Citation: *R.* v. *Brown*, 2006 YKTC 34 Date: 20060315
Docket: T.C. 05-00208
Registry: Whitehorse

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

REGINA

v.
AARON WILLIAM BROWN

Appearances:
Edith Campbell Counsel for Crown
Malcolm Campbell Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Aaron Brown has entered guilty pleas to the offences of impaired driving, dangerous driving and assaulting a police officer. The factual basis of these three offences relates to a series of disturbing events which occurred on Wednesday, July 6, 2005.

[2] At approximately 7:30 in the morning the RCMP received a number of complaints regarding an SUV driving erratically in the downtown area of Whitehorse. One witness reported a concern that the driver was impaired, as he had been viewed holding a bottle of cider. The vehicle was noted to drive into the 202 Hotel, causing damage to the building. The vehicle then crashed into a street light pole on Jarvis Street. It proceeded

along Jarvis at a high rate of speed, failing to stop at the corner. The SUV was then noticed on First Avenue where the driver crashed through a barrier located in the roundhouse area and then into a building which houses Gold Rush Float Tours, damaging both the building and a bus owned by the tour company. Instead of stopping, the vehicle continued on towards Main Street. It had difficulty navigating the turn onto Main Street, ending up on the wrong side of the road, forcing a number of people on the sidewalk to retreat. The vehicle then crashed into a Yukon Electrical truck parked in front of the Edgewater Hotel and pushed that truck into yet another vehicle.

[3] Fortunately, two RCMP members were across the street and witnessed the latest collision. They attended and arrested Mr. Brown, who was found to be the driver. Mr. Brown displayed marked symptoms of impairment, including a strong odour of alcohol, slurred speech and unsteadiness on his feet. Mr. Brown was taken to a police vehicle where he proved to be uncooperative and, at least initially, unresponsive. He then stated to the officer, "Shut up, bitch, can I spit in your face," whereupon he proceeded to indeed spit in the officer's face. He was taken to the RCMP detachment and lodged in cells.

[4] During the course of his mercifully brief ride through the downtown area, Mr. Brown left in excess of $13,000 worth of damage in his wake, not including the damage to the vehicle Mr. Brown himself was driving.

[5] At the time of these offences, Mr. Brown was bound by the conditions of a probation order, which included a condition that he abstain from the possession and consumption of alcohol.

[6] Mr. Brown advises, through his counsel, that on the evening before the offences occurred, he met up with a couple of girls downtown and offered them a ride. They had cider with them and offered to share. He concedes that he began drinking in contravention of his probation order; however, he asserts that he has absolutely no recollection of events beyond beginning to consume alcohol until he was lodged at WCC. He speculates that he was perhaps drugged. However, there is no information before me which supports that speculation.

[7] Mr. Brown is a 26-year-old member of the Carmacks Little Salmon First Nation. He is the father of a four year old son, who resides with his mother. Mr. Brown has obtained his grade 12 equivalency and has started to pursue college courses, continuing his efforts while in custody. He has plans to pursue certification in the pipefitting trade.

[8] He has some employment experience, including three months with crime prevention in an HRDC-sponsored youth program where he obtained a number of certificates. These, in turn, enabled him to secure full-time employment as a pipefitter, which lasted until he was taken into custody on November 24, 2005.

[9] Mr. Brown comes before the Court with a prior criminal record, extending back to 1998. While he has no prior convictions for driving offences, he has four prior convictions for assault offences and numerous convictions for failing to abide by court orders, including three breaches of prior conditional sentence orders.

[10] Mr. Brown asserts that he had been taking steps to turn his life around before this incident and he is continuing his efforts while in custody. Since November, he has

attended weekly AA meetings in WCC. Since mid-January, he has had bi-weekly meetings with Larry Kwiat and has also commenced a 30 hour literacy course with Mr. Kwiat. Since January 20th, he has attended the educational program offered in the facility. Since the beginning of January, he has attended a weekly lifeskills program offered by Yukon Learn. He is also the A dorm representative on the inmates committee.

[11] Mr. Brown has the support of his mother and Mr. Parton (phonetic), both of whom attended court on his behalf. Mr. Parton indicates that he has been working with Mr. Brown for a while and has noted him to be doing really well, including regular attendance at church.

[12] Crown seeks a global sentence of one year, less credit for time served on remand, a probation order of 18 months to two years and a driving prohibition of two to three years.

[13] Defence suggests a sentence of five months on the dangerous driving, a fine on the impaired driving and 60 days on the assault. Defence further asserts that Mr. Brown should receive two-for one credit for the roughly three and one half months spent in remand, thus suggesting that time served plus a fine would be an appropriate sentence.

