

Citation: *R. v. Smarch*, 2009 YKTC 58

Date: 20090313
Docket: 08-00557
08-00641
Registry: Whitehorse

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

REGINA

v.

JOHN WALTER SMARCH

Appearances:
Ludovic Gouaillier
Emily Hill

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): John Walter Smarch is before me in relation to three offences to which he has entered pleas of guilty. They include one offence of trafficking in cocaine. Coupled with that is a breach of his abstain condition for being in possession of drugs as a result of that transaction. The last is a spousal assault; or I probably should say that is the first because it is the first in time, arising on the 16th of November 2008, at which time Mr. Smarch and his then spouse got into a disagreement which escalated first into a verbal altercation and ultimately Mr. Smarch has pled to an offence which factually involves him pushing the complainant.

[2] Following that incident, on December 11, 2008, Mr. Smarch was approached outside of the 98 by an undercover police officer as part of Project Miner and discussions were had which led to Mr. Smarch acting as middleman with respect to the purchase of 0.4 grams of cocaine. During the course of discussions with the undercover officer he asked him for money, indicating that he only had ten dollars, and was advised that he would receive a \$25 tip for facilitating the purchase of drugs. I am advised, through his counsel and in the pre-sentence report, that his involvement was related to his wanting to get money to purchase alcohol.

[3] At the time the transaction occurred he was on a condition that he abstain absolutely from the possession of controlled drugs, and was thus in breach of that condition.

[4] Crown is suggesting that I consider a sentence in the range of six to nine months on the trafficking charge and has filed a number of cases in that regard. There is some four and a half months or so of remand time credit he would be entitled to and Crown is suggesting that I use three months of that with respect to the spousal and 21 days with respect to the breach, followed by a ten-year firearms prohibition and a one-year probation order.

[5] Defence is suggesting that I credit Mr. Smarch with the four and a half months of credit against both the trafficking and the abstain counts and has suggested a probationary disposition with respect to the spousal, focussed on rehabilitation and treatment, and is seeking, should I consider a jail sentence to be necessary, that I consider either a conditional or an intermittent sentence.

[6] I have a great deal of information about Mr. Smarch before me in the form of a probation report. I also have information attached to that probation report from Maxine Thunderchild, the justice coordinator for the Carcross/Tagish First Nation, as well as information that has been provided by counsel.

[7] Mr. Smarch comes before the Court with an extensive criminal record, with some 48 prior convictions, which dates back to 1982. There are three prior violent offences on this particular record. There is one prior drug-related offence, which I believe was a simple possession in 1986, some time ago. So there are related offences. Of the offences before me, this is the first trafficking offence and the first assault of a spousal nature, but there are some related offences, as I noted, on the record. The interesting thing about the record is, with the exception of one impaired in 2007, the record essentially ends in 1999, a factor which coincides with Mr. Smarch obtaining employment with Parks Canada.

[8] In terms of background information, Mr. Smarch is 43 years of age, a member of the Carcross/Tagish First Nation. There is a great deal of information about his background and circumstances, much of which can only be described as disturbing, quite frankly. He was exposed at an extremely early age to both violence and substance abuse, and it appears he was the victim, himself, of a fair amount of physical abuse at the hands of his father in his early years, and this resulted in his being taken into care at the age of 15.

[9] Particularly disturbing to note is the fact that Mr. Smarch first began consuming alcohol around the age of six or seven and, in fact, drank to excess on several

occasions in his early childhood. He appears to have stopped around the age of nine or ten up until he turned 13, at which point he began drinking again, and by the age of 15 was what is termed in the pre-sentence report as an alcoholic. It is interesting to note that the age of 15 is the age of his father's death, which clearly triggered an escalation in his consumption of alcohol and abuse of substances. It, as well, appears to be the beginning of his lengthy criminal record, which led to his spending considerable time in custody over the years up until 1999.

[10] At that point in time, Mr. Smarch obtained employment on the Chilkoot Trail for Parks Canada and works through the summer months with them. There is this gap in his record which demonstrates, as I said, a significant difference from his history before 1999.

