Citation: *R. v. Venclovsky*, 2023 YKTC 50

Date: 20231215
Docket: 20-11010
20-11010A
Registry: Dawson City
Heard: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

OLDRICH VENCLOVSKY

Appearances:
Leo Lane — Counsel for the Crown
Kevin Drolet — Counsel for the Defence

REASONS FOR SENTENCE

[1] PHELPS T.C.J. (Oral): Oldrich Venclovsky is before the Court having entered pleas of guilty to two offences, one being that:

> On or about the 12th day of December, 2019 at the City of Dawson, in the Yukon Territory, , did have in his possession child pornography to wit: digital photographs and videos, contrary to Section 163.1(4) of the Criminal Code.

and the second count that:

> On October 19th, 2023, at Dawson City, Yukon, being at large on a release order entered into before a justice without lawful excuse did fail to comply with a condition of said release order, to wit: not to use, possess or own any

> computer system or device capable of accessing the Internet contrary to section 145(5) of the Criminal Code.

[2] There is an Agreed Statement of Facts for sentencing that was filed and entered as an exhibit in this hearing that sets out that Mr. Venclovsky, in Dawson City, Yukon, on the 22nd day of October 2019, took his laptop computer to a local technician for repairs. The laptop technician discovered some photographs that appeared to be of nude children, so he contacted the RCMP.

[3] An RCMP investigation resulted in a search warrant on Mr. Venclovsky's residence looking for evidence of child pornography. The officers seized several electronic devices, including his laptop.

[4] Forensic analysis of the laptop revealed over 1,300 unique images consisting of child pornography. Mr. Venclovsky was arrested and released on an order prohibiting him from possessing any computer system or device, including a mobile phone capable of accessing the Internet.

[5] On October 20, 2023, Mr. Venclovsky asked a computer technician in Dawson City to fix his laptop computer as he was having trouble accessing the website. The technician was aware of Mr. Venclovsky's criminal charges and notified the RCMP.

[6] The RCMP then executed a search warrant on Mr. Venclovsky's residence and seized one tablet computer, two mobile phones, and an Internet router. These devices were capable of accessing the Internet and Mr. Venclovsky knew he was prohibited from possessing them.

[7] When seized, Mr. Venclovsky's tablet computer was connected to the website "Porndoe.com", and the page contained the links "Naughty Lesbian Teen" and "Sexy Casting of a Teen Buhalo".

[8] Based on those facts, there was a finding of guilt with respect to the two counts before the Court. Attached to the Agreed Statement of Facts is an appendix created by Cst. Clements of the RCMP, who is attached to the Internet Child Exploitation Unit in Whitehorse, Yukon. She sets out that the images captured on the device of Mr. Venclovsky fall into all five categories as set out in *R. v. Oliver*, [2002] EWCA Crim 2766, EWJ 5441, from the English Court of Appeal. He was in possession of 772 images under Category 1, which are images depicting erotic posing with no sexual activity; 140 unique images under Category 2, which are images of sexual activity between children or solo masturbation by a child; 131 unique images under Category 3, which are non-penetrative sexual activities between adults and children; 307 unique images and one unique video under Category 4, which are penetrative sexual activity between children and adults; and a further 18 unique images under Category 5, which are of sadism or bestiality.

[9] To expand on the nature of the images, I will simply reference the explanation of Category 5, given that they are the most serious images on his computer. The report states as follows:

> Images of young females with their legs and/or arms bound by ropes, tapes, handcuffs or ankle cuffs/ Some of these females have tape on their mouths as well. One of the females is posing without underwear and someone is holding a whip by her buttocks. A young female has a leather collar around her neck, attached to a chain while her

> hand is inserted into an adult female's vagina. There is a young female with her hands tied with a rope giving a fellatio. One of the females who is bound by her legs and hands also appears to have a device inserted into her vagina and held by a harness. There are images that actually belong to a video in which the female gives a fellatio to a dog. There are images of a dog penetrating a young female. There is a close up image of a young female whom I believe was just penetrated by a dog and there are also images of a dog licking a female's anus.

[10] I note that Mr. Venclovsky was in possession of these images. He was not necessarily an individual who was actively abusing the children in question. I will get to the victim impact statements momentarily. I find that s. 718.01 of the *Criminal Code* does apply to the offence that is before me, which states:

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct…

[11] As well as under 718.2(a)(ii.1), which states:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> (a) …
>
> ...
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> ...
>
> shall be deemed to be aggravating circumstances.

[12] The offence before me directly contributes to the physical acts depicted in the images by encouraging the activity in question. As indicated, I find that those provisions apply to the sentencing.

[13] There were victim impact statements presented to the Court attached to an affidavit of Monique St. Germain, general counsel for the Canadian Centre for Child Protection. She attaches three victim impact statements that were prepared with respect to individuals believed to be depicted in the imagery seized from Mr. Venclovsky.

