

IN THE SUPREME COURT OF YUKON

Citation: *R. v. Smarch*, 2008 YKSC 47

Date: 20080605
Docket No.: S.C. No. 07-01512
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

JOSEPH EDWARD SMARCH

Before: Mr. Justice R. S. Veale

Appearances:

Kevin C. Komosky
Nils Clarke

Counsel for Her Majesty the Queen
Counsel for Joseph Edward Smarch

REASONS FOR SENTENCING

INTRODUCTION

[1] Joseph Smarch has been convicted, after a trial, of intending to extort money by threats contrary to s.346(1.1)(b) and committing mischief by wilfully damaging the door of a residence contrary to s.430(4) of the *Criminal Code* in an incident that took place in October 2006. He has also pled guilty to three process offences since he committed the extortion in October 2006, consisting of two failures to appear in court contrary to s. 145(5) and one breach of condition contrary to s. 145(3) of the *Criminal Code*. I sit as a Territorial Court judge in relation to the three process offences.

CIRCUMSTANCES OF THE OFFENCES

[2] Mr. Smarch testified that he is a crack cocaine addict and that he was trying to collect a \$70 drug debt. Mr. Smarch was driven to a parking lot adjacent to the residence of the complainant who was in the residence at the time to the knowledge of Mr. Smarch. Mr. Smarch used a baseball bat to break open the complainant's outer door but he was unable to break down the inner door, despite repeated banging on the door with the baseball bat. There was a great deal of banging and yelling that was heard by the neighbours as well as the complainant. One neighbour confirmed that Mr. Smarch was asking for money and threatening to kill the person inside. The complainant himself was quite terrified and was a reluctant witness. He acknowledged that he threatened to shoot Mr. Smarch if he entered the apartment. Mr. Smarch eventually left and struck a vehicle with the baseball bat in the process. I am satisfied that there was sufficient evidence at trial to prove these facts beyond a reasonable doubt.

VICTIM IMPACT STATEMENT

[3] The complainant indicated in a written statement that both he and his neighbours were traumatized by the incident. It appears that his landlord is requiring him to replace the outer door.

CIRCUMSTANCES OF OFFENDER

[4] This information is based upon a pre-sentence report on Mr. Smarch supplemented by letters of support filed by counsel for Mr. Smarch.

[5] Mr. Smarch has had an unfortunate family history. His mother, who also had a drug addiction, died when he was a very young child. He was raised by his maternal grandparents in British Columbia until a physical altercation with his grandfather resulted in Mr. Smarch residing in a group home from ages 15 to 18. He alleges that he suffered from physical, emotional, and sexual abuse.

[6] Mr. Smarch is of Yukon First Nation ancestry and expresses a great interest in learning about and living in a traditional lifestyle. His First Nation indicates that he has had sporadic seasonal employment. The Capital and Infrastructure department of his First Nation indicates there is potential employment for him but they are not holding a position should he be released. He could be a candidate for a Fish Technician job, a one-month position this summer.

[7] Mr. Smarch attended schools from kindergarten to grade 11 in British Columbia. He has also completed a number of programs or courses from transporting dangerous goods to wilderness first aid and trapping.

[8] He has had several common-law relationships which appear to have been quite dysfunctional. He has a 15-year-old son who resides with his mother. It appears that he has a good relationship with his son. He indicated in the hearing that he has two other children.

[9] Mr. Smarch has a good relationship with Mike Hodgson, the social worker in his home community of Teslin. Mr. Hodgson gives the most positive prognosis for him. Mr. Hodgson candidly concedes that Mr. Smarch lies pathetically and at 40 years old still pretends to be a gangster, all the while realizing that this lifestyle is a dead end. However, Mr. Hodgson believes that Mr. Smarch can change his lifestyle and confirms

that he held a labourer's position from September to December 2007, which Mr. Hodgson describes as a big step for him.

[10] Mr. Smarch would like to have a community disposition but has no residence in his First Nation community because of unpaid rent to the extent of \$12,000. He also acknowledges having a significant drug problem that has negatively affected him most of his adult life. He acknowledges that his drug problem continued right up to this offence in October 2006. He professes to have a group of supportive friends who give him appropriate guidance. None have come forward to provide a residential placement or employment proposal.

