Citation: *R. v. Bernhardt*, 2017 YKTC 27

Date: 20170428
Docket: 16-00259
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before His Honour Judge Lilles

REGINA

v.

TONY ROBERT BERNHARDT

Appearances:
Leo Lane — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

REASONS FOR SENTENCING

[1] LILLES J. (Oral): I would like to address the notice of application filed by defence counsel first, a matter that we discussed at length earlier in the day. The approach taken by defence counsel in this particular case, notwithstanding the decision I am going to make, is, in my view, an appropriate one but in different circumstances.

[2] I am going to rule against the application in this particular case, but it should not be interpreted by counsel that I think that in different circumstances an application like this would not be appropriate.

[3] Having heard from both counsel with respect to the charge before the Court, which is simply a driving while disqualified, a regulatory charge under the *Criminal*

Code, I am of the view that it does not trigger overwhelming concerns relating to Aboriginal issues to such an extent that a "*Gladue*" report is required. I have concluded, having heard submissions from counsel on the trial proper, that a pre-sentence report directing consideration of Aboriginal principles, as set out in the *Gladue* report, is not necessary on the facts of this case.

[4] I will deal then with the driving while disqualified matter, that is, Count 3 in the Information before the Court.

[5] This is the matter of *R. v. Tony Robert Bernhardt*. Mr. Bernhardt has entered a guilty plea to a charge of driving while disqualified, contrary to s. 259(4) of the *Criminal Code*. This driving occurred on June 4, 2016, in the City of Whitehorse, Yukon Territory.

[6] The police became involved with Mr. Bernhardt on June 4, 2016, as the result of several complaints by motorists who observed a vehicle speeding and driven erratically. The vehicle was followed by two motorists to a parking area near the Canadian Tire store, from where a call was made to the police. Constables Booth and Faulkner attended. The driver, Mr. Bernhardt, was identified by one of the witnesses. Constable Faulkner determined that Mr. Bernhardt was a prohibited driver.

[7] Mr. Bernhardt has a related criminal record. That record indicates that he has nine previous driving while disqualified convictions. The last conviction for driving while disqualified was in 2006, but I understood from submissions by counsel that convictions in 2010 and 2012 for care and control and driving while his ability was impaired also

involved driving while disqualified charges, which were taken into account in sentencing for the predicate offences mentioned.

[8] The law in this area is somewhat disparate, in the sense that the sentences imposed fall in a very broad range. Sentences seem to reflect, in part, the individual characteristics of the offender, the criminal history, but more often the nature and number of other charges that were dealt with along with the driving while disqualified sentencing. Rarely does the sentencing for a charge of driving while disqualified occur by itself.

[9] Most but not all of the cases I reviewed were composites involving other charges, the most common being impaired driving or driving over 0.08. I will refer to some of those cases, but I want to underscore the fact that I am only referring to some of them. Counsel have filed many more but I am not referring to all of them.

[10] *R. v. Taylor*, 2008 YKCA 1, is a decision of the Yukon Court of Appeal upholding a sentence of eight months' imprisonment for driving while disqualified. It was Mr. Taylor's second conviction for driving while disqualified. He was in the final year of a 10-year prohibition that was ordered as a result of an earlier conviction for causing death while his ability to drive was impaired by alcohol. Aggravating factors included the seriousness of the predicate offence, the fact of two instances of driving in a 24-hour period, and that he had been warned earlier by a neighbour not to drive but dismissed that warning. The Court of Appeal upheld the sentence of eight months' incarceration, noting that specific deterrence and public safety were important sentencing principles on these facts.

[11] *R. v. Hindmarch*, 2010 BCSC 1257 resulted in a sentence of 21 months' imprisonment less time served. Although only 30 years old, Mr. Hindmarch had a lengthy criminal record consisting of 56 criminal convictions, of which 15 were motor vehicle-related, including three driving while prohibited, four dangerous driving, and three impaireds over 0.08. Denunciation and deterrence were identified by the Court as relevant sentencing principles.

[12] In *R. v. Melanson*, 2009 NBCA 41, the accused had a record of 25 offences, which included four convictions for driving while disqualified. He received a sentence of 14 months' incarceration followed by three years' probation.