[14] One is written firsthand by a victim referenced as “Jenny”, who states in her victim impact statement as follows:

> I was only seven when my predator began molesting me and photographing me. It went on for two years before they found him on the Internet sending pictures of me to men. Then they found me after arresting him, but my life has never been the same. I have lived my life uncomfortable with men and boys around. I am always conscious of my clothing and making sure no one can see any parts of me. I worry about the pictures of me that are out there and I hate that others see them. I have feared over the years that someone would recognize me in public. I wish only that every single one can be found and destroyed someday. It is upsetting thinking about them and I want them to go to jail for doing it.

[15] There are two further victim impact statements prepared by the mother of two victims. I will reference one written by the mother on behalf of “Pia” that states as follows:

> How has this crime affected my child's general well being? A crime of this magnitude has had an enormous emotional effect on my child. My child's life has been changed forever.

> She is very aware of the images and videos that were produced and distributed online. She is aware of the seriousness and the vastness of this crime. This crime creates a crippling insecurity in her and makes her worried and extremely upset. The fear consumes her daily. Talking about this crime (the distribution of her abuse images) causes her to feel sick almost to the point of vomiting. When her siblings start to talk about anything related to this crime, she will ask us, her family, to stop talking about it and will go on to say how ill she feels. She will shut down and not want to talk about it. At times my child is full of anxiety, and does not know how to express it. Sometimes she tries to just bury it. But, she is not able to keep it buried, and it re-emerges in unexpected and unpredictable ways—often anger, but also sadness. I believe that she worries that others will learn what has happened to her, and that she will be shunned, ridiculed or victimized by others who don't know how to react to the reality that my daughter has to cope with. She is embarrassed and humiliated, knowing that images that portray her in a sexual manner are available for others to see. She is afraid, as am I, that she will be recognized by those who have downloaded the images of her abuse. At times, she appears to be depressed. At those times she is withdrawn, uncommunicative, sleepy, sometimes tearful, occasionally paralyzed and unable to move forward or complete tasks that she is quite capable of completing, appearing to be unmotivated, unable to concentrate, and overwhelmed.

[16] The statements in question indicate the significant trauma endured by the children, the victims, abused at times by friends and family. The ongoing shame and re-victimization as the photographs are shared and circulated throughout the Internet, the lifetime trauma, and, no doubt, the limited resourcing available to the victims all go to the serious nature of the offences. This was addressed in *R. v. Friesen*, 2020 SCC 9, at paras. 47 and 48, by the Supreme Court of Canada as follows:

> 47 New technologies have enabled new forms of sexual violence against children and provided sexual offenders with new ways to access children. Social media provides sexual offenders “unprecedented access” to potential child victims

> (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 102).The Internet both directly connects sexual offenders with child victims and allows for indirect connections through the child's caregiver. Online child luring can be both a prelude to sexual assault and a way to induce or threaten children to perform sexual acts on camera (see *R. v. Woodward*, 2011 ONCA 610, 107 O.R. (3d) 81; *R. v. Rafiq*, 2015 ONCA 768, 342 O.A.C. 193). The Internet has also "accelerated the proliferation of child pornography" (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 114, per Deschamps J.).
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> 48 Technology can make sexual offences against children qualitatively different too. For instance, online distribution of films or images depicting sexual violence against a child repeats the original sexual violence since the child has to live with the knowledge that others may be accessing the films or images, which may resurface in the child's life at any time (*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 92; *R. v. S. (J.)*, 2018 ONCA 675, 142 O.R. (3d) 81, at para. 120).

[17] I do have before me, with respect to these offences, a joint submission between counsel that I impose a sentence of 15 months' jail on the s. 163.1(4) *Criminal Code* offence less time served and a consecutive sentence of three months for the s. 145 *Criminal Code* offence. In addition, the joint submission is for two years of probation, and the ancillary orders that would attach to an offence like the one before the Court.

[18] A casebook was filed setting out jurisprudence for similar offences in the Yukon.

[19] The case of *R. v. Finn*, 2012 YKTC 106, from the Territorial Court of the Yukon, involved a 56-year-old offender. It is a pre-*Friesen* decision. I will quote from the decision at paras. 2 and 3:

> 2 … On one of these computers the agent discovered some nude photographs of Mr. Finn and a very young-looking Filipino girl. This discovery led to further inspection of the

> computer and, ultimately, to a forensic search and analysis of the computer by RCMP technicians. One of the computers contained over 100 images and seven videos, meeting the definition of child pornography.
>
> 3 The images ranged from posing, where the focus is on the genitals, to sexual activity with adult males, and bestiality. The victims are as young as one year old. …

[20] In that decision, Judge Faulkner references the *R. v. Missions*, 2005 NSCA 82 decision, which adresses the categorization that I referenced earlier when reviewing the facts. He highlights the five categories, noting that the majority of the videos and images were at the lower levels, but there were a significant number in levels 3 and 4, and at least one in level 5.