[11] The pre-sentence report indicated that Mr. Smarch thinks that the whole trial process has been "crooked" and believes that the Crown and his lawyer conspired against him. I should interject that his lawyer applied to withdraw from the record, an application that I granted. He is now represented by a lawyer that was not involved in the trial. To his credit, Mr. Smarch apologized and showed some remorse for the offence at the sentencing hearing.

[12] Mr. Smarch has a criminal record that began in 1987 and consists of 20 convictions ranging from theft, breaking and entering, possession of a narcotic, possession of a weapon, uttering threats, and a number of failures to comply with a probation order or undertaking. However, his last major offence is a conviction in 2002 when he broke into a house where his cousin was sleeping. He was convicted of breaking and entering and committing an assault and uttering threats. He slapped his cousin and held him down on his bed with his forearm at his cousin's throat, choking him. This was in apparent retaliation for alleged comments made by his cousin that

Mr. Smarch was not the parent of his children. Mr. Smarch threatened to kill his cousin if he did not stop talking about him and, if he called the police, Mr. Smarch would see that his cousin's family would be hurt. He received a sentence of three months in custody.

[13] The probation officer advised that Mr. Smarch was cooperative in meeting with him and in providing information for his report. However, he did not recommend a community disposition for Mr. Smarch because of his inability to obey court orders, his negative attitude regarding this conviction, and his frequent dishonesty. In contrast, the Teslin social worker stated that Mr. Smarch can be overly aggressive to get what he wants, but he is often posturing and at age 40 he wants to change his life. He confirmed that Mr. Smarch needs long-term intensive counselling. The Many Rivers counselling service confirms that Mr. Smarch has attended eight counselling sessions since December 12, 2006.

[14] Phillip Gatensby, who delivers a program called Gathering Power at the Whitehorse Correctional Centre, has provided confirmation that Mr. Smarch is making an honest effort to move toward positive change.

SENTENCING PRINCIPLES

[15] Section 718 of the *Criminal Code* provides that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions with one or more of the following objectives: denunciation, deterrence, separation, rehabilitation, reparations for harm done, and promoting a sense of responsibility in offenders. It also requires consideration of all

available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.

[16] A conditional sentence may be imposed under s. 742.1 where the sentence of imprisonment is less than two years and serving the sentence in the community would not endanger the safety of the community and would be consistent with the aforementioned principles of sentencing.

[17] The Crown is seeking a sentence of incarceration of 36 months, primarily focussed on deterrence and denunciation as the primary factors in sentencing. The Crown submits that the range of sentence for this extortion offence is one to five years. This is based upon the principle, recently enunciated, in *R. v. Vickers*, 2007 BCCA 554, at paras. 12 and 13 that:

This Court has repeatedly stated that deterrence and denunciation are the primary factors in sentencing for violent crimes, particularly when these crimes violate the safety and security of a person's home. As Madam Justice Saunders recently stated in *R. v. Meigs*, 2007 BCCA 394 at para. 25, "it is a grave offence to enter another person's home without permission, and graver to enter the home and violate the occupant. The courts must and do impose stern sanctions for such crimes".

While rehabilitation cannot be overlooked, it is of secondary importance in dealing with a case of this kind. This is particularly so when there is no indication that the offender is a good candidate for rehabilitation. Indeed, the indicators with respect to Mr. Vickers point in the opposite direction, given his criminal record and the fact that he engaged in serious criminal activity within hours of being released from jail."

[18] The Crown does not suggest that the sentence of 10 years imposed in *R. v. Vickers* for a particularly violent offence and home invasion is relevant to Mr. Smarch's

circumstances but rather an indication of the court's view of violations of the safety and security of a person's home.

[19] The Crown does submit that s. 348.1 of the *Criminal Code* should be applied to Mr. Smarch. That section states:

Aggravating Circumstance – Home Invasion

If a person is convicted of an offence under any of subsection 279(2) or sections 343, 346 and 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,

(a) knew that or was reckless as to whether the dwelling-house was occupied; and

(b) used violence or threats of violence to a person or property.

[20] The Crown submits that the statutory aggravating circumstance in s. 348.1 applies to this extortion offence as Mr. Smarch knew this home was occupied by the complainant and used physical violence against the home itself and a death threat to the complainant.

