

# SUPREME COURT OF YUKON

Citation: *R v Smith*,  
2022 YKSC 28

Date: 20220610  
S.C. No. 21-01506  
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

WILLIAM HENDERSON SMITH

Before Justice K. Wenckebach

Counsel for the Crown

Noel Sinclair

Counsel for the Defence

Christiana Lavidas

This decision was delivered in the form of Oral Reasons on June 10, 2022. The Reasons have since been edited for transcription without changing the substance.

## REASONS FOR SENTENCE

[1] WENCKEBACH J. (Oral): Mr. Smith has pleaded guilty to two charges: possession of a firearm without a licence, contrary to s. 92(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “*Criminal Code*”); and carrying a weapon for a purpose dangerous to the public peace, contrary to s. 88 of the *Criminal Code*.

[2] At the sentencing hearing, the Crown sought that Mr. Smith be sentenced to 90 days jail on the first charge, as well as 90 days jail on the second charge, to be served concurrently, along with ancillary orders. Mr. Smith’s defence counsel submitted

that a nine-month conditional sentence order (“CSO”) globally for both charges would be appropriate.

[3] The issue I must therefore decide is whether the circumstances warrant a jail sentence or if I should impose a conditional sentence order.

[4] Section 742.1 of the *Criminal Code* allows the court to make a conditional sentence order where four criteria are met. The four criteria are:

- (a) the offence for which the offender is convicted must not be punishable by a minimum term of imprisonment;
- (b) the court must impose a term of imprisonment of less than two years;
- (c) the safety of the community would not be endangered if the offender were to serve the sentence in the community; and
- (d) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing.

[5] In this case, there is no minimum term of imprisonment and it is uncontroverted that neither probation nor a term of imprisonment of more than two years would be appropriate. Therefore, the issues for me to decide are about safety and how the principles of sentencing apply to the facts of this case.

[6] I will first address whether the safety of the community would be endangered if Mr. Smith were to serve his sentence in the community.

A. Safety of the Community

[7] In *R v Proulx*, 2000 SCC 5 (“*Proulx*”), the Supreme Court of Canada discussed the principles of conditional sentence orders. The Supreme Court of Canada identified two factors the sentencing judge should take into account when examining the

offender's risk to the community: (i) the risk of the offender re-offending; and (ii) the gravity of the damage that may occur in the event of re-offence (at para. 69).

[8] In addressing the gravity of the damage that could ensue in the event of re-offence, the court said:

[74] ... Particularly in the case of violent offenders, a small risk of very harmful future crime may well warrant a conclusion that the prerequisite is not met. (citation omitted)

[9] The sentencing judge should also determine whether the offender's risk could be attenuated through appropriate conditions in the CSO (at para. 72).

[10] If, at the end of the assessment, the judge concludes that there is a real risk of re-offence, then they should not make a CSO but should impose a jail sentence (at para. 69).

[11] Here, in addressing whether Mr. Smith is at risk of offending, I will consider the following factors:

- the nature of the offence;
- the relationship between Mr. Smith and the victim, Mr. Edward Sharkey;
- Mr. Smith's circumstances, including his occupation, lifestyle, and other circumstances; and
- his criminal record.

*Nature of the Offence*

[12] The basic facts of the offence are that, on March 2, 2020, Mr. Smith drove to Mr. Sharkey's house with a loaded .44 calibre rifle. He walked up to the house and banged on the door. Mr. Sharkey did not answer but instead phoned 911. When Mr. Sharkey did not answer the door, Mr. Smith returned to his truck. His truck was stuck in the snow and he was still there when the RCMP arrived.

[13] When the RCMP approached Mr. Smith's truck, they told him to put his hands up and keep them visible; however, he did not. An RCMP officer concluded that there was an imminent threat to himself and he fired his gun at Mr. Smith. It hit Mr. Smith's truck and Mr. Smith was not injured.

