

Citation: *R. v. Fry and Smarch*, 2004 YKTC 36

Date: 20040503
Docket: T.C. No. 03-00649A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Barnett

Regina

v.

Clark Kevin Fry

and

Alexander Ernest Smarch

Appearances:

John Phelps

Nils Clarke

Robert Dick

Counsel for the Crown

Counsel for the co Accused

Counsel for the co-Accused

REASONS FOR SENTENCING

[1] BARNETT T.C.J. (Oral): Back on the 24th of January this year, up at the Whitehorse Correctional Centre, there was an incident. Some reports of that incident have used the word riot. Other reports of that incident have used the word disturbance. On that day, the "A" dorm up at the Correctional Centre was accommodating a total of 12 inmates. When one looks at the photographs and the plan accompanying the admissions, it is very obvious that these 12 men were

being accommodated in a so-called dormitory that was never intended to house that many persons, all serving time. The incident happened after the dormitory had been searched because the correctional authorities believed that they detected the smell of marijuana. The inmates in Dorm "A" became agitated and upset. We have got perhaps too many men, presumably younger men, accommodated in an overcrowded and worn-out facility and things got out of hand. I don't mean to excuse this, these sorts of incidents, people who run correctional institutions understand that incidents of this nature will inevitably happen.

[2] The damage done during this incident, while not minimal, certainly could not be characterized as extreme. There were a couple of sinks ripped off the wall. There was a fire started. There was a lot of water damage done, a couple of windows broken and a hole punched in an exterior wall. It is hard to believe that the inmates were going to try to escape through that hole on a night of extreme winter temperatures. They were also trying to punch a hole through to a women's area. They didn't get very far with that, but one does assume that they were trying to escape through that hole if they ever got it completed.

[3] This was just adequately described in the Information as wilful damage, no good excuse, no excuse at all, but it wasn't the sort of wanton damage done in the *Felix* case up in Yellowknife. There was a great deal of damage done there. The judge described that as damage just done for the fun of it. And it wasn't an

incident like the *Markworth* case in Alberta where that incident described by the Court of Appeal is a dangerous riot, not so much in terms of dollars, \$80,000 worth of damage, but those prisoners were apparently trying to get out to harm other prisoners that were held in protective custody.

[4] My sense of what happened up at the Correctional Institute here is that things just got out of hand and progressed, and these two young men were part of it. It didn't go on for a very long time. When the RCMP showed up and were obviously prepared to put an end to it, it stopped. Nobody got hurt. Repairing the damage and paying extra wages and things of that nature, the bill ran to around \$50,000.

[5] These young men were a part of it. There is no suggestion that they were the leaders and they have pled guilty. That is a matter to be taken into account always, but in this case, I think it has to be recognized that taking matters like this to trial is always going to require a lot of effort on the part of the Crown, not dealing with the easiest witnesses, and in this case I am well aware of the fact that taking these cases to trial is going to involve particular difficulties that have been avoided in the cases of Mr. Fry and Mr. Smarch.

[6] Mr. Felix was found guilty following a jury trial. There was a lot of damage done there. He was sentenced to 12 months. I think it was Mr. Justice Doan who once said, when he was sentencing a prisoner following a jury trial:

Well, you wanted a first-class trial, you had a first-class trial. Now you are going to get a first-class sentence.

These men pled guilty.

[7] In the *Markworth* case, that was a Crown appeal. The Court of Appeal there thought that the circumstances of that incident, which they described as a riot, were very dangerous. I don't think that anybody could fairly say that this was a particularly dangerous incident up at the Correctional Centre.

[8] There was a joint submission for sentences of eight months to be served concurrently to the existing sentences that Mr. Smarch and Mr. Fry are serving.

[9] Mr. Smarch got sentenced at the end of October last year to a total of 180 days for thefts, threats and other things. That will be followed by a period of probation. He was hoping that he might get out as early as the 10th of July.

[10] Mr. Fry was sentenced the 6th of November for break and enter to 10 months of jail and 12 months of probation. Mr. Fry had been hoping that he might get out as early as the 29th of June.

[11] The suggestion is that each of these men have an eight-month sentence concurrent to their existing sentences. Such sentences would extend their release dates. These are joint submissions and they make sense, and I am not

inclined to think that I should tinker with the sentence suggested for one of these two men so that their release dates prospectively may become concurrent. That could still happen, but I don't think that it would be a sensible exercise on my part to differentiate their participation, which was joint participation that night, simply to make some, I think, false attempt to tailor their release dates. Sentences should, in the case of each of them, be eight months concurrent to the existing sentences they are serving.

[12] The victim surcharge, I presume, should be waived.

[13] MR. PHELPS: That is agreeable to the Crown.

[14] THE COURT: Mr. Dick, is there anything more that I need to do?

[15] MR. DICK: I have nothing to add, Your Honour. Thank you.

[16] MR. PHELPS: I am prepared to stay the proceedings with respect to the other count on each -- with respect to each individual.

[17] THE COURT: This does seem to me that it was a sensible decision on the part of everybody that these men plead guilty to wilful damage, because that is what happened up at the Correctional Centre that night, it seems, from what I heard. As I said, I doubt very much that either of these men or anybody

else would have been keen to go out dressed as they must have been in temperatures which I understand were pretty extreme that night. Thank you.

BARNETT T.C.J.