[21] I note that he adds in para. 11:

> I should add that, in my own view, that while I find the categorization from *Missions*, which has been adopted in many cases in Canada, to be helpful, there is, in my view, one additional consideration, and that is the question of the age of the children involved, and as has been noted here in this case, some were but infants.

[22] He goes on to note the focus of denunciation and deterrence in the sentencing and imposed a two-year sentence.

[23] Also filed was the Yukon Court of Appeal decision of *R. v. McCrimmon*, 2022 YKCA 1, a case where the trial judge had imposed a sentence of 20 months' imprisonment followed by two years' probation. The facts of the case being that the police found over 33,000 unique images and almost 5,000 unique videos of child pornography on Mr. McCrimmon's devices. The material depicted male and female victims ranging in age from six months to 17 years old and covered the gambit of the

categories previously outlined by me in this decision. The Court of Appeal upheld the sentence of 20 months followed by two years' probation.

[24] Finally, the case of *R. v. Saplala*, 2022 YKTC 29, where the offender had imagery, the volume of the imagery was approximately 100 images or videos constituting child pornography. In that decision, the sentence was 11 months' jail.

[25] Of note, in that decision, Mr. Saplala was on conditions for a period of approximately two years requiring him to reside at the local men's transition home and it imposed a significant hardship on him which explains, to some extent, the relatively low sentence of 11 months.

[26] As indicated, the submission before me is a joint submission. I note from the decision of *R. v. Anthony-Cook*, 2016 SCC 43, the following with respect to how courts should treat joint submissions:

> 32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. …
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> …
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> 44 Finally, I note that a high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (Martin Committee Report, at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616). Defence counsel is required to act in the accused's

> best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online), rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.*, rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (Martin Committee Report, at p. 287).

[27] Defence counsel provided some background information with respect to Mr. Venclovsky confirming his age is 72 years old; there is no prior criminal record; noting that he immigrated to Canada in 1982; lived in the Dawson City area for most of his time in Canada; and for 30 years lived in a small cabin out on the land without running water or power.

[28] Defence counsel explained that he sat with Mr. Venclovsky and read the victim impact statements to him and noted that there was a significant response by Mr. Venclovsky. He simply did not appreciate the harm that he was doing by possessing these images. He did not make or distribute the images, but he acknowledges the harm that he has done by possessing them and viewing them. He further stated through counsel that he regrets his behaviour and wished to convey the depth of his horror to learn the harm that he had caused to these victims.

[29] On the facts before me, in light of the case law that I have reviewed, and the requirements under the *Anthony-Cook* decision, I find that the joint submission before me is appropriate, and I am prepared to adhere to it.

[30] Mr. Venclovsky, I am sentencing you today as follows:

- On the s. 163.1(4) *Criminal Code* offence, I am sentencing you to a period of custody of 15 months. Your record will reflect that you will receive credit in the amount of 72 days towards that sentence for the time that you have served in custody, which was 48 days to date.

- On the offence contrary to s. 145(5) of the *Criminal Code*, I am sentencing you to a further three months in custody, for a total of 18 months in custody, again, less the time served, totaling 72 days of credit.

[31] In addition to the period of custody, I am placing you on probation for a period of two years, the conditions of which will be that you must:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify your Probation Officer in advance of any change of name or address, and promptly notify your Probation Officer of any change of employment or occupation;

4. Report to your Probation Officer immediately upon your release from custody and thereafter when and in the manner directed by your Probation Officer; and

5. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer and complete them to the

satisfaction of your Probation Officer, for any issues identified by your Probation Officer, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition.

[32] Pursuant to s. 487.051 of the *Criminal Code*, you will be required to provide a DNA sample, which means that you will provide samples of bodily substances that are reasonably required for the purpose of forensic DNA analysis.

[33] You will be subject to the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 20 years.

[34] You will be subject to an order pursuant to s. 161(1) of the *Criminal Code* for a period of six years, which will include the provision that you do not seek, obtain, or continue any employment, whether or not the employment is remunerated or become or be a volunteer, in any capacity that involves being in a position of trust or authority towards persons under the age of 16 years.

[35] As well, you are not to use or possess an Internet router or any computer system as defined in s. 342.1(2) of the *Criminal Code*, including any desktop computer, laptop computer, tablet computer, or smart phone, except:

(i) you may use a “flip phone” or other cellular phone that does not have an Internet browser or mobile data capabilities;

(ii) you may use a publicly accessible computer inside a library as long as you do not use it to view, copy, or download any nude images; and

(iii) you may use a computer or smart phone under the direct supervision of an adult approved in writing by a member of the Dawson City RCMP.

[36] In addition, I am going to approve the request for forfeiture of the devices seized, being those devices that have access to the Internet, as well as the router that was seized from your premises.

[DISCUSSIONS]

[37] Victim surcharges will be waived.

[38] Crown directed a stay of proceedings with the outstanding counts at the commencement of the submissions, so those counts will be stayed.

[DISCUSSIONS]

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PHELPS T.C.J.