

CR 02924

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

CLINTON WESTGARD

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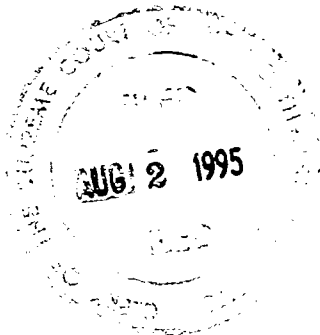
Transcript of Reasons for Sentence delivered by The  
Honourable Mr. Justice J.Z. Vertes, sitting at  
Yellowknife in the Northwest Territories, on Thursday,  
July 27, A.D. 1995

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APPEARANCES:

Mr. S. Couper:

Mr. R. Gorin:



For the Crown

For the Defence

(Charges under Sections 279(2) and 266(a) of the Criminal  
Code)

1 THE COURT: Clinton Westgard has entered pleas of  
2 guilty to three charges: one of unlawful confinement  
3 and two of common assault.

4 The guilty pleas came on the eve of the  
5 commencement of his trial before a jury. He had been  
6 facing trial on a six-count Indictment. The guilty  
7 pleas were entered, with the Crown's agreement, to  
8 lesser and included offenses on three of those counts.  
9 The other three counts were stayed by the Crown.

10 The crime of unlawful confinement, contrary to  
11 Section 279(2) of the Criminal Code, is punishable by a  
12 potential maximum penalty of ten years imprisonment.  
13 The indictable offense of assault, contrary to Section  
14 266(a) of the Criminal Code, is punishable by up to  
15 five years imprisonment. The Criminal Code, of course,  
16 does not set down any mandatory minimum punishment for  
17 these crimes. So there is a wide discretion given to  
18 trial judges to impose sentences based on the  
19 appropriate circumstances and particular facts of each  
20 case.

21 Considering the fact that the guilty pleas were  
22 entered with the Crown's consent to significantly  
23 reduced charges from those set out in the Indictment, I  
24 think it is fair to say that they must be the result of  
25 extensive discussion, investigation, and negotiation.  
26 I commend counsel for their efforts. However, much  
27 more effort was obviously required since, after entry

1 of the guilty pleas, counsel embarked on a day-long  
2 sentencing hearing. There was so much disagreement  
3 over the facts and circumstances of each offense, and  
4 over the context in which those offenses occurred, that  
5 I wonder how counsel were able to agree at all on the  
6 pleas.

7 In respect of the facts, I heard from seven  
8 witnesses, including the complainant and the accused  
9 plus a teenage son of each of them. Many of the facts  
10 addressed seemed to me to be only marginally relevant  
11 to the question of sentence. I also heard from four  
12 character witnesses called on behalf of the accused.

13 I think it is worth repeating what was said at the  
14 hearing.

15 It is not every disputed fact that must be proven  
16 at a sentencing hearing. In this case, I can assume,  
17 by the entry of the guilty pleas, that the accused  
18 admits all of the essential elements of the offense.  
19 So in this case convictions have been entered. It is  
20 only when the Crown seeks to rely on facts of  
21 aggravating circumstances so as to impose a harsher  
22 sentence on the accused, and the accused challenges  
23 those facts, the Crown must then establish those facts  
24 beyond a reasonable doubt. Similarly, if  
25 representations as to the facts made by the defence are  
26 challenged by the Crown, then there is an obligation on  
27 the part of the defence to present evidence.

1 Mitigating factors are not to be simply assumed in the  
2 absence of evidence establishing those facts. But, of  
3 course, any doubt should still be resolved in favour of  
4 the accused with respect to any aggravating factors  
5 that the Crown attempts to prove.

6 On a sentencing hearing, I have much more latitude  
7 than in a trial as to the sources and types of evidence  
8 upon which to base the sentence. Any evidence, so long  
9 as it is relevant and reliable, can be considered.

10 I find the following uncontroverted facts.

11 The charges arise from a four-year-long domestic  
12 relationship between the accused and the complainant.  
13 They cover a time frame from mid-January 1995, the time  
14 when the complainant says they separated, to March  
15 10th, 1995, when the complainant made the first report  
16 to the police. The specific date for two of these  
17 charges has not been established, while only the third  
18 charge has a specific date. There was, from the date  
19 of separation on, continued contact between the  
20 complainant and the accused. The complainant admitted  
21 as much. She said they tried to be friends, so their  
22 contact was fairly frequent early on in the separation,  
23 but became less so when she realized that their  
24 inter-personal problems would not change. This is  
25 consistent with the fact that the complainant finally  
26 decided to go to the police. It is also consistent  
27 with what I conclude was a continuing pattern of

1           conduct whereby the accused would persist in pursuing  
2           the possibility of reconciliation. I do not go so far  
3           as to label it harassment in a criminal sense, but the  
4           conclusion I draw is that it became harassing over time  
5           on a personal level. I did not hear any evidence to  
6           suggest that the complainant wanted to reconcile. It  
7           is also consistent with the accused's failure to abide  
8           by a non-contact condition in his recognizance of bail  
9           after his arrest.