[14] After the arrest, when the RCMP retrieved Mr. Smith's rifle, they found that not only was there ammunition in the firing chamber but the firing hammer was in the cocked and ready to fire position. An RCMP member also detected an odour of alcohol on Mr. Smith's breath and that he had slurred speech and glassy eyes.

[15] The RCMP made a breath demand, which Mr. Smith refused to provide.

[16] Mr. Smith's firearms possession and acquisition licence had been revoked in 2009 because of a firearms prohibition order. The prohibition order had expired but Mr. Smith never applied for a new licence.

[17] Crown and defence counsel made submissions about whether I could conclude that Mr. Smith was intoxicated during the incident. The Admissions of Fact does not state that Mr. Smith was intoxicated. Defence counsel also points out that slurred speech and glassy eyes do not conclusively prove intoxication. However, an RCMP officer also detected an odour of alcohol on Mr. Smith's breath. Mr. Smith then failed to comply when the RCMP officer made a breath demand.

[18] The pre-sentence report ("PSR") makes clear that Mr. Smith has issues with alcohol and Mr. Smith himself said that a majority of his arrests involved alcohol abuse because he gets a "bad temper when drunk".

[19] I conclude that alcohol played a role in the offence. The offences are serious. Carrying a loaded weapon, as Mr. Smith did after he had been drinking, could have had

disastrous consequences. The circumstances of the offence suggest that Mr. Smith is at a higher risk of reoffending.

*The Relationship between Mr. Smith and Mr. Sharkey*

[20] Mr. Sharkey is Mr. Smith's ex-partner's father. The Crown submits that the relationship between Mr. Smith and Mr. Sharkey also increases the risk of re-offence, as it occurred in the context of a domestic relationship.

[21] I am not prepared to come to this conclusion. Mr. Smith and his ex-partner, Ms. Sharkey, ended their relationship many years ago. The Admissions of Fact says that, in the distant past, Mr. Smith accosted Mr. Sharkey with regards to parenting and relationship problems he had with Ms. Sharkey, his partner. However, Mr. Sharkey and Mr. Smith had not spoken to each other in years.

[22] In the PSR interview, Mr. Smith said that he went to Mr. Sharkey's house to talk about rumours about Mr. Smith being a drug dealer that he believed were spread by Mr. Sharkey. While this is an incomplete and not wholly satisfactory explanation for Mr. Smith's attendance at Mr. Sharkey's home, I find that there is not enough evidence to conclude that Mr. Smith has long-standing animus towards Mr. Sharkey and which is related to his relationship with Ms. Sharkey.

[23] Mr. Smith and Mr. Sharkey are not presently connected in any real sense. I do not believe that their former connection through Ms. Sharkey elevates the risk of re-offence. The relationship between Mr. Smith and Mr. Sharkey is therefore a neutral factor.

*Mr. Smith's Circumstances*

[24] In many ways Mr. Smith's circumstances point to less risk of reoffending. He is fully employed. His employer knows that he has criminal troubles and supports him. He has support from his family as well and is particularly close to his sister.

[25] Other circumstances, however, suggest that his risk of re-offence is not negligible. Mr. Smith has had a problem with alcohol abuse for many years. He said, during the interview for the PSR, that he was not excited about attending counselling for alcohol abuse but would take counselling if he had to. At sentencing, he did say that he was willing to take counselling and that he thought it would be helpful, but he has not taken any steps to arrange for counselling or treatment.

[26] I do have concerns about Mr. Smith's commitment to dealing with his alcohol problems, although I hope Mr. Smith proves me wrong.

[27] It is also unclear whether Mr. Smith recognizes the seriousness of his actions. In the PSR, Mr. Smith stated that he just wanted to talk to Mr. Sharkey and did not address the effect that carrying a loaded rifle with him would or could have had.

[28] On the other hand, Mr. Smith entered a guilty plea, thus taking responsibility for what he did. In court, he also apologized, which I do not wish to minimize.

[29] In my opinion, this presents a mixed picture with regards to risk. Taken together, Mr. Smith's circumstances increase the risk he presents, although the positives in his life mean that the risk he presents is not as high as it would otherwise be.

