

Citation: *R. v. Johnnie*, 2009 YKTC 48

Date: 20090428
Docket: 08-00441A
Registry: Whitehorse
Heard: Pelly Crossing

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

DARREN JOHNNIE

Appearances:
Ludovic Gouaillier
Gordon Coffin

Counsel for Crown
Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Darren Johnnie has entered a guilty plea of having committed an offence under s. 253(1)(b) of the *Criminal Code*.

[2] The circumstances are that on August the 1, 2008, RCMP responded to a complaint that Mr. Johnnie was driving in Pelly Crossing while intoxicated. They located Mr. Johnnie backing out of a residence at somewhat of an angle that appeared to be inconsistent with the driveway he was backing out of. There were a group of people near the car, including children.

[3] Mr. Johnnie was approached by RCMP officers who noticed symptoms of intoxication and arrested him. Once at the detachment he provided breath samples of

270 and 260 milligram percentile.

[4] Mr. Johnnie comes before the Court with a criminal record that includes convictions for impaired driving offences in 1992, for which he received an \$800 fine and one year prohibition from driving; 1993, for which he received 21 days in jail and a one year driving prohibition; 1998, for which he received 90 days in jail and a one year driving prohibition; and again in 2003, for which he received four months in jail and a three year driving prohibition.

[5] Crown has proceeded by indictment and has not filed notice.

[6] When this matter was before the Court on March 3, 2009, a pre-sentence report had been prepared. The pre-sentence report in many aspects is a very positive report. Mr. Johnnie was raised in a home that did not have drinking and violence and he experienced the traditional lifestyle of his First Nation. He has been in a stable relationship for a significant number of years and has three children, one of whom is five months of age. The other two children were the children of his partner from previous relationships. He has an education which indicates he completed up to Grade 11, which I am not sure includes Grade 11 or is Grade 10, neither of which particularly matters.

[7] He has had solid employment for the past four years with the operation and maintenance department within the Selkirk First Nation and is seen as a good employee. A letter has been filed to that effect. The only negative in his employment history is in February of this year when he was suspended for one week for drinking, which I note is after this offence took place and after the birth of his five-month-old, at

that time, child. I also note that this was simply weeks before he was to be sentenced for this charge, and while one of the indicators of stress in his life is his concern about the court process, it would appear that rather than doing what one would expect if someone wished to come before the Court and present the most favourable position possible, which is clearly abstaining from drinking, is indicative of a failure to do so properly in dealing with stress the wrong way.

[8] That said, he has continued after that week to work with his employer, which again is significant with respect to their opinion of him as a good worker. His partner, Ms. Baker, has been completely sober for over two years and there is indication she will not tolerate his drinking. In fact, she attempted to stop him from driving on the day in question, for which he has now been convicted. She has also indicated that if he does not stop drinking she will leave him.

[9] He has had a number of deaths in his family in the last two years for which he has not received any grief counselling or other counselling.

[10] Mr. Johnnie acknowledges that alcohol has been a significant, long-time problem for him. He has attended treatment twice, once in 2001 and again in 2007.

Notwithstanding these attendances at treatment he has not been able to maintain his sobriety. There is an indication this may be in part because aftercare has not been available.

[11] He shows a substantial level of problems related to alcohol abuse in the Problems Related to Drinking self-reported assessment.

[12] He is indicated to be a polite, intelligent man who is very honest about his drinking problem, who appears to feel bad that he was caught drinking and driving, and who feels remorse that his family may suffer due to his actions.

[13] At the time that this report was prepared, the writer of the report could not support a community disposition to what still appeared to be an inability to control his drinking even after his arrests and some pro-criminal attitudes towards drinking and driving.

[14] Mr. Johnnie has just completed a program at Alcohol and Drug Services. This is a residential program that went from March 29th to April 24th, which is the most significant change since this matter was originally set for disposition and the pre-sentence report had been prepared.

[15] Crown counsel is suggesting that a range of sentence of six to nine months would be appropriate as straight incarceration, pointing to the aggravating factors of the readings which, of course, are over three times the legal limit, and the fact that there were children nearby, and the criminal record of Mr. Johnnie. Crown did note that there was nothing in the driving itself that actually put anyone at any risk that was observed. However, I note that at any time an individual gets behind the wheel of a vehicle and drives, there is a risk and what that risk would have been had he actually got out of the driveway and begun to drive, we do not know.

[16] Crown, however, in light of all the positives in the pre-sentence report and the fact that there has been this attendance at the residential treatment program, is not opposed to the sentence being served conditionally. It is noted that the RCMP advised

the Crown that Mr. Johnnie is not a problem in the community except at those times when he drinks and it comes to their attention, in particular, through his driving.

[17] Defence counsel takes no issue with the range but also submits that a conditional sentence would be appropriate in these circumstances, pointing out Mr. Johnnie's willingness to continue on the programming that he has done including attendance at the Tele-Health conferences with AA every week and pointing to all the very positive things in Mr. Johnnie's life.

