Citation: *R.* v. *Coldwell*, 2008 YKTC 59

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Docket: T.C. 07-00154A
08-00193
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

NICKOLAS COLDWELL

Appearances:
Eric Marcoux — Counsel for Crown
Jamie Van Wart — Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Nickolas Coldwell has entered guilty pleas to five offences under the *Criminal Code*, offences contrary to s. 255(2), s. 259(4)(a), s. 334(a), s. 733.1(1) and s. 145(3). On June 7, 2007 at 2:28 a.m., the Teslin RCMP responded to a motor vehicle accident. Mr. Coldwell and a Ms. April Morgan were brought to the RCMP detachment in Teslin by a Greyhound bus. The RCMP, while patrolling, located a Mr. Leroy Bien wandering on the highway in some distress.

[2] The investigation revealed that Mr. Coldwell was the driver of the vehicle. He had been consuming alcohol and had been smoking marihuana. He had rolled over the

vehicle with Mr. Bien and Ms. Morgan in it on the highway. His alcohol readings were 110 and 100, I believe. The injuries to Mr. Bien were two fractured ribs as well as bruising and abrasions to the chest that caused him trouble breathing and distress. The injuries to Ms. Morgan caused her considerable pain, for which she was sedated with morphine, and included bruising and abrasions and swelling to the thighs, as well as contusions to the chest wall and a hematoma in her abdomen 15 by 15 centimetres.

[3] At the time of this offence, Mr. Coldwell was also disqualified from driving as a result of a conviction on February 21, 2007, approximately four months earlier, for driving over .08. Subsequently, Mr. Coldwell was released from custody and engaged himself ultimately in the Community Wellness Court. He was, however, subject to a probation order made September 4, 2007 that required him to abstain absolutely from the possession or consumption of alcohol. He was also subject to a recognizance that required him to abide by a curfew by remaining within his residence between the hours of 10:00 p.m. and 7:00 a.m.

[4] On May 17, 2008, at about 1:36 a.m., the RCMP responded to a complaint of an abandoned truck in the downtown Whitehorse area, with individuals fleeing from it. They located the two individuals, one was Mr. Bien, who was the victim in the prior s. 255(2), and the other was Nickolas Coldwell. The truck had been stolen from Metro Chrysler. The steering column had been broken, resulting in about $1500 damage, and, ultimately, Mr. Coldwell admitted his involvement in the theft of this vehicle with Mr. Bien. It appears that he was the passenger in the vehicle at this time, not the driver. He had been consuming alcohol and was intoxicated, which constituted a breach of his probation order,

and as well with the hour, a breach of the term of his recognizance that he abide by a curfew.

[5] The criminal record filed indicates only the one conviction for the driving over .08 on February 21, 2007, for which he received a $600 fine and was prohibited from driving for one year, indicating that that is on the lower end of the spectrum. I am not certain for what offence the probation order was made on September 2007 but it apparently is not related. Counsel may be able to assist me with that.

[6] MR. MARCOUX: Yes, I think I have submitted that it came in two parts, the other part of it --

[7] THE COURT: Right, yes.

[8] MR. VAN WART: September 4, 2007. 348(1)(a).

[9] THE COURT: Section 348(1)(a), thank you, counsel. He received a suspended sentence and 12 months probation on that charge.

[10] Crown counsel's submissions, and I might indicate that there were two pre-sentence reports filed, effectively. One was prepared before the September 7th sentencing, and the subsequent one was prepared for this sentencing, which attached the earlier one. Crown counsel has looked at this pre-sentence report, submits that it is generally a negative report, based on a lack of Mr. Coldwell's follow-through with respect to what he indicated he would do, including his involvement in the Community Wellness Court and somewhat sporadic compliance with what he was expected to do and what he in fact did do.

[11] Crown has filed several cases, and suggests the range for the 255(2) is anywhere from four to ten months from best case to more serious cases, and that in a global context, six to seven months would be appropriate for this case. Crown is also suggesting that the 60 days consecutive be attached in respect of the 259, plus three to five months for the 334, and an additional 15 to 30 days for the breach charges, for a global sentence of 12 months, plus a two to three year driving prohibition. This would be followed, as suggested, by a probation order.