[21] The Crown also submits that the case of *R. v. Brace and Stewart*, 2008 YKTC 41, is relevant to the sentence. In that case, Brace and Stewart were convicted of breaking and entering a dwelling-house and committing an assault therein contrary to s. 348(1)(b) of the *Criminal Code*. Judge Faulkner found that one of the occupants was punched in the head, knocked down and kicked in the face. A second occupant was assaulted and the third managed to escape. Judge Faulkner applied the statutory

aggravating circumstances of s. 348.1 of the *Criminal Code* and sentenced Brace and Stewart to a period of imprisonment of three years each.

[22] Counsel for Mr. Smarch submits that the range of sentence for this case is 10 to 12 months. He points out that there was no personal violence against the complainant and relies upon the case of *R. v. Cromwell*, 2007 BCSC 601, where Ehrcke J. imposed a sentence of nine months imprisonment on Mr. Cromwell's co-accused, Mr. Vonhiltgen. In that case, there was no evidence of actual physical violence. The facts were that Mr. Vonhiltgen came speeding towards the complainants who sat in their truck. He blocked their way and reached in the driver's window and removed the car keys. He had two other men with him and the sentencing judge concluded that the complainants believed they were not free to leave. Apparently, the purpose of the incident was to induce fear and collect a large drug debt.

[23] In *R. v. Cromwell*, Crown counsel referred to cases where the sentences for extortion ranged from three months to five years.

[24] Defence counsel also provided cases where a conditional sentence of 22 months was imposed for the offence of extortion. In *R. v. Bohoychuck*, [2005] M.J. No. 92, a conditional sentence of 22 months was imposed for extortion in the amount of \$2,000. The facts were that Mr. Bohoychuk assaulted his victim with kicks to the head and took his car in exchange for \$2,000. The car was returned in 5 or 6 days and the injuries inflicted were relatively minor, not requiring medical attention. This case followed a Manitoba Court of Appeal precedent in *R. v. Romolo*, [2002] M.J. No. 209, where the court imposed a conditional sentence of two years less a day for a case involving

extortion and threats with a revolver. The court found that the accused made positive gains towards rehabilitation between the time of the offence and the sentencing.

[25] Defence counsel submits that the appropriate range of sentence is low because this case is more akin to a conviction for uttering threats. He submits that the statutory aggravation set out in s. 348.1 of the *Criminal Code* is not applicable because I did not make a specific finding of fact in convicting Mr. Smarch in *R. v. Smarch*, 2008 YKSC 29, that would bring him within s. 348.1. I have some difficulty with this submission because I clearly found that Mr. Smarch was hitting the door frame of the complainant's house, with the knowledge the complainant was inside and uttering the threat to kill him if the drug debt was not paid. I do understand the submission to the extent that it suggests that s. 348.1 is entitled "home invasion" and that is not precisely what occurred here, as there was no entry into the complainant's house.

SENTENCE

[26] I am of the view that the appropriate range of sentence for extortion is one to five years as suggested by the Crown.

[27] I also am of the view that s. 348.1 clearly applies in the circumstances of this offence. Mr. Smarch was clearly involved in extortion in relation to a dwelling-house. He went to the complainant's house to collect a drug debt. He knew the dwelling was occupied by the complainant because they shouted at each other and made threats: the complainant in defence of his property and Mr. Smarch threatening the complainant with death if he didn't pay the drug debt. There was no personal assault of the complainant but Mr. Smarch clearly used a baseball bat to break the outer door although he was

unsuccessful in penetrating the inner door. I conclude that the statutory aggravating circumstance of s. 348.1 applies to this case.

[28] As I understand the submission of counsel for Mr. Smarch, it is that s. 348.1 should not apply to these circumstances because the facts do not support the conclusion that it was a “home invasion” which is the heading of s. 348.1. The role of headings in statutory interpretation was discussed by Estey J. in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, where he held:

I conclude that an attempt must be made to bring about a reconciliation of the heading with the section introduced by it. If, however, it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning. Even in that midway position, a court should not, by the adoption of a technical rule of construction, shut itself off from whatever small assistance might be gathered from an examination of the heading as part of the entire constitutional document.

[29] This was cited with approval in *R. v. Davis*, [1999] 3 S.C.R. 759, by Lamer C.J. who said at para. 53:

In my view, Estey J.'s approach to the role of headings in statutory interpretation is the correct one. Headings "should be considered part of the legislation and should be read and relied on like any other contextual feature": Driedger on the Construction of Statutes (3rd ed. 1994), by R. Sullivan, at p. 269. The weight to be given to the heading will depend on the circumstances. Headings will never be determinative of legislative intention, but are merely one factor to be taken into account: see Lohnes, supra, at p. 179.