[30] In terms of Mr. Smith's criminal record, Mr. Smith has a limited but related record. In particular, he was convicted of uttering threats and assaulting a police officer in 2009.

The Crown submits that Mr. Smith's convictions should be taken into account in assessing risk.

[31] What I see from Mr. Smith's criminal record is that his previous convictions are dated. He was sentenced to 15 months' probation and was apparently able to comply with his conditions, as no breach convictions resulted. Mr. Smith is able to comply with court conditions and has not had involvement with the criminal justice system in 13 years. This factor suggests that Mr. Smith is at a lower risk to reoffend.

[32] In assessing the gravity of the damage that would occur if Mr. Smith were to reoffend, Mr. Smith showed at best a serious lack of judgment in going to Mr. Sharkey's home with a loaded rifle in hand. Moreover, he seems not to have a great deal of insight about why he did what he did. It is possible then that Mr. Smith will wind up in another equally dangerous situation.

[33] Otherwise, however, Mr. Smith's past offences do not suggest that he would cause a great deal of damage were he to commit another crime. I conclude that this is not a situation in which a CSO should be rejected because of the potential damage that could be caused should Mr. Smith reoffend.

[34] Taking everything into consideration, I conclude that there is a risk that Mr. Smith will reoffend. However, given his ability to comply with court orders, the risk can be sufficiently mitigated by a well-crafted conditional sentence order. A conditional sentence is therefore available to him.

#### B. Fundamental Purpose and Principles of Sentencing

[35] The second question is whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing. The most important principles in

sentencing firearms offences are denunciation and deterrence. Courts have repeatedly recognized the danger associated with firearms offences and the need for sentences to reflect the seriousness of these crimes.

[36] In *Proulx*, the Supreme Court of Canada explained how the principles of denunciation and deterrence apply in CSOs. The Supreme Court stated that although incarceration generally provides more denunciation than a conditional sentence, denunciation can be achieved through onerous conditions and by imposing a longer sentence in a CSO (at para. 102).

[37] The Supreme Court also noted that in some cases the need for denunciation would be so important that only incarceration would be suitable (at para. 106).

[38] The Crown submits that, as denunciation and deterrence are the primary principles to take into account in firearms offences, a jail sentence is appropriate for Mr. Smith.

[39] Defence counsel states that although denunciation and deterrence are important, the principle of rehabilitation is still to be taken into consideration, and applies here. Mr. Smith would benefit from counselling, such as anger management. The principles of sentencing in this case would thus be best met through a CSO.

[40] I agree with defence counsel. Alcohol consumption and anger management problems contribute to these offences. While Mr. Smith's interest in counselling and treatment has been lukewarm, he is not averse to it.

[41] In *Proulx*, the Supreme Court stated:

[109] ... when the objectives of rehabilitation, reparation, and promotion of a sense of responsibility may realistically be achieved in the case of a particular offender, a conditional sentence will likely be the appropriate sanction, subject to



the denunciation and deterrence considerations outlined above.

[42] In my opinion, a nine-month conditional sentence order with strict conditions is sufficient to accomplish the goals of denunciation and deterrence while also meeting the objective of rehabilitation.

[43] I therefore order Mr. Smith to serve a nine-month conditional sentence order on Count #1 and a nine-month conditional sentence order to run concurrently on Count #2.

[44] Before I outline the terms of the order, I want you to know, Mr. Smith, that I was very close to ordering a jail sentence. Based on all of the information I have it seems to me that obeying the law is not always something that is important to you as it should be. The reason I decided I could order a conditional sentence order is because you have proved in the past that you can comply with court conditions.

[45] If you breach your CSO though, it could lead the Court to conclude that you cannot comply with court conditions. If you breach, you may end up serving the rest of your sentence in jail, so it is vital that you comply with your CSO.

[46] The terms of the CSO:

1. Keep the peace and be of good behaviour.
2. Appear before the court when required to do so by the court.
3. Report to a supervisor within two (2) working days upon your release from custody, and thereafter, when required by the supervisor and in the manner directed by your supervisor.
4. Remain within the Yukon unless you have written permission from the court.

