

Citation: *R. v. Smith*, 2010 YKTC 67

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09-05870
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

HENRY EDGAR SMITH

Appearances:
Bonnie Macdonald
Julie Desbrisay
David Christie

Counsel for the Federal Crown
Counsel for the Territorial Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): This is a difficult case. Mr. Smith has entered guilty pleas to three offences under the *Criminal Code* and two under the Territorial *Motor Vehicles Act*, R.S.Y. 2002, c. 153.

[2] The first is an offence contrary to s. 249.1(1) of the *Criminal Code* from September 30, 2009, which has an associated s. 266 *Motor Vehicles Act* offence out of the same circumstances. On this occasion, at 1:11 in the morning, RCMP in Whitehorse responded to a complaint of an argument. Mr. Smith and his partner, Carla Boss, left with him driving her red Grand-Am automobile - and I say her, in the sense

that he purchased it but gave it to her - at a high rate of speed. As it headed towards Riverdale it almost had contact with an RCMP cruiser. According to Ms. Boss, at the time, she said that he sped through traffic lights and reached very high speeds up to 150 kilometres per hour. I am not sure how she was able to determine that or give that estimate; however, in her statement, the vehicle turned off the road that heads towards the dam in the Riverdale area. He stopped the car, he pushed her; she rolled out of the car and ran and hid and went back to the 98 Hotel. The police vehicle that he almost struck activated its emergency lights and the officer noted that the vehicle being driven by Mr. Smith was at speeds of up to 120 kilometres per hour, to the point that the RCMP called off the pursuit because of the risk.

[3] Later, at 2:30 in the morning, the RCMP were able to locate the vehicle in the McIntyre subdivision, but not Mr. Smith. An arrest warrant was issued and he was subsequently arrested on February 12, 2010. At the time he was disqualified from operating a motor vehicle. This disqualification arose from November 2005 and he had not been licensed to operate a vehicle in the Yukon since that time.

[4] On February 6, 2010, RCMP responded to a complaint in Haines Junction from Ms. Boss that Mr. Smith had assaulted her. When the RCMP arrived at the residence, Mr. Smith was located outside doing donuts on a snowmobile in the driveway. The police vehicle's lights were activated. Mr. Smith took off in the snowmobile and was driving through Haines Junction at what the police officer noted to be a high rate of speed, with erratic driving, and this was all in the area of 3:00 a.m. in the morning, not high traffic times by any means, but there was only one police officer on duty at the

time. He did not continue any pursuit. He had concerns as well that Mr. Smith might return and the argument with Ms. Boss might continue.

[5] The assault with which he was charged, as a result of that incident, based on the information that Ms. Boss gave, related to him punching her at least ten times in the head, arms, and shoulder, causing some bruising, abrasion and bumps and he tore her shirt. He also was kicking at the door of the residence, attempting to get in.

[6] So the two offences that day under the *Criminal Code* were the assault on Carla Boss and a dangerous driving contrary to s. 249(1)(a). Also, on that occasion, he was again operating a snowmobile without a valid operator's licence pursuant to the driving disqualification.

[7] Mr. Smith has a criminal record going back to 1996. It is not insignificant. There are a number of fail to comply with recognizances or probation orders. One driving over .08 in 2000, two driving while disqualified in 2001, an assault in 2001, a spousal assault in 2004, two other assaults in 2004, and more fails to comply with recognizance. There was a conditional sentence imposed for two of the assaults in 2004, and a fail to comply with recognizance for which he received a conditional sentence. There was a breach, however, it appears that no action was taken on the breach. The most recent conviction is in 2007 for a s. 145(5.1).

[8] The Crown's position for the federal Crown is that the 63 days in custody Mr. Smith has served should be attributed towards the s. 266 *Criminal Code* offence of assault. There should be a sentence of four months on the flight from the police officer, and a consecutive sentence of five months for the dangerous driving.

[9] The Territorial Crown has filed notice and is seeking the mandatory minimum, three months on each of the charges for which he has entered guilty pleas today.

Crown is seeking that these be served consecutive to each other.

[10] Defence counsel is seeking that the *Motor Vehicles Act* offences be dealt with by way of time served concurrent on each of 90 days; technically at one and a half to one, it could be 95 days but there is no requirement to treat it any differently than 90 days.

As the offences occurred prior to the amendments coming into place, without going any further, I am prepared to give him time and a half credit, approximately, for 90 days.

[11] With respect to the remaining *Criminal Code* offences, counsel for Mr. Smith is suggesting these be served by way of a conditional sentence in the community. The Federal Crown is opposed to the sentence being served conditionally.

