

Citation: *R. v. Smarch*, 2010 YKTC 106

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Docket: 09-00891A
09-00891B
10-00022A
Registry: Whitehorse
Heard: Carcross

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

SIDNEY FRANCIS SMARCH

Appearances:
Noel Sinclair
Emily Hill

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Sidney Smarch is before me and before this Circle for sentencing here today. There are three charges on which I need to pass sentence, for which he is taking responsibility.

[2] The first of those involves a theft under from Walmart in Whitehorse. Essentially, Mr. Sidney and his cousin walked out of Walmart with a flat-screen TV. He was captured, as he was leaving, on a video recording showing what had happened.

[3] The second offence arises in February, so about two and a half months after the theft from Walmart. It is the most serious of the charges before me; it is a robbery. It

involves Mr. Smarch going to the 98 Hotel with a couple of friends. The facts certainly read as if there was a plan to attempt to distract the manager of the 98 Hotel in an effort to take some money. It starts out with, again, Mr. Smarch's cousin going into the back office and offering to sell some gold at what I understand to be a ridiculously low price. He did not, of course, have the gold with him. He returned at some point, I understand from Mr. Roberge, wanting Mr. Roberge to come out to talk to the bartender who had cut him off. While all of this was happening, Neil Regimbald was in the office counting a considerable sum of money. It was at this time that Mr. Smarch entered the office brandishing a stick and yelling out that no one was to move. He reached in and he grabbed a \$5,000 bundle of the money that was being counted and attempted to flee the scene. Mr. Regimbald followed him, was able to catch him at the entrance to the bar and take hold of him, whereupon both went to the ground and there was a struggle that ensued. Mr. Smarch dropped the money. He was able to get away and fled the scene. It appears his two friends were no longer in the bar either at this point in time.

[4] The police were called and approximately 15 to 20 minutes later, an officer noted a vehicle passing him at a high rate of speed and believed that the front passenger was wearing clothing consistent with that worn by the robber at the 98 Hotel. He pulled over the vehicle. Mr. Smarch was ultimately arrested for the robbery. It appears, of the three, he was the one that was charged. I note there were comments made by Mr. Roberge and Mr. Regimbald about the fact that they have some questions as to whether he should be here holding the bag alone, but he is the one that is before me for sentencing today.

[5] Subsequent to that, he was released on conditions. These included conditions

that he abstain, keep the peace, and that he reside at his grandmother's home on a house arrest type of situation.

[6] On April 9th, his grandmother, quite properly, as is her responsibility as a surety, contacted the police to advise that Sidney was not there where he was supposed to be. A constable who was on patrol later in the area of the fish ladder in Whitehorse investigating a theft from the Roadhouse, and I should say there is no indication that Mr. Smarch was involved in the theft from the Roadhouse, but he was found in the company of those who had been. He was arrested along with the others, and during the course of the arrest, it was noted that there was some odd behaviour that he was exhibiting, consistent with drug use. A search of the vehicle, and, in particular, the area in the vehicle in which he had been sitting, resulted in finding a fair amount of drug paraphernalia, including a spoon which tested positive for cocaine. So the admission is that he had been using cocaine in contravention of his release condition when he was arrested.

[7] Now, this matter has come on before me today in the form of a Circle Sentencing. We have been going for quite some time now today, and there is a lot of information before me in terms of Mr. Smarch's background, his current circumstances, his hopes and goals. I also have information from Walmart and, as well, from Mr. Roberge and Mr. Regimbald who were kind enough to take the time to be here today and participate.

[8] In terms of the victim impact, because I do think it is important to recognize that people are impacted by our actions, as I noted earlier, Mr. Roberge and Mr. Regimbald

both asked the question as to whether or not Mr. Smarch ought to be here on his own. Mr. Regimbald indicated that he has known Mr. Smarch a long time and that he is usually a good guy; clearly not on this particular day. It has forced them to change the way that they do business, to be more careful, to be more suspicious, to have to work behind closed doors, to be less trusting of their fellow men and women; something that they should not have had to do, but unfortunately it is a sad reality. When asked what they felt should happen today, what they indicated they think is important and fair, and I agree with them, is that Mr. Smarch should not be allowed to go back to the 98; not after he has done something like this to the people that work there.

[9] The Walmart offence, of course, is significantly less serious. It is important to recognize, though, that while it is a big corporation, a theft like this has an impact on all of us. Every time that somebody walks out of the store with something they have not paid for, every one of us pay more for everything that we buy in that store, and that includes single parents trying to put food on the table for their children. So, while it feels as if nobody is affected by it, in fact everybody is affected by it. Walmart, however, through their general manager, appears to have been interested in seeing a response that would have Mr. Smarch giving something back to the community and, perhaps, to some of the charities that they fund in the form of community service or donations.