[11] I should state that Mr. Smarch has indicated an interest in treatment. He has taken some steps, most notably contact with Ms. Thunderchild, who is working with him in terms of arrangements for some residential treatment, and I understand she is looking at this point at the possibility of Tsow-Tun Le Lum in Nanaimo, given that they have an addiction program which has a significant trauma component. I also understand that while in custody Mr. Smarch has sought programming, engaging in both the White Bison and Gathering Power programs, and he has also been described as a model inmate for the time that he has been in custody.

[12] This is a somewhat unique circumstance. When one considers the sheer length of Mr. Smarch's record, a lengthy custodial term is not a difficult response, but I also have to be mindful of the timing of that record, and there is a significant difference in his

behaviour before 1999 and after 1999, which I think has to be factored into the ultimate sentence. What that says to me, quite frankly, is we are not at the stage where the notion of rehabilitation can or ought to be completely discounted.

[13] Having said that, I also take the position, and I think this was accepted by both counsel, that when we were talking about the offences that are before me, the dominant sentencing principles, particularly with respect to the drug offence, are deterrence and denunciation, and given that the assault offence before me is a spousal, I am of the view that denunciation and deterrence are considerable factors with respect to that offence as well.

[14] However, in terms of balancing everything, I am satisfied that it is appropriate to resolve the matters as follows. What I am going to do is, for the amount of time in custody, I am going to give him five months credit. I appreciate that he did access some programming, but I am raising it somewhat because of what I want the record to reflect. I have come to the conclusion that the employment is pretty critical to Mr. Smarch maintaining the improvements that he has made, so I want the record to reflect the five-month sentence but I do not want to jeopardize the employment at the same time.

[15] So what I am going to do, with respect to the trafficking offence there is going to be a sentence of one day deemed served by his attendance in court today and I am going to credit him five months for time spent in pre-trial custody.

[16] There was much discussion about sentencing range. I have been provided cases in the range of five to 14 months. I am satisfied that factually this matter is

closest to *R. v. Webb*, [2003] Y.J. No. 151, which is another case involving a middleman. Now, Crown fairly pointed out that in that particular case Mr. Webb had a record of some 19 criminal offences, which is significantly less than Mr. Smarch; however, I think that is balanced off by the period of the last ten years in which Mr. Smarch has managed to maintain relatively little involvement with the criminal justice system. So while I appreciate he has a longer record, I have balanced that off by the gap in his record.

[17] I have also considered the fact that we are dealing with a single transaction that was motivated by his desire to get money to purchase alcohol. There is no evidence before me that this was a pattern of behaviour, and it appears to have been opportunistic in response to the approach by the undercover officer. Now, in saying that I want to make it clear that those are factors I have considered in terms of where I go in the range. They are not factors that ought to be taken to suggest that I do not think this was an extremely serious offence. So I am satisfied that there needs to be that custodial term on his record to clearly indicate that this kind of behaviour is not to be tolerated.

[18] With respect to the abstain breach, I am satisfied that the facts arise out of the substantive trafficking offence such that the sentence ought to be one day deemed served by his attendance in court today. I am going to ask that the record reflect that I am crediting him for 30 days in remand concurrent with, which makes it a little bit more awkward; the record should reflect that but it will not be additional time.

[19] Now that leaves us with the spousal. Now, factually this does fall on the lower end of spousals, involving as it does a push, as opposed to physical blows or weapons, but again, those comments are ones which, in my mind, assist to place it within the range. They are not to suggest that the behaviour engaged in is not behaviour that I consider to be extremely serious, and indeed circumstances that I am required by law to consider as serious, given that the assault occurred within a spousal context. I am also mindful of information in the victim impact statement from the victim, most notably where she speaks of the impact on her and her children and the resulting impact that this has had on her view of herself as a result of this particular incident.

[20] With all of those factors, I am satisfied that there does need to be a term of custody to address the issues of denunciation and deterrence, and that that term of custody ought to be followed by a period of probation to address treatment concerns. Accordingly, there is going to be an additional sentence of 30 days on the spousal to be followed by a period of probation of 12 months.

[21] When would the employment start?

[22] THE ACCUSED: End of April.

[23] THE COURT: End of?