[12] Defence counsel's position is that, taking into account his youth and efforts he has made with respect to trying to deal with some of the issues that he has, even though they may have been ultimately unsuccessful, should, at least, be indicators of a desire to do better and some efforts to do that, that in the circumstances, with the guilty pleas and all the additional information in the pre-sentence report, allow for a global sentence of six months to be considered. Mr. Coldwell has 125 days at time and a half of pre-trial custody. Both counsel are agreeing on the credit as being 125 days, as I see it.

[13] Mr. Coldwell presents somewhat of a difficult individual to sentence when taking into account the extremely serious nature of the initial 255(2) offence, and it should be noted that the cases that were filed that establish a range of four to ten months are cases from 1999 and 1998. In one of the cases, a decision of Judge Lilles in *R*. v. *McGinnis,* [1998] Y.J. No. 33, in paragraph 4, Judge Lilles said that:

> … the offence contrary to s. 255(2) is a very serious offence. I acknowledge that the case law indicates a wide range of possible dispositions. But consistently, the dispositions imposed for drinking and driving, where bodily harm results, are today much more significant than they were a decade ago. This is primarily a result of less tolerance in our society for drinking and driving and the direction given by Courts of Appeal that general deterrence is to be

> considered an important sentencing principle for these kinds of offences. That is to say, I must impose a sentence today that not only will deter Mr. McGinnis, but will also send a message to others in the community who might drink and drive.

[14] That was true ten years ago. It is even more true today, because we have legislative changes that have, one, removed the option of conditional sentences for impaired causing bodily harm, indicating a more severe view of society on this charge. In particular, we have increased sentences in legislation with respect to mandatory minimums on simple impaired driving charges. Just as the sentences in 1998 reflected, increased severity for impaired driving charges, in 2008, when compared to those in 1998, sentences can again be viewed as also being more severe in view of the greater emphasis of society's abhorrence of the offence of drinking and driving.

[15] When I look at these cases that were filed in comparison to the circumstances that we are dealing with here, the *R*. v. *Fletcher* case, [1999] Y.J. No. 51, from 1999 was a ten-month sentence. No age is given for the driver in that case. It indicated that she had priors in 1988 and 1996, so she was clearly older, I would assume, than Mr. Coldwell. Three people were injured very seriously, but on her 255(2) guilty plea, she received a sentence of ten months.

[16] The *R*. v. *Campen* case, [1998] Y.J. No. 15, which was the lower end of the range, provided a sentence of four months. This was an individual, again no age is given, with no prior criminal record. However, in this case, which is a significant difference from the case before me today, very serious injury to the victim resulted, possible permanent incapacity, which is more serious than what we are dealing with here, as far as injuries go.

[17] In the *McGinnis* case in 1998, a 30-year-old, and three individuals with less serious injuries than some of the other cases, received a sentence of seven months after taking into account five weeks of pre-trial custody, which would reflect as 10 weeks or approximately two and a half months, so nine and a half months.

[18] When I look at these cases and I look at the societal view of impaired driving generally and impaired causing bodily harm, Crown's position of six to seven months is giving Mr. Coldwell all the benefit, I would suggest, that he could have for his youth and what efforts that he has made to recognize, at least, and try to deal with his issues. He could easily, if some circumstances were different, be looking at possibly longer sentences considering the harm caused and considering how shortly after the prior impaired driving conviction sentence that he had was imposed that this offence took place.

[19] When I look at the personal circumstances of Mr. Coldwell as set out in these reports, he has some difficulties dealing with stress; he has some difficulties with depression. He has acknowledged using drinking and marihuana, it appears, as coping mechanisms with some of the stress that he has had to deal with in his life, and the stress includes the loss of one of his two brothers through, as I understood it, an accident that involved drinking.

