

Citation: *R. v. Smarch*, 2013 YKTC 85

Date: 20131004
Docket: 13-00223
13-00188
12-00512A
12-00512B
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

TRENT SMARCH

Appearances:
Joanna Phillips
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C. (Oral): Trent Smarch is before the Court for sentencing on a charge of assault with a weapon, namely a knife, contrary to s. 267(a) of the *Criminal Code*, and two breaches of probation orders that he was bound by, contrary to s. 733.1(1) of the *Code*. The first is an abstention clause, the second is a no-contact or communication with Cynthia Dixon clause. Pursuant to s. 725 of the *Code*, the Crown has read in the facts of related Informations. I note, from a review of s. 725(b.1) and (2), that:

The court shall, on the information or indictment, note

(a) any outstanding charges considered in determining the sentence under paragraph (1)(b.1) ...

[DISCUSSION RE INFORMATIONS WITH ENTERED PLEAS]

[2] The facts that were put before the Court are as follows: on November 30, 2012, Mr. Smarch was sentenced to six months jail and 12 months' probation on a s. 267(a) conviction. The terms of the probation order included a no-contact clause with Ms. Cynthia Dixon except in specified circumstances, not to go to her residence, to abstain from the possession and consumption of alcohol, and not to attend at any bars, taverns or off-sales whose primary purpose is the sale of alcohol.

[3] The offences to which he pled guilty to are that on June 30, 2013 in Whitehorse, while he was at the residence of Ms. Dixon, he pushed her off of a chair, she struck her head on the way to the ground, he stood over her with a kitchen knife and he threatened to use it. They were both drinking, therefore the assault with a weapon, the breach of the probation order for failing to abstain absolutely from consumption of alcohol, and the failing to comply with the no-contact provision were made out.

[4] Further relevant facts are that on May 10, 2013, he was noted to be in the Casa Loma bar, which is a place he was prohibited from being at pursuant to the terms of his probation order. On June 6, 2013, he was out with Ms. Dixon, having contact with her without permission, went to her residence, and in her residence they were in an argument and he broke some pots, pushed her to the ground and took her iPhone. The charges that he faced on Information 13-00188 were assault, mischief for the damage to the pot, theft for the stealing of the iPhone, and failing to keep the peace and be of

good behaviour, which is a breach of his probation order, a failure to comply with the no-contact provisions of his probation order, and a failure to comply with the not attend at the residence of Ms. Dixon. I note these are not charges to which pleas were required or have been entered.

[5] I also note the facts that shortly after June 6, 2013, Mr. Smarch failed to report to his Probation Officer as he was required to do by the terms of his probation order, and thus, in addition to the offences to which he has entered guilty pleas, there are a number of his actions that were the foundation for other charges that the Crown is not proceeding on upon his admission to the facts contained in them in relation to a sentencing on these matters.

[6] He has been in custody for a period of 97 days, since his arrest on June 30, 2013.

[7] Mr. Smarch has a criminal history as a youth. In 2008, there are two entries for sexual assault, for which he received probation. In 2009, he was convicted of sexual assault and was given a nine-month sentence, taking into account his time served. He was convicted of forcible entry, mischief, and failing to comply with a Youth disposition. In 2011, he was convicted of uttering threats, failing to comply with a probation order, mischief, and breach of a recognizance. He was placed on a conditional sentence of 60 days in relation to the uttering threats charge, and this was suspended, I note, for seven days.

[8] On July 27, 2012, Mr. Smarch was sentenced to two 30 day conditional sentences and six months' probation for two breaches of probation orders. It does not

say on the supplementary criminal record from the Crown's office whether these sentences were concurrent or consecutive, but I do note that on August 15, 2012, the conditional sentence was terminated, which in all likelihood makes me think they were concurrent, because if they were consecutive only the one he happened to be on at the time would have been terminated.

[9] On November 30, 2012, Mr. Smarch was sentenced to the six months jail and 12 months' probation that I referred to earlier.

[10] The Crown's position is that a custodial disposition of nine to 12 months is appropriate. Crown is opposed to it being served conditionally in the community.

[11] Defence counsel's position is that while the range of nine to 12 months is appropriate, Mr. Smarch should be allowed to serve the sentence in the community, pursuant to s. 742.1, and that it should be at the lower end of the range.

