

Citation: *R. v. Holbein*, 2017 YKTC 69

Date: 20171013  
Docket: 17-00186  
16-00194A  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before Her Honour Chief Judge Ruddy

REGINA

v.

BYRON RONALD HOLBEIN

Appearances:

Leo Lane  
Amy Steele

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCE**

[1] RUDDY T.C.J. (Oral): Byron Holbein is before me for sentencing in relation to five counts to which he has entered pleas of guilty. They basically cover two separate incidents almost exactly a year apart involving impaired driving-related offences.

[2] The first two offences occurred June 18, 2016. At that time, Mr. Holbein was subject to a probation order requiring him to keep the peace and be of good behaviour. There is an alleged breach to which he has entered a guilty plea for having failed to keep the peace and be of good behaviour in relation to his having committed a substantive criminal offence of driving while the concentration in his blood exceeded the legal limit.

[3] He was brought to the attention of a conservation officer in the Haines Junction area by another motorist, who had observed some fairly egregious driving that suggested that Mr. Holbein was intoxicated.

[4] Mr. Holbein and another individual were in a vehicle he was driving. He was drinking while driving. There was swerving, speeding, and some other indicators of problematic driving.

[5] The conservation officer found the truck and initiated a stop. Indicia of impairment were noted, including problems with balance and slurred speech. This was confirmed by the RCMP member who then attended.

[6] Ultimately, breath samples were given, with the lowest being 220 mg%, well beyond the statutory aggravating limit and significantly beyond the minimum limits set out in the *Criminal Code*.

[7] Mr. Holbein was released on a recognizance, which included a condition that he abstain absolutely from the possession or consumption of alcohol.

[8] On June 16, 2017, two different motorists brought Mr. Holbein to the attention of the Teslin RCMP, again, with respect to him being a possible impaired driver. The driving was probably even more egregious in the second set of circumstances, Mr. Holbein, than the first.

[9] There is a video that confirms some of it: the passenger's review of the experience of driving with you while you were consuming alcohol; the clear indicators that you were extremely intoxicated while driving, which included passing over a solid

yellow line, drifting within the lane; and, most importantly, driving for periods of time in the wrong lane altogether.

[10] There was extensive driving as it appears that Mr. Holbein had driven to Whitehorse and back to Johnson's Crossing. He missed Johnson's Crossing on the way back. He then made his way to Teslin, where he was brought to the attention of the RCMP. A further investigation led them to Johnson's Crossing and, ultimately, to Mr. Holbein.

[11] There is more than enough evidence from all of the individuals to indicate that Mr. Holbein was extremely intoxicated while he was driving. He is most fortunate that no one was hurt or killed as a result of his driving. He was ultimately charged just with impaired driving because of the way the investigation unfolded. It simply was not possible for the RCMP to then pursue a charge of over 80, as it was some time later that he was located in his trailer at Johnson's Crossing.

[12] When Mr. Holbein was arrested, it was also noted that he was extremely belligerent and uncooperative, including him making a number of comments that were or could be taken to be threatening in nature and a couple that clearly were threatening in nature.

[13] Mr. Holbein has entered a plea with respect to an uttering threat charge, as well.

[14] Mr. Holbein comes before the Court with a lengthy criminal record dating back to 1991. There are, of particular interest, two prior related impaired driving offences: one in 2002 and the other in 2008. Other charges on it include breaches and offences of

violence. As defence counsel has pointed out, his longest sentence appears to have been 131 days. His record is clearly reflective of his long-standing problem with alcohol. While there do appear to be a number of assaults on his record, the sentences suggest that they were perhaps at the lower end of the range, in terms of the level of dangerousness of his behaviour.

[15] The dilemma for me today is what the appropriate sentence is.

[16] The Crown has filed notice in relation to the first of the two impaired driving offences. There is no question about the sentence in relation to the first of the two impaired driving offences. By law, I am required to impose a four-month term.

[17] The question is: What do I do with everything else?

[18] Crown is suggesting that a global sentence of 12 months is appropriate, in all of the circumstances, particularly given his record and the particularly egregious nature of the driving that occurred in the impaired driving offences that are before the Court today. The breakdown for that would be four months, with a concurrent 30-day term for the breach on the first impaired driving offence, with a six-month consecutive term on the second impaired driving offence, and with two 30-day consecutive terms for the s. 145 offence and the uttering threats that are connected to that offence.

[19] Crown is also suggesting that I add 18 months of probation to the end of the sentence, which would have terms both intended to protect the safety of the public, but also to support ongoing rehabilitation.

[20] Mr. Holbein's counsel is suggesting a sentence which would effectively amount to time served — he has done what would be credited at six months in pre-trial custody — followed by a probationary term that would be rehabilitative in nature.

