

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

GREGORY THOMAS SMITH

ELIZABETH BELLEROSE

For the Crown

ELAINE CAIRNS

For the Defence

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): This is an appeal of sentence by Gregory Smith. On November 29, 2001, he was convicted of forcibly entering a residence in Haines Junction and was sentenced to four months in jail, followed by nine months probation.

THE FACTS

[2] The offence was committed on May 19, 2001. The complainant was at home

alone with her two children. At 3:00 a.m. she was awakened by a loud noise at her neighbor's house and she knew that her neighbor was not at home. When she yelled at the two individuals, they said they were going to come into her residence. The complainant rushed to her back door and was able to lock it, preventing their entry; however, Gregory Smith and one other went to the front of her residence and entered that unlocked door.

[3] The complainant called 9-1-1 and was yelling at the intruders to leave while she was on the 9-1-1 call. Mr. Smith and the other individual, eventually, left the premises. It was an extremely frightening incident for the complainant. Mr. Smith and the other individual were intoxicated and although they left her house, they did not leave the area. When the police arrived, Mr. Smith was at the back door, where he had tried to enter the complainant's residence again.

THE SENTENCE

[4] The trial judge described the incident as an extremely upsetting one and a very serious offence. He also found that deterrence was one of the primary considerations and determined that a custodial sentence was warranted for the safety and protection of the public. The trial judge considered and rejected a conditional sentence.

[5] I find that the trial judge erred in not giving any explicit consideration to the fact that the offender was an aboriginal person. It was, no doubt, clear to those

present that Gregory Smith is an aboriginal person and, no doubt, his counsel made submissions in that respect.

[6] However, it is incumbent on the sentencing judge to acquire information regarding the circumstances of the offender as an aboriginal person. This court cannot assume that s. 718.2(e) was taken into consideration in this case.

[7] Gregory Smith is a 24-year-old member of the Champagne Aishihik First Nation. He resides with his girlfriend. They have recently had a daughter, born on January 30, 2002. His girlfriend describes their relationship as a good one, without any violence. Mr. Smith is also good with the baby. Gregory Smith has a good relationship with his mother, Mary Jane Smith, who also resides in Haines Junction. She is supportive of him remaining on a conditional sentence. He had no relationship with his father.

[8] Gregory Smith does not see himself as having a drinking problem. I am of the view that he will have one if he does not come to grips with the dangers of drinking to excess. He does have an impaired charge from December 1996, and I am advised that that fine has never been paid.

[9] I am also advised that it is not the practice in this jurisdiction to collect fines, which I find, quite frankly, to be shocking that there would be sentences handed out in this jurisdiction where the judge and the court assumes that they will be

implemented, and they are ignored. That, I think, must be dealt with.

[10] At the time of his conviction he was employed by his First Nation in the maintenance department. He lost that job when he was convicted. When he was released on appeal, he was able to become re-employed and is expected to work until at least the end of March when the funding for the job program terminates.

Gregory Smith is clearly a young man with potential. He has a spouse and child and a caring mother. He can become a leader in his community.

[11] I was concerned that the pre-sentence report indicated that Mr. Smith did not understand why the victim would be afraid of him in the circumstances. However, he has accepted responsibility for that offence and, from my discussion with him in court, I am satisfied that the seriousness of the impact of his actions on the victim has been understood. This is clearly not a case where incarceration is appropriate.

Nevertheless, a serious offence has been committed and it must be brought home to Gregory Smith that such conduct will not be tolerated.

[12] Stand up, please, Mr. Smith.

[13] I am sentencing Gregory Smith to six months, to be served conditionally, on the following conditions: (1) that he report immediately to a conditional sentence supervisor, and thereafter as and when directed; (2) that he abstain absolutely from possession, purchase, consumption of alcohol and non-prescription drugs, and

submit to a breathalyzer upon reasonable demand from a peace officer who has reason to believe that he is not complying with the condition; (3) that he attend, participate, and complete alcohol assessment and/or counseling as directed by the supervisor; (4) that he attend for such other assessment, counselling and programs as directed by the supervisor; (5) that he have no contact, directly or indirectly, with Paula Armstrong or her children; (6) that he not attend within 100 metres of the residence of Paula Armstrong; (7) that he maintain and seek employment; (8) that he abide by a curfew between the hours of 9:00 p.m. and 6:00 a.m., unless given permission in writing by the supervisor to be out past the curfew. He is to present himself at his door during curfew checks by a probation officer or a peace officer, and failure to do so will result in a breach of the conditional sentence.

[14] I am also adding the condition that you had on your recognizance, Mr. Smith, that you report to the R.C.M.P. once a week, on Friday, between 4:00 p.m. and 6:00 p.m.

[15] MS. CAIRNS: My Lord, Mr. Smith has found that quite difficult. The R.C.M.P. are often not at the detachment and he has to wait for a significant period. If he, perhaps, could report instead to the conditional sentence supervisor, that would be much more convenient.

[16] THE COURT: Is that more convenient?

[17] MS. CAIRNS: He's found it quite difficult. The R.C.M.P. are often not available when he is supposed to be there, and he has had a difficult time.

[18] THE COURT: Is the conditional sentence supervisor in the community?

[19] MS. CAIRNS: There is, I believe, Val Binder, has been involved with that, and perhaps, even, there could be phone check-ins or something like that, but he has found the R.C.M.P. a difficult place to report to.

[20] THE COURT: Okay. I will change that condition then, that you report to the conditional sentence supervisor, or such other person authorized by the conditional sentence supervisor in the community, on a day and time to be designated by the conditional sentence supervisor.

[21] I am also making it a condition that you pay the 1996 impaired charge fine, in the amount of \$300, no later than March 30, 2002. I want to make it clear to you, Mr. Smith, that if you do not pay it by that date, it becomes a breach of condition of this conditional sentence, and you can be brought back before the Court and sentenced again. Do you understand that?

[22] THE ACCUSED: Yes.

[23] THE COURT: I am instructing the Crown attorney to put this in her date book to ensure that that fine is paid and that action is taken in the event that it is not paid. Thank you. You can be seated, Mr. Smith.

[24] Mr. Smith will be credited with the time he has already served, and his two months of recognizance time, as though it were a part of this conditional sentence. He will not be given credit for the time involved before conviction.

[25] Anything arising, counsel?

[26] MS. CAIRNS: Nothing arising.

[27] MS. BELLEROSE: I wonder if My Lord would consider a condition where he is not to attend premises where the primary purpose is the sale of alcohol?

[28] MS. CAIRNS: There is already an abstain clause.

[29] THE COURT: It is already in there. I think that is well covered. If he is involved in any way in the possession, purchase or consumption of alcohol, he is going to have big trouble.

[30] Mr. Smith, the conduct that you were involved in on May 19 of 2001 is not acceptable conduct in this court or in your community, and I am sure it is an

embarrassment to you now, and an embarrassment to your family. I certainly hope that you will conduct yourself in the future in a more suitable way, because I think that you are now a father, you have a spouse, and you have serious responsibilities in your community, and I think it is time that you started to live up to those. Good luck, sir.

VEALE J.

