

Citation: *R. v. Smith*, 2010 YKTC 18

Date: 20100204
Docket: 09-00056
Registry: Whitehorse
Heard: Teslin

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Chief Judge Ruddy

REGINA

v.

STEVE ROY SMITH

Appearances:
Ludovic Gouaillier
Malcolm Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Steve Smith is before me having entered a plea of guilty to a single count of sexual assault.

[2] The facts of the offence arise on the 25th of April, 2009. Mr. Smith was at a friend's home drinking. It appears that everyone was heavily intoxicated. The victim retired to her bedroom and was sleeping fully clothed above the covers and during the course of the evening, Mr. Smith entered her room and touched her over her clothing in the buttock area, as a result of which she woke up and told him to stop. He immediately did so and left the residence. He spent some five or six days in custody as a result but has since been released on conditions.

[3] He is a 37-year-old Teslin Tlingit First Nation male. This is an unusual day in that we have two cases, back to back, that share some similarities, but there are some differences as well, and I am of the view those need to be reflected in the ultimate sentence.

[4] I have, again, a very thorough and helpful pre-sentence report with respect to Mr. Smith's circumstances. In this particular case, when one looks at Mr. Smith's background, it is not perhaps surprising that he is before me here today. His childhood is one which can only be described as extremely traumatic characterized by abandonment. In his estimation, he lived in probably at least 16 different foster and group homes in the first 16 years of his life. There are serious substance abuse issues within his family and perhaps, most sadly, Mr. Smith himself was subjected to sexual abuse at the hands of more than one person on more than one occasion. He has, as a result of his history, developed significant issues with alcohol and, according to the report, has been abusing alcohol from the age of 19 to May of this past year.

[5] He also has, over the course of those years, amassed a significant and lengthy criminal record. There are a number of offences on it. Of particular concern, there are three related convictions for sexual assault. Two of those were while he was still a youth in 1989, and the most recent is an adult conviction in 2003.

[6] There are a number of positives before me as well, however, that must be considered. It appears from the report that I have before me that since May of this year Mr. Smith has made some significant changes in his life. He is residing in a supportive, sober, stable home with his older brother who has himself maintained sobriety for 14

years and has been of significant support to Mr. Smith. He is maintaining full time employment and he is described by his employer as being very reliable and willing to work extra hours. In fact, he goes so far as to say that, "To say he is a hard worker is an understatement. He is easily one of the best guys." So he seems to be doing very well in his current employment situation. He has also, I understand from him, been maintaining sobriety since May of 2009. He has taken steps to change his circle of friends and has lost friends as a result of his commitment to maintaining sobriety. Many of his former friends, not surprisingly, are those that abuse alcohol themselves.

[7] He has also learned in the last couple of years that he is the father of a 13-year-old boy and it is clear from the report that he is making a concerted effort to learn what it means to be a father and to be a good father to his son.

[8] Also, another factor which is very important to me in this particular case is that I am satisfied, based on everything that I have read and everything that I have heard, and particularly what I have heard from Mr. Smith today, that he is sincerely remorseful about his behaviour. A lot of people are sorry when they come before the Court and a lot of them are sorry because they have been charged. I think what is different about Mr. Smith is the number of times that he expressed his concern for the victim. He clearly has a great deal more insight than a lot of people we see into the fact that there are people that are harmed when we do bad things and that they have to carry that with them throughout their lives. He clearly understands that. He clearly understands that the community itself has been negatively affected by his behaviour, so I must say that I was impressed with the degree to which he understands the impacts of his behaviour, the degree to which he is remorseful, and the degree to which he wants to make it right.

[9] The Crown is suggesting, given that I just heard a case that had some similarities, that I consider a sentence in the same range as that previous case, which was an 18-month conditional sentence. I should state for the record that based on the report, and I believe it is generally agreed, in fact I agree as well, that this is a case in which a conditional sentence is appropriate. I am satisfied that Mr. Smith has made significant changes, that he is demonstrating, perhaps for the first time in his life, an ability to live a stable and sober lifestyle. He has managed to do so within the very community in which he developed a lot of the problems that he is dealing with, and that is to his credit. So, I am of the view that the pre-conditions for a conditional sentence are met.

[10] What is at issue in this case is the length of the particular sentence and there has been a lot of discussion about this case in reference to the last case. Factually, I am of the view that this is a less serious offence. That is not to minimize the behaviour and I think Mr. Smith clearly understands how serious his behaviour was and, as I said earlier, the negative impacts of that behaviour on the victim in particular and her family, but also the community, particularly so because he has lived it himself. But objectively, the facts of this case is less serious.

[11] The previous case involved a breaking into someone's home. The individual had not been invited to the home. The previous case also involved a touching of the vaginal area under clothing. In this particular case, Mr. Smith had been invited into the home. He was friends with the owners; the touching was brief; it was in a less intimate area, although still an intimate area, but a less intimate area and it was over clothing. Factually, it is less serious than the last offence.