[20] So Mr. Coldwell's personal circumstances provide an indicator of the kinds of issues he is going to have to continue to deal with, and if he does not a find a way to deal with, could result in some risk to the community at large, because not dealing with the issue of his drinking at such a young age would raise concerns that the stresses that

would increase could lead him on a cycle of a downward spiral. He is young enough now that that can be interrupted and can be changed. This requires support. He has support from his mother, who is present in court today and who has been present at many of his prior court appearances.

[21] In the report that was prepared for the September disposition, there was some assessment of risks related to Mr. Coldwell. There was a problem related to the drinking scale assessment. These are yes and no responses from an offender; self reporting. They deal only with alcohol issues, not necessarily any physical dependency. He scored a seven on this, which indicated a severe level of problems related to alcohol use. In the subsequent report that was filed for this disposition, there was an indication from Ms. Moylan-White, who was dealing with Mr. Coldwell, that he does not appear to be an alcoholic. "However, he will misuse alcohol when pressured by peers or as a coping mechanism to deal with negative emotions. Alcohol appears to give him the courage to do some things that he would not normally do, such as these offences," and I view that as being the more recent offences, in all likelihood, of the 334.

[22] In the report itself, the writer of the report indicates Mr. Coldwell admits to a substance abuse problem. That needs to be set, of course, and perhaps before I say that, the crimnogenic risk assessment for the subsequent reports scores him in the high range of a 73 percent probability of re-offending, linked to alcohol and drug abuse, associating with criminal peers, and, essentially, lack of real focus and direction in life through employment and leisure time that is not necessarily best used. It appears that there are certain leisure activities that he enjoys that are quite constructive. Much of what Mr. Coldwell is dealing with seems to come down to an issue of choice, and, to his credit,

he made a choice to become involved in the Community Wellness Court and submit himself to a number of onerous conditions. Those were not provided to me, but it is common knowledge to those who have been involved with the Court that there are a considerable number of conditions that attach themselves to Community Wellness plans and he had such a plan prepared.

[23] His compliance with the requirements in the Community Wellness Court was indicated to be sporadic: some compliance, not complete compliance. There seems to be some not complete truthfulness with respect to some of the details of what he was doing and what he was not doing. That, I will attribute to a large extent, to his immaturity. As indicated, he is 21 but appears to be not a particularly mature 21-year-old, and does not appear to be manipulative or sophisticated in any of his denials or attempts to explain what he does not do. They frankly seem to be his immaturity and not really realizing the extent of the difficulties that he has gotten himself into and his responsibility in not only dealing with them, but dealing with his future by dealing with the issues, in particular, alcohol, that have given him problems in the past and will, unless addressed, give him problems in the future.

[24] I note that in the original report, the drug abuse screening test, again somewhat self-reported, puts him at a moderate level of problems related to drug abuse. Although in the sentencing submissions, the issue of how well he has done while on terms brought up issues about failing tests for what appear to be marihuana or THC, while a contributing factor in the 255(2), drug abuse does not seem to be as directly related to the commission of the offences, although, frankly, any continuing involvement and use of drugs is an

indicator that Mr. Coldwell would not be taking the steps to remove himself from the lifestyle he has currently found himself wandering in and make better choices.

[25] Mr. Coldwell has indicated he had not drank for a considerable period of time, until the May offence. I have no evidence that would suggest, until the May offence, from June of last year that he, in fact, had been drinking. In a nutshell, I have his evidence that Mr. Coldwell wants to be different, involved himself in a process that provided him supports to be different, but was simply unable or unwilling, through a lack of maturity, to a large extent, to take advantage of these options and fundamentally change his life. So now he is before the Court today facing not only the original serious charge but some additional serious charges.