10           There is also no doubt that the relationship was a  
11           volatile one. I heard evidence of assaultive behaviour  
12           by both of them toward each other at other times  
13           outside of these charges.

14           With respect to the unlawful confinement charge,  
15           this took place in the complainant's home. The accused  
16           blocked the complainant's freedom of movement for a  
17           brief time -- five to ten minutes -- by standing in the  
18           doorway of her bedroom. According to the Crown, she  
19           told him she had to leave and he finally let her do  
20           so. According to the defence, she finally pushed her  
21           way out. To my mind, nothing turns of significance on  
22           this difference.

23           The complainant said this happened a few weeks  
24           after the accused move out of the house. She testified  
25           that he moved out on January 13th. The accused said  
26           this happened on January 29th or thereabouts, but that  
27           he was still living in the house at the time. There

1 was evidence that he lived in the house up until  
2 February 2nd, 1995, when he signed a lease on an  
3 apartment. There was no evidence to rebut this. Hence  
4 I cannot conclude beyond a doubt that the accused was  
5 not living there at the time. Hence I cannot find, as  
6 an aggravating factor, that the accused was in the  
7 house unlawfully or without permission. In any event,  
8 the Crown chose to withdraw an allegation of a break  
9 and enter. So I do not see how it can suggest  
10 otherwise than that the accused was in the house  
11 lawfully.

12 The first charge of assault, resulting from Count 3  
13 of the Indictment, drew the most controversy. Again,  
14 the facts are highly disputed.

15 The Crown says that the accused came into the house  
16 sometime in early February in the early morning hours.  
17 The complainant said, and I quote, "He broke into the  
18 house." Again, considering the fact that the Crown  
19 dropped a break and enter charge in relation to this  
20 offense, I find it incongruous that they would still  
21 advance this allegation.

22 The Crown alleges that the accused confronted the  
23 complainant while she was still in bed. He asked her  
24 to take him back. She told him no. He allegedly  
25 pinned her to the bed, threatened to beat her, and then  
26 choked her with his hands. He ceased after a short  
27 while and left.

1           The defence alleges that the accused had spent the  
2 night there at the complainant's invitation. The  
3 accused testified that they argued and that she hit and  
4 scratched at him. He said that a struggle ensued in  
5 which he used excessive force by pulling her hair. He  
6 denied choking her.

7           What is not disputed is that, as a result of this  
8 altercation, the complainant suffered an anxiety attack  
9 and her breathing became laboured. Even the accused  
10 acknowledged that he became worried, and the  
11 complainant's son confirmed that the accused asked him  
12 to keep an eye on the complainant as he left the  
13 house. There was also some evidence that the  
14 complainant may have struck the accused after the  
15 incident was over as he was leaving the house.

16           How is one to choose one story over another? There  
17 are no rational external criteria by which to judge the  
18 discrepancies. I find I cannot do so in this case.  
19 The burden being on the Crown, I find that the Crown  
20 has failed to prove beyond a reasonable doubt those  
21 aggravating factors Crown counsel asks me to find:  
22 those being an unexplained presence in the home, the  
23 instigation of the assault, and the choking. On the  
24 other hand, I am equally unpersuaded that I should find  
25 there were those mitigating circumstances that defence  
26 counsel wants me to find: the accused's presence in  
27 the home by consent and his being struck first. The

1 assault is serious enough in and of itself even without  
2 the alleged choking and even without consideration of  
3 any specific aggravating or mitigating circumstances.

4 On the third charge, that being the charge of an  
5 assault in Count 6, the facts are admitted. On March  
6 10th, 1995, at approximately 10 a.m., the accused came  
7 to the complainant's home. He asked her to take him  
8 back. He persisted by following her throughout the  
9 house. She told him to leave. He would not. He thus  
10 became a trespasser in her home. She tried to push him  
11 out. He pushed back. By his plea of guilty, the  
12 accused acknowledges he used excessive force. That is  
13 the extent of Count 6.

14 In their submissions on sentence, Crown counsel  
15 argued that I should impose a further sentence of  
16 imprisonment. Defence counsel suggested time served.  
17 The accused has been in custody since March 24th, of  
18 which 15 days was a sentence for breach of his  
19 undertaking. The approximately three and a half months  
20 of pre-trial custody must, of course, be taken into  
21 account. It is usually credited at a ratio higher than  
22 one to one, but, as counsel knows, there is no strict  
23 formula.

24 The accused is a mature man. He has been steadily  
25 employed for the past eight years. His employer and  
26 friends speak highly of him. He has three children  
27 that he supports as well. The accused does have a



1 previous criminal conviction. There is one conviction  
2 from 1987 for sexual assault for which he received 60  
3 days. Obviously it was not a major offense, so I  
4 attach little weight to it.

5 The aggravating circumstance present in all of  
6 these offences is that they arise from a continuous  
7 pattern of domestic violence. That is obviously very  
8 serious and must be denounced. The accused and others  
9 must be deterred.

