

Citation: *R. v. Smarch*, 2011 YKTC 30

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10-00150B

10-00339

10-00339A

10-00401

10-00401A

10-00401B

Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Chief Judge Cozens

REGINA

v.

JOHN WALTER SMARCH

Appearances:

Terri Nguyen
Emily Hill

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS C.J.T.C. (Oral): John Walter Smarch has entered guilty pleas to a number of offences. Chronologically speaking, the first of these offences is under s. 117.01, and the circumstances of that offence are that on December 28, 2009, RCMP attended at a residence that was occupied by Mr. Smarch. Based on information they received in that residence they located two firearms that he had placed there. They were located in a closet, and properly secured. The problem for Mr. Smarch is that he had been prohibited from possessing firearms on March 13, 2009, for a period of ten years, with a sustenance hunting exception. This exception was not in play at the time

that he had possessed these rifles and was maintaining possession of them.

[2] Subsequent to that, on March 23, 2010, he was in a relationship with Ms. Shepherd. While intoxicated and in possession of the car keys which Ms. Shepherd knocked away as she went to grab them, Mr. Smarch grabbed her, pushed her onto the couch, banged her head into the cushions, and dragged her into the kitchen, banging her hand on the sink. She was able to run out despite him grabbing at her coat, and he followed her outside. He thus committed an assault.

[3] Subsequent to that, on June 1, 2010, he was in a relationship with a Ms. Bonnie James and he slapped Ms. James with a open hand on her face constituting an assault. Aggravating was the fact that he also slapped her daughter in the face at the same time.

[4] Then on July 4, 2010, Mr. Smarch was operating a motor vehicle. He put \$20 worth of gas in at Integra Tire and left without paying. He was known and the vehicle was identified and the RCMP located it shortly afterwards. Mr. Smarch had some minimal symptoms of alcohol consumption, but enough for an ASD to be administered. He failed and subsequently provided breath samples of 160 and 150 milligrams percentile. He was also on a recognizance at the time that required him to abstain from the possession and consumption of alcohol. He was initially arrested for the curfew breach, although it is the abstain breach we are dealing with in court today. This made three offences: 253(1)(b), 334(b) and 145(3).

[5] On June 2, 2010, Mr. Smarch was released on a recognizance that required him to report immediately to a probation officer or bail supervisor and thereafter when and as directed. On July 12th he was directed to show up for a meeting on July 19th. He

failed to do so between the 19th of July and the 24th, committing an offence under s. 145(3) for failing to report.

[6] On July 20, 2010, Mr. Smarch had been consuming alcohol. He was walking with two other males by the window of Terra Firma, and he, basically spontaneously, smashed the window, causing \$1170.46 worth of damage. He was on a recognizance requiring him to abstain from the possession and consumption of alcohol and he was intoxicated, thus committing offences under s. 430(4) and 145(3).

[7] On October 18, 2010, Mr. Smarch was on a recognizance with a reporting clause. On October 15th he was told to report on October 18th and he failed to do so. He was having problems with the ARC where he had been directed to reside at the same point in time, thus committing an offence under s. 145(3).

[8] Finally, on May 23, 2011, while on the recognizance requiring him to abstain from the possession and consumption of alcohol, he was located intoxicated and causing some problems. He agreed to go back to his room and stay there; however, he chose to go out again and was located at a bar, basically causing some disturbance there while consuming alcohol. He also was not supposed to be in a bar at that point in time, pursuant to the terms of his recognizance.

[9] The Crown has filed notice on the impaired; a minimum of 120 days is required, and the minimum driving prohibition is three years. Crown's position is that globally six to seven months less credit for 70 days time served would be an appropriate sentence. Defence does not really disagree, and is suggesting the six months.

[10] The basis for this submission, in large part, is that Mr. Smarch had actually, through participation in the Domestic Violence Treatment Option Program, been doing exceptionally well, and had work lined up. Until this final breach, he was in a position where things were looking very positive. He has done a lot of front end work, and, unfortunately, on May 23rd, at least temporarily, set himself backwards. I say temporarily because the work is not wasted and I am hopeful that, after this sentence is concluded, that Mr. Smarch will pick up right where he left off with respect to the positive developments in his life.

[11] There is a pre-sentence report that was filed. Mr. Smarch had an extremely difficult upbringing. He is a 45-year-old First Nations individual. He lives in the Carcross area where many of these offences took place. It is noted in the PSR, in the summary, just simply the words that "Mr. Smarch had an extremely difficulty childhood." The information of his childhood can be summarized, the report says, by saying: "he witnessed and experienced significant physical and sexual abuse during his childhood." His mother and father, while he was young in Carcross were alcoholics. There was much domestic violence. Both his parents attended residential schools. Mr. Smarch's father was extremely abusive towards him, while all the same finding some positive things he was able to communicate. His father was killed by a family member when Mr. Smarch was only 15 years of age.

[12] He started drinking at the age of nine, has struggled with alcohol ever since, and alcohol continues to be the most serious significantly negative factor, in a practical way, on Mr. Smarch's life. I am recognizing that what he lived through as a child may be more significant. It is just that it is not as visibly apparent, and what is tangible is

whatever is going on in Mr. Smarch's life and what he has to deal with; and it is significant; I do not pretend to even imagine it. It is only when he drinks that it really becomes a problem and he is not able to make the right choices. So his pattern of drinking means he has a severe level of problems related to alcohol abuse. It tends to be binge drinking, which shows that he can go a long time without drinking. My hope is that he can go forever without drinking, from this court date.

[13] He did extremely well in the Domestic Violence Treatment Option program, was very much an active participant, and provided some leadership. He has taken other programs, such as the White Bison Program. There is a lot to build on but the reality is that it cannot involve alcohol.

[14] The sentence I am going impose is as follows. It is going to globally amount to six months. On the s. 117 charge it will be one day deemed served. There will be a forfeiture order that I have already signed. There will be a mandatory ten year s. 109 firearms prohibition. It will be in the same form as the prohibition currently ordered in that it will have the "except for sustenance hunting as per section 113" included on it.

[15] With respect to the s. 253 offence, the minimum sentence of 120 days will be imposed, of which ten days will have already been deemed served by time in custody. That will leave 110 days.

[16] On the s. 334 offence and the s. 430 offence, there will be 30 days on each, concurrent to each other, time deemed as already having been served.

[17] On the s. 145(3) charges, they will all be 30 days, time served, consecutive to the other time served, and concurrent to each other.

[18] Now that is six months. On the s. 266 offences, I am not going to place you on probation. There will be no further order, but based on how well you have done in the Domestic Violence Treatment Option court, the sentence on those will be 15 days, time served on each, consecutive to each other but concurrent to the 30 days time served on the breach charges. So they have already been dealt with by way of your time in custody.

[19] So if I have it correct, the total sentence was 120 plus 30 plus 30 less the 70 days credit, which leaves 110 days still in custody.

[20] There will be the three-year driving prohibition that is required, prohibiting you from operating any motor vehicle on any street, road, highway or other public place.

[21] I do not believe there is anything else that is required.

[22] MS. NGUYEN: Victim fine surcharges. The Crown is content that they be waived in the circumstances.

[23] THE COURT: They will be waived.

[24] THE CLERK: Your Honour, also there were outstanding --

[25] MS. NGUYEN: All withdrawn.

[26] THE COURT:

Withdrawn.

COZENS C.J.T.C.