[24] THE ACCUSED: End of April.

[25] THE COURT: Okay. I have some concerns because of the more recent behaviour about the appropriateness of a conditional. I also have some concerns, however, with an intermittent sentence, whether that would interfere with the

employment. In all of the circumstances, I think the most appropriate way to deal with it would simply be straight time, to get it in and done before the employment starts. I have considered both, but I think in the circumstances it makes most sense simply to get it over with. At which point the probation order would start, and there is a lot more flexibility with the probation to accommodate the employment, because I am satisfied based on what I have heard that maintaining that employment is critical.

[26] So in terms of the conditions on the probationary term, they will be as follows.

You are to:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Notify the probation officer in advance of any change of name of address, and promptly notify the 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;

I would like to hear from counsel on the abstain clause at the end, whether there ought to be one; however, you are to:

5. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
6. Take such alcohol and drug assessment, counselling or programming as directed by your probation officer;

7. Report to the Family Violence Prevention Unit to be assessed, and attend and complete the Spousal Abuse Program as directed by your probation officer;
8. Take such other assessment, counselling and programming as directed by your probation officer;
9. Make reasonable efforts to find and maintain suitable employment, and provide your probation officer with all necessary details concerning your efforts;

That is not to suggest you should look for other work, but I am considering work as fairly central to your staying out of trouble, so I want that to be a priority. You are also to:

10. Provide your probation officer 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;

[27] The abstain; any submissions on whether there ought to be an abstain or not?

[28] MR. GOUAILLIER: Well, I think in this case it's still an eternal debate. I think Mr. Smarch has been struggling and it's going to be hard for him to comply but, again, it's identified by the pre-sentence report as being the main trigger, a main risk factor, so I think in that case the protective value outweighs the potential prejudice to Mr. Smarch. It needs to be there just to ensure a measure of control over the length of the order.

[29] MS. HILL: I agree with my friend, it is an ongoing debate. I think we look to protection of the public and to rehabilitation. I think it didn't necessarily bring him to the courts. The alcohol wasn't involved in the offences before the Court, but it was greatly underlying the offences. I think that if we focus on -- so protection of the public I'm not -- I don't know that it's required at this stage. With regard to his rehabilitation, it's something he wants to do anyway. A year is a long time.

[30] THE COURT: It is, although you are able to maintain sobriety for long periods of time, are you not? It appears to be a binge thing?

[31] THE ACCUSED: Yeah, yeah.

[32] THE COURT: Okay. What I am going to do is require that you:

11. For the first six months of the order, 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;

I am satisfied on what I have heard, that you should not have any issues with doing that, and that gives you a good start to get the programming off and moving.

[33] The firearms prohibition; it is not his intention to make any submissions as it relates to the mandatory order?

[34] MS. HILL: Only to seek the exception under s. 113, that for subsistence purposes that he could be permitted to have a firearm; 113(1)(a).

[Submissions on s.113(1)(a) *Criminal Code of Canada*]

[35] THE COURT: Well, I am prepared to make the exception then. So there will be the mandatory ten-year prohibition order under s. 109, but I will allow for the exception under s. 113 for the purposes of subsistence hunting.

[36] Okay, does that leave us anything?

[37] MR. GOUAILLIER: Is there anything about DVTO in the probation order?

[38] THE COURT: He was directed to attend and do the spousal abuse program.

[39] MR. GOUAILLIER: Okay, sorry. I just missed it.

[40] MS. HILL: Nothing further.

[41] MR. GOUAILLIER: Nothing further.

[42] THE COURT: Okay. Are there no outstanding charges?

[43] MS. HILL: That's right.

[44] THE COURT: Okay.

[45] MR. GOUAILLIER: There is one.

[46] MS. HILL: Oh, thank you.

[47] THE COURT: Victim fine surcharge; any submissions?

[48] MS. HILL: He's been in custody for the last little while and will be for a month longer.

[49] THE COURT: I will waive it in the circumstances.

[50] MR. GOUAILLIER: And Crown will stay, I believe there's one outstanding charge. Crown will direct a stay of proceedings.

[51] THE COURT: Okay.

RUDDY C.J.T.C.