Citation: *R.* v. *Silverfox*, 2009 YKTC 96

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Registry: Whitehorse

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

REGINA

v.

JONATHAN SILVERFOX

Appearances:
Kevin Komosky — Counsel for Crown
Gordon Coffin — Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Jonathan Silverfox is before me for sentencing on six counts, including two common assaults on his spouse, a break and enter, and three breaches of release conditions.

[2] In the first spousal assault, occurring on July 27, 2008, Mr. Silverfox and his partner, Ginelle Skookum, were drinking and began arguing. Mr. Silverfox threw Ms. Skookum into the bathtub and slapped her in the face three times. When Ms. Skookum left the residence, Mr. Silverfox followed her, saying that he was sorry. Mr. Silverfox

later turned himself in. He has no recollection of the events due to his state of intoxication.

[3] Subsequent to his arrest, Mr. Silverfox was released on an undertaking by an officer in charge, which included conditions that he have no contact with Ms. Skookum and that he not attend their shared residence.

[4] On September 29, 2008, Mr. Silverfox was driving his vehicle when he came upon Ms. Skookum. He offered to drive her home and when she refused he pulled her into the van. Upon arriving at the residence, Mr. Silverfox caused damage to the exterior stairs, apparently by striking them with his vehicle. Ms. Skookum entered the home and locked the door. Mr. Silverfox kicked at the door, demanding entry. He then climbed into the home through the wood chute. Ms. Skookum had gone upstairs to speak to a friend who had been caring for the couple's infant child. Mr. Silverfox followed upstairs, where he punched Ms. Skookum in the head and struck her with the phone.

[5] Photographs indicate that Ms. Skookum suffered minor injures as a result of the assault, including bruising. It is noted that Mr. Silverfox was intoxicated at the time of these offences. Again, he subsequently turned himself in to the RCMP. Mr. Silverfox was re-released some time later with the requirements that he reside at the YARC and report to the spousal abuse program for programming as directed.

[6] In February of 2009, he missed three scheduled appointments with the spousal abuse program, contrary to his release terms. He was detained from February 24th to March 12th, when he was released again on numerous terms, including a condition that

he abstain absolutely from the possession or consumption or alcohol. On July 23, 2009, Mr. Silverfox was observed in an intoxicated state, holding an open bottle of vodka. He has remained in custody since this last offence.

[7] Mr. Silverfox has spent approximately four months in remand as a result of his charges. It should also be noted that Mr. Silverfox did accept responsibility for the substantive offences at an early date and did enter into and successfully complete the requirements of the Domestic Violence Treatment Option Court, or DVTO, as it is commonly known.

[8] In determining the appropriate disposition, I have had the benefit of a thorough pre-sentence report and a report from the Family Violence Prevention Unit. Mr. Silverfox is a 22-year-old member of the Little Salmon/Carmacks First Nation. He comes before the Court with a limited and unrelated criminal record consisting of one conviction for impaired driving and one for contempt of court, for which he was sentenced to pay fines.

[9] During his formative years Mr. Silverfox was exposed to instances of domestic violence prior to his mother's decision to stop drinking. Geraldine Silverfox, Mr. Silverfox's mother, remains a significant and positive support for him including attending Court in support of him and advising me that Mr. Silverfox does not have a history of violence and noting the importance of Mr. Silverfox providing support and assistance, financial and otherwise, to his young family.

[10] Mr. Silverfox appears to have been a good student up until Grade 11, when he became involved with a negative peer group and began using drugs, specifically

marihuana and alcohol. He ultimately dropped out of school. He has made some efforts to complete his high school education and intends to obtain his GED. In the meantime, he has completed a number of trade-related certificates and a prospecting course. For Mr. Silverfox's young age, he has a relatively positive employment history while in his home community of Carmacks. Most recently he spent approximately 18 months working as a plumbing assistant for the Carmacks Development Corporation. He also performed carpentry work for the Carmacks First Nation. However, Mr. Silverfox appears to have demonstrated little motivation to find employment in Whitehorse.