[12] The difficulty with Mr. Smith is that he has three related priors, and that does affect, in my view, the way that I need to look at the sentence. In this particular case, he has a lengthier record, but his record is also more dated. The last individual did not have related offences other than some assaults, but had a more recent record. So there were differences there as well. At the end of the day, I am satisfied that, based on what I have read, in terms of Mr. Smith's circumstances, and I do think it is important to state that when I compare these two offenders, Mr. Smith has and has had a great deal more to overcome in terms of addressing his issues than the last individual. Both individuals have taken proper steps and when I look at the two reports, I am of the view that Mr. Smith's report is more positive than the last report. The information I have received suggests to me that he is a somewhat better candidate for a conditional sentence. So those are factors I have considered, as well.

[13] I have also been reminded of the *R. v. Risby* 2004 YKTC 9, which was factually very similar to this case and which resulted in a four-month jail term. However, that was a straight jail term and it was an individual that did not have prior related offences as Mr. Smith does.

[14] When I balance all of those factors out I am of the view that there should be a somewhat shorter sentence for Mr. Smith than there was in the last case. I am not of the view that I can go as low as the six months suggested by defence counsel. A six-month conditional, in my view, on these facts and in these circumstances would have been appropriate, had Mr. Smith not had the prior related offences. In this particular case he does, and I cannot lose sight of the fact that there is related behaviour in his history and I cannot lose sight of the fact that there is a great deal more work that he

needs to do, particularly work that he needs to do to address the underlying issues of trauma that have led to him being here today. He has done a great deal, including taking a number of courses here in the community and maintaining sobriety, but there is a lot of work still ahead of him. I think he recognizes that and I think he has the commitment to pursue the programming that he needs.

[15] In all of the circumstances, I am satisfied with a sentence of 12 months, but that it can be served conditionally within the community. The terms and conditions of it are going to be as follows:

1. That you keep the peace and be of good behaviour and that you appear before the Court when required to do so by the Court;
2. That you remain within the Yukon Territory unless you have written permission from your Conditional Sentence Supervisor;
3. That you notify the Supervisor in advance of any change of name or address and promptly notify the Supervisor of any change of employment or occupation;
4. That you report to a Supervisor immediately and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
5. That you reside as approved by your Supervisor, abide by the rules of the residence and not change your residence without the prior written permission of your Supervisor;
6. That for the first three months of your sentence, you are to remain within your place of residence at all times except for the purposes of employment, including travel directly to and directly from your

employment, or except with the prior written permission of your Supervisor.

And you will want that permission in advance, so you talk to him about other things that you might need to get out to do, and get that permission in advance.

For the remaining nine months of the sentence, you will abide by a curfew by remaining within your place of residence between the hours of 9:00 p.m. and 6:00 a.m., except with the prior permission of your Supervisor. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition.

7. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances except in accordance with a prescription given to you by a qualified medical practitioner.

Any issue with the samples? With providing samples, any issue?

[16] MR. CAMPBELL: No.

8. You are to provide a sample of your breath or urine for the purposes of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition.
9. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol.
10. You are to take such alcohol and/or drug assessment, counselling or programming as directed by your Supervisor.

11. You are to take such sex offender assessment, counselling or programming as directed by your Supervisor;
12. You are also to take such other assessment, counselling or programming as directed by your Supervisor.
13. You are to have no contact, directly or indirectly or communication in any way with Sheila Aster except with the prior written permission of your Supervisor in consultation with Victim Services.

It is clear in the report and you stated several times that you are very concerned about being able to apologize. I think it is important that you do so, but I also think it is important that you let her decide when and how and if she wants to hear that from you.

14. You are to perform 80 hours of community service as directed by your Supervisor or such other person as your Supervisor may designate. These hours are to be completed within the first nine months of your sentence. Your Supervisor may credit any hours spent in counselling or programming as against your community work service hours;
15. You are to make reasonable efforts to find and maintain suitable employment and to provide your Supervisor with all necessary details concerning your efforts;
16. You are to provide your Supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this order.

I want you to understand as well that this is a jail sentence even though you are serving it within the community, so you need to follow each and every condition or you could end up serving the rest of it in jail. You do not want to lose the progress that you have made. It is probably the first time in your life that you have ever been in this situation, and you need to build on that. You do not want to go backwards.

[17] Any submissions on the DNA or the SOIRA order?

[18] MR. CAMPBELL: No.

[19] THE COURT: By law I am required to order that you provide such samples of your blood as are necessary for DNA testing and banking. I also order that you comply with the provisions of the *Sex Offender Information Registration Act* for a period of ten years. It is not his first. Do you have -- although the Registry did not exist back then. Do you have --

[20] MR. GOUAILLIER: No, I believe that it's by summary -- summary conditions

[21] THE COURT: It has to be within a certain --

[22] MR. GOUAILLIER: -- is 10 years.

[23] THE COURT: Okay, good. For a period of ten years. Victim fine surcharge is \$50. How long does he need to pay that?

[24] MR. CAMPBELL: Two months.

[25] THE COURT: Okay. Two months time to pay. Any issues with the conditions?

[26] MR. CAMPBELL: No.

[27] MR. GOUAILLIER: No.

RUDDY C.J.T.C.