[10] In addition to that information from the victims, which I think is incredibly important to recognize, in particular for Mr. Smarch to recognize, I have, as I said, a great deal of information about Mr. Smarch himself. There are similarities in what I have heard today with far too many of the sentencings that come before me. Mr. Smarch appears to have been raised in quite difficult circumstances. When he was

young, it was a time when his parents, his mother in particular, as he appears to have been placed with his mother after his parents split when he was a year old, was struggling significantly with alcohol. He was exposed at an early age to the abuse of alcohol and to violence. There appear to be significant issues with respect to abandonment, and times when he was not properly cared for or properly fed. I accept, as I have to every day in court, that those types of things have a long-term impact on children when they become adults. There are very few people I see come before me that have had a stable, supportive, sober upbringing. There is a connection between kind of chaotic and traumatic childhood and individuals growing up to become offenders.

[11] In addition to that background, I have a criminal record before me, which is an ugly criminal record. It is not that common to see a robbery conviction at all. In this particular case, we are dealing with sentencing on a robbery with an individual who has two prior convictions for robbery and one prior conviction for attempted robbery. It is a pretty high-end, significant offence, and Mr. Smarch has a pattern of that kind of behaviour. In fact, on his last one, he did go to the penitentiary. The one thing I do want to say, though, as I indicated in an earlier discussion, I believed I had been the one to pass that sentence and, in fact, I had been. I will say it was a significantly more egregious set of facts, in fact, quite a disturbing set of facts that involved Mr. Smarch, while highly intoxicated, basically going on a rampage through the Tagish area where he stole, first, one vehicle, then another, and managing to assault several people quite significantly, including an elderly woman, along the way. So they were a particularly bad set of facts. That is not to minimize what has happened here, because there is

certainly no excuse for Mr. Smarch's behaviour in the 98 Hotel, particularly not with his history. He has been through this several times before. He has behaved in this way. He knows what happens. But I did want to make the point that that penitentiary term had been attached to a particularly ugly set of facts.

[12] The big question for me is, what do I do with Mr. Smarch at this point? The Crown is suggesting that I send Mr. Smarch to the penitentiary again, with a three year term, recognizing his serious history of related behaviour. I have to say, based on the information that is before me, it is a reasonable position to take. In fact, it is not even necessarily on the high end when we look at his record and the facts of this particular robbery.

[13] On the other hand, defence counsel, while recognizing that there needs to be a jail term on the robbery, given his history, is suggesting that I consider something in the six to 12 month range, to be followed by a lengthy probationary term, which would allow for Mr. Smarch to address the underlying issues that have continued to bring him into conflict with the law.

[14] It is clear to me in listening to the Circle that he has a great deal of support in this community. He does not have a long history in the Carcross community, having been raised within his mother's community in Whitehorse, but has more recently been attached to this community, and there appears to have been work done to connect him to the community and to make him feel welcome.

[15] I also have information suggesting that he has had a period of time of a few months, primarily over the summer, in which he appears to have done relatively well.

He was employed at the Emerald Lake Ranch. His employer, Joni Mackinnon, as well as one of his -- or actually two because there was a young woman here that was unable to stay.

[16] CORINNE CARVILL: She actually had to pick up kids, yes.

[17] THE COURT: But two co-workers who were here as part of the Circle, one of whom spoke, and both of whom provided letters of support for Mr. Smarch, and I imagine, for both of them, there is some difficulty in connecting the facts of the offence and the criminal record to the person that they came to know this summer. They speak highly of him. His employer spoke and went so far as to say that he was perhaps the best male employee that she has ever had at the ranch, that he did an exceedingly good job with the work and, in particular, with the number of kids, including cadets that spent time at the ranch over the summer. The information I have also suggests that for that period of time, up until he returned to custody, that he had been able to stay clean and sober. There is information to indicate that over the course of the summer he was exposed to a different lifestyle and has a certain degree of motivation now to pursue that type of lifestyle.

[18] The struggle for me is I have to weigh the four or five months of good behaviour as against probably ten or 12 years of not so good behaviour, and what do you do in those circumstances? It is not at all unusual for me to do a sentencing where somebody tells me that now they have seen the light, now they are ready to change, now they are motivated, now they feel they can succeed and now they can do it

differently. That is not at all unusual, and the sad reality is that in a large number of those cases, they do not succeed.

