Citation: *R.* v. *P.L.M.*, 2010 YKTC 46

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Registry: Whitehorse

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

REGINA

v.

P.L.M.

Publication of information that could disclose the identity of the complainant or any witness has been prohibited by court order pursuant to section 486.5(1) of the *Criminal Code*.

Appearances:
Bonnie Macdonald — Counsel for the Crown
David Christie — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Mr. M. has entered guilty pleas to five offences. The first offence is an assault, contrary to s. 266 of the *Criminal Code*, against J.M., who is the partner of Mr. M..

[2] The circumstances of that offence are that on February 19, 2009 there was an argument between the couple. They were intoxicated and Mr. M. grabbed Ms. M. by her arms and threw or pushed her to the ground two times, causing her to strike her head the second time. She has a bad back and it caused her considerable pain.

[3] He was then released on a recognizance on February 20, 2009, and on June 26, 2009, while bound by the terms of that recognizance, was located drinking alcohol at the riverbank in Whitehorse, yelling, and generally causing some disturbance and when arrested, smashed one of his bottles of vodka on the ground, thus committing the offence of failing to keep the peace and be of good behaviour, contrary to s. 145(3) of the *Criminal Code*.

[4] Again, while on release on a recognizance that required him to report to a Bail Supervisor as directed by the Bail Supervisor, he failed to attend for a meeting with the Bail Supervisor on October the 13th. He had been directed to do so on October the 6th. This constitutes the second s. 145(3) offence.

[5] He was required to attend court on October 26, 2009, and failed to do so, thus committing an offence under s. 145(2).

[6] Lastly, and most significantly, Mr. M. had been before the Court, was released to reside at the YARC, but had not yet been able to be released due to the issue of availability of a bed at the YARC. On December 13, 2009, while awaiting a room at the YARC, he committed the offence of assault causing bodily harm against N.F., contrary to s. 267(b) of the *Criminal Code*.

[7] The circumstances of that assault were read into the court record and a video, without audio, of the assault was played for the Court. What occurred is that N.F. was on the phone. There were a number of individuals in the correctional facility in the general area where N.F. was, sitting on benches, some walking back and forth. Mr. M. was not in view for most of the video prior to the assault occurring. It was clear from

watching the assault that it was a bit of a concerted effort by some of the individuals in the area where N.F. was on the phone to basically set him up for an assault. After a couple of individuals had gone back and forth from the area where N.F. was, out of camera range, Mr. M. is observed coming back, following two of these individuals from the area out of camera range over to where N.F. was. One individual stood up on the benches in an attempt to block the camera view, and a second individual stood up and raised a pillow above his head in order to further block the camera view. Both efforts to block the view were not really successful.

[8] It is clear on that camera shot that Mr. M. then takes N.F., or follows right behind N.F., into a separate room and, from long distance, the assault can be seen. There is a second camera view within the room itself that the assault took place and that shows Mr. M., in what can only fairly be described as a vicious assault, repeatedly punching N.F. in the head and kneeing N.F. in the face at least three times. There is no question that N.F. was in great fear for his safety at the time. He suffered a broken nose and four stitches as a result of the assault against him. The level of fear that he felt surely would have been accentuated by the fact that this is not just one individual beating him up in a jail setting, but was clearly the one individual acting with the support of several others behind him.

[9] The extent to which Mr. M. may or may not have been involved in any of the lead-up to the assault is not clear. He has stated in court that he felt pressured to do this. At the end of the day, we are dealing with what we clearly do know and we saw an unprovoked, vicious assault upon a fairly vulnerable inmate that caused him bodily harm.

[10] Crown is suggesting that the sentence be dealt with by way of 12 to 14 months on the assault causing bodily harm, 30 days consecutive on the s. 266 against Ms. M., and 30 days concurrent with respect to the breaches, taking into account the principle of totality. By way of elaboration on the s. 266 offence, there had been discussions between Crown and defence with respect to that being the proposition for resolution, and Crown, notwithstanding the subsequent assault causing bodily harm charge, considered it appropriate to maintain the position they had with counsel prior to that taking place, and that seems fair and appropriate in the circumstances. The sentence for the s. 267(b) will speak for itself.

[11] Defence counsel is suggesting that there be a sentence of eight months with respect to the s. 267(b) and that eight months be made up of the 165 days pre-trial custody that Mr. M. has accrued to date. Following that would be a further sentence of eight months to be served conditionally in the community on the s. 266 charge. The s. 145 charges would be concurrent. So technically, the position of defence counsel possibly exceeds by one month the higher end of the Crown's position on sentence. However, there is a significant difference with respect to the actual time in custody.

[12] Mr. M. is a young man. He just turned 25 years old last month in custody. He has a criminal record as an adult starting in 2005 with an assault for which he received 30 days in jail, a break and enter with intent, uttering threats, a further break and enter, and theft for which he was placed on a conditional sentence order. That order had one breach and was then subsequently terminated on July 18, 2006. Since that point in time, there are three fail to comply with probation orders in 2007, all of which resulted in 30 day sentences, one of which at least was concurrent to another.

