SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Smith*, 2017 NSSC 122

Date: 20170509
Docket: Cr. No. 449182
Registry: Halifax

Between:

Her Majesty the Queen

v.

Tyrico Thomas Smith

Sentencing Decision

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	May 8 and 9, 2017 in Halifax, Nova Scotia
Oral Decision:	May 9, 2017
Written Decision:	May 17, 2017
Counsel:	Catherine Cogswell and Brandon Trask for the Crown J. Brian Church Q.C. for the Defence

Coughlan, J. (Orally)

[1] On May 8, 2017 Tyrico Thomas Smith plead guilty to a charge of aggravated assault pursuant to s. 268(1) of the Criminal Code; failure to comply with a condition of a recognizance dated December 23, 2014 to keep the peace and be of good behaviour contrary to s. 145(3) of the Criminal Code and while bound by a Probation Order issued July 4, 2014 failed to comply with the order without reasonable excuse to keep the peace and be of good behaviour contrary to s.733.1(1)(a) of the Criminal Code.

[2] On March 10, 2015 Mr. Smith was incarcerated in the Central Nova Scotia Correctional facility at Dartmouth, Nova Scotia. Mr. Smith was sharing a cell with Tyrelle Benedict. Mr. Benedict had asked to share a cell with Mr. Smith. Messrs. Smith and Benedict were alone in the cell. At approximately 10:45 officials were called to the cell. Mr. Benedict was found to be injured and was transported to the Q.E.II Health Centre. Mr. Benedict had suffered significant head trauma, cuts and abrasions and was placed in a medically induced coma. There were no injuries to Mr. Smith. Mr. Benedict suffered a vicious beating, which has left him with long term effects of the beating. Mr. Smith has plead guilty to the aggravated assault.

[3] Mr. Smith is 23 years old and was 20 years old at the time the offence was committed. Mr. Smith has an extensive criminal record including trespassing at night, assault with a weapon, taking a motor vehicle without consent, breach of probation and failure to comply with a condition on a recognizance or undertaking, assault and causing a disturbance.

[4] The relevant principles of sentencing relevant to this matter include:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender,

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders . . .

[5] I have received a joint recommendation on sentencing from Crown and defence counsel. The recommendation is for a sentence of three years together with an order for Mr. Smith to provide samples of bodily substances for the purpose of forensic DNA analysis; a prohibition order pursuant to s. 109 of the Criminal Code and an order Mr. Smith is to have no contact with Mr. Benedict.

[6] In **R. v. MacIvor** 2003 NSCA 60 the Court was dealing with an appeal in which the sentencing judge had not followed a joint recommendation of sentence. In giving the court's judgment Cromwell J.A., as he then was, stated at (paras. 33 and 34):

> [33] The tendency in most courts of appeal in recent years has been to emphasize the weight that should generally be given to joint recommendations following a plea agreement. Some courts have gone so far as to adopt the principle that a joint submission should only be rejected if accepting it would be contrary to the public interest and otherwise bring the administration of justice into disrepute: **R. v. Dewald** (2001), 156 C.C.C. (3d) 405 (Ont. C.A.); **R. v. Cerasuolo** (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); **R. v. Dorsey** (1999), 123 O.A.C. 342 (C.A.); **R. v. T.M.N.** (2002), 172 B.C.A.C. 183 (C.A.); **R. v. Hatt** (2002), 163 C.C.C. (3d) 552 (P.E.I.S.C.A.D.) at paras. 15 & 18. Many of the relevant authorities were reviewed by Fish, J.A., writing for the Court, in **R. v. Verdi-Douglas** (2002), 162 C.C.C. (3d) 37 (Que. C.A.):
>
>> [42] Canadian appellate courts have expressed in different ways the standard for determining when trial judges may properly reject joint submissions on sentence accompanied by negotiated admissions of guilt.
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>> [43] <u>Whatever the language used, the standard is meant to be an exacting one. Appellate courts, increasingly in recent years, have stated time and again that trial judges should not reject jointly proposed sentences unless they are "unreasonable", "contrary to the public interest", "unfit", or "would bring the administration of justice into disrepute".</u>
>>
>> [51] In my view, a reasonable joint submission cannot be said to "bring the administration of justice into disrepute". An unreasonable joint submission, on the other hand, is surely "contrary to the public interest". Accordingly, though it is purposively framed in striking and evocative terms, I do not believe that the Ontario standard [i.e. that the jointly recommended sentence is contrary to the public interest and would bring the administration of justice into disrepute] departs substantially from the test of reasonableness articulated by other courts, including our own. [The] shared conceptual foundation [of these various

> formulations of the principle] is that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty -- provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted. (Emphasis added).
>
> [34] I respectfully agree with and would adopt the last sentence of this quoted passage.

[7] Therefore I should follow the joint recommendation if the sentence proposed falls within the acceptable range and the plea is warranted by the admitted facts.

[8] Aggravating factors here include Mr. Benedict suffered a vicious beating with long term effects and the assault took place in a correctional facility.

[9] Mitigating factors are Mr. Smith was young at the time of the offence, 20 years old. Also, he entered a guilty plea thereby avoiding the need for a trial.

[10] The Crown submitted there was only circumstantial evidence available here. The complainant Mr. Benedict did not cooperate with the investigation of the offence.

[11] The Crown has referred me to the following cases; **R. v. Betker** 2013 BCPC 0291, **R. v. Black** 2014 ABCA 214, **R. v. Carter** 2014 ABPC 220, **R. v. A.H.H.** 2016 NSSC 239, **R. v. Williams** 2015 BCSC 709, **R. v. Cullen** 2014 SKQB 371, **R. v. Richter** 2014 BCCA 368 and **R. v. Clifford** 2016 NSPC 16.

[12] Having read the cases provided and hearing the submissions of the Crown and defence, I find the proposed sentence is within the acceptable range and warranted by the facts.

[13] Mr. Smith would you please stand.

[14] For the charge pursuant to s. 268(1) of the Criminal Code I sentence you to a period of incarceration of three years in a federal institution. For the charge pursuant to s. 145(3) of the Criminal Code I sentence you to serve a sentence of six months concurrently to the charge pursuant to s.268(1). For the charge pursuant to s.733.1(1)(a) of the Criminal Code I sentence you to a period of incarceration of six months to be served concurrently to the charge pursuant to s.145(3) of the Criminal Code.

[15] There is no remand time for which Mr. Smith is to be given credit as his time in custody relates to another offence.

[16] I order the taking from Mr. Smith the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis pursuant to s.487.051(1) of the Criminal Code.

[17] I order pursuant to s.109(1) of the Criminal Code that Mr. Smith be prohibited from possessing any firearm, any crossbow, restricted weapon, ammunition and explosive substance for life.

[18] Pursuant to s.743.21 of the Criminal Code Mr. Smith shall not communicate directly or indirectly with Tyrelle Benedict during the custodial period of his sentence.

[19] Mr. Smith shall pay a victim surcharge in the amount of $200, which Mr. Smith shall pay within five years.

J.