[11] Mr. Silverfox and Ms. Skookum have been in a relationship since 2006 and share a one-and-a-half year old daughter. The couple has had numerous instances of contact, as authorized by the bail supervisor, with no further allegations of violence or safety concerns arising since the substantive offences arising in September of 2008. It appears that Ms. Skookum has now made the decision, however, to leave the relationship, but Mr. Silverfox hopes to maintain an amicable relationship with her for their daughter's sake.

[12] With respect to alcohol and drug concerns, Mr. Silverfox began consuming alcohol at the age of 14. The pre-sentence report describes a history of binge drinking and blackouts. His score on the Problems Related to Drinking Scale denotes a substantial level of problems. To his credit, he has successfully completed the White Bison substance abuse program as part of his DVTO program requirements, though, as his most recent charge would indicate, he continues to struggle with maintaining sobriety.

[13] Drugs present as a somewhat lesser concern. Mr. Silverfox does have a history of marihuana use but has successfully abstained since February of 2009. His score on the Drug Abuse Screening Test indicates a low to moderate level of problems with drugs.

[14] In addition to the White Bison substance abuse program Mr. Silverfox completed the Spousal Abuse Program through 20 individual sessions with a SAP counsellor as part of his DVTO requirements. The report from the Family Violence Prevention Unit indicates that, while Mr. Silverfox demonstrated some initial reluctance to participating in treatment, he became an active participant as sessions progressed. He took responsibility for this actions, was able to identify his risk factors, demonstrated an understanding of the impact of the assaults on his partner and of the effects of violence on children, and he created a safety plan to manage his risk factors. According to the SARA, Mr. Silverfox is currently at low to medium risk to reoffend violently in a spousal context, while the LS/CMI places him at high risk to reoffend generally.

[15] Mr. Silverfox is described overall as having been successful in treatment but due to ongoing concerns about the impact of alcohol on his risk levels, his SAP counsellor recommends follow-up treatment to help his risk remain low.

[16] In their submissions, counsel have presented widely divergent positions on appropriate sentence in this case. Counsel for Mr. Silverfox suggests that an effective sentence of time served plus probation is warranted in light of Mr. Silverfox's young age, his lack of a related criminal record, his successful completion of the DVTO program, and credit for time spent in remand.

[17] Crown counsel notes the aggravating factors of the infant child's presence during the second assault, the no-contact breach, the high risk assessment under the LS/CMI and the fact that both assaults were spousal in nature. He further argues that the offences arising in September of 2008 are tantamount to a home invasion, warranting a sentence in the three to four year range when one applies s. 348.1. Suggesting credit of six months for remand and additional credit for successful completion of DVTO, Crown seeks a sentence of 24 months plus two years probation.

[18] In support of his position, counsel for the Crown has filed a book of authorities which includes a number of what are commonly known as home invasion cases which speak to the application of s. 348.1. The heading for s. 348.1 is "AGGRAVATING CIRCUMSTANCE - HOME INVASION" and the ensuing section reads:

> 348.1 If a person is convicted of an offence under section 98 or 98.1, subsection 279(2) or section 343, 346 or 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,
>
> (a) knew that or was reckless as to whether the dwelling-house was occupied; and
>
> (b) used violence or threats of violence to a person or property.

[19] The difficulty in applying s. 348.1 to the circumstances before me lies in the fact that the actions of Mr. Silverfox, while serious, do not fall within what is typically considered to be a home invasion, as the term has been popularized in the media. However, on a strict reading of s. 348.1, it must be conceded that the necessary factors do nonetheless exist in this case. Mr. Silverfox entered the home knowing it to be

occupied and he used violence to a person therein. I am accordingly satisfied that the section does indeed apply. I am not, however, satisfied that the mere applicability of the section would place Mr. Silverfox within the sentencing range of those cases filed by the Crown.

