

Citation: *R. v. Stewart and Whitehead*, 2004 YKTC 35

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Docket: T.C. No. 03-00635

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03-00750

Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

Regina

v.

Kirk Stewart

and

Marina Whitehead

Appearances:

Keith Parkkari

Gordon Coffin

Lynn MacDiarmid

Counsel for the Crown

Counsel for the Accused

Counsel for the Co-Accused

REASONS FOR SENTENCING

[1] LILLES C.J.T.C. (Oral): I am not going to repeat the circumstances.

We are dealing with property offences, the involvement of Kirk Stewart and Marina Whitehead relatively similar, with the exception of several of the vehicles were taken by her and he then subsequently joined her after the fact in the possession of the vehicle, riding or driving in the vehicle until they were apprehended.

[2] Let me run through Kirk's sentencing first. With respect to the November 29th, 2003 plea of guilty to the s. 354 offence, I am imposing a period of incarceration of one month. This is Kirk Stewart.

[3] With respect to the s. 348(1)(b), for Kirk Stewart, I am imposing a period of incarceration for two months consecutive.

[4] With respect to the December 15th s. 354, to which he has pled guilty, I am imposing a period of incarceration of two months consecutive.

[5] With respect to the s. 354, March 14th offence, to which he has pled guilty, I am imposing a period of incarceration of two months consecutive. That is a total of seven months.

[6] I have taken into account the approximately five weeks pre-trial custody, for which I have given him generally double credit. So this sentence is in addition to that.

[7] With respect to Marina, with respect to the November 29th offence, one month in custody.

[8] With respect to the s. 348 offence, the November 29th offence, two months in custody consecutive.

[9] With respect to the December 15th, s. 334, one month in custody, consecutive.

[10] And with respect to the March 14th 334, two months consecutive, for a total of six months.

[11] Having due regard to her previous record, which is substantially different from Mr. Stewart's, having regard to the pre-sentence report and the interest shown by her in following up on programming, I am inclined to give her full opportunity to take advantage of that by providing that with respect to the two November 29th offences, a total of three months custody, that she be allowed to serve that conditionally in the community on conditions that I will prescribe. The result then is, Ms. Whitehead, that you will have a sentence that will be three months actual custody and three months conditional custody, which means that you will serve that custody in the community.

[12] Do you understand that?

[13] MS. WHITEHEAD: Yes.

[14] THE COURT: Going back to Mr. Stewart, I am going to impose a period of probation of three months. The purpose of that probation period is to allow him, if he is so inclined, to follow up with his probation officer and set up

some treatment and programming. The probation officer can be of assistance to him, but basically the three months will mean that if he doesn't follow through with it, that will be his problem. It will show up on his record the next time he is before the Court. If he doesn't follow up on it and complete it, his contact with Ms. Whitehead will be very limited indeed. Secondly, there is no question in my mind that he will be back here in court being sentenced on other matters, and the fact of his non-compliance or not following through with the counselling will be an aggravating factor. But if he is determined to follow through his three months probation, we will give him an opportunity to do so.

[15] So it would be a period of three months probation, the statutory terms: report within 24 hours of his release from custody to a probation officer and thereafter as and when directed by the probation officer; participate in such assessment for alcohol and drugs as may be directed by the probation officer; participate in such alcohol and drug counselling and programming, including residential programming as and when directed by the probation officer, and there will be a term that he abstain absolutely from the possession and consumption of alcohol and non-prescription drugs during this period.

[16] The reason I insert that is that he will not be eligible for any programming unless he does abstain during this period because they will require a period of abstention before they accept you into any residential program, Kirk. Should a peace officer have a reasonable suspicion that you are in breach of this term, the

peace officer may make a demand for a breath sample or a urine sample and you will comply with such a term.

[17] What I am going to do is use this term; you are to have no contact, directly or indirectly, with Marina Whitehead, except as permitted by the probation officer. Now, it may be that some form of supervised contact may be considered appropriate, and I will leave that to the probation officer to determine, but the starting point should be no contact. It may be that progress is made and the probation officer may allow some supervised contact.

[18] The committal order, Madam Clerk, will be endorsed to include supervised contact with Ms. Whitehead in WCC is not precluded.

[19] THE CLERK: Should the probation order attach to all his matters?

[20] THE COURT: Yes, please.

[21] THE CLERK: Thank you.