[19] What it comes down to for me, in this case, is this: there needs to be a jail term. I do not see how I can get around that on the facts of the case, given the nature of the robbery charge. I think I have more freedom with respect to the other two, but for the robbery charge, there has to be a jail term and it has to be a significant one. It is a serious, serious offence and Mr. Smarch has a serious related history for the same type of behaviour. In my mind, what this case comes down to is, do I keep him in the Territory or do I send him out? That is really what it comes down to.

[20] As the Crown fairly points out, I have to consider protection of the public. I have to consider whether or not part of this sentence has to be about isolating Mr. Smarch from the community to protect them from similar behaviour in the future for a period of time. I have to consider a sentence that will send a deterrent message that will tell other people, as well as Mr. Smarch, that this kind of behaviour cannot be tolerated, and, quite frankly, a penitentiary term is the easiest way to send that message.

[21] On the other hand, I cannot lose sight of the principle of rehabilitation. I cannot lose sight of the fact that Mr. Smarch is still a young man. He has a pretty ugly history that he has amassed in a short period of time, but he is only 24 years of age. So the question for me is, has this period of time over the summer been enough to demonstrate to me that there is enough, recognizing that I cannot have certainty, but whether there is enough there to persuade me to take a chance on Mr. Smarch's rehabilitation by keeping him in the Territory and close to his supports?

[22] I am satisfied there are a number of people here that are prepared to work with him and work hard with him. At the end of the day I am satisfied, based on the comments of people like his employer and his co-workers, about the person that he showed to them this summer, and in particular, the fact that Ms. Constable Rushant, the Bail Supervisor who has dealt with him in the past, was able to indicate that there has been a significant change in his attitude and behaviour beyond anything she has observed in the past. In fact, when he was sent to the pen, she noted him to be a very hard young man. That was not the same person she saw this summer.

[23] While I would like to have had a longer period of time over which to assess Mr. Smarch's chance of being able to continue along this road, I am satisfied that there is enough there for me to find that now is not the time to give up on him. So I am satisfied that while there needs to be a custodial term, that that should be one that is within the Territorial range, as we call it, which means one that would keep him in the Territory. So it has to be two years less a day, or less, for me to do that; otherwise he goes out of the Territory. But I am satisfied, Mr. Smarch, that while it was only four or five months, it was enough to demonstrate to me that you have the potential. It is enough for me to also recognize, when I think back to your past sentencing, which did take me some time to register had been before me, given the number of sentencings that we do, that that same information was not before me at that sentencing. It was not a discussion about rehabilitation; it was a discussion about how long the sentence should be.

[24] The other thing, in reaching the conclusion that he ought to remain within the Territory that I am very mindful of, quite frankly, is the issue of his Aboriginal heritage. Ms. Hill quite fairly pointed out that there is a frightening overrepresentation of

Aboriginal persons within our jail system. There are a number of reasons why that has happened that have to do -- well, actually, it would probably take me too long to go through that today, but there are a number of systemic reasons as to why we find ourselves in that situation, and we have been urged by both Parliament and the Supreme Court of Canada -- though I think it has been a long practice here in the Yukon -- to try and search for other ways to address the issues; to look at more restorative approaches so that we can try and reduce the frequency with which, and the length of time for which, Aboriginal offenders are within our system. That does not offset the need for us to address public safety issues as well. But we are dealing with a young First Nations man who clearly has some significant issues that need to be addressed. I am satisfied with what he has done over the last few months that he has the ability, if he is able to continue, and that he has the support, which he is going to need over the long term if he is going to be at all successful.

[25] So, I do not believe I have covered everything that I ought to or should have in this sentencing decision. Suffice it to say, I have considered everything that has been said, and I have considered everything that I have read and, at the end of the day, I am satisfied that Mr. Smarch should remain in the Territory. I am satisfied that there does need to be a significant jail term as it relates to the robbery charge, but because of the support in place, his ability over the last few months to demonstrate that the potential at least is there and, lastly, the need to recognize his background circumstances and his Aboriginal heritage, I am satisfied that with respect to the robbery charge, there needs to be, at an absolute minimum, a sentence of 18 months. In my mind, I do not see with his record that I can go any lower than that, but, Mr. Smarch, that keeps you in the

Territory. It gives you the opportunity to keep working with all of the people here that have offered their support. It gives you the opportunity to actively engage with counselling services, both within the facility and those that will come up to the facility, because there are a number of them that they will bring in. That will allow you to do significant work to transition back into the community.

