

Citation: *R. v. Smith*, 2012 YKTC 42

Date: 20120424
Docket: 10-00723A
10-00723B
Registry: Whitehorse
Heard: Pelly Crossing

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

REGINA

v.

WILLIAM PETER SMITH

Appearances:
Wendy Miller
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): William Peter Smith stands convicted of assault causing bodily harm and with breach of an undertaking. Mr. Smith was originally charged with aggravated assault. To that charge he entered a guilty plea, but the plea was later struck and a not guilty plea was entered. On the date of trial, Mr. Smith again changed his plea, entering a guilty plea to the lesser and included offence of assault causing bodily harm.

[2] The Crown exercised its discretion to re-elect to proceed summarily upon the s. 267 charge. The matter of sentence was then adjourned to today's date. Today, Mr. Smith entered a guilty plea on the breach allegation.

[3] The circumstances of the assault charge are serious, to say the least. Mr. Smith was at a New Year's Eve party at the home of Danny Van Bibber. Mr. Van Bibber, it should be noted, is not only an older man, but he is the offender's father-in-law. Mr. Smith became grossly intoxicated and was asked to leave the party. Outside, Mr. Smith encountered Mr. Van Bibber. The offender was acting in a menacing fashion. Mr. Van Bibber indicated he did not want any trouble, and turned to go into the house. Mr. Smith hollered, "Danny," and Mr. Van Bibber turned around and was blindsided by a punch to his head. This was followed by a volley of punches which resulted in Mr. Van Bibber falling and hitting his head on a stove. Once Mr. Van Bibber was on the ground, the assault carried on and included what were described as "soccer kicks" to the victim's head and body.

[4] The assault eventually ended. By then, Mr. Van Bibber's injuries were extensive. He had a concussion, numerous cuts, swelling and bruising in his face, there was blood in his urine, his left eye had suffered a corneal tear, and there were multiple fractures of Mr. Van Bibber's facial bones including the eye orbital, cheek and sinus bones. Mr. Van Bibber was required to be medevaced to Vancouver where he remained for an extended period of time and underwent numerous surgeries. More yet are still scheduled, particularly one to remove a steel plate that was used by surgeons to stabilize the facial fractures.

[5] With respect to the circumstances of the breach charge, it arose the following October, October of 2011. Mr. Smith, who was grossly intoxicated, passed out in a restaurant in Whitehorse. The police were summonsed and Mr. Smith, who was acting somewhat aggressively, was restrained and arrested. At the time, his undertaking

included a condition requiring him to abstain from the possession or consumption of alcohol.

[6] Obviously, with respect to the sentence to be imposed, it is the assault causing bodily harm charge which is the major matter to be considered. Mr. Smith is 29. However, surprisingly, given what happened, he has no prior record of violence whatsoever. Indeed, he has only one prior conviction, that for a charge of driving with more than 80 milligrams of alcohol in 100 millilitres of blood, which was entered in 2008.

[7] With respect to Mr. Smith's personal circumstances, it can be concluded from his prior record, limited though it is, and certainly from the circumstances of the index offences, that he struggles with alcohol addiction. Nevertheless, he is in a stable relationship and has two young children. He is regularly and responsibly employed, most recently, for the last several years, looking after the water treatment plant for his community of Pelly Crossing. There is a favourable Pre-Sentence Report. Mr. Smith's circumstances and lack of prior history of violence notwithstanding, the severity of his crime is such that a substantial custodial sentence is inevitable. The only issue before the Court is whether that sentence should be served in actual custody or conditionally in the community, subject to a conditional sentence order.

[8] Although neither counsel mentioned it, I think it is clear that it is at this point that the Court is required to have regard to s. 718.2(e) of the *Criminal Code*. As the Supreme Court of Canada has recently confirmed in *R. v. Ipeelee*, and the companion case of *R. v. Ladue*, [2012] S.C.J. No. 13, sentencing judges must give full and anxious consideration to Mr. Smith's aboriginal background. This consideration is necessary

both to understand what factors have led him before the Court, and as well to craft a restorative sentence, if possible.

[9] These principles were first enunciated in *R. v. Gladue*, which principles the *Ipeelee* and *Ladue* cases clearly and strongly reaffirm. However, as *Gladue* itself points out, the practical reality is that the more serious and more violent the offence, there will reach a point where a jail sentence, and I mean an actual jail sentence, is the only alternative, given the need to deter, to denounce and to protect the public. If Mr. Smith had any prior history of violence whatsoever, on the facts of this case, that custodial tipping point would clearly have been reached. Given his lack of prior criminal history, the issue remains a live one and requires consideration by the Court.

