

Citation: *R. v. Germain*, 2009 YKTC 49

Date: 20090501
Docket: 08-00281
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Chief Judge Ruddy

REGINA

v.

BRUCE IRVING GERMAIN

Appearances:
David McWhinnie
Gordon Coffin

Counsel for Crown
Counsel for defence

REASONS FOR SENTENCING

[1] RUDDY C.T.C.J. (Oral): Bruce Germain is before me in relation to a single count of driving while the concentration of alcohol in his blood exceeded the legal limit.

[2] The offence itself arises on June 19, 2008, at which point it appears that Mr. Germain had been in a dispute with his mother. He was under the influence of alcohol. He was told to leave the home. He went and sat in his vehicle, turned the vehicle on to listen to music. He maintains that he had no intention to drive the vehicle but concedes that he was in care and control.

[3] The RCMP was contacted with respect to the vehicle running and the loud music

as it was one o'clock in the morning. They located Mr. Germain behind the wheel. They also observed him remove the keys and throw them elsewhere in the vehicle. He exhibited indicia of impairment, provided a breath sample into a roadside screening device, registered a fail, and ultimately provided two breath samples which registered at 240 and 220 milligrams percent.

[4] He comes before the Court with a prior related criminal record. It has some five prior impaireds between the years of 1993 and 2004. There are also two drive while disqualifieds in 1996 and 1997.

[5] There is a thorough pre-sentence report before me which sets out Mr. Germain's background and current circumstances. That report will be on file. It is not my intention to go through it in detail today but suffice it to say that in terms of background, Mr. Germain is 36 years of age, a member of the Liard First Nation. His early childhood involved significant exposure to substance abuse. In fact there appears to be information in the pre-sentence report that Mr. Germain had his first drink at the age of seven or eight.

[6] Also of particular importance today is his educational circumstances. He has received a diploma from BCIT with respect to turbine technician repair. I believe he did work for some time in that field. He is now involved in the surveying program at Yukon College. He has just completed the course work and testing for this session and would be expected to return to Yukon College to continue the program in September of this year.

[7] He clearly has a significant problem with alcohol. There has been some

improvements in his ability to manage his use of alcohol although the pre-sentence report suggests that he is continuing to use at this point in time, although at a reduced rate. He has, however, to his credit, had some contact with a doctor with a view to potentially mounting a curative discharge application. It appears, despite efforts, that he was not successful in obtaining the necessary medical information required from the doctor and was unsuccessful in developing a plan with him or her, I am not certain who the doctor is, with respect to addressing the addiction issue.

[8] Crown has indicated that with respect to the timing of this offence it falls under the old mandatory minimum provisions. Crown has filed notice of intention to seek greater punishment, which would bind me to a minimum 90-day sentence. But Crown has also quite properly pointed out a number of the leading cases in the Yukon which highlight the seriousness with which offences of this nature are viewed in this territory with the focus on denunciation and deterrence, and has indicated their view that the circumstances of this case fall within a nine to 12 month range, and is asking me to consider a sentence in that range with a three to four year driving prohibition.

[9] I must say I think the Crown is quite right about the range that they have provided. The complicating factor in this particular case is the fact that a sentence in that range is going to preclude Mr. Germain from returning to school to complete his program. As a result, defence is suggesting that I consider a sentence in the range of six months which, while perhaps below the range, would ensure that Mr. Germain would be able to continue the program.

[10] I must say this is a difficult case in that there are quite valid arguments on both

sides. Absent the issue of school, I would have no hesitation in sentencing Mr. Germain to a sentence in the range of nine months and I would do so based primarily on the issues of denunciation and deterrence, which are paramount considerations for this type of offence.

[11] There is, from a rehabilitative perspective, which is a principle I am also required to consider, value to allowing Mr. Germain to attend and complete the program that he is involved in. But that puts me in a place where I may well be sentencing him to something that is below the accepted range.

[12] I am mindful, however, of some of the efforts he has made towards a curative discharge application and also mindful of the fact that this is a care and control offence as opposed to an offence of actually driving while under the influence, which would have been such that he presented a more significant danger, had that been the case, than just the potential danger that he created in this case with the possibility that he might have inadvertently set the vehicle into motion.

