

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Smarch,***
2008 YKCA 17

Date: 20081124
Docket: YU610

Between:

Regina

Respondent

And

Joseph Edward Smarch

Appellant

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Neilson

Oral Reasons for Judgment

J. Van Wart

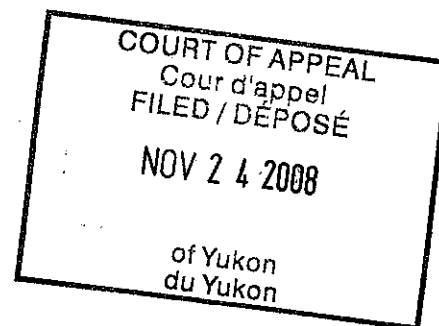
Counsel for the Appellant

P. Chisholm

Counsel for the (Crown) Respondent

Place and Date:

Vancouver, British Columbia
24 November 2008



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[1] **PROWSE J.A.:** On June 4, 2008, Mr. Smarch was sentenced to imprisonment for two years less a day, followed by one year probation, on one count of extortion. He is applying for leave to appeal his sentence, and, if leave is granted, is seeking to have his prison sentence reduced to 12 months.

[2] The circumstances giving rise to this offence occurred in White Horse, Yukon, on October 26, 2006. On that date, Mr. Smarch attended at the residence of his cousin, Kevin Billy, to obtain repayment of a \$70.00 drug debt. Armed with a baseball bat, Mr. Smarch succeeded in breaking open the outer door of Mr. Billy's residence, but he did not succeed in entering the residence.

[3] The sentencing judge accepted evidence that Mr. Smarch threatened to kill Mr. Billy if he did not repay the debt. Neighbours who heard the banging on the door and yelling called the police and Mr. Smarch was arrested sometime thereafter.

[4] Mr. Smarch submits that the sentencing judge erred in overemphasizing the "home invasion" aspect of the circumstances as an aggravating factor despite the fact there was no entry into the home and no physical assault of the occupant. He submits that this error led the sentencing judge to focus on a range of sentence of between one and five years, when the appropriate range for similar, and even more serious, offences includes lesser sentences, including suspended sentences. Mr. Smarch further submits that the sentencing judge failed to take adequate account of his Aboriginal heritage and related difficulties, in imposing a sentence which was unfit.

[5] The Crown submits that the circumstances of this offence, and Mr. Smarch's circumstances, including his lengthy criminal record, justify the sentence imposed by the sentencing judge.

[6] This Court should not interfere with the sentence imposed by a sentencing judge unless the sentence arises from an error in principle, failure to consider a relevant factor, over-emphasis of an appropriate factor, or where the sentence is demonstrably unfit: see *R. v. C.A.M.*, [1996] S.C.J. No. 28. This is particularly so in cases such as this where the sentence was imposed after a trial in which the sentencing judge heard all of the evidence and had the opportunity to observe all of the witnesses, including Mr. Smarch.

[7] I am not persuaded that the trial judge erred in emphasizing that this case had the hallmarks of a home invasion, which was only thwarted because, despite best efforts, Mr. Smarch was not able to break down the inner door of Mr. Billy's residence. Mr. Smarch clearly went to Mr. Billy's residence knowing Mr. Billy was at home with the intent of collecting the drug debt by force. His efforts were accompanied by threats to kill Mr. Billy, who apparently responded in kind. The sentencing judge justifiably found that these circumstances brought the offence within s. 348.1 of the *Criminal Code* as an aggravating factor in sentencing. I am not persuaded that the sentencing judge overemphasized this factor in determining the appropriate sentence. (I note that the applicability of s. 348.1 of the *Code* to these circumstances is not challenged on appeal.)

[8] Nor am I persuaded that the sentencing judge downplayed or overlooked the fact that Mr. Smarch was an Aboriginal offender. The sentencing judge specifically

mentioned that fact in his reasons for sentence, together with some of the related problems Mr. Smarch had suffered as a consequence of a dysfunctional family life.

[9] As noted by Crown counsel in his written submissions, the fact that an offender is of Aboriginal descent does not necessarily entitle him or her to a lesser sentence than would otherwise be imposed, but it is one factor to take into account in sentencing. The more serious the offence, the less significance will be attached to the fact that the offender is of Aboriginal heritage.

[10] This was a serious offence. Mr. Smarch clearly intended to use violence to effect his purpose, which was to collect a drug debt. It is purely fortuitous that he was not able to gain entry into Mr. Billy's home.

[11] The sentencing judge found that Mr. Smarch had a lengthy record of 20 previous convictions, including breaking and entering, possession of a dangerous weapon, breaking and entering and assault, four other assault convictions and uttering threats. Although the most serious of these offences were committed in 2002 or earlier, there is a pattern of criminal behaviour which gives some context to the offence of extortion committed in this case.

[12] Mr. Smarch also has a history of failing to respect court orders. In that regard, I note that he was sentenced to concurrent time on three counts of breach of court orders at the time he was sentenced for this offence.

[13] Although Mr. Smarch has some support in the community, particularly that of a sympathetic social worker, his pre-sentence report indicates that he blamed the lawyers and the system for his most recent conviction and that, as of the date the

report was prepared, approximately one month prior to sentencing, Mr. Smarch continued to assert his innocence. Although Mr. Smarch expressed some remorse for his actions at the sentencing hearing, it is fair to say that the pre-sentence report is generally negative and suggests that Mr. Smarch has a long way to go in accepting responsibility for his actions. The sentencing judge obviously shared that view.

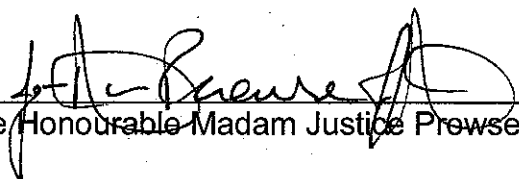
[14] While the range of sentences available for convictions for extortion includes cases in which sentences as low as a suspended sentence have been imposed, the sentencing judge was well aware of that fact. In his view, however, the relevant range of sentence in this case ranged between one and five years. I am satisfied from a review of the authorities provided that the sentencing judge was justified in placing Mr. Smarch's conduct somewhere near the middle of that range.

[15] In the result, I am not persuaded that the sentence imposed was demonstrably unfit or that it reflects any error in principle or otherwise. I would grant leave to appeal, but dismiss the appeal.

[16] **CHIASSON, J.A.:** I agree

[17] **NEILSON, J.A.:** I agree.

[18] **PROWSE, J.A.:** Leave to appeal is granted and the appeal is dismissed.


The Honourable Madam Justice Prowse