[22] THE COURT: Coming then to Ms. Whitehead, three months of her incarceration to be served conditionally in the community on the following terms. Statutory terms will apply. Those statutory terms include a reporting to a supervisor within two working days after her release from Whitehorse

Correctional. It will include a term that she reside at such place as approved in advance by her conditional sentence supervisor. I strongly recommend the ARC as a placement for her. I have strong views against her residing with her mother during the conditional sentence, and it may very well be, Ms. Rushant, that there may be a period of time where there isn't a suitable place for her to reside and she may have to default to WCC. Her place of residence and conditions of her residence are going to be critical if she is going to stay on a rehabilitative path. So there will be a reside term. There will be a term that she abstain absolutely from the possession and consumption of alcohol and non-prescription drugs. Should a peace officer have a reasonable suspicion to believe that she is in breach of this term, the peace officer may make a demand for a breath and urine sample and she will comply with such a demand.

[23] Can I go back, Madam Clerk, to the reside term, to reside at such place and abide by the rules of said residence. She is to take such alcohol and drug assessment counselling and programming, including a residential programming as directed by the conditional sentence supervisor. She is to have no contact, direct or indirect, with Kirk Alvin Stewart, except as approved by the probation officer in advance.

[24] You are to abide by a curfew by remaining within your residence between the hours of 6:00 p.m. and 8:00 a.m. unless you have the prior written permission of your conditional sentence supervisor. You are not to attend at any licensed

bar or tavern or any other commercial premise whose primary purpose is the sale of alcoholic beverages.

[25] Did I indicate a treatment term already, Madam Clerk?

[26] THE CLERK: Yes, to take such alcohol assessment ---

[27] THE COURT: Thank you. And treatment -- including residential treatment.

[28] With respect to the curfew, the normal knock and talk term will apply; that is to say she is to answer the telephone or the door during reasonable hours of the curfew. Failure to do so will be a presumptive breach of this order.

[29] Attend such other assessment, counselling and programming as directed by the conditional sentence supervisor.

[30] This will be followed by a 12-month probation order. The probation order will have the statutory terms. It will have the normal reporting term. The abstain terms, Madam Clerk, will apply, as will the testing; that is to say the breach -- to put it another way, the peace officer who has reason to believe that she is in breach can make a breath or urine sample demand. The assessment, counselling and programming terms will apply, as will the not attend at any

licensed premise term will apply. I think I should include at this point as well the no contact, direct or indirect, with Kirk Alvin Stewart unless she has the prior permission from her probation officer.

[31] Again, I think the understanding is clear that this is not an attempt to break up this relationship, but rather to ensure that there be no contact or very limited supervised contact until some programming has been completed to the satisfaction of the probation officer in this case.

[32] Victim fine surcharges will be waived. There will be no restitution orders made in this case.

[33] MR. PARKKARI: With respect to Ms. Whitehead, one clause in Ms. Rushant's report that I don't think is covered is the random urinalysis.

[34] THE COURT: I am prepared to put random drug testing as part of the conditional sentence but not as part of the probation order. I am not persuaded that it is a lawful order in a probation order. If she is at the ARC, she will have that in any event.

[35] MR. PARKKARI: But I would note that the 348 is a secondary designated offence for DNA purposes. I just raise that. I am not making an application.

[36] THE COURT: Yes.

[37] MS. MacDIARMID: Your Honour, Ms. Rushant has just pointed out -- I know that you made an endorsement with respect to Mr. Stewart about contact while he is incarcerated.

[38] THE COURT: Thank you very much. There will be a similar endorsement on the Committal Order with respect to Ms. Whitehead, that supervised access in WCC is not precluded.

[39] I am inclined, in all of the circumstances, to make the DNA orders. I suspect that Mr. Stewart, in the past, has already made a contribution of his DNA. If he hasn't, he should. In Ms. Whitehead's case, the case for so doing is not compelling, but in light of the fact that she is a co-accused with Mr. Stewart, it tips the balance in my mind. There will be a DNA order.

[40] Do you have those with you?

[41] MR. PARKKARI: I don't believe there is one on file. We will look into that.

[42] THE COURT: You will attempt to have it in the normal course?

[43] MR. PARKKARI: Yes.

[44] THE COURT: If you will fly it by both counsel for their approval, I will deal with it in chambers.

[45] MR. PARKKARI: Yes.

[46] With respect to the charges for which guilty pleas are not entered, that is the 334, the 774(a) Information, Count 1, and then Count 4 is a 354 charge, we stay the proceedings.

[47] THE COURT: Thank you. Stays will be recorded.

[48] Anything from either counsel?

[49] MR. COFFIN: No.

[50] MS. MacDIARMID: No.

[51] THE COURT: Ms. Whitehead, I do want to speak to you directly. You heard my comments earlier. There is an opportunity here for you to start turning things around. You know it is not going to be an easy journey. It is going to be a very, very difficult and a long journey to do it. I hope that you will make all

reasonable attempts to do so. If you do, I think you will have a lot of support. You will have a lot of support from probation people and from other people who are concerned about you, but you know it is not going to be easy. You will have to persevere.

[52] Thanks.

LILLES C.J.T.C.