

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Christie

REX

v.

JUSTIN SMARCH

Appearances:
Neil Thomson
Mark A. Townsend

Counsel for the Crown
Counsel for the Defence

This decision was delivered from the Bench in the form of Oral Reasons. The Reasons have since been edited without changing the substance.

REASONS FOR JUDGMENT

[1] CHRISTIE T.C.J. (Oral): Mr. Smarch is before the Court on a breach of a Conditional Sentence Order (“CSO”), which was imposed on May 2, 2025. The sentence was for a 12-month period of imprisonment to be served conditionally in the community. The breaches are admitted, and I will make findings that they were breaches on the basis of the admissions of the facts that were before me.

[2] The following conditions were breached:

(1) Keep the peace and be of good behaviour.

...

(9) At all times, you are to remain inside your residence or on your property, except with the prior written permission of your Supervisor or except for the purposes of employment including travel directly to and directly from your place of employment.

(10) 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 or urine or blood for the purpose 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.

...

(15) Not attend in the City of Whitehorse except with the prior written permission of the Supervisor.

[3] I have before me a report that was filed.

[DISCUSSIONS]

[4] Mr. Smarch concedes the breaches, as noted, therefore I make the finding that there were those breaches that Mr. Smarch has without reasonable excuse breached those clauses as identified.

[5] Having found breaches, I must determine the sanctions to be imposed.

Section 742.6(9) of the *Criminal Code* provides that:

Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may

- (a) take no action;
- (b) change the optional conditions;
- (c) suspend the conditional sentence order and direct
 - (i) that the offender serve in custody a portion of the unexpired sentence, and
 - (ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or
- (d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

[6] The Crown's position is that I should terminate the CSO pursuant to s. 742.6(9)(d) of the *Criminal Code* and commit Mr. Smarch to custody until the expiration of the sentence.

[7] Mr. Smarch's position, as conveyed by his lawyer, is that the CSO should continue with a change that has been proposed that he attend Alcoholics Anonymous ("AA") on a mandatory basis.

[8] The starting point for any court called upon to consider an application for the termination of a conditional sentence is *R. v. Proulx*, 2000 SCC 5. At para. 39, the Court stated that:

... where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. ...

[9] The idea is that the threat of incarceration will help to ensure the offender complies with his conditions.

[10] My task at this disposition hearing is to consider:

- the nature of the offence;
- the nature, circumstance, and timing of the breaches;
- any subsequent criminal conduct and sentences for that conduct;
- changes in the plan for community supervision;
- the effect of termination on the appropriateness of the sentence of the original offence; and
- the offender's previous criminal record in determining whether the presumption of termination breach is to be applied.

[11] If the presumption is rebutted, the Court is then tasked with choosing which of the three options is appropriate, having regard to the same factors.

[12] The Crown submits that when the Court takes into account the factors noted, Mr. Smarch has not rebutted the presumption that he serve his remainder of sentence in jail.

[13] Mr. Smarch submits that incarceration is not necessary and he points to important considerations of *Gladue* and rehabilitation. He is proposing one additional term; mandatory attendance at AA meetings.

[14] I acknowledge that Mr. Smarch has seemingly complied with his CSO for approximately eight months, by my calculations, and that he has attended counselling.

He has employment. He cares for his elderly mother, who resides with him. He can resume employment. His lawyer characterizes this as a one-time mistake rather than a series of transactions, breaches, and events. Mr. Smarch has accepted full responsibility for the breaches and served 11 days, which I take from the submissions that that has been a consequence that has been meaningful to him.

[15] Crown characterizes the breaches as flagrant, wilful, and intentional. They could also be characterized as multi-layered. There was not just one mistake, it was a series of mistakes that have layers to them. Not only was he to keep the peace and be of good behaviour, but he was also to remain inside his residence except with permission or for the purposes of employment. He was not to consume alcohol, not to attend premises such as the one (the Dirty Northern) that he did, and not to attend the City of Whitehorse.

[16] I note that the charge before Judge Cozens that he was sentenced for is quite serious.

[DISCUSSIONS]

[17] It is a s. 268(2) aggravated assault that resulted in a jail sentence, which was allowed to be served conditionally in the community.

[18] I find that Mr. Smarch has not rebutted the presumption that the CSO should be terminated for the reasons set out, there is an insufficient reasonable excuse, and therefore I will be terminating the CSO.

[19] Mr. Smarch was sentenced on May 2, 2025. He breached on January 10, 2026, and that is 11 days. Does Crown and defence have submissions on that credit for that 11 days?

[DISCUSSIONS]

[20] MR. THOMSON: The Crown takes no position if the Court wishes to apply it to the remainder of his CSO.

[21] THE COURT: Okay, I will do so.

CHRISTIE T.C.J.