[14] In support of its position, the Crown has filed four cases spanning a range of six to 18 months for dangerous driving offences. Defence has filed copies of two court informations, setting out the sentences given in two Yukon cases of dangerous driving. Defence also relayed brief factual synopsis of each case. The sentences noted are 90

days on one and five months conditional in conjunction with a curative discharge on the other.

[15] With respect, I find that I am unable to place much, if any, weight on the two sentences noted. Sentencing is a complex exercise involving the weighing of a number of factors, including the circumstances of both the offence and of the offender. There is simply insufficient information before me as to either the offence or the offender to determine what factors influenced the ultimate sentence such that I can compare them to the circumstances before me in any meaningful way.

[16] Defence has further sought to distinguish the cases filed by the Crown by suggesting that each involved factual circumstances more serious than those in this case. In particular, defence noted that each case involved a high speed chase over lengthier distances, while Mr. Brown was not being pursued and drove only a short distance, jeopardizing fewer people than a high speed chase. I must say that I find this argument extremely difficult to accept.

[17] One of the main aggravating factors considered in sentencing dangerous driving offences involving high speed chases, and indeed in sentencing on impaired cases, is the potential for harm posed by the offender. The actions of Mr. Brown, in this case, move beyond the potential for harm into actual harm. The sheer number of buildings and vehicles struck by Mr. Brown on his short trip clearly demonstrate that lengthy distances are not required to create significant damage. While it is true that Mr. Brown was not being pursued by police, I would note that he was not deterred in his conduct by any of the collisions that he caused along the way. In fact, it is difficult to imagine a

more egregious driving pattern than is seen in this case, notwithstanding the short distance and the lack of police pursuit. It is extremely fortuitous that Mr. Brown did not kill or seriously injure either himself or an innocent bystander.

[18] I am of the view that while none of the four cases filed by the Crown is directly on point, from a factual perspective, they do provide me with guidance in determining an appropriate sentence.

[19] The Yukon Court of Appeal decision in *R.* v. *Allan,* [1989] Y.J. No. 126, is largely distinguishable in terms of its 18 month sentence, considering Allan's prior record, which included two recent convictions for impaired driving. The case is, however, important for its enunciation of the principles to be considered in such cases, as seen in the Court's adoption of the reasoning in the Ontario case of *R.* v. *McVeigh,* [1985] O.J. No. 207 (Q.L.):

> …it is the conduct of the accused, not just the consequences, that is the criminality punished. If such an approach acts as a general deterrent then the possibilities of serious and tragic results from such driving are reduced. No one takes to the road with the thought that someone may be killed as a result of his drinking. The sentences should be such as to make it very much less attractive for the drinker to get behind the wheel of a car after drinking. The public should not have to wait until members of the public are killed before the courts' repudiation of the conduct that led to the killing is made clear. It is trite to say that every drinking driver is a potential killer.

[20] The Court in *McVeigh, supra*, went on to state that:

> General deterrence in these cases should be the predominant concern.

[21] On the other end of the spectrum of cases filed by the Crown, the *R.* v. *Sidney* case, [1999] Y.J. No. 12, is of limited assistance as it did not involve impairment by alcohol, a significant factor in both the case at bar and the other cases filed by the Crown.

[22] In *R.* v. *McLeod*, [2003] Y.J. No. 172, the Yukon Supreme Court imposed a sentence of seven months for dangerous driving and one day deemed served, plus a driving prohibition of one year for a refusal. The case involved a high speed chase at 11:15 p.m. through Whitehorse with four passengers in the vehicle, while Mr. McLeod, who is described as moderately impaired, was noted to drive at excessive rates of speed, ignoring lights and stop signs. There were no resulting collisions.

[23] I view the circumstances in Mr. Brown's case as somewhat more serious. The aggravating feature of passengers is not present in this case, but Mr. Brown's offence occurred at 7:30 in the morning on a work day when a far greater number of people would have been on the roads and sidewalks of downtown Whitehorse, and it involved numerous collisions resulting in a significant amount of damage.

[24] The final case, *R.* v. *Quock,* [1998] Y.J. No. 171, is perhaps the closest of the cases filed. After consuming alcohol to a point where his recollection was impaired, Quock stole a vehicle, led the police on a high speed chase from Whitehorse to Haines Junction, which ended when Mr. Quock drove the stolen vehicle into a police car at a road block causing $15,000 worth of damage to the two vehicles. His Honour Judge Lilles imposed a global sentence of eight months, after giving credit for one month in pre-trial custody.

[25] Like Mr. Brown, Quock was on probation at the time of the offence, he exhibited a similar degree of impairment and caused a similar level of damage, albeit with fewer collisions. Given the location of Quock's offence, fewer people would have been placed at risk than in Mr. Brown's case, but this difference is offset by the fact that Mr. Brown had permission to drive the vehicle he was in, while Quock did not.