[26] I said difficult because in deciding an appropriate sentence for Mr. Coldwell, the gravity of the underlying offence, in light of the subsequent offence, based on a limited but related record, would, on one hand, call for sentences of specific deterrence. Mr. Coldwell says jail is not a place for him, and the sentence of specific deterrence that incorporates a substantial period of jail might really set that point home to him. He has never been in jail before other than the time he has spent, about eight days, prior to May 17th on this case. So on the one hand, specific deterrence and general deterrence, which is, of course, always preeminent factors with respect to impaired driving offences, and in particular, impaired bodily harm, as is seen by the removal of the conditional sentence option, would call for a lengthy period of imprisonment in the range of four to ten months. This may well be viewed in future cases as being a range that may be low for such offences, going forward.

[27] On the other hand, he is a young man with a limited record, with support, with, as it appears, no underlying reason that would stop him from becoming a mature young man who has the ability to go out and make a meaningful contribution to his own life, the lives of the people that love him, and to society. So there has to be a balance in the sentence between the general deterrence and denunciation that are so properly part of such offences, and I am including the theft offence in this, and the rehabilitation of a young individual who has made efforts and who should also have the ability, and find in the sentence he is going to get today, greater motivation to take advantage of those opportunities provided for him.

[28] The sentence that I am going to impose is going to strike a balance between that, but there will be an additional significant period of custody. I cannot, in all the circumstances, find that globally, even taking into account the guilty pleas, his youth, the efforts he has made so far, that six months is a sufficient sentence. The Crown's suggestion of 12 months is well within the range, but I am not going to impose 12 months because I am going to give as much credit as I can to your youth and to the options that you have available.

[29] The sentence globally will be nine months less credit of four months for time served. I know counsel indicated that it was 125 days, but frankly, in imposing a nine month sentence, I am keeping in account the fact that it was 125 days, but the record will reflect four months credit for time served that will be reduced from the nine months. The sentence will be broken down as seven months on the 255(2). There will be 30 days concurrent -- and the time served can be credited onto that seven months. The 259 offence will be 30 days consecutive. I appreciate Crown counsel's position seeking

greater than the 30 days imposed because of the close proximity in time, but on all sentences in which there is a driving disqualification of one year, it is always going to be fairly close, to some extent, and in all the global circumstances, with his limited record, it will be 30 days.

[30] The 334 offence will be 30 days consecutive to that, and that is light, but that is globally, and it is taking into account everything positive that I can. The 145 and 733 will be 30 days each, concurrent to each other and concurrent to the rest of the sentence.

[31] This will be followed by a period of probation of 18 months. I do not have a copy of the other probation order but, however, it will not really matter because that order would have expired by the time that Mr. Coldwell is out of custody.

[32] Subject to anything counsel might say, the terms that I am proposing are as follows:

1. To keep the peace and be of good behaviour;
2. To appear before the Court when required to do so by the Court;
3. To notify the Court in advance of any change of name or address, and promptly notify the Court or probation officer of any change of employment or occupation;
4. To remain within the Yukon Territory unless you obtain written permission from your probation officer or the Court;
5. To report to a probation officer immediately upon your release from custody and thereafter when and in the manner directed by the probation officer;

6. To reside as approved by your probation officer and not change that residence without the prior written permission of your probation officer;
7. To 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;
8. To not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
9. To take such alcohol and drug assessment, counselling or programming as directed by your probation officer;

[33] This issue was not directly addressed, but is your client prepared to attend residential treatment, Mr. Van Wart, in the event that it is offered?

[34] MR. VAN WART: Yes, that's fine.

[35] THE COURT:

10. Having given the Court your consent, attend and complete a residential treatment program as directed by your probation officer;
11. Take such psychological assessment, counselling and programming as directed by your probation officer;
12. Take such other assessment, counselling and programming as directed by your probation officer;
13. Make restitution by paying into Territorial Court the amount of $750 in trust for Metro Chrysler;

14. Participate in such education or life skills programming as directed by your probation officer;

15. Make reasonable efforts to find and maintain suitable employment and provide your probation officer with all necessary details concerning your efforts;

16. Provide your probation officer with consents to release information with regard to participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this probation order.

[36] Are there any of the terms of probation that are problematic or any additional terms? I have not imposed a curfew.