[12] The aggravating factors: With respect to the assault, it is a domestic assault, with the breach of the trust that occurs in a spousal relationship, and it is not his first. The criminal record is aggravating because of the prior assaults and the prior driving offences. The circumstances surrounding both driving offences involved the victim of the assault.

[13] The second offence, February 6th, took place while a warrant was out for his arrest on the first offence but that is to be distinguished from the circumstance where he was out on a recognizance and awaiting the outcome of the first offence and, nonetheless, went out and committed a similar offence. In the facts related to the February 6th offence, I had not made mention of it, but, at times, while the police officer

was keeping him in observation in Haines Junction, the snowmobile would race back towards the cruiser with the lights on and go by it and then leave again.

[14] The extent to which alcohol was involved in either offence is unclear as the police did not have opportunity to speak closely to Mr. Smith on either occasion and determine his level of sobriety or intoxication.

[15] His motor vehicle abstract also is unenviable, with what appears to be numerous driving disqualifications. Conviction dates are similar in 2001, on four of them; however, they point to two separate offence dates. But it is clear, insofar as Mr. Smith and his ability to operate a motor vehicle in accordance with the laws, that there is some conflict.

[16] Ms. Boss has provided a statement and has spoken in the Court and clearly points out the difficulties that the two of them share with respect to alcohol. They have three children between them, one being Ms. Boss's from a prior relationship, the second, an 18-month old son of their relationship, and then Mr. Smith has a 10-year-old child that he seldom sees, from another relationship. Their relationship is marked by periods when they are doing well and periods when they are not doing very well, and it almost all seems attributable to alcohol, perhaps coming into more focus when dealing with other issues related to jealousy and similar matters.

[17] Mr. Smith cooperated in the preparation of a pre-sentence report. He is 32 years of age, a member of the Selkirk First Nation. He had a troubled childhood. His father, that he did not really know very well, died December 2009 at the age of 59, related to alcohol abuse. His mother lives in town and apparently has a sober home. Mr. Smith

was removed from the home at two years of age, placed with grandparents in what appeared to be a fairly strict environment, then removed from the grandparents' home because of abuse from an uncle. He was placed in a foster home. He has a Grade 11 education. He has what is noted to be a severe level of problems related to alcohol abuse. He describes himself as a harsh binger. When he is working, he does not drink. When he is not working, he gets the urge to drink. He cannot drink for just one night and has a binge that lasts for a week and a half. He said he is fighting with the urge all the time. It appears that he can, at times, exercise sufficient willpower to not drink again, as he states he did from September 30th until February 6th. The Criminogenic Risk Assessment places him at a high risk of re-offending.

[18] The one continuous positive in the report, with some hesitation, is his employment. He has worked himself up from a janitor to having a role of some responsibility out at Minto, and he has the support of his employer, who has been holding his job for him but cannot do so for much longer. He is qualified for a millwright apprenticeship program that, once started, would take, according to the pre-sentence report, two years; Mr. Smith said four years. He is a valuable employee, he is a good employee, however, the mill superintendent at Capstone Mine says that when he is there, he does good work but there have been issues with him missing work. Mr. Ledgerwood says this has something to do with family problems, that sometimes he misses the plane or bus connection.

[19] The criteria; and I will start with the conditional sentence, because whether that is or is not appropriate would shape the rest of the sentencing. In order to impose a conditional sentence, I must be 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 as set out in s. 718 to s. 718.2.

[20] There is a short-term and a long-term aspect to safety of the community. These driving offences are offences that clearly put the community at risk. Yes, they are to be distinguished from cases where there are a lot of people around, it is the middle of the day, it is a school zone, and some of the other factual circumstances of the cases put before me by the Crown, which the Crown acknowledged in submissions. But they are not offences that took place in remote areas where it is highly unlikely that anyone would be around, either.

[21] There is a serious risk of harm to the community that flows from driving offences such as this and from the disregard of either court orders, licence suspensions, police directions to stop, which all increase the risk to the community. They are not necessarily insurmountable risks but they are risks that call out for sentences that denounce such conduct and are to be imposed to ensure that specific deterrence is met, and general deterrence. In Mr. Smith's case, specific deterrence has not accomplished as much as could be hoped, looking at his record, his driver's abstract and these current offences. It is not a continuous, unbroken string of offences but there is a pattern, nonetheless. That short-term safety risk has to be measured against the long-term safety risk and that is where courts always have to weigh the rehabilitation of the offender in a manner that, perhaps, dealing with them at a certain way at one juncture might have a greater benefit to society down the road, without unduly posing any risk at present.

[22] This is the philosophy behind curative discharges, in which the long-term protection of society can perhaps call for more of a rehabilitative focus at a particular point in time than a denunciatory focus. However, when these things apply in the curative discharge context, generally there is an abundance of evidence that points to the steps a person has made to separate themselves from the alcohol that is their problem. Or, in a case like this, while not a discharge application, the application of that principle would look to what steps Mr. Smith has done to back up his statements of desire and stated intentions to avoid putting the public at risk in this manner again.