[26] There are further similarities between the two cases: both involved young men with a history of problems with substance abuse, both entered guilty pleas and both expressed an interest in treatment and took preliminary steps in this regard.

[27] Having considered all of he circumstances before me, I am satisfied that a custodial sentence of 10 months is appropriate for the dangerous driving offence, to be followed by a period of probation of 18 months. I will return to the conditions of the probation order in a moment.

[28] Turning first to the remaining two counts with respect to the impaired driving charge, I disagree with defence counsel's submission that a fine would be appropriate. It is Mr. Brown's first impaired driving conviction, but it is extremely aggravated by the degree of impairment and the horrendous driving pattern. In my view, a custodial term of 30 days is warranted, but given that the circumstances of the impaired are so inextricably intertwined with those of the dangerous driving, the term will be served concurrently. There will be a driving prohibition of two years.

[29] A custodial term is similarly warranted with respect to the assault charge. Given Mr. Brown's record for similar offences, I may well have considered a term of imprisonment in excess of the 60 days suggested by defence counsel, but, in my view,

the offence is significantly mitigated by Mr. Brown's efforts to have himself tested and to have the test results forwarded to the RCMP officer to allay any concerns. Accordingly, there will be a sentence of 60 days on the assault. However, as it is an offence distinct from the driving offences, the term will be served consecutively.

[30] Before turning to the conditions of probation and the issue of restitution, I am mindful of the fact that Mr. Brown has served time in pre-trial custody and he is entitled to credit for that time served. At issue is the amount of credit that should be given.

[31] Mr. Brown was clearly accessing various programs within WCC as early as the beginning of January. As of January 20th, Mr. Brown's name appeared on the general population list. Defence counsel suggests that Mr. Brown should receive two-for-one credit for all time spent in pre-trial custody as he was not afforded all privileges, though Mr. Campbell was only able to point to the lack of yard privileges; not a particular hardship, in my view, in Whitehorse in the middle of winter. Crown suggests that I adopt the reasoning of His Honour Judge Faulkner in the *R.* v. *Boya* decision, [2006] Y.J. No. 22, and credit some of the remand time at two to one and the remainder at one and a half to one.

[32] I have reviewed the *Boya, supra*, decision and am satisfied that a similar apportionment of credit would be appropriate in this case, though I would note, Mr. Campbell, that my calculations come out similar to yours even with that, given that my calculations of the actual time he spent in remand is in excess of three and a half months.

[33] To give Mr. Brown the benefit of the doubt, I have decided to use the date of January 20th as the dividing point. For the first 60 days spent in custody, which include the three days following his arrest and the period from November 24th to January 19th, Mr. Brown will receive two-to-one credit for a total of four months. For the remaining 54 days, from January 20th to March 15th, there will be roughly one and a half to one credit. At exactly one and a half to one, the amount would be 81 days. To make calculations easier and to reflect Mr. Brown's lack of yard privileges, I will give him credit for 90 days or three months. The total of seven months credit will be applied against the 10 month dangerous driving sentence, making it a sentence of three months and I will direct that the record reflect credit for seven months spent in remand.

[34] With respect to the 18 month probation order, it will include the following terms and conditions. The statutory term that he:

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 or 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;
5) Reside as approved by your probation officer;
6) Abstain absolutely from the possession or consumption of alcohol;

7) Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

8) Take such alcohol assessment, counselling or programming as directed by your probation officer.

[35] This leaves the issue of restitution. Of the total amount of damage, much was covered by insurance. Crown seeks a stand-alone restitution order with respect to the following amounts: $1,800 for the repairs of the 202 Hotel; $192.50 to cover the GST on repairs which must be paid by the Gold Rush Float Tours; $260.96 to Yukon Electrical to fix the street light, and $3,029.71 also to Yukon Electric to cover repairs to the Yukon Electrical truck.

[36] Defence takes issue with the amount sought for the 202 Hotel. Given the lack of supporting documentation to verify the claim, I am forced to agree. I am not prepared to include the $1,800, but I will make a stand-alone restitution order requiring Mr. Brown to pay into court the sum of $192.50 in trust for Gold Rush Float Tours, and the sum of $3290.67 in trust for the Yukon Electrical Company. In doing so, I have combined both the truck and street light repairs, as all appeared to be due and owing to Yukon Electrical.

[37] In the circumstances, given that I would prefer any money earned by Mr. Brown to go to the victims to cover the damages or, in the alternative, to the support of his child, the victim fine surcharges are waived in this particular case.

[38] Counsel, is there anything that I have missed?

[39] MR. CAMPBELL: No, Your Honour.

[40] MS. CAMBELL: No, Your Honour. The Crown directs a stay of proceedings on the remaining matters.

[41] THE COURT: Thank you. Mr. Brown I wish you good luck with the efforts that you have started.

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RUDDY T.C.J.