[26] That is going to be followed by a period of probation. I am going to make it a three-year probationary term and I will say, in doing so, that I am using a long probationary term to offset what would otherwise have been a significantly longer custodial term. I am of the view, though, if you are going to be successful you need long-term support and supervision. You have made a good start this summer, but you need to be able to sustain that over the long term, and when it gets real tough, you cannot slip back into using again. You cannot slip back into those old patterns of -- I think Nina had the best phrase when she said, "You cannot lash out at others," and that is what your history has been. It has been using and it has been abusing others, and that has been your way of managing your own issues with trauma. You have to figure out how you manage those issues in a way that it does not hurt other people and it does not continue to hurt you, which is what you are doing.

[27] So there is going to be a three year probationary term. What I am going to do on the Walmart theft charge and the breach; on the breach I am going to do one day deemed served by your attendance here in court. The Walmart theft, what I am going to do is a concurrent six month probationary term, simply because I do not want the theft to reflect a three year probationary term; I think that is excessive, but it will be on

the same terms and conditions. But I am looking at Madam Clerk thinking, does that require you to do two orders?

[28] THE CLERK: Yes.

[29] THE COURT: Sorry.

[30] THE CLERK: That's a suspended sentence?

[31] THE COURT: Suspended sentence.

[32] MR. SINCLAIR: He has time served as well.

[33] THE COURT: Thank you for reminding me. He does.

[34] MS. HILL: Time and a half, I think it's at right now.

[35] THE COURT: Okay. Thank you. It has been a long enough day, I had completely forgotten that. So he has 75 days in custody he has effectively already spent. So what I am going to do is take 25 of those on the Walmart. So that will be easier, then Madam Clerk does not need to do two orders.

[36] So there will be a sentence of one day deemed served by his attendance in court today and the record will reflect that he is being credited for -- sorry, what did I -- no, let us make it 15 days. Then I will reduce the 18 months by the remaining 60 days, which will take it down to 16 months. Does that make sense? So with the credit for remand, we have dealt with Walmart. The breach will simply be one day deemed served, and the remaining 60 days comes off of the 18 months to give you a remaining 16 months in custody.

[37] For the three year probationary term, we need to deal with conditions. There are some suggested conditions and that is what I am going to use as my guide. There are statutory terms I am required to include in each and every probation order. They are:

1. That you keep the peace and be of good behaviour;
2. That you appear before the Court when required to do so by the Court;
3. That you notify the Probation Officer in advance of any change of name or address and promptly notify the Probation Officer of any change of employment or occupation;

In addition to those statutory terms, I am going to require:

4. That you remain within the Yukon Territory unless you have written permission from your Probation Officer;

I would not normally include that in a probation order, but part of what has persuaded me to do this is the support for you. I think you need to be where that support is.

5. You are to report to a Probation Officer immediately upon your release from custody and thereafter as and when required by the Probation Officer;
6. You are to report to members of the Carcross/Tagish First Nation Family Council as and when directed by the Probation Officer in consultation with the Carcross/Tagish First Nation Family Council;
7. You are to reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;

I am looking at a curfew and, in this particular case, what I am going to do is put you on a curfew for the first six months because I want to make sure that you have a good transition back out into the community. If your behaviour is a little more restricted at the beginning, you are not suddenly free to go out drinking and doing whatever else you ought not to be doing. So for the first six months of your probation order:

8. You are going to be required to abide by a curfew by remaining within your place of residence between the hours of 10:00 p.m. and 7:00 a.m. daily, except with the prior written permission of your Probation Officer or when in the actual presence of a member of the Family Council. You must present yourself at the door or answer the telephone during reasonable hours for curfew check. Failure to do so will be a presumptive breach of this condition;

They will be checking to make sure you are there. Here is the biggie:

9. You will be required to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner;

If you are going to be successful, you have got to stay clean.

10. You are not to attend any bar, tavern, off-sales, or other commercial premises whose primary purpose is the sale of alcohol;

I am also going to add, even though it would be included in there:

11. That you are not to attend within 20 metres of the 98 Hotel;

Just so that it is expressly clear that you are not to go there. That condition, quite frankly, is for the 98 Hotel because I think they quite fairly pointed out that you ought not to be allowed in after what you have done.

[38] MS. HILL: Your Honour, just with regard to the 20 metres, I am just calculating how close Legal Aid is to the 98.

[39] THE COURT: Oh, yes.

[40] MS. HILL: And I'm just wondering whether ten metres might be --

[41] THE COURT: Okay. No, you are right, Legal Aid is right next door. Okay. So ten metres; we will make it ten metres. So he cannot get within ten metres of the front door of the 98 but he can make it to Legal Aid's front door.