[13] In *R. v. MacLeod*, 2016 YKTC 40, Mr. MacLeod was sentenced to four and a half months' custody. At the time, he was on parole after being convicted of two impaired driving offences and two driving while prohibited offences. In total, he had 12 prior impaired driving convictions. The sentencing judge noted that, as a result of the current charge, Mr. MacLeod's parole was revoked and he had made significant strides in addressing his alcohol problem.

[14] *R. v. Hunziker*, 2016 YKTC 28, is also a Yukon case. Mr. Hunziker had four drinking and driving convictions and 11 driving while disqualified offences in addition to a significant history under the *Motor Vehicles Act*. Mr. Hunziker received a 20-month sentence.

[15] In *R. v. Johnnie*, 2009 YKSC 42, the facts are somewhat different than the case at bar. But in that case, at para. 19, Justice Gower stated:

> The Crown also relies on *R. v. Taylor*, 2008 YKCA 1, a more recent decision of the Yukon Court of Appeal. That case involved a sentencing for an offence of driving while disqualified, which was the second such offence for that offender. At para. 10, the court stated:
>
> > ". . . The public safety concern to which the judge referred is real and pressing. Generally speaking, driving prohibitions must be obeyed and breaches sanctioned in a meaningful way. Specific deterrence for this man is required because of his bad criminal history and somewhat casual attitude towards the driving restriction."

[16] That is also my impression in this case. Mr. Bernhardt has a bad driving criminal history and he seems to have somewhat a casual attitude towards the driving restrictions.

[17] I had mentioned Mr. Bernhardt's convictions for driving while disqualified earlier. In addition to the driving while disqualified, he has 10 convictions for either driving while his ability is impaired or care and control while impaired, both offences pursuant to s. 253 of the *Criminal Code*. I mention the latter because, first of all, it is part of his criminal record, which is relevant at sentencing, but also because it is obvious that he has been prohibited from driving because of the Court's concern in relation to his drinking as well as his inability to make responsible decisions not to drive when he has been drinking.

[18] I mentioned earlier that the case law reflects a lack of uniformity with respect to sentencing for driving while disqualified offences. Of course, no two criminal offenders are identical and their fact situations are invariably different. In this particular case, I take into account the fact that Mr. Bernhardt is an Aboriginal individual, that he came

through the residential school system, and is a person recognized by *R. v. Gladue* and *R. v. Ipeelee*, both Supreme Court of Canada decisions, as requiring special attention and consideration.

[19] In reviewing the case law, I have cautioned myself to be careful not to fall into the trap of adopting the "step-up" or the ladder principle, meaning that a judge imposes lengthier and lengthier sentences if the offender keeps committing the same crime, with the idea that if the sentences get long enough, perhaps the person will stop committing that crime. If one follows the step-up principle *ad absurdum*, the resulting sentence will very soon become grossly disproportionate to the offence. Moreover, there is very little research that supports the idea that longer sentences alone increase the effect of deterrence.

[20] On the facts of the case at bar, I impose a sentence of 13 months' incarceration less time served. Counsel advise that with credit for one and a half times actual custody served, Mr. Bernhardt has served the equivalent of 11 and a half months. As a result, there is a further one and a half months' custody to be served. I therefore direct that he serve that remaining one and a half months' custody.

[21] The victim surcharge is payable forthwith. Mr. Bernhardt will be noted in default.

[22] On the April 23rd and May 28th theft charges, I impose a 15-day sentence on each of those theft charges concurrent to each other but consecutive to the matter before the Court.

[23] I actually have considered a probation order at length and concluded that, in all of the circumstances, a probation order is not appropriate. There is no likelihood that any condition I impose will be abided by. My primary concern is that Mr. Bernhardt not drive. He is well-enough known in the North that if he drives again, he will be arrested promptly and he will go to jail for another lengthy period. I do not see a probation order serving any constructive purpose.

[24] But there should be s. 259 prohibition order. In the circumstances, I would make it for life. I want to make it very clear to Mr. Bernhardt that it is a life order and part of that order, Mr. Bernhardt, is that if you drive again, you are going to jail again, and you are going to go to jail for some time. You have to decide what you want to do.

[25] My suggestion to you is that you not drink, because it is pretty clear to me that when you drink you have very poor judgment.

[26] It is up to you; okay? Good luck to you.

_____

LILLES T.C.J.