10 The mitigating circumstance is that all offenses  
11 were of brief duration, more spontaneous than  
12 premeditated.

13 I give credit to the guilty plea. It has saved  
14 time and expense and the need at least for the  
15 complainant to testify before a jury (although this  
16 factor is not as great as it ordinarily would be since  
17 the complainant had to testify at the sentencing  
18 hearing where she was cross-examined and her  
19 credibility was attacked). But I do not think the  
20 guilty plea can be disregarded simply because it came  
21 at the last moment. This is not a case of the accused  
22 realizing he was in a hopeless situation with an  
23 overwhelming case against him. On the contrary, it was  
24 the Crown that gave significant ground at the last  
25 minute. I am sure that the Crown had good reasons to  
26 do so, reasons that accord with the Crown's  
27 responsibility to the pursuit of justice. But the

1 result is that the guilty plea should be given some  
2 mitigating effect.

3 In my opinion, appropriate sentences on these  
4 charges, leaving aside the pre-trial custody time,  
5 would be gaol terms of two, three, and four months,  
6 respectively, increasing with each occurring offense,  
7 and all consecutive to each other since they are  
8 separate offenses. That is a total of nine months. To  
9 that, I must apply a reduction for time already spent  
10 in custody. In this case, I credit the accused with  
11 the equivalent of six months so as to reduce the total  
12 to one of three months.

13 Is there any reason not to order intermittent  
14 time? The accused has steady employment. He has  
15 children to support. It seems to me society would be  
16 better served by having him working as opposed to  
17 sitting behind bars.

18 I accept, however, Crown counsel's recommendation  
19 that the accused's future conduct be controlled by some  
20 type of ongoing protective order. This would help  
21 protect the complainant.

22 Stand up Mr. Westgard.

23 Mr. Westgard, I am sure you realize by now that if  
24 there is any repetition of this type of behaviour, you  
25 are going to go to gaol for a long time. Do you  
26 understand that?

27 THE ACCUSED: Yes, sir.

1 THE COURT: On Count 2, that is the charge of  
2 unlawful confinement, I sentence you to serve a term of  
3 imprisonment of 30 days. On Count 3, the charge of  
4 assault, I sentence you to serve 30 days consecutive.  
5 On Count 6, the charge of assault, I sentence you to  
6 serve a further term of 30 days consecutive. That is a  
7 total of 90 days. That sentence is to be served  
8 intermittently on weekends. You are to report to the  
9 Yellowknife Correctional Centre on Friday, July 28th,  
10 1995, at 6 p.m. You are to be incarcerated there until  
11 Monday, July 31st, 1995, at 7 a.m., and you are to  
12 continue to report each and every weekend thereafter  
13 until your sentence is served.

14 Do you understand that, sir?

15 THE ACCUSED: Yes, sir.

16 THE COURT: You will be on probation for a period  
17 of two years from today's date, and the terms and  
18 conditions of that probation will be as follows. You  
19 are to keep the peace and be of good behaviour. You  
20 are to report to this Court if and when required to do  
21 so. You are to serve the intermittent sentence in  
22 accordance with my instructions. You are to report  
23 within the next 48 hours to the probation officer here  
24 in Yellowknife, and you are to continue to report as  
25 and when required by the probation officer. You are to  
26 engage and participate in any counseling programs that  
27 the probation officer may direct you to do or recommend

1 for you. You are to have no contact, directly or  
2 indirectly, with the complainant, and you are not to be  
3 within a space of 100 yards of her residence at any  
4 time.

5 Do you understand that, sir?'

6 THE ACCUSED: Yes sir.

7 THE COURT: Now, the Clerk of the Court will  
8 prepare the probation order. Your counsel will have an  
9 opportunity to review it with you. But I want to make  
10 it very clear to you, sir, that if you breach any of  
11 the conditions of the probation order, that is an  
12 offense. You can be charged for that. You can be  
13 brought back before me. I can change the terms and  
14 conditions for your probation order. I can extend  
15 them. Do you understand that?

16 THE ACCUSED: Yes, sir.

17 THE COURT: You may have a seat.

18 In addition, there are will be a victim of crime  
19 surcharge.

20 I understand, Counsel, that there is some  
21 regulation in place that limits me to imposing a fine  
22 surcharge of \$35 in the absence of any fine.

23 So, Mr. Westgard, I direct that you pay the sum of  
24 \$35 to the Clerk of the Court within the next seven  
25 days. That money is to go into a fund to help develop  
26 support programs for victims of crime.

27 Do you understand that?

1 THE ACCUSED: Yes, sir.

2 THE COURT: If you do not pay that, you will serve  
3 an additional two days in gaol.

4 Now are there any questions, Counsel?

5 MR. COUPER: No, My Lord.

6 MR. GORIN: No, sir.

7 THE COURT: Thank you very much. We will adjourn.

8 (PROCEEDINGS CONCLUDED)

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Certified Pursuant to Practice Direction #20  
dated December 28, 1987.

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Jane Romanowich  
Court Reporter

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