[30] Applying these principles to the interpretation of s. 348.1, I conclude that the words “an offence ... in relation to a dwelling-house ...” is unambiguous and does not require entry in the sense that might be conveyed by the words “home invasion”. The

latter words are terminology or jargon that is very descriptive and useful in a general way to describe an aggravating circumstance. But it was not intended, in my view, to limit the application of s. 348.1 to only those circumstances where there is an actual entry inside a dwelling-house. That would place a very narrow interpretation on the words “in relation to a dwelling-house” where the more salient requirement is not entry but knowledge that the dwelling-house was occupied and using violence or threats of violence to a person or property.

[31] There are other aggravating factors:

1. Mr. Smarch has a lengthy and serious criminal record culminating with a conviction in 2002 for breaking and entering and committing an assault and uttering threats. The circumstances of the 2002 offence, set out above, contain some similarities to the present offence, but the 2002 offence is more serious as it was a break and enter and assault of the occupant;
2. the fact that the precipitating issue is the collection of a drug debt, albeit a small one;
3. the Crown has submitted that the pre-sentence report is negative and an aggravating factor because Mr. Smarch showed no remorse and effectively blamed the justice system. This must be offset by the positive views of his social worker and Mr. Gatensby and Mr. Smarch’s apology and remorse in Court.

[32] There are mitigating factors:

1. Mr. Smarch did not enter the home of the complainant;

2. Mr. Smarch did not physically assault the complainant. Although he used the baseball bat in a violent manner, it was against property and not a person.
3. Mr. Smarch has taken some tentative steps towards his own rehabilitation by starting to avail himself of counselling services and pursuing positive change in the Gathering Power program at the Whitehorse Correctional Centre. However, it is clear that he requires long-term intensive counselling to realize a positive change in his life.

[33] There is no doubt that deterrence and denunciation are the primary factors in sentencing for this extortion offence, aggravated by being in relation to a dwelling-house, when Mr. Smarch knew the complainant was inside while he was violent to the property and uttered a death threat to the occupant. At the same time, this is not an offence with the violent factors in *R. v. Vickers* or even *R. v. Brace and Stewart*, cited above. While Brace and Stewart received appropriate three-year penitentiary terms, the case before me did not involve a break and enter and assault. Nevertheless, the offence of extortion carries a maximum sentence of life imprisonment. This offence was committed at a dwelling-house with a death threat and property violence. It is a serious offence which must be denounced and deterred. I also find that there is hope for rehabilitation for Mr. Smarch but he has a long way to go on that road.

[34] I have considered the appropriateness of a conditional sentence but I am of the view that serving this sentence in the community would endanger the safety of the community and that he would be unable to abide by the restrictive conditions that would necessarily be imposed.

[35] I conclude that the appropriate sentence for Mr. Smarch is incarceration for two years less a day which recognizes the very serious nature of his offence but takes into consideration the rehabilitation program he can pursue while at the Whitehorse Correctional Centre. He will receive credit of five months for his pre-sentence custody of approximately three months. The sentence for the mischief offence will be 30 days, to be served concurrently.

[36] In order to assist Mr. Smarch in successfully reintegrating into the community, I also order a term of probation for one year following his release on the following terms:

1. that he will keep the peace and be of good behaviour;
2. that he appears before the court when required to do so by the court;
3. that he notifies his probation officer in advance of any change of name or address, and promptly notifies his probation officer of any change of employment or occupation;
4. that he takes such other assessment, counselling and programming that may be arranged in consultation with Michael Hodgson or Phillip Gatensby and his probation officer.

[37] I also sentence Mr. Smarch to 30 days on each of the three convictions under s. 145 of the *Criminal Code* to be served concurrently with the extortion sentence. The charges under Informations ending in G, H and I are withdrawn.

[38] I also order that a warrant be issued for taking bodily substances for DNA analysis.

[39] I further order that pursuant to s. 110 of the *Criminal Code* that Mr. Smarch be prohibited from possessing any firearm, crossbow, prohibited or restricted weapon, ammunition or explosive substance for a period of five years from the date of his release from imprisonment.

VEALE J.