[10] With respect to Mr. Smith's background and heritage, he is originally from Old Crow and is a member of the Vuntut Gwitchin First Nation. His upbringing was, regrettably, typical in many respects. His parents drank. His father committed suicide when Mr. Smith was but an infant. His mother's second relationship was also marred by alcohol, but, as well, by violence directed at Mr. Smith, his mother and his siblings. Beginning in high school, Mr. Smith developed a severe problem with alcohol abuse: this has carried on throughout his adult life. He did attend treatment in 2010, but soon relapsed. I have already indicated that he has a steady work history. This is worthy of note and perhaps particularly surprising, given his battle with alcohol abuse.

[11] Considering Mr. Smith's antecedents, his present circumstances and so on, at the end of the day the Probation Officer concluded that Mr. Smith would be a suitable candidate for community disposition, although, clearly, his risk of reoffending is tied to

his use or abuse of alcohol. Indeed, his breach of his release conditions have to heighten that concern to some extent. However, it has also to be noted that Mr. Smith has been compliant since then, and he has subsequently taken some steps to arrange further treatment and counselling both for himself and his wife.

[12] At the end of the day, this is one of those very hard, very close calls, the kind that tend to make judges old before their time. One must, at the end of that day, balance or reconcile the perhaps irreconcilable. Having given as anxious a consideration as I can to all the relevant factors, and also considering the additional factor that one of the things which would meet the ends of justice in this case is to have some restitution in favour of the victim, and considering that that is unlikely to happen if I throw Mr. Smith in jail, I have concluded that a fit sentence is that he be sentenced to a period of imprisonment of one year to be followed by a period of probation of 18 months. That sentence will, however, be served conditionally upon the following terms.

1. You will keep the peace of good behaviour;
2. You will appear before the Court when required to do so by the Court;
3. You will notify your Conditional Sentence Supervisor in advance of any change of name or address, and promptly notify her of any change of occupation or employment;
4. You will report to the Conditional Sentence Supervisor forthwith and thereafter when and in the manner directed by the Supervisor;
5. You will remain within the Yukon Territory unless you have obtained prior written permission from the Conditional Sentence Supervisor;

6. You will reside as directed by the Conditional Sentence Supervisor and not change that residence without the prior written permission from the Supervisor;
7. Except in the case of actual emergency, you are to remain within your place of residence at all times except for the purposes of employment or obtaining the necessities of life or otherwise with the prior written permission of your Supervisor. You must present yourself at the door or answer the telephone in response to curfew checks, and your failure so to do will be a presumptive breach of the condition;
8. You will abstain absolutely from the possession or consumption of alcohol or controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;
9. It will further be a term of the conditional sentence order that you provide a sample of your breath or urine for the purpose of analysis upon demand by a peace officer or a Conditional Sentence Supervisor if either has reason to believe that you may have failed to comply with the abstain condition.

I add that clause, mindful of the law respecting such terms, at least with respect to probation orders, but noting that this is, firstly, a conditional sentence order, and, secondly, were I unable to impose such a term, in my view, the risk posed by this offender would be such that I would have no alternative but to order a sentence of actual imprisonment. There will also be a term that:

10. You not attend at any place where alcohol is sold except a restaurant which might be incidentally licensed for the sale of alcohol with meals;
11. You will have no contact directly or indirectly or communicate in any way with Danny Van Bibber or Laura Joe except with the prior written permission of your Conditional Sentence Supervisor in consultation with Victim Services;
12. You will take such alcohol or substance abuse counselling and programming as directed by the Supervisor, including, if required, to attend and complete a residential treatment program;
13. You will take such other assessment, counselling and programming as directed by your Supervisor;
14. You will provide your Supervisor with consents to release of information with regard to your participation in any programming, counselling or other activities you have been directed to pursue, pursuant to the conditional sentence order;
15. You will make restitution in the amount of \$1,000 by paying into the Territorial Court Clerk such sum in trust for Danny Van Bibber, that sum to be paid within six months after the order comes into force.

[13] Following completion of your conditional sentence you will be subject to a probation order for the further period of 18 months. The terms of that order will mirror those of the conditional sentence order, save and except that any reference to the Conditional Sentence Supervisor will refer to the Probation Officer. It will not, of course,

include the house arrest clause and will not include the clause requiring you to provide samples of breath and urine.

[14] With respect to the restitution clause, it will require the payment of \$1,000 in trust for the victim of your offence, minus any sum which has previously been paid prior to the conditional sentence order. Again, that is to occur within six months.

[15] With respect to the surcharges, I will waive those because I prefer to give priority to payment directly to the victim of your offence.

[16] There will be an order by which you will provide samples of bodily substances for the purposes of DNA analysis and banking.

[17] I have considered whether it is necessary to impose a firearms prohibition, but as the Crown is not seeking one and there is no allegation of misuse of firearms, I do not feel it is necessary to impose such an order.

[18] Anything further?

[19] MS. MILLER: Not from the Crown. Thank you, Your Honour.

[20] MR. ROOTHMAN: Nothing from defence.

FAULKNER T.C.J.