[23] There is a concern with respect to safety of the community here. Now, the fundamental purpose and principles of sentencing, without going through them at length, recognize the principles of denunciation, deterrence, rehabilitation, the principle of restraint, and of course that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[24] There is not a *Gladue*-style report here that directly links Mr. Smith's issues with alcohol to things that arose in his background directly as a result of his First Nations status; information as to residential school impact on his parents, grandparents, others, that may have worked its way into his family and into his life. That kind of information is, of course, extremely helpful to the Court, and that does not mean that I cannot consider his First Nation status and his history in looking at this; I certainly do, and it is a pattern that is not at all unusual. So I recognize that his First Nations status may well have contributed somewhat to the condition he finds himself in now, and it is an interesting dilemma for the courts, for counsel in their submissions, when the biggest risk factor

posed by an individual in opposition to a rehabilitative sentence or a conditional sentence is the consumption of alcohol and the problems they have with it when one of the primary negative impacts on a person's life that flow from their First Nations status is often a problem with alcohol. So it creates a very, sometimes delicate, balancing situation and that is where solid information as to how that problem is being dealt with is critical when assessing risk to the public and the principles of sentencing in the context of s. 718, and so all too often makes cases such as this difficult.

[25] I focused on the driving offences but, certainly, when you are dealing with offences of domestic assault, Ms. Boss is a member of the public. Her children are members of the public who are affected by what takes place in the relationship between the parents. Much of the difficulty that seems to cause the stress on Mr. Smith that contributes to his drinking arises from this relationship that seems, at times, to be supportive and seems, at other times, to create an environment that makes it difficult for Mr. Smith to exercise good judgment, and that sometimes contributes to his consumption of alcohol and the trouble he finds himself in. I have no problem accepting what Ms. Boss says about her trying and the difficulties that this has placed on her and on her children, on their children.

[26] In the end, after giving careful consideration to all of these principles, I am not satisfied that a conditional sentence is appropriate in the circumstances. The safety of the public in this case, on the steps that have been taken so far to deal with this very serious and significant problem with alcohol that Mr. Smith has just been unable to deal with, cannot be properly protected by the imposition of a conditional sentence, and I do not say this lightly but it is, in this case, the finding that I feel I must make.

[27] As a result, the sentence will be as follows: For the s. 266 assault, there will be a sentence of three months time served. For the s. 266 *Motor Vehicles Act* offences, notice was filed; the amended minimum sentences are three months. There will be three months imposed on each and they will be consecutive to each other. With respect to the flight that arises from September 30th, the sentence will be four months concurrent to the s. 266 *Motor Vehicles Act* offences. For the dangerous driving, the sentence will be a further four months and it will be consecutive to the flight but concurrent to the s. 266 offences. There will be a two-year driving prohibition that will attach to the s. 249 offences, prohibiting Mr. Smith from operating a motor vehicle on any street, road, highway or other public place or from operating a vehicle in any public place, and that will be for a period of two years, as I stated.

[28] There will be a DNA order attached to the s. 266 assault in this case.

[29] There will be a probation order. The probation order will attach itself to the *Criminal Code* offences. The terms of the order will be:

1. To keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the Court or Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;
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 do not change that residence without the prior written permission of your Probation Officer;
6. 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;
7. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
8. Take such alcohol and drug assessment, counselling or programming as directed by your Probation Officer;
9. Report to the Family Violence Prevention Unit to be assessed and attend and complete the Spousal Abuse Program as directed by your Probation Officer;
10. Take such other assessment, counselling and programming as directed by your Probation Officer;
11. Have no contact directly or indirectly or communication in any way with Carla Boss, except with the prior written permission of your Probation Officer in consultation with Victim Services and Family and Children Services;
12. Not attend at or within 25 metres of the residence of Carla Boss except with the prior written permission of your Probation Officer in consultation with Victim Services and Family and Children Services;
13. Participate in such education or life skills programming as directed by your Probation Officer;

14. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;
15. Provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities you have been directed to do pursuant to this probation order.

[30] There will not be a s. 110 firearms order. This is discretionary and I will not impose it in this case.

[31] Victim fine surcharges will be waived. Remaining charges?

[32] MS. MACDONALD: Stay of proceedings by the Crown, Your Honour.

[33] MR. CHRISTIE: And just for clarity, Your Honour, I hope I heard you right, that the end result, with the concurrent and consecutive, is eight more months following today?

[34] THE COURT: That is correct.

COZENS T.C.J.