[21] I have a fair amount of information before me about Mr. Holbein's background and circumstances. They include indicators of a difficult childhood.

[22] It appears that, from a socioeconomic standpoint, Mr. Holbein, who was adopted, was provided all of the necessities. His mother appears to have been supportive. His father appears to have been significantly stricter and physically abusive, in terms of the punishments that were doled out.

[23] Mr. Holbein also appears to have had significant difficulties at school and was subjected to a significant amount of bullying.

[24] Thirdly, and perhaps most importantly in terms of the impact on the issues that he has since developed, Mr. Holbein was subjected to sexual abuse at the hands of a family friend when he was quite young.

[25] The report describes what has been a largely itinerant lifestyle. Mr. Holbein has since developed a long-standing and significant problem with abusing alcohol. That is clearly reflected in his record. He has clearly never had significant periods of sobriety that he has been able to maintain in the past.

[26] Mr. Holbein has moved primarily around Ontario before moving to the Yukon three years ago. His employment history is similarly itinerant in nature. He appears to have held down a number of positions for short periods of time.

[27] He has been in custody since the second of the two offences, as I said, and would be entitled to credit, at 1½:1, of six months in pre-trial custody. He has, while in pre-trial custody, done a number of things which are certainly to his credit.

[28] Mr. Holbein has participated in counselling with Psychologist, Nicole Bringsli. He has found an AA sponsor and has been meeting regularly with his AA sponsor. He has sought and obtained support from FASSY, and his FASSY worker has attended to support him today. He has found support through Blood Ties, as well, in relation to a Hep C condition that he suffers from.

[29] Mr. Holbein has attended for programming, including completing three different programs: the Making Empowering Decisions — I do not think that is the exact title, but it is something along those lines; the Violence Prevention Program; and the Relapse Prevention Program. He has also been participating in Yukon College courses offered, including WHMIS and the Transportation of Dangerous Goods.

[30] There are support letters from a number of the related agencies and individuals that have been working with him. He has certainly reached out for support.

[31] Mr. Holbein has also discovered, while in custody, that he has some artistic talent. He has brought a number of pieces of his artwork here today to show me. It is quite evident, Mr. Holbein, that you do have significant artistic talent. Hopefully that is something, on a go-forward basis, that you will find becomes of assistance as you are trying to manage your sobriety and your other long-standing issues.

[32] Defence counsel has made a number of arguments about totality in response to the position taken by the Crown and whether that position would be one that could properly be characterized as unduly harsh or disproportionate from a totality standpoint.

[33] In my view, looking at it from a totality standpoint, I do not know that the position being put forward to the Crown when the focus is on denunciation and deterrence would be one that someone would describe as unduly harsh or disproportionate, in all of the circumstances. Denunciation and deterrence is often the focus of impaired driving sentences, particularly because of the threat that impaired drivers represent to the safety of the public on the roads.

[34] In this particular case, the driving clearly indicates that there was significant risk created, and we are very fortunate not to be dealing with a much more serious outcome.

[35] The real question in my mind is whether the appropriate term in custody ought to be reduced somewhat in deference to the principle of rehabilitation in this particular case. There does need to be a custodial response, Mr. Holbein. Because of the impaired driving, because of the danger you have created, there needs to be some jail.

[36] The question is whether you have already done enough and whether or not the steps you have taken towards your rehabilitation are enough to persuade me that I ought to reduce what is an otherwise not unreasonable proposal by the Crown, in terms of custody, whether I ought to reduce that to support your rehabilitation.

[37] Two things satisfy me that it is appropriate to do that and to give you that chance.

[38] The first is the number of steps that you have already taken. I am satisfied, based on what I have read in the report, that you have not had an extensive history of being given opportunities to take advantage of supports and programming to try and address your issues. That may well reflect the type of lifestyle that you have lived, but you appear to have reached out to those supports now. You have attended programming. Indicators are that you have been an active participant and that you have been benefiting from it. The aforementioned persuades me to give you the benefit of the doubt, in terms of the prospects for rehabilitation.

[39] In other circumstances, even making allowances for reducing the custodial term somewhat to promote rehabilitation, I would have, nonetheless, imposed a bit more custody to allow for a transition but for the second fact that I find persuasive, which is the availability of a bed today at ADS and the willingness of Ms. Lakowicz and Mr. Holbein's FASSY worker to take him from here to there, to take him to get his stuff, to get him to ADS, and to get him installed there. He has the bed. Programming starts on the 18th. We have confirmation that he can stay in the pre-treatment bed until treatment starts. The expectation is treatment will be about 90 days.

[40] I effectively have a period of time where his movements are going to be restricted and where he is going to be subject to some significant rules in ADS while getting programming that allows for the kind of transition that I think would have been necessary and that I might well have imposed more custody for.