[37] MR. MARCOUX: I am just thinking about what the Court has said. I wonder if it would be a helpful condition that he stays away from Leroy Bien.

[38] THE COURT: I thought about that condition. I was wondering whether there should be a condition to have no contact with such individuals as may be identified to you by your probation officer, or, somewhat more restrictive, have no contact with Leroy Bien. Is Crown suggesting that narrow, Leroy Bien, or more general? I mean, I know there is general comment in the pre-sentence report about general individuals, but.

[39] MR. MARCOUX: Yes, but so far the files before the Court involve, twice, Mr. Bien. So I would be specific.

[40] MR. VAN WART: That's fine. I don't have any submissions on that.

[41] THE COURT: There will be a term:

17. To have no contact directly or indirectly or communication in any way with Leroy Bien.

[42] There will be a driving prohibition under s. 259 of the *Criminal Code*. This will be for two years and it will prohibit Mr. Coldwell from operating a motor vehicle on any street, road, highway or other public place. I will, given his youth, make a recommendation that he be considered for an interlock program, and this will be after four months. It should be noted that the suspension, of course, takes place for two years plus any period of imprisonment that is served, according to the *Code*.

[43] With respect to the interlock recommendation, that, of course, is something that is a recommendation only and it is up to the Yukon Government Motor Vehicles Branch whether they in fact approve you for that. You will need to make contact with them and see whether that is something that is possible. There is a cost associated with it. It is not inexpensive. You may or may not choose to follow up with it, but it is an option that is available.

[44] Is there anything else with respect to the disposition? Are there any questions?

[45] MR. MARCOUX: I understood that the four months time served will be deducted from the seven months, is that what I --

[46] THE COURT: Yes, so that leaves five months remaining.

[47] MR. MARCOUX: That is correct, yes, thank you.

[48] MR. VAN WART: Just with regards -- given that he's been in custody since May, and he will be in custody for, well, at least the next 100 days, I'd ask the victim fine surcharges be waived.

[49] MR. MARCOUX: No issue.

[50] THE COURT: They will be waived.

[51] Mr. Coldwell, I know that five more months can seem like a lot of time, especially to a 21-year-old. It is a difficult sentence because I recognize some of your personal circumstances. This sentence is designed to balance society's interests in not having these offences committed against it, against the hope that you will become a better person in the future than you have found yourself being recently. There is, whether you understand it or see it right now, there is a strong rehabilitative part of this sentence. It is a lower sentence than what it could have easily have been, given your efforts in the Community Wellness Court, and the steps you have taken and what you want to do are important factors in me imposing a sentence that is lower, perhaps, or on the lower end of the range.

[52] The time in custody that you will serve over the next five months is not designed to be just what some people would call punishment. It is time that will allow you, should you choose to do so, to accept responsibility for your actions and the consequences of your actions, and use that as a stepping stone to never find yourself in that situation again. I want you to understand that. I want you to understand that from the Court's point of view, that you have the potential to be better, but the thing that stands between that potential and your desire is effort, continuous effort, and if you do not make that effort now, it is not

going to get any easier, as you get older, to make that effort. The easiest time to change is now. The easiest time to take advantage of the programming and options available to you is now. It will only get more difficult, and every time you are faced with a choice that will not be or provide you with anything of value, every time you are faced with a right choice and wrong choice, if you make the wrong choice now, it is going to be harder to make the right choice the next time.

[53] This probation order is, again, designed to give you the opportunity to make as many right choices as you can, with as much support as you can have. You have family support, you have community support, and you need to take advantage of these supports while you are still young and while you still have a full life ahead of you.

[54] The remaining charges?

[55] MR. MARCOUX: Yes, would direct a stay of proceedings on all pending charges against Mr. Coldwell.

[56] THE COURT: There will be stays of proceedings. Nothing further? I will not wish you luck, Mr. Coldwell, because it is not a question of luck, it is a question of determination.

[57] THE ACCUSED: Yes, thank you.

[58] THE COURT: So I hope you the best.

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COZENS T.C.J.