[12] Mr. Smarch is 22 years of age, an Aboriginal individual, and correct me if I am wrong, a member of Teslin Tlingit Council. His parents separated when he was young and he was raised primarily by his father. His father had attended residential school and struggled with substance abuse and parenting issues, including violence. He did receive treatment and, as I understand it, has had a substantially long period of abstinence with a pro-social lifestyle. He currently has a good relationship with his father. Mr. Smarch's connections are almost entirely with his father's side of the family.

[13] Mr. Smarch has very little connection to his mother's side of the family. His mother has struggled with alcohol and drug addiction for as long as Mr. Smarch can

remember, and she is currently dealing with related health issues.

[14] Mr. Smarch began consuming alcohol regularly at the age of 13. It is clear he struggles with coming to a clear understanding of the difficulties alcohol has created for him and being able to admit that he is an alcoholic. While he states that he is prepared to take treatment, including attendance at the 28-day residential treatment program at Alcoholics Anonymous, I note that the author of the Pre-Sentence Report states:

It should be noted that the writer was Mr. Smarch's probation officer in 2009-2011. During that time three separate treatment strategies were formulated, all of which Mr. Smarch had unfettered input into formulating them. In each instance when the time came for Mr. Smarch to begin the work he sabotaged the plan in one way or another.

Mr. Smarch is noted as having a substantial number of problems relating to alcohol abuse. He claims to have no recollection of the assault against Ms. Dixon, stating to the author of the Pre-Sentence Report that he thinks someone may have slipped something into his drink that night. The author of the report notes that Mr. Smarch "has little insight or even noticeable remorse regarding his actions of June 30th."

[15] Mr. Smarch has limited employment history. He wants to work in the carpentry field and says he enjoys the work, but he has no employment prospects lined up. He has been in a relationship with Ms. Dixon since mid-2011. She is just under 20 years older than him. I note she was the victim of the s. 267(a) offence for which he received the six months jail in November 2012. Ms. Dixon is supportive of the relationship between herself and Mr. Smarch, and is supportive of Mr. Smarch. She recognizes his need for counselling and programming. She does not excuse his behaviour. She has provided a thoughtful letter that outlines her recognition of the issues he struggles with,

the need for him to change his behaviours, and the need for him to obtain therapeutic assistance to do so. In that regard, she shows considerable insight and provides considerable support. This said, I understand that she does not abstain absolutely from the consumption of alcohol, which is concerning in respect of the information I have, i.e. that the offence for which Mr. Smarch is being sentenced occurred when they were both consuming alcohol. There is a recognition that when he consumes alcohol he is not the good person that she says he is otherwise. It would seem that it would be very important for her to ensure that he does not drink alcohol and to not contribute to his drinking.

[16] Mr. Smarch has no clear plans for residence upon his release. He would like to live with Ms. Dixon, or, if that is not suitable, with his father in Teslin. The Pre-Sentence Report notes that Mr. Smarch's reporting while he was under a different probation officer immediately prior to his arrest for this offence was "minimal at best." He appeared unmotivated to address his criminogenic risk needs, behaviour or violence and substance abuse. His previous supervisor considered him to be "unmanageable in the community, as evidenced by his non-compliance to his court orders and criminal record." The Yukon Offender Supervision Inventory rates Mr. Smarch with a high risk rating and requiring a high level of supervision. He is noted as having a high level of criminogenic needs.

[17] There is a report filed by defence counsel with respect to the conduct of Mr. Smarch while he has been in custody on remand awaiting disposition of these matters. I would characterize this as a positive report. Out of 116 entries, only eight are negative; the rest are positive. It notes that he has been working and has positive

reports about his work, except that he is currently suspended because he refused to get out of bed and go to work one morning. However, he is hopeful of being able to get that work back.

[18] It also notes that Mr. Smarch has been very active in taking part in activities and programming and has volunteered to do this.

[19] The range of sentence of nine to 12 months is appropriate in the circumstances. The question for me is whether it can be served conditionally in the community. Section 742.1 in part reads that if the court imposes a sentence of imprisonment of less than two years, and:

...is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2... the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3... .

