

Citation: *R. v. Smith*, 2004 YKTC 14

Date: 20040308
Docket: 02-00736
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Lilles

R e g i n a

v.

Helen Smith

Appearances:
Edith Campbell
Elaine Cairns

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

Facts:

[1] Helen Smith is a 51 year-old aboriginal woman who has pled guilty to one count of assault causing bodily harm, contrary to s. 267(1)(b) of the *Criminal Code*. The circumstances are as follows: On May 17, 2003, around 7:00 a.m., Helen Smith contacted the Royal Canadian Mounted Police in Carcross, Yukon Territory and said that she had "beaten up" her husband, Robert Smith. She told the police that they had both been partying into the early morning hours and that he made some derogatory comments about her, to which she took offence. As a result, she attacked him, punching and kicking him in the head area. Photographs of Mr. Smith were filed as an exhibit, and showed facial lacerations, considerable swelling and discoloration from bruising.

[2] Mr. Smith provided a breath sample that morning with a reading of 200 mg/%. He was obviously intoxicated. Helen Smith also provided a breath sample but her reading showed a blood/alcohol reading of zero. It is obvious that her

partying did not involve very much alcohol, although other drugs cannot be ruled out.

[3] This sentencing is somewhat exceptional due to Mrs. Smith's lengthy and violent criminal record as an adult. In 1969, when she was 16 years old, she was convicted of wounding with intent, receiving a sentence of two years less a day. The victim was a female, and the assault involved the use of broken glass to cut the victim, including her face.

[4] In 1971, when she was 18 years of age, she was convicted of three common assaults and one assault causing bodily harm, for which she received concurrent sentences, the longest of which was six months incarceration.

[5] Additional convictions include the following:

1. 1983, Assault Causing Bodily Harm;
2. 1988, (2 times) Assault and Assault with a Weapon;
3. 1990, Aggravated Assault;
4. 1997, Assault.

[6] The assault in 1997 was against the current victim, her husband, Robert Smith.

[7] In 2000, Mrs. Smith assaulted her husband again. As her husband would not testify against her, the matter was resolved by way of a diversion agreement involving a referral to the Southern Lakes Justice Program. As a result, this incident does not appear on her criminal record. It is noteworthy, however, that this assault was very serious, as Mr. Smith received a broken arm and ribs, facial lacerations and many bruises. He had to undergo reconstructive surgery to his face. He was in the hospital for a period of time.

[8] As mentioned earlier, the assault now before the court occurred in 2003, and, it too, involved a serious attack on Mr. Smith. As in the case of previous assaults, Mrs. Smith appears to have inflicted most of the blows to the victim's face and head.

[9] Mrs. Smith's criminal record also includes two convictions for failing to comply with court orders.

[10] The chronic nature and severity of her violence is described by Dr. Boer in his report at page 7:

The RCMP record continues with a variety of assaults, all against men after 1969, except in 1988 when she was charged with assaulting her own children. All assaults followed a common path: drinking to excess, and then becoming aggressive. The aggression is gratuitous and excessive and has resulted in permanent mutilation and scarring of some of her victims. Her violence is typically perpetrated on the victim's face without thought to the lasting problems that such disfigurement will cause the victim. One man lost an eye and one of her first victims had her face permanently scarred. Her current victim is also permanently scarred according to her probation officer, G. Sutton. She admitted to assaulting her husband Robert four times, including the present offence. In the first assault, 6 years ago, she kicked him with her boot and cut his mouth open. The second time, 4 to 5 years ago, she used a chair and an inflated tire, and broke his jaw in four of five places. According to G. Sutton, her husband had to be evacuated to Vancouver by air ambulance and had to have reconstructive surgery as a result of his injuries.

Performance During Detention:

[11] Since the attack, Mrs. Smith has spent six months at the Yukon Adult Residential Centre. While at the ARC, she was essentially under house arrest, as she was required to remain there unless given permission to be absent for a specific approved purpose. Considering the restrictive nature of her stay at the

ARC, I allow her credit for six months pretrial custody on that account. In addition, giving her the usual two-for-one credit for the time spent in the Whitehorse Correctional Centre, I credit her for another 11 months, for a total of 17 months pretrial custody.