[13] In all of the circumstances I am not satisfied that I can do a six-month jail sentence alone, but what I am satisfied that what I can do is have a somewhat reduced custodial term but with the addition of a lengthy probation order that would address rehabilitation. So I should ask you, Mr. Coffin: my view would be that if I went with six months that there should be an 18-month probation order to follow with conditions requiring him to abstain and to get programming as it relates to alcohol. And I think that balances out a sentence that addresses both, to some extent, denunciation and deterrence but also rehabilitation. Is that something he is prepared to do?

[14] THE ACCUSED: Yes, Your Honour, it is.

[15] THE COURT: Okay, because it is the only way that I can see that I can order a custodial term that would get you out to school. It has got to be balanced off with you taking a serious look at your alcohol problem.

[16] THE ACCUSED: I understand.

[17] THE COURT: Okay. There will --

[18] MR. MCWHINNIE: The probation officer seems to have anticipated that, Your Honour. If you look to page 11 of her report she included a set of proposed terms, and so she may have given you the tools to go where you now want to go.

[19] THE COURT: Thank you. So there will be a sentence on the single count of six months in prison to be followed by a probation order of 18 months on the following terms and conditions. The statutory terms, those are terms I am required by law to include in each and every probation order, are:

1. That you keep the peace and be of good behaviour and that you appear before the court when required to do so by the court;
2. That you 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;
3. That you report to a probation officer immediately upon your release and thereafter when and in the matter directed by the probation officer;
4. That you 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;
5. That you not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
 6. That you take such alcohol and drug assessment, counselling and programming as directed by your probation officer;
 7. That you take such other assessment, counselling and programming as directed by your probation officer;
 8. That you participate in such educational or life skills programming as directed by your probation officer; and
 9. That you provide your probation officer with consent to release information with regard to your participation in any programming, counselling or educational activities that you have been directed to do pursuant to this order.

Any issues with respect to the conditions?

[20] MR. MCWHINNIE: Nothing, Your Honour.

[21] MR. COFFIN: No.

[22] THE CLERK: Your Honour, was it your intention to include or not include the employment?

[23] THE COURT: Not included, because he is going to be going to school and I am not certain when that program will end in relation to the order. So we will leave it with education at this point with the assumption that when the programming

is finished it will lead to, hopefully, employment.

[24] So that is the trade off, Mr. Germain, less time in custody so you can still go to school, but you are going to have 18 months that you have to focus on addressing your alcohol problem.

[25] THE ACCUSED: Thank you.

[26] THE COURT: Seriously addressing your alcohol problem. So while you are in custody, start thinking about how you are going to do that. There is programming out there available; you need to access it. Your probation officer will assist you in directing you to certain things but you have got to start preparing for it.

[27] Given that he is going into custody, any submissions on the victim fine surcharge?

[28] MR. MCWHINNIE: Nothing, Your Honour.

[29] THE COURT: Okay, I will waive it and --

[30] MR. MCWHINNIE: The driving prohibition?

[31] THE COURT: Sorry?

[32] MR. MCWHINNIE: The driving prohibition? Did you mention it?

[33] THE COURT: Oh, thank you, thank you. Any submissions on the driving prohibition, Mr. Coffin?

[34] MR. COFFIN: No, it -- I would ask that there be an Interlock

recommendation.

[35] THE COURT: I believe with the amendment to the section I am not required to do that anymore.

[36] MR. COFFIN: Well, except that this is prior to the amendment --

[37] THE COURT: Oh, this one is prior, thank you, yes.

[38] MR. COFFIN: -- and so we don't want to get into the argument --

[39] THE COURT: Fair enough.

[40] MR. COFFIN: -- of the issue of whether it's retrospective.

[41] THE COURT: Whether that particular issue falls under the old or the new provisions, fair enough, and thank you for the reminder.

[42] There is going to be a driving prohibition of four years, given your driving history, and I will, however, make the recommendation that you be entitled to make application to participate in the Interlock program. What is the time frame we are looking at?

[43] MR. MCWHINNIE: I believe it is one year, Your Honour.

[44] THE COURT: Okay.

[45] MR. MCWHINNIE: Yes, it is 12 months.

[46] THE COURT: Okay, thank you, within 12 months. Anything further?

[47] MR. COFFIN: No, thank you.

[48] THE COURT: I think that covers everything.

[49] MR. MCWHINNIE: Count 1 should be stayed.

[50] THE COURT: Thank you.

RUDDY C.J.T.C.