[20] Little in the way of a plan has been put forward to me to support a Conditional Sentence. I have virtually no detailed information regarding residence or employment. I am told that Mr. Smarch could live with his father in Teslin and help out with his grandparents by assisting them in obtaining food and wood. I have no direct information from the father or the grandparents regarding this, such as letters.

[21] I am told that the Justice Coordinator for the village of Teslin, Karen Keenan, has said that the First Nation will support Mr. Smarch. I have no information, however, in regard to in what way they will support him, confirmation that Ms. Keenan is even aware of the circumstances behind Mr. Smarch's offences, or confirmation that she is aware of

what his plan is.

[22] I have a limited amount of *Gladue*-type information before me and nothing in the way of a *Gladue* Report that would flesh out these issues more fully. I am aware of the purpose and principles of sentencing, in particular s. 718.2(e), with respect to trying to avoid the incarceration of Aboriginal offenders if other options are available. However, sentencing requires a balancing of numerous factors and Mr. Smarch's Aboriginal heritage must be assessed within the overall framework of sentencing.

[23] This is an offence of violence against a domestic partner. Mr. Smarch received a six-month sentence for assaulting the same victim approximately seven months prior to the assault of June 30th. There was another assault against this victim on June 6th by Mr. Smarch. This is an aggravating set of circumstances with the repeated breach of trust that is entailed within them. Denunciation and deterrence, in particular specific deterrence, are significant considerations. Mr. Smarch demonstrates little insight into his behaviours or his substance abuse problems. He was unable to comply with the terms of the two previous conditional sentences that were imposed on him.

[24] Mr. Smarch has repeatedly breached terms of court orders or process. On the information before me, I have little confidence that if released into the community Mr. Smarch would comply with the conditions of a conditional sentence. His plan, if I were to go so far as to call that, falls far short of what I would need to see in order to allow Mr. Smarch to service his sentence conditionally in the community. I believe that the safety of the community, of which Ms. Dixon is a part, would be put at risk were I to impose such a sentence.

[25] In recognition of the aggravating and mitigating circumstances of these offences, including his guilty pleas, and taking into account his Aboriginal heritage and the purpose and principles of sentencing, including the rehabilitation of Mr. Smarch, I impose a sentence of 274 days custody, which is essentially the equivalent of nine months for the s. 267(a) offence.

[26] Considering the application of *R. v. Vittekwa* in the Yukon Court of Appeal in *R. v. Cardinal*, 2013 YKCA 14, in regard to the consideration of *Gladue* factors while assessing credit for time in remand, I will, also in light of the remand report, allow Mr. Smarch 146 days credit for his 97 days of pre-trial custody, thus leaving him 128 days in custody to be served. Sentences of 30 days' time served concurrent will be imposed on the s. 733.1(1) offences.

[27] Mr. Smarch will be placed on probation for a period of 15 months. The terms of the Probation Order will be as follows. You are to:

1. Keep the peace and be of good behaviour, and appear before the Court when required to do so by the Court;
2. 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;
3. Remain within the Yukon Territory, unless you obtain written permission from your Probation Officer or the Court;
4. Report to a Probation Officer immediately upon your release from custody and thereafter when and in the manner directed by the Probation Officer;

5. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
6. Take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer;
7. Take such other assessment, counselling and programming as directed by your Probation Officer;
8. Have no contact directly or indirectly or communication in any way with Cynthia Dixon if either of you are under the influence of alcohol;
9. Not to attend at the residence of Cynthia Dixon if either of you are under the influence of alcohol;
10. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;
11. Provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling or employment that you have been directed to do pursuant to this Probation Order;
12. Not have in your possession any firearm, ammunition, explosive substance or weapon except with the prior written permission of your Probation Officer.

[28] You are subject to the mandatory DNA order. I am not going to subject you to a firearms prohibition, despite your history of violence which, for a young man of 22, is getting substantial, because I do not consider it necessary at this point in time.

However, were you to find yourself convicted in the future of further offences of violence, in particular in a domestic relationship, you would likely find not only the Crown seeking more substantial sentences, but you yourself subject to a prohibition order.

[29] I am going to waive the Victim Fine Surcharges. Is there anything further? The remaining counts?

[30] MS. PHILLIPS: Stay of proceedings.

[31] THE COURT: Stay of proceedings on the remaining counts.

COZENS C.J.T.C.