[12] While in custody and at the ARC, Mrs. Smith has taken advantage of all the counseling options available to her, and these were numerous. She has made contact with and received counseling from Alcohol and Drug Services, the Family Violence Prevention Unit, CAIRS, (a programme for residential school survivors) and a variety of support people in her home community of Carcross. She has been seeing Dr. Hutsul on a regular basis. Dr. Hutsul is a psychologist funded by the Carcross/Tagish First Nation. Mrs. Smith completed a three-week substance abuse program, the SAM program, while in detention. She completed a 15-hour Suicide Intervention Skills Program in October 2003. During the latter part of 2003, she was released on bail to complete a four-week Women's Residential Treatment Program for alcohol and drug addictions. She has also contacted Hospice Yukon. Throughout this period, she has maintained contact with various religious organizations, from which she receives support.

[13] Her attendance and participation in all the programs were reported as excellent.

[14] Mrs. Smith agreed to a psychological assessment, which was conducted by Dr. Boer. Dr. Boer also testified during the sentencing hearing. His report and oral evidence were extremely helpful in understanding Mrs. Smith's issues and the nature of treatment or programming that may be of assistance to her.

Personal History:

[15] Mrs. Smith has had a traumatic and violent childhood, which has continued into adulthood. The following extracts from Dr. Boer's report are descriptive (page 3):

Ms. Smith reported a dysfunctional childhood in which she was the victim of and witness to various forms of family violence. She reported all sorts of abuse, including physical and sexual abuse in residential school, as well as emotional, spiritual, physical, sexual abuse and neglect at home. The sexual abuse was by an uncle and attempted sexual abuse incidents by various visitors to the family home. One of her earliest memories (at age 6) was trying to find a gun so she could shoot her father as he had beaten up her mother quite badly. In relating this history, she mentioned that she has realized now she has "been angry with (her) father and took it out on men in (her) life". Her memories of her mother are not much better and she maintained that one of her first female assault victims reminded her of her mother. Her experience of being abused has continued into her adult life and she reported that she was raped less than 10 years ago, and that she has been in a number of physically abusive relationships. She also admitted that she has been abusive to her partners, often waiting until they were drunk before assaulting them, since she could not successfully assault them when the men were sober.

[16] Mrs. Smith has limited schooling and effectively no work history. She has been involved with alcohol since age 11 and heroin and cocaine in her mid-40s. Although she has been aware of the relationship between drinking and her assaultive behavior for some time, it has not resulted in a change in her behavior.

[17] Mrs. Smith has been in numerous different relationships, of which two were legal marriages. For a period of time, she worked as a prostitute while living in skid row in Vancouver, but remembers little of this due to her addictions.

[18] Dr. Boer notes that violence has been part of all her relationships. He observes, at page 5:

Ms. Smith stated that she has been in physical fights with all of her partners. Her expectations of her partners were often not met in that she believed the men should work and not stay at home and drink and

abuse her (generally they were chronic alcoholics as well). As a result of her partners not meeting her idealistic expectations, she would build up resentment and eventually attack them when they were drunk. As noted in the 1969 probation report, she has also used the tactic of trying to burn down the residences of men with whom she was angry in the past.

Risk Assessment:

[19] Dr. Boer assessed Mrs. Smith for her risk to re-offend. He evaluated her as a high-risk for future violent and general recidivism. She also meets the criteria for Anti-social and Borderline Personality Disorders. Problematic clinical factors include a lack of insight about her problems, impulsivity and unresponsiveness to treatment. Dr. Boer concludes, at page 11:

Overall, taking into account her results on risk measures and other clinical and dynamic risk factors (e.g., lack of empathy for her victim, rationalizations for her violent behavior), Ms. Smith's risk for future violence is seen as HIGH, and her current level of manageability in the community is seen as LOW. In my opinion, until her treatment needs are addressed through risk-relevant programming, she is a significant threat to re-offend through alcohol or drug related violence as well as ignoring the orders of the Court if released on a probationary term to the community at this time.