5. Notify the supervisor in advance of any change of name or address, and promptly of any change of employment or occupation.
6. Have no contact directly or indirectly or communication in any way with Mr. Edward Sharkey.
7. Remain 100 metres away from any known place of residence, employment, or education of Mr. Edward Sharkey.
8. Reside at 14 MacDonald Road, abide by the rules of the residence and do not change that residence without the prior written permission of your supervisor.
9. For the nine months of this Order, at all times you are to remain inside your residence or on your property, except for the purposes of employment, including travel directly to and directly from your place of employment, and except with the prior written permission of your supervisor. You must answer the door or the telephone to ensure you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition.
10. Do not possess or consume alcohol and/or illegal drugs that have not been prescribed for you by a medical doctor. Provide a sample of your breath for the purposes of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition.
11. Not attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off sales, bar, pub, tavern, lounge or nightclub.

12. Attend and actively participate in all assessment and counselling programs as directed by your supervisor, and complete them to the satisfaction of your supervisor, for the following issues:
  - alcohol abuse,
  - anger management,
  - any other issues identified by your supervisor,and provide consents to release information to your supervisor regarding your participation in any program you have been directed to do pursuant to this condition.
13. Make reasonable efforts to find and maintain suitable employment and provide your supervisor with all necessary details concerning your efforts.
14. Not possess any firearm, ammunition, explosive substance or any weapon as defined by the *Criminal Code*.

[47] The Crown has also sought ancillary orders. I am going to make the following orders: under s. 491 of the *Criminal Code*, a weapons forfeiture order; a DNA order; and under s. 109, a firearms prohibition order for 20 years.

[48] Is there anything else today?

[49] MS. LAVIDAS: I don't think so, Your Honour.

[50] MR. SINCLAIR: Your Honour, with respect to the employment exception to the period of house arrest, I am wondering if the Court would consider that that exception permit him to be outside of the house as permitted in writing by his conditional sentence supervisor. The notion would be that he would meet with his conditional sentence supervisor, who I expect will be Mr. Mashe, who is present in court today, and then he

would provide his employment schedule and Mr. Mashe would say yes, no, whatever. I ask for that simply because it will aid in the enforceability of the order.

[51] THE COURT: Any submissions on that?

[52] MS. LAVIDAS: That should be fine. The majority of the work though is on the property where he's living.

[53] THE COURT: All right. I will make that as part of the order.

[54] MR. SINCLAIR: Thank you.

[DISCUSSIONS]

[55] MR. SINCLAIR: It would be, you know, except for employment purposes as authorized in writing by his conditional sentence supervisor.

[56] MS. LAVIDAS: And except with the prior written permission ...

[DISCUSSIONS]

[57] Victim surcharge, do you have any submissions on that?

[58] MS. LAVIDAS: That's fine, we can proceed with the surcharge.

[59] THE COURT: All right. I have not done a victim surcharge before. Is that —

[60] THE CLERK: \$200 each.

[61] THE COURT: It is \$200 each?

[62] MR. SINCLAIR: \$100 per charge.

[DISCUSSIONS]

[63] MS. LAVIDAS: Is it \$200?

[64] THE CLERK: Yes. Summary is \$100 each; indictable is \$200 each.

[65] I always defer to Madam Clerk.

[66] MR. SINCLAIR: Yes, same.

[67] Time to pay?

[68] MS. LAVIDAS: It will be paid today.

[69] THE COURT: All right. Immediately.

[70] THE CLERK: And remaining counts?

[71] MR. SINCLAIR: Stay of proceedings.

[72] I wonder if we might allow Mr. Smith perhaps seven days to pay the victims of crime surcharge, just in case anything goes —

[73] MS. LAVIDAS: He said he can pay today.

[74] THE COURT: I think Mr. Sinclair is being wise, though. I will allow the seven days, knowing that your intention is to pay today.

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WENCKEBACH J.