[41] Because of the work that has been done by Mr. Holbein and the supports around him, I think that it is appropriate, in these unique circumstances. As I said, I do not think

the custodial range the Crown is looking at, in and of itself, for the offences committed is inappropriate. I simply think that the plan that has been put in place and Mr. Holbein's efforts while in custody towards his rehabilitation are sufficient to persuade me, in these unique circumstances, to give him the chance to pursue his rehabilitation.

[42] That being said, I think that there needs to be a lengthy probationary term to support rehabilitation.

[43] On the s. 253(1)(b) offence arising on June 18, 2016, there will be a sentence of one day being served by your attendance in court today. I am crediting you four months of the time you spent in pre-trial custody as against that offence because I am required by law to impose four months in relation to that offence.

[44] With respect to the accompanying breach, I am satisfied that one day being served by your attendance in court today is sufficient. It is a keep the peace breach. It is an aggravating fact that you were on probation at the time. I do not think your record needs to reflect more than that.

[45] With respect to the second of the impaired driving-related offences on June 16, 2017, again, your sentence will be one day being served by your attendance in court today. I am going to credit you for the two remaining months spent in pre-trial custody on that offence.

[46] On the breach, I might normally have done a one day deemed served as well, because it is an abstain breach with somebody with a serious alcohol issue, but in this case it was an abstain breach where you got behind the wheel of a vehicle, and I view

that somewhat more seriously. I want his record to reflect that I am crediting him concurrently for 30 days.

[47] Regarding the s. 264.1 charge, I want the record to reflect concurrent two months in pre-trial custody. While at the lower end, there is, nonetheless, a fairly extensive history of assaultive behaviour. I do think that is the appropriate sentence for the record to reflect. I am making it concurrent because I think it is appropriate to support his rehabilitation, given the work that has been done.

[48] These sentences are to be followed by a probationary period of two years, as I think an extensive period is required to support Mr. Holbein's rehabilitation.

[49] The terms of the probation order are going to be, Mr. Holbein, that you:

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. Have no contact directly or indirectly or communication in any way with Gordon Sinclair, Whitney Horne, Theresa O'Brien, Patrick O'Brien, and/or Jamie Hutton;
5. Remain 25 metres away from any known place of residence, employment or education of those same five individuals;

6. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the court;
7. Report to a Probation Officer immediately upon your release from custody, and thereafter, when and in the manner directed by the Probation Officer;
8. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;

[50] For the purposes of this decision, my expectation is that, for the next few months, you are going to be residing at ADS. After that, the intention is for you to reside in your trailer on the property of your AA sponsor. This should be relayed to your Probation Officer. It is certainly my expectation that that is what is going to happen.

9. Not attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
10. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues:

alcohol abuse,

psychological issues, and

any other issues identified by your Probation Officer,

and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

11. Participate in such educational or life skills programming as directed by your Probation Officer and provide your Probation Officer with consents to release information in relation to your participation in any programs you may have been directed to do pursuant to this condition;
12. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;
13. Not be outside of your place of residence when under the influence of alcohol.

[51] What that means is — and ADS is not going to let you drink, so for the next few months, you effectively cannot drink because you are going to be at ADS. But when your trailer is on the property, you need to still be shooting to be sober. However, should you slip, you must remain in the trailer.

[52] In the circumstances of this case, Mr. Holbein, the term of the driving prohibition that I am going to impose is five years. It will be three on the first and five concurrent on the second.

[53] It is not an offence to be an alcoholic. It is an offence to drink and get behind the wheel of a vehicle, so you cannot be driving. Unless and until you get to a point where you are stable and sober for the long term, you should not be driving.

[54] I am satisfied that that is necessary in terms of ensuring the safety of the public.

[55] That leaves me with the question of DNA. It is a secondary designated offence for DNA. Crown is suggesting in this particular case it would be appropriate. I suspect, quite frankly, looking at his record, it has probably already been ordered in relation to his last conviction, but even if it has not, there is nothing particularly compelling on these circumstances that suggest that a DNA order would be necessary or appropriate, or of significant assistance from an investigatory standpoint in the long term. I would decline to make that order.

[56] I am required to impose victim surcharges: \$100 on each of the five counts, amounting to \$500 total. You will have 12 months' time to pay. If you experience difficulty during that 12-month period, you can ask to bring it back and seek an extension of time to pay.

[57] You will need to attend before the court for a review of your probation order in four months' time.

[58] The review will be held on February 9, 2018 at 9:30 in whatever circuit point I am in.

[59] There will also be a condition that if you leave the ADS residential treatment facility at any time before treatment is completed, you are to immediately notify your Probation Officer. My expectation is that is not going to happen. However, if you do, then it is imperative that you immediately notify your Probation Officer.

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RUDDY C.J.T.C.