Treatment Needs

[20] Mrs. Smith has a wide variety of treatment needs, including alcohol and drug abuse treatment and counseling for the sexual, physical and mental abuse she has endured throughout her life. She also needs counseling for her propensity to inflict violence on her partners in domestic situations. Dr. Boer concludes that the mix of counseling and treatment programs available in the Yukon are insufficient to reduce her risk to her current husband or future partners to a level manageable in the community.

[21] Dr. Boer was specifically asked whether the programming completed by Mrs. Smith since June of last year has impacted on her risk factors or her treatment needs. Dr. Boer advised that they have not, although her participation and performance indicate a high level of motivation which is a positive sign.

[22] Dr. Boer's opinion, as expressed at page 13 of his report, remains unchanged:

Ms. Smith is currently awaiting sentencing and is thus compliant and eager to please. This is another manipulation that has been seen in the past. According to the file, Ms. Smith seems to "shop around" for supportive people in the therapy profession and in churches and manages to obtain community dispositions or brief jail stays – only to repeat the cycle again. This manipulative and repetitive "positive" behavior is part of her cycle and the current situation is all part of her "pretend normal" phase. She is expecting a community disposition and will, if allowed, return penitently to her husband, only to return to drinking and abusing him in the future (if the past is any indication of the future).

[23] Dr. Boer concludes that there is little prospect of Mrs. Smith refraining from assaultive behavior in the future without a significant intervention at this time:

As a result of her history, lack of insight and the results of risk assessment testing, I would conclude that Ms. Smith's risk for violent reoffending is HIGH. Her risk for violence may escalate to fatal proportions and the likely victim of her future violent behavior will probably be her unfortunate alcoholic, and thus easily victimized, husband Robert. This risk level is increased further in terms of imminence of violent behavior with any return to substance use. Thus, there is a substantial level of risk to the public that cannot be moderated without significant treatment interventions that should be delivered in a secure setting in my opinion.

Such institutional treatment should be followed with a structured release plan with contingencies in place to

manage Ms. Smith should problems arise. Without significant treatment gains that indicate reduction in her dynamic risk factors levels, it is unlikely that there is any reasonable possibility of eventual control of her risk for future violence in the community with or without the involvement of alcohol or drugs. Importantly, the use of alcohol increases her risk, but does not cause her risk as she claims. And, while I would agree that the Christian faith is important to her recovery, it is not the entire solution to managing her behavior – she still has to take responsibility for her behavior.

[24] Dr. Boer has concluded that there are no programs available in the Yukon at the current time that can reduce Mrs. Smith's behavior to a manageable level. I agree. On the other hand, there are a variety of programs available in the federal system, including several which accommodate traditional aboriginal values and customs.

Mitigating Factors:

- [25] 1. Several hours after the assault, Mrs. Smith reported the assault to the police at her initiative:
- (a) she provided detailed information to police indicating her culpability in the offence.
 - (b) she expressed concern for her husband and asked the police to look for him in order to get medical attention for him.
 - (c) she was fully co-operative with the police.
2. Based on previous experience, one cannot say with any certainty that Mr. Smith would have testified against Mrs. Smith in court. Without her co-operation and admissions, this prosecution may not have gone forward.
3. Mrs. Smith has taken and successfully completed all the programming that was available to her during her detention. She is clearly motivated to deal with her issues at this time.

4. The time spent in pretrial custody and at the ARC, the equivalent of 17 months, mitigates her sentence.
5. She has the support of many individuals within and outside her community. A number of letters were filed with the court and a number of individuals attended court in her support. It remains for her to take advantage of that support when her sentence is completed.
6. Mrs. Smith is a 51 year-old aboriginal woman. She has had a most unfortunate childhood where she was exposed to violence. As an offender, she has also been a victim.

Aggravating Factors in Sentencing:

- [26]
1. The offence itself was very serious, as indicated by the photographs entered as exhibits.
 2. This assault against her husband is not the first. She has assaulted him previously. This assault took place when he was very intoxicated and less able to defend himself.
 3. An assault against a family member is an abuse of trust, and must be considered an aggravating factor.
 4. Mrs. Smith has a lengthy record of very serious assaults going back 35 years.
 5. Mrs. Smith has received lengthy periods of incarceration as well as community dispositions in the past. They have not been effective in deterring her offending. Diagnosed with Anti-social and Borderline Personality Disorders, she requires a lengthy period of intensive and structured treatment, which is not available in the Yukon or in the community, in order that her risk factors can be managed in the community.