[13] The pre-sentence report that was filed notes that Mr. M. had some difficulties with Attention Deficit Hyperactivity Disorder, having been diagnosed with that when he was young, and possibly a severe anger problem. He was placed at the Bosco Homes in Edmonton for ten months. There is an indication in the report that he completed the Spousal Abuse Program in 2005; however, in October of 2009, while attending that course, he failed to complete it, and it is clear he has a significant problem with alcohol abuse.

[14] The Problems Related to Drinking Scale, which is self-reported, suggests that he has a substantial level of problems related to alcohol abuse, and the Drug Abuse Screening Test notes him to have a moderate level of problems. The Level of Service/ Case Management Inventory Criminogenic Risk Assessment places him at a very high range, 73 percent probability of re-offending. I note that one of the breaches in 2007 was for failing to complete the Spousal Abuse Program, so that is coupled with the failure to attend it leading up to October of 2009.

[15] The author of the pre-sentence report indicates that Mr. M.'s prior response to community dispositions, in addition to his most recent failure to complete his DVTO plan, shows that Mr. M. has difficulty in staying focused on his treatment goals. A lengthy period of supervision will allow for increased opportunity for these goals to be met.

[16] He has entered guilty pleas. One with respect to the s. 266 charge was on the day of trial when the Crown was in a position to proceed, which lessens, to some effect, the mitigation available to him for this offence that would have resulted had he entered a

guilty plea immediately or shortly afterwards. That said, there is still credit to be given and it is to be acknowledged there is a guilty plea that did save Ms. M. from having to testify.

[17] He has also entered a guilty plea to the s. 267(b) charge, which again, to some extent, can be an indicator of remorse but this is also factored into the context of the very graphic video that was available, I would expect, to be introduced as evidence at trial.

[18] Now that said, Mr. M. has expressed remorse in the pre-sentence report and remorse in the court, and I have no problem accepting that he is sorry for what he has done.

[19] The sentence for the s. 267(b) offence clearly requires that the principles of denunciation and deterrence be front and foremost. There is no differing law for the behaviour of inmates at Whitehorse Correctional Centre with respect to threatening and assaultive behaviour than there is outside of that facility. When the Court sentences an individual to spend time as a prisoner at Whitehorse Correctional Centre or when the Court remands a prisoner to Whitehorse Correctional Centre for any reason, the Court does so on the basis that these individuals should be safe and secure from assaultive and threatening behaviour in these facilities. A person has not given up their rights to be free from assaultive and threatening behaviour by virtue of the fact that they have either committed offences or have been accused of committing offences and thus are in a correctional facility. Inmates in correctional facilities need to know that if they commit assaults against other inmates, these assaults will be looked at very seriously by the

courts and that the sentences imposed will reflect the serious view that the Court takes of such behaviour.

[20] In my view, a sentence of eight months for this assault in these circumstances is below the acceptable range for this offender. I have considered the appropriateness of a conditional sentence and using creative crafting in order to come up to a sentence that, while not necessarily disparate globally in terms of actual time, would allow Mr. M. to begin to take steps in the community while still bound by the restrictive aspects of the conditional sentence regime. There may be and have been times in this jurisdiction when those creative approaches are used because there are many ways to achieve a just and appropriate sentence. The imposition of a conditional sentence requires that the sentence being served in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in s. 718 to 718.2 - I am not going to repeat those sections of the *Code* - and the balancing act again, here, as in many such cases where either Crown or defence counsel in concert, or defence counsel separately, ask the Court to do something different that still achieves a just end.

[21] There is an emphasis on rehabilitation. In this case, Mr. M. is young. As I stated earlier, he is not someone whose criminal record is so significant that it would cause the Court to have serious reservations about his ability to maintain a life that is free of criminal acts. He, while having some limitations, it appears, with respect to educational and perhaps behavioural issues, does not appear to be so severely affected by them that it would impede any ability to be rehabilitated. So there is significant hope that Mr. M. can turn his life around, and he says he wishes to do so.

[22] What is lacking in the pre-sentence report, however, are clear steps that have created a track record of success in dealing with the problems that have plagued him. I have no problem believing Mr. M. when he says he would like to return to Yukon College and complete some basic literacy and mathematic skills. I have no problem that he recognizes that as being problematic. I have no problem recognizing that he sees that alcohol is severely impacting his life. I believe he wants to be different, but in order to obtain a conditional sentence, it is most usually the case that there is a clear track record of efforts made, courses taken, and a turning of the corner that would allow the Court to take an individual who clearly has a problem complying with court orders, including conditional sentence orders, and then be satisfied that this person could serve a conditional sentence in the community. He does not have employment waiting for him, just the hope of employment, and employment is very important. One of the struggles I have had in looking at the appropriate sentence in this case is wanting Mr. M. to have an opportunity to find gainful employment, with the assistance of his mother, as set out in the report, before the main season for working in the Yukon is over.