[20] The trio of B.C. Court of Appeal cases filed by the Crown, *R.* v. *Vickers*, 2007 BCCA 554, *R.* v. *Moore*, 2008 BCCA 129, and *R.* v. *T.J.F*., 2008 BCCA 325, all involve factual situations and levels of violence which are considerably more serious than the circumstances before me in this case, although Crown did indicate that he sought to rely on these cases, not necessarily to establish the appropriate sentencing range, but rather to highlight the dominant sentencing principles in home invasion cases.

[21] As noted by Frankel J.A. in *Vickers*:

> This Court has repeatedly stated that deterrence and denunciation are the primary factors in sentencing for violent crimes, particularly when these crimes violate the safety and security of a person's home.

He went on to say:

> While rehabilitation cannot be overlooked, it is of secondary importance in dealing with a case of this kind. This is particularly so when there is no indication that the offender is a good candidate for rehabilitation.

[22] In terms of applicable sentencing range, the Crown has asserted that the case of *R*. v. *Brace and Stewart*, 2008 YKTC 41, a decision of Faulkner T.C.J. out of this Court, is the case most factually consistent with the case before me. *Brace and Stewart* involved a situation where two young men kicked in the door of a residence in Watson Lake and assaulted the three male individuals located within. The assaults involved

punching and kicking, and the victims were subjected to threats and intimidation. Each of the two accused received sentences of three years.

[23] In my view, the facts as set out in *Brace and Stewart* are more serious than those in the case before me. The level of violence was clearly higher, resulting as it did in a substantial injury to one victim, requiring medical intervention and stitches. Furthermore, the sentence followed a finding of guilt at trial rather than guilty pleas, and there was no suggestion of any efforts towards rehabilitation. In light of these factors, I fail to see how *Brace and Stewart* can be used as a basis to suggest that a starting point of three to four years is appropriate on the facts before me.

[24] Subsequent to the sentencing hearing, counsel were given the opportunity to file additional cases. Crown responded by filing the case of *R*. v. *Nolan*, 2007 YKTC 8, a decision of Mr. Justice Foisy sitting as a deputy judge of our Court. Factually, the *Nolan* case is indeed somewhat closer to the case at bar. The accused had no prior record; she entered early guilty pleas; the case involved more than one assault on the same victim; the assaults were spousal in nature, as the victim was the ex-spouse of the accused; and the second assault involved a break and enter into the victim's dwelling house and it occurred while the accused was on conditions. However, the main distinguishing feature between the *Nolan* case and this one is the fact that the assaults committed and offences pled to by Ms. Nolan included an assault causing bodily harm and an aggravated assault, as opposed to the two common assaults to which Mr. Silverfox has entered guilty pleas, denoting a much higher level of violence. The *Nolan* case resulted in an effective global sentence of two years less a day.

[25] The cases of *R.* v. *Aldridge*, 2009 YKTC 47, and *R.* v. *Glada*, 2003 YKTC 11, are two cases out of this Court involving multiple common assaults which are spousal in nature. In *Aldridge* the accused pled guilty to two counts of common assault and four counts of breaching court orders, including a breach of a no-contact condition. The effective sentence was one of 195 days or approximately six and one half months. The case does not include the significant aggravating factor of a break and enter but Ms. Aldridge did have a prior conviction for assaulting the same partner.

[26] *Glada* involved convictions for two counts of common assault, again spousal in nature, an uttering threats and two breaches of probation. The effective sentence was one of ten months. Again, the significant aggravating factor of break and enter was absent, although the sentencing judge did find the fact that one assault occurred in the family home, in the complainant's bedroom, to be an aggravating factor on sentencing. In addition, the second count of common assault actually encompassed numerous instances of assault and the accused had a prior conviction for assaulting the same partner.