[27] In all of these circumstances, protection of the public, and in particular, those individuals who may in the future enter into a relationship with her, is a paramount principle in this sentencing. Protection of the public can best be

achieved by “rehabilitation”, meaning intensive treatment in a structured setting. Such programs are only available in or through the Federal system.

[28] Since conducting the psychological assessment last June, Dr. Boer has identified a program at the Fraser Valley Institute in Abbotsford, British Columbia, part of the federal system. This six-month program for violent women has eight beds in a structured living unit. At the current time, there are three vacancies. This program involves cognitive dialectical behavior therapy and Dr. Boer recommends it for Mrs. Smith. He believes Mrs. Smith has the motivation and focus to successfully complete this program. She has advised the court that she agrees to participate in the program. Dr. Boer has also advised that his recommended program can be accessed through the provincial/territorial corrections system as a result of agreements currently in place.

[29] There may also be other programs that might be identified as suitable for her, but based on the evidence received from Dr. Boer, they would be very few in number. Such programs would have to be identified almost immediately and would have to have the approval of the Territorial Corrections Department who would no doubt consult directly with Dr. Boer. Absent identifying such a program and ensuring its availability through the federal system, Mrs. Smith has agreed to participate in the Fraser Valley Institute program identified by Dr. Boer

[30] Mrs. Smith has indicated her willingness to participate in this treatment program. I strongly recommend that the relevant Yukon authorities take immediate steps to permit her to access the program described by Dr. Boer. Time is of the essence as only three of a total eight beds are currently available.

Conclusion:

[31] In light of the pretrial custody, for which I have credited Mrs. Smith with 17 months, I impose a further period of custody of 14 months. This is to be followed by three years probation with the following terms:

1. Keep the peace and be of good behavior and appear before court when required to do so.
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. Report to a probation officer within two working days after the expiration of your custodial sentence and thereafter, when required by the probation officer and in the manner directed by the probation officer.
4. Remain in the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer.
5. Take any psychological assessment, counseling, programming and treatment as and when directed by a probation officer.
6. Report as directed to the FVPU to be assessed and if so directed, attend, participate in and successfully complete any relevant programming as directed by your probation officer.
7. Take such other assessment, counseling, programming and treatment as directed by your probation officer including but not limited to mental health counseling, grief counseling, life skills and in relation to your past victimization.
8. Take such alcohol and drug assessment, counseling, programming and treatment as and when directed by a probation officer.
9. Abstain absolutely from the possession, consumption or purchase of alcohol, non prescribed drugs and other intoxicating substances as outlined in Schedule I – VIII of the *Controlled Drugs and Substances Act* and submit to a breathalyzer and urinalysis or blood test upon demand by a peace officer or probation officer who has reason to believe that you may have failed to comply with this condition.

10. No contact directly or indirectly with your husband, Robert Smith, except as permitted by your probation officer after consultation with Victim Services and the Carcross/Tagish First Nation.
11. For the first twelve months of this order, abide by a curfew by remaining within your place or residence between the hours of 10:00 p.m. and 6:30 a.m. daily unless in the actual presence of a responsible adult designated by the probation officer or unless with the prior written permission of the probation officer. You shall make yourself available at the door and by telephone during reasonable hours of the curfew for the purpose of curfew checks. Failure to comply will be considered a presumptive breach of this order.
12. Not to have in your possession any firearms, knife, or other weapon or ammunition or explosive substance.
13. Not to attend at any licenced bar, tavern or other premise whose primary purpose is the sale of alcohol.
14. Not allow any persons under the influence of alcohol into your residence.
15. Maintain an alcohol-free home, by not bringing in or allowing anyone else to bring alcohol into your home.
16. You are to establish a support group of sober individuals, advise your probation officer of their names, and meet with the support group individually or as a group from time to time as directed by your probation officer.
17. You to advise your probation officer prior to entering into a live-in domestic relationship with any person.