

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

TREVOR HUNZIKER

Appearances:

Leo Lane

Malcolm E.J. Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM J. (Oral): Mr. Trevor Hunziker has pleaded guilty to the offence of driving while disqualified, contrary to s. 259 of the *Criminal Code*.

[2] The fact pattern is straightforward, as Mr. Hunziker drove a motor vehicle in downtown Whitehorse on the afternoon of February 8, 2016. The issue of an appropriate sentence is complicated by the fact that Mr. Hunziker is a serious recidivist.

[3] The Crown has proceeded by way of indictment. The Crown seeks a sentence of 27 months' imprisonment and a five-year driving prohibition. The Crown refers to the fact that Mr. Hunziker's last convictions for offences of this nature resulted in significant jail sentences. The Crown argues that the step-up principle, which sees sentences

increased in moderation, is only applicable where there is a prospect of rehabilitation.

The Crown submits that in this matter, past history reveals that Mr. Hunziker is incorrigible and, as such, a large increase in penalty is appropriate.

[4] Defence argues that a six to eight month term of imprisonment is more appropriate. The defence submits that the circumstances of this offence are at the lower end of the scale. It is argued, as well, that Mr. Hunziker has been taking some steps to rehabilitate himself.

[5] Mr. Hunziker is 46 years of age. He is single with no dependents. He has lived in Whitehorse since he was a young child. He comes before the Court with a criminal record that is comprised mainly of driving offences, namely for drinking and driving and for driving while disqualified. He has been convicted of four drinking and driving offences, the last in 2011 for which he was sentenced to seven months' imprisonment and a five-year driving prohibition. He has been convicted of 11 driving while disqualified offences, with his last two convictions in 2014. Mr. Hunziker received concurrent 16-month jail terms for these 2014 convictions, plus a six-year driving prohibition. Mr. Hunziker has a significant history under the *Motor Vehicles Act*, RSY 2002, c. 153, although the frequency of convictions has diminished somewhat over the years.

[6] In looking at the principles of sentencing, the codified principles of sentencing are found at ss. 718 to 718.2 of the *Criminal Code*.

[7] The fundamental purpose of sentencing as set out in s. 718 is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions.

[8] The objectives of those sanctions include: denouncing unlawful conduct; deterring the offender and others from committing offences; separating offenders from society where necessary; assisting in rehabilitating offenders; providing reparations; promoting a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

[9] Section 718.1 of the *Criminal Code* states:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[10] Proportionality ensures that a sentence reflects the gravity of the offence. The Supreme Court of Canada, in *R. v. Ipeelee*, 2012 SCC 13, has stated that this is closely tied to the objective of denunciation. The proportionality principle also addresses the moral blameworthiness of the offender by ensuring that the sentence does not exceed what is appropriate. (*Ipeelee*, para. 37)

[11] As outlined in *Ipeelee* and *R. v. Gladue*, [1999] 1 S.C.R. 688, the Court must impose a sentence that fits the offence, the offender, the victim, and the community. Sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender. (*Ipeelee*, para. 38, *R. v. M.(C.A.)* [1996] 1 S.C.R. 500, para. 92)

[12] A review of the sentencing case law in this area reveals a wide range of sentences. The maximum penalty for driving while disqualified is a term of imprisonment of five years. The maximum sentence was increased from a period of imprisonment of two years in 1999.

[13] In addition to the numerous cases filed by counsel, I have reviewed other decisions, including the decision of *R. v. Billard*, 2011 NSPC 31. It includes a helpful review of driving while disqualified sentencing decisions. I have borrowed a number of the case summaries, specifically:

- *R. v. Cooper*, 2008 CarswellOnt 7388 (Ont. Ct. Justice) where:
 - an older (age not specified) offender was sentenced to 12 months in custody for driving while disqualified. Mr. Cooper had seven prior convictions for driving while disqualified.
- *R. v. Drake*, 2010 NLTD 82:
 - a 52-year-old offender was sentenced to 12 months imprisonment for driving while disqualified. Mr. Drake was on a ten-year driving prohibition imposed in 2007 when in 2009 he was stopped by police. He had eight prior convictions for impaired driving and a prior conviction for driving while disqualified. The Court noted that none of Mr. Drake's previous sentences appeared to have deterred him and emphasized specific deterrence and protection of the public as "Mr. Drake has a propensity for driving motor vehicles while he is under the influence of alcohol."
(*paragraph 19*)

- *R. v. Hindmarch*, 2010 BCSC 1257:
 - a 30-year-old offender was sentenced to 21 months (less remand time) for driving while disqualified. Mr. Hindmarch had 56 prior convictions, including three for driving while disqualified, four for dangerous driving and three impaired or over .08. He also had eight convictions for breach of bail or probationary conditions.

- *R. v. Kakakaway*, 1998 CarswellSask 613 (Sask. C.A.):
 - the Saskatchewan Court of Appeal substituted a term of imprisonment of two years less a day instead of a conditional sentence for a conviction for driving while disqualified. The 30-year-old offender had a lengthy prior record that included eight over .08 convictions and eleven convictions for driving while disqualified.

- *R. v. Melanson*, 2009 NBCA 41:
 - the New Brunswick Court of Appeal substituted a term of imprisonment of 14 months for a conditional sentence in the case of a 52-year-old offender who pleaded guilty to driving while disqualified. Mr. Melanson had four prior convictions for driving while disqualified. The Court noted that: "Mr. Melanson is a mature offender. The underlying charge involves a conscious violation of a court order."
(*paragraph 15*)

- *R. v. Pilgrim*, 2009 BCCA 444:
 - an offender (age not specified) was sentenced to 18 months' imprisonment (less remand time) for driving while prohibited. The BCCA did not disturb this sentence. Mr. Pilgrim had a significant criminal record including two convictions for dangerous operation of a motor vehicle (one incident causing bodily harm), and one conviction for failing to provide a breath sample. He was in breach of two driving prohibitions.