12. You are to have no contact directly or indirectly or communication in any way with any known drug users and you are not to attend at or within 50 metres of any known drug houses;

13. You are to take such alcohol and/or drug assessment, counselling or programming as directed by your Probation Officer in consultation with the Family Council;

Is he prepared to agree to a residential program?

[42] MS. HILL: If I could just have a moment. Yes, he is.

[43] THE COURT: Okay.

14. Having given your consent, you are to attend and complete a residential treatment program as and when directed by your Probation Officer;
15. You are to take such psychological assessment, counselling, and programming as directed by your Probation Officer in consultation with the Family Council;

In the hope that that might answer some of the questions that you have.

16. You are to take such other assessment, counselling, and programming as directed by your Probation Officer in consultation with the Family Council;
17. You are not to attend at Walmart except with the prior written permission of your Probation Officer;
18. You are to make restitution by paying into the Territorial Court the amount of \$733 in trust for Walmart, said restitution to be paid no later than 12 months from the start of your probationary term;
19. You are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all the necessary details concerning your efforts;
20. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment, or educational activities that you have been directed to do pursuant to this probation order.

[44] The only thing that I did not cover, because we did not talk about it, was community work service.

[45] CONSTABLE RUSHANT: I included that in there because in the plan that Corinne had put together with the Family Council there was -- there were numerous items that would be construed as community work service, so I don't know.

[46] THE COURT: Okay. I am not adverse to there being something so that he is accountable to the community and he gives something back to the community. Do you have a suggested amount?

[47] CORINNE CARVILL: How about if you do the -- will work together with Family Council and Probation Supervision to determine what he is going to do?

[48] THE COURT: I have no problem with that. I just need to know the number of hours given the nature of the offences, and, again, this would be something that offsets the fact that it is a significantly reduced custodial term from what he would otherwise be looking at. I would sort of be thinking of somewhere within the 100 hour range.

21. You are to perform 100 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate --

Sorry, maybe I should phrase that as?

[49] CONSTABLE RUSHANT: Or by a member of the Family Council.

[50] THE COURT: So instead of designate we will say:

-- as directed by your Probation Officer or by a member of the Family Council. This community service is to be completed, I am going to say, within 18 months of the start of your probation order.

[51] Any concerns or additions on conditions for the probationary term? No? Okay. Mr. Smarch, you understand all those conditions?

[52] THE ACCUSED: Yes.

[53] THE COURT: It is not going to be an easy road. There are a lot of conditions. Quite frankly, doing three years in custody in some ways might be easier, but this will give you the chance that you want, to demonstrate to yourself and to this community that you can follow through and that you can become the person that you want to be.

[54] I do have to make certain other orders because of the nature of the offence. By law, I am required to make an order that you provide such samples of your blood as are necessary for DNA testing and banking.

[55] I am also required by law to make an order that you not be entitled to have in your possession any firearms, ammunition, or explosive substances for a period of?

[56] MR. SINCLAIR: Ten years.

[57] THE COURT: Ten years. Is there not a prior one?

[58] MR. SINCLAIR: There's no notice of intention.

[59] THE COURT: Okay. Fair enough. For a period of ten years from today's date. Did I miss any of the other orders?

[60] I am going to waive the victim fine surcharges, given his custodial status and the term left to be served.

[61] Now, there are some remaining counts. I gather with the more recent Information that has been referred to, and I will say the Crown did allude to it, they are unproven allegations. There is, in my view, little if anything that I can do with them in terms of influencing this sentencing, but I take it those would be going over, Ms. Hill, to the next circuit?

[62] MS. HILL: Yes, Mr. Clarke is counsel on those matters, and so if they could just be set to the next circuit. I believe it's -- Crown elected?

[63] THE COURT: I do not have a Crown election.

[64] MR. SINCLAIR: Summarily.

[65] THE COURT: Okay. Thank you. So it will go for plea November 23rd at 10:00 a.m. here in Carcross.

[66] The remaining counts outside of that Information?

[67] MR. SINCLAIR: I'd direct a stay of proceedings.

[68] THE COURT: Okay. Thank you.

(DISCUSSION REGARDING OUTSTANDING MATTER)

[69] THE COURT: Mr. Smarch, you have your chance. Good luck to you. The last thing I want to say, though, is my thanks to everyone for being willing to attend today, to wait and to participate for as long as it took us to get this done. It was extremely valuable to me and I imagine it was equally valuable to the community and to Mr. Smarch as well. So I do thank you very much for your time and your thoughts. In particular, I would thank those Elders that are here today for sharing your knowledge and experience and wisdom. Thank you.

RUDDY C.J.T.C.