[27] In considering all of the cases before me, I am satisfied that the appropriate starting point in this case would be one of 12 months, to meet the principles of denunciation and deterrence. By this I mean I am satisfied that the offences before me would have warranted a global sentence of 12 months had Mr. Silverfox not participated in the DVTO program. This then would be reduced, of course, by the credit for six months in pre-trial custody, leaving a remainder of six months. However, Mr. Silverfox did participate in and successfully complete the DVTO court program. While I accept the primacy of denunciation and deterrence in cases of violence, as stressed in the

Vickers case, rehabilitation does remain a factor and, unlike Mr. Vickers, Mr. Silverfox has proven himself to be a good candidate for rehabilitation and he is entitled, in my view, to substantial credit for successful completion of the DVTO program.

[28] The Yukon DVTO Court was established in 2000 in response to general dissatisfaction with the manner in which the courts were addressing cases of domestic violence. Typical criminal justice interventions appeared to have little impact on recidivism or a reduction of incidences of violence. Domestic violence cases typically resulted in a high collapse rate, in part as the needs of victims were not being adequately met. The existing system was felt to be too adversarial and punitive. As noted in the DVTO manual, DVTO is a therapeutic court alternative which adapts traditional criminal court practices and combines them with innovative treatment programming aimed at providing the best environment for offender rehabilitation and family and community healing to occur. Judicial case processing and ongoing judicial intervention are integrated with intensive treatment services and case management practices.

[29] In opting into the DVTO Court, offenders must accept responsibility for their offending behaviour, agree to abide by strict conditions under strict supervision, agree to have their sentencing deferred until completion of treatment, attend before the Court for ongoing check-ins to assess performance and, of course, to participate in treatment and programming as directed. The requirements of DVTO are onerous. In return, offenders enter into the DVTO program on the understanding that their ultimate sentence will reflect their progress and participation in treatment such that their sentence will be demonstrably less than what they would have received had they not

voluntarily entered a guilty plea and participated in counselling. While jail sentences are possible, the norm is a community-based disposition upon successful completion. This reduction in sentence is a central feature of the DVTO Court, providing significant incentive to DVTO participants to actively participate in and complete treatment. DVTO sentences which do not reflect this promise will, in my view, undermine the integrity of the DVTO Court and run the risk of adversely influencing offenders against participating in programming.

[30] Mr. Silverfox has spent almost a year in the DVTO Court. He has been subject to close supervision by his bail supervisor and treatment team. He spent five months under strict supervision at the YARC. He has spent considerable time away from his home community, his employment and his family. He has completed both substance abuse and spousal abuse programming. He has attended before the Court for regular check-ins under judicial supervision, and he has not reoffended violently since September of 2008. He has successfully completed the DVTO program and he is entitled to appropriate credit for his efforts.

[31] In the result, I am satisfied that the appropriate disposition on the circumstances of these offences and this offender would be an effective sentence of time served plus probation of two years, to ensure ongoing active management of risk factors. I would break the sentences down as follows. On the break and enter, the sentence will be one day deemed served by his attendance in Court today and I would ask that his record reflect that he is being credited for four months in pre-trial custody. On the second assault, which occurred in conjunction with the break and enter, similarly there will be a sentence of one day deemed served by his attendance in Court today. The credit will

be one month of pre-trial custody. On the no-contact breach, again, which arises with the break and enter and second assault, one day deemed served with credit for one month in pre-trial custody. On the two remaining breaches, there will be a sentence of one day deemed served by his attendance in Court on each of those two offences. On the offence which is first in time, the first assault, I would suspend the passing of sentence and place Mr. Silverfox on probation for a period of two years. I will also ask that that probation order attach to both the break and enter and the second assault count as well.