- *R. v. Taylor*, 2008 YKCA 1:
 - the Yukon Territorial Court of Appeal upheld a 61-year-old offender's eight-month sentence for driving while disqualified on two consecutive days. This was Mr. Taylor's second conviction for driving while disqualified. He was in the last year of a 10-year driving prohibition imposed on conviction for impaired driving causing death in 1997. He had a record of four drinking and driving prohibitions prior to 1997. He had had no criminal convictions since 1997. There was no allegation of bad driving; the Court held: "Generally speaking, driving prohibitions must be obeyed and breaches sanctioned in a meaningful way." (*paragraph 10*)

[14] I also consider the case of *Boillard c. R.*, 2010 QCCA 2260, which involved an offender who was close to 50 years of age. He had eight prior drinking and driving convictions and five prior driving while disqualified offences. The Court noted that the offender was within 15 days of the expiration of his driving prohibition when the offence occurred. The Court also found that the offence in question had not put the public at risk, that there had been no speeding, and that there was no suggestion that the offender had consumed alcohol. The offender demonstrated a certain amount of rehabilitation. The Court upheld an 18-month term of imprisonment and a two-year driving prohibition.

[15] In *R. v. Hanna*, 2013 ABCA 134, the Court dealt with the sentence appeal of an appellant who had been found guilty of dangerous driving, driving while disqualified, and two breaches of recognizance. He was 55 years of age and had a lengthy criminal record, including eight convictions for dangerous driving, 12 convictions for driving while disqualified, and two convictions for flight from police. The Court of Appeal found that the appropriate sentence for driving while disqualified was one of three and one-half years' imprisonment.

[16] The same Court, in *R. v. Virani*, 2012 ABCA 155, upheld the sentence of 12 months' imprisonment and a two-year driving prohibition for the driving while disqualified offence. The probationary term attached to the jail sentence was increased from two to three years. The offender had 10 related prior convictions, as well as other driving offences. The offender had "significant challenges", including "mental and personality disorder difficulties."

[17] The defence has also included the decision of *R. v. Johnnie*, 2009 YKSC 42, in which the offender was sentenced for driving while disqualified; impaired driving; failing to stop his vehicle while being pursued by police; and a breach of probation. Mr. Johnnie, who was 52 years of age, had endured an abusive and unenviable upbringing. His criminal record included 69 convictions, including 11 convictions for drinking and driving type offences and 13 convictions for driving while disqualified. The Court sentenced him to two years less a day imprisonment for the impaired driving charge; eight months consecutive for the driving while disqualified; eight months consecutive for the fleeing from police; and eight months concurrent for the breach of probation charge. This amounted to a global sentence of 40 months.

[18] The defence points to the eight-month jail sentence for driving while disqualified for an offender with a more serious driving record than Mr. Hunziker. However, it is important to remember that this eight-month term formed part of a significant global sentence for a number of offences that arose out of the same incident.

[19] Mr. Hunziker's prior related criminal history — specifically his driving history — is the most aggravating factor in this matter. It might best be described as atrocious.

[20] Mr. Hunziker has taken responsibility for the offence by way of his guilty plea. He was cooperative with the police at the time of his arrest.

[21] In terms of efforts to rehabilitate himself generally, he submits that he was beginning efforts to register in the Alcohol Ignition Interlock Device Program prior to his arrest in order that he could legally operate a motor vehicle. He also indicates he has not consumed alcohol in three years. There is no formal confirmation or corroboration of this. However, I am advised that he has taken two substance abuse management programs. The first occurred during his 2014 jail sentence and the second occurred recently while on remand awaiting sentence.

[22] Mr. Hunziker has displayed an attitude of contempt, with respect to driving prohibitions put in place to protect the community. His actions detract from the confidence the public should have in the judicial system. As he amassed convictions for driving while disqualified and drinking and driving offences, relatively lenient sentences of incarceration were not sufficient to deter his behaviour. Much more substantial jail sentences in 2014 for two driving while disqualified offences also failed to deter him. At that time, the sentencing judge warned him he would likely face higher penalties if he continued to offend. At the time of the present offence, he was not far along in the six-year driving prohibition. He has presented no evidence to minimize the circumstances of the present offence.

[23] The bottom line is despite other alternatives — for example, taking a taxi or calling someone for a ride — he made a conscious decision to drive a company vehicle, yet again ignoring an order of the Court prohibiting him from driving.

[24] I find that his moral culpability for this offence is high. Mr. Hunziker has not come to the realization that he has no other choice but to abide by this court order.

[25] At the same time, I do not find that rehabilitation is completely out of the question for Mr. Hunziker. Based on what has been submitted on his behalf, it may be that he is developing some insight into his issues.

[26] Nonetheless, his conduct must be denounced and he must be deterred from his chronic and flagrant breaches of driving prohibitions.

[27] In all the circumstances, the appropriate sentence is one of 20 months' imprisonment. Giving him credit for four months of pre-sentence custody, 16 months remains to be served. Additionally, there will be a five-year driving prohibition.

[28] The \$200 victim surcharge is payable forthwith.

CHISHOLM T.C.J.