counts could be withdrawn, Your Honour.

[28] THE COURT: Yes. All other counts will be withdrawn. Thank you very much.