[32] The terms of the probation order will be those set out in the pre-sentence report on pages 8 and 9. They are as follows, Mr. Silverfox:

1. That you will keep the peace and be of good behaviour;
2. That you will 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;
4. That you report to a Probation Officer within two working days and thereafter when and in the manner directed by the Probation Officer;
5. That you reside as approved by your Probation Officer, abide by the rules of the residence and not change that residence without the prior written permission of your Probation Officer;
6. That you abstain absolutely from the possession or consumption of alcohol and/or controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;

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 and/or drug assessment, counselling or programming as directed by your Probation Officer;
9. That you report to the Family Violence Prevention Unit to be assessed and attend and complete the Spousal Abuse Program as directed by your Probation Officer;
10. That you take such psychological assessment, counselling and programming as directed by your Probation Officer;
11. That you take such other assessment, counselling and programming as directed by your Probation Officer;
12. That you have no contact, directly or indirectly, or communication in any way with Ginelle Skookum except with the prior written permission of your Probation Officer in consultation with Victim Services and Family and Children's Services;
13. That you participate in such educational or life-skills programming as directed by your Probation Officer;
14. That you make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts; and,
15. That you 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 order.

[33] So, Mr. Silverfox, I know you have done a lot of work, but based on the reports that I have read you have still got more work to do. The intention of the probation order is to make sure that you keep doing the work that you need to do so that we do not have a repetition of the violence that occurred last year. You need to really focus on the alcohol issue and you need to stay in touch with your Spousal Abuse Program counsellor if you want to manage your risk factors. And you know that from having done your safety planning and other exercises that you have done with them. So the intention of my order is to make sure that you keep doing that.

[34] This is also a secondary designated offence for the purposes of the DNA provisions. Considering all of the relevant factors, I am satisfied that this would be appropriate in this case. Accordingly, I will make an order requiring Mr. Silverfox to provide such samples of his blood as are necessary for the purpose of DNA testing and banking.

[35] The application of a firearms prohibition is discretionary in this case. Having reviewed the circumstances of the offences before me and those of Mr. Silverfox in particular, his limited criminal record and his efforts at rehabilitation, I am not satisfied that a firearms prohibition is warranted and I decline to make that order.

[36] Victim fine surcharges will be waived in light of his more recent custodial status and his current unemployment.

[37] Any issues or concerns as it relates to conditions or any other orders which have been made?

[38] MR. COFFIN: No, thank you, Your Honour.

[39] THE COURT: Mr. Komosky?

[40] MR. KOMOSKY: I believe you indicated that the DNA warrant was a secondary --

[41] THE COURT: That was the notation that I had written, but now that you mention it, I do believe --

[42] MR. COFFIN: Yes. We got to the point where --

[43] THE COURT: -- we did get into that discussion at the time of sentencing and it was slightly unclear.

[44] MR. COFFIN: Yes.

[45] THE COURT: In any event, I will make the order that he is required to provide them.

[46] MR. KOMOSKY: I don’t know how much turns on it. It’s a different form, depending on --

[47] THE COURT: Okay. It seemed to me there were other subsections of s. 348 that we determined did fall in as a primary designated offence; is that correct?

[48] MR. COFFIN: Yes, that's correct. There is one -- I believe there is one subsection, not (b), is the primary. There are two subsections, not (b), that are secondary. So what one takes from that?

[49] THE COURT: I am not certain, to my knowledge, that anything turns on whether the order is made, other than the form itself, as to whether or not it is a primary or secondary offence.

[50] MR. KOMOSKY: I am not aware of any difference.

[51] THE COURT: I think that for the purpose of this decision and the fact that there appears to be some ambiguity as it relates to the way they have been divided in the *Code*, I will call it a secondary designated offence for the purposes of the form, but, as stated, I am satisfied that it is appropriate to make the order in this particular case.

[52] Anything further?

[53] MR. COFFIN: No, Your Honour.

[54] MR. KOMOSKY: Your Honour, the Crown would ask to withdraw the remaining *Criminal Code* allegations, and I have instructions from the Territorial Crown to direct a stay of proceedings with respect to the motor vehicle offence.

[55] THE COURT: Thank you.

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RUDDY C.J.T.C.