[23] All of this to say that I am not satisfied that a conditional sentence would be consistent with the principles of sentencing set out, and while on paper that may have appeared to be an easy thing to say, based on the record and the pre-sentence report and the failures to complete the Spousal Abuse Program, it is not so easy to do in person because I do believe that Mr. M. wants to be different than how he has been recently. So, as a result, I cannot accede to the submission of defence counsel.

[24] What I am going to do is firstly, give Mr. M. credit of eight months custody for the time that he has served. That will be at time and one half, which amounts, potentially,

to slightly, perhaps, a week over 30-day months, but I will give him eight months credit. These offences took place before the amendments to the *Criminal Code* came into force and I am satisfied that he should receive the usual credit he would have received before that in the normal course, although I understand that Whitehorse Correctional Centre always maintains a discretion to cause prisoners to serve their full terms without any remission, depending on their behaviour in the facility. However, to a large extent, Mr. M. is being dealt with for his behaviour in the facility by way of the sentence on the s. 267(b). The sentence that will be imposed on that is 12 months less the eight months credit for time served.

[25] I will impose one month on the s. 266 and I will impose one month concurrent to each other on the s. 145(3) offences. What I am going to do, however, is impose those sentences concurrent to the 12 months, because that is as far as I believe I can safely go with respect to emphasizing the principle of rehabilitation in a way that would allow Mr. M. to be out of custody without an undue amount of time occurring and perhaps have efforts made towards securing him employment, so that when he gets out he has some time to have a track record of employment before we enter the fall and the winter season. These sentences could have been imposed consecutively, but, considering all of the circumstances of this case, I will impose them concurrently to the 12 months.

[26] There will be a period of probation to follow. That probation will be for two years, a lengthy probation order in part, taking into account the perhaps slightly lesser jail time you are serving than you could have served. The terms will be:

1. To keep the peace and be of good behaviour;

2. Appear before the Court when required to do so by the Court;
3. Notify the Court or Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;
4. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
5. Report to a Probation Officer immediately upon your release from custody and thereafter when and in the manner directed by the Probation Officer;
6. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
7. For the first two months of your probation order, abide by a curfew by remaining within your place of residence between the hours of 11:30 p.m. and 6:00 a.m. daily except with the prior written permission of your Probation Officer. You must present yourself at the door and answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition.

The purpose of that term is to allow for some court-enforced degree of restraint on your immediate time out of custody. It is not a particularly restrictive curfew and it will allow for exceptions as are felt appropriate.

8. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances except in accordance with a prescription given to you by a qualified medical practitioner;

9. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

10. You are to take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer;

11. You are to report to the Family Violence Prevention Unit to be assessed and attend and complete the Spousal Abuse Program as directed by your Probation Officer;

12. You are to take such other assessment, counselling and programming as directed by your Probation Officer;

13. You are to have no contact, directly or indirectly, or communication in any way with J.M. except with the prior written permission of your Probation Officer in consultation with Victim Services;

14. You are not to attend at or within 25 metres of the residence of J.M. except with the prior written permission of your Probation Officer in consultation with Victim Services;

15. You are to have no contact, directly or indirectly, or communication in any way with N.F. (which, of course, will be set out in full names in the probation order) except with the prior written permission of your Probation Officer;

16. You are to participate in such education or life skills programming as directed by your Probation Officer;

17. You are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

18. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this probation order.

Are those all the terms that were required?

[27] MS. MACDONALD: Yes, Your Honour.

[28] MR. CHRISTIE: Your Honour, could you please repeat the condition with respect to N.F.?

[29] THE COURT: Yes. It is to have no contact, directly or indirectly, or communication in any way with N.F. except with the prior written permission of your Probation Officer. I left it general because I believe that that will cover all of the possible circumstances at Whitehorse Correctional Centre or anywhere that this could occur.

[30] There will also be the mandatory DNA order as this is a primary designated offence. There will also be the s. 109 order that prohibits you from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, and explosive substance for a period of ten years. That is, as I have stated, mandatory.

[31] Under the *Criminal Code* the victim fine surcharges will be waived. Any remaining charges?

[32] MS. MACDONALD: Any charges to which guilty pleas weren't entered the Crown enters a stay of proceedings.

[33] THE COURT: There is some more time, Mr. M., but hopefully you will be able to crystallize your plans for when you get out and put this part of your life far behind you.

[34] THE ACCUSED: Thanks for considering everything.

[35] THE COURT: I wish you well.

[36] THE ACCUSED: Thank you.

[37] MR. CHRISTIE: I told him too, Your Honour, if he does really well, maybe a year into probation maybe we could ask to be brought before you again and re-visit the conditions of --

[38] THE COURT: If Mr. M. is doing really well I would be happy to have him brought before me and discuss where we are with respect to the probation order. I am hopeful he will do really well.

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COZENS T.C.J.