[18] Conditional sentences for impaired driving offences can certainly be appropriate, and they can meet the issues of general deterrence and denunciation, as well as specific deterrence, that are at the forefront of the consideration of the Court when imposing sentences for crimes like this that so randomly bring devastation into the lives of people in the communities, whether they be those people connected to or friends of the offender, or innocent people on the street who happen to be in the wrong place at the wrong time when an impaired driver comes forward.

[19] Parliament has increased the penalties for impaired driving offences as of July 2008, indicating the continued seriousness with which Canadian society treats the offence of impaired driving. As I have said before when looking at the range of sentences that are appropriate for impaired driving offences, that a distinction can be drawn between those offences that took place prior to these amendments and those offences that took place afterwards when assessing what the appropriate range is.

[20] Mr. Johnnie has a lot of positive things going in his life. He has support from his family and a family that does not drink alcohol. He has support from his employer. He

has skills, he has abilities. These have not, up to the date of this offence, or even up to February of this year, been enough to allow him to maintain his sobriety to the extent that he would need to do if a conditional sentence were to be imposed. That said, the successful completion of this 28-day residential program and his acknowledgement and recognition of the serious position he finds himself in today allows me to be satisfied that the sentence I am going to impose can be imposed conditionally in the community.

[21] I have confidence that Mr. Johnnie has come to a watershed in his life and recognizes that, and the occasion in February when he clearly was having a problem enough to cause his employer to suspend him may well, in light of what I have read in this report, been sort of a last wrongful response to the stressful situation he found himself in, and the concerns he had coming up with sentencing on March 3rd and that should he find stress in his life again, that is not a choice he will make, to go and drink alcohol. Because my concern in his drinking alcohol, in relation to this offence, is that he will drive. I am satisfied that he has been deterred enough at this point in time that he is going to take the conditional sentence I am going to impose very seriously and that he understands the consequences.

[22] There will be a conditional sentence. The length of the sentence will be nine months. The terms will be:

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 report to a supervisor immediately and thereafter when required by the supervisor and in the manner directed by the supervisor;

4. To remain within the Yukon Territory unless you have written permission from your supervisor and to notify the supervisor in advance of any change of name or address and promptly notify your supervisor of any change of employment or occupation;
5. To reside as approved by your supervisor and to not change that residence without the prior written permission of your supervisor;

What are the work hours for your client, Mr. Coffin? I know that in the communities sometimes the hours are not completely predictable.

[23] MR. COFFIN: 8:30 'til five.

[24] THE COURT: Monday to Friday?

[25] MR. COFFIN: Monday to Friday.

[26] THE COURT:

6. To remain within your place of residence at all times except for the purposes of employment, including travel directly to and directly from your employment. You are to provide your supervisor with a notice in writing of what your employment hours are and the time it will take to go to your place of employment and return. You are otherwise allowed to be outside your place of residence with the prior written permission of your supervisor. You must present yourself at the door or answer the telephone during reasonable hours for checks to ensure that you are complying with this condition. Failure to do so will be a presumptive

breach of this condition;

The purpose behind this, this is a jail sentence, but it is a sentence that recognizes the value you are to your family, to your employer and the positives that these bring into your life that will enable you to continue to serve your community, continue to serve your family and find the strength you need in yourself to not drink in the future. It allows you to work and it allows you to do things other than work if your supervisor gives you permission. You need to maintain a good relationship with your supervisor in order to do that. I can say that that term is on for the full nine months but if there is cause to do so, the conditional sentence supervisor, or either Crown or defence, have the ability to seek to relax that condition and that application, if brought forward with positive reports, could be entertained by the Court.

7. To abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances except in accordance with a prescription given to you by a qualified medical practitioner;
8. Not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
9. To take such alcohol assessment, counselling or programming as directed by your supervisor and attend and complete a residential treatment program as directed by your supervisor;

That may well not be necessary, since you have just done one.

10. To take such other assessment, counselling and programming as directed by your supervisor;

I can note that may include grief counselling or other factors.

11. To provide your supervisor with consents to release information with regard to your participation in any programming or counselling that you have been directed to do pursuant to this conditional sentence order.

[27] Any of the terms of that order counsel wishes to address?

[28] MR. COFFIN: No, Your Honour.

[29] MR. GOUAILLIER: No, Your Honour.

[30] THE COURT: There will be a period of probation to follow the order.

Probation will be for nine months as well. The terms of the probation order will be the statutory terms:

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 promptly notify your probation officer in advance of any change of name or address and promptly notify your probation officer of any change of employment or occupation;
4. To report to a probation officer within two working days upon completion of your conditional sentence and thereafter when and in the manner directed by the probation officer;
5. To abstain absolutely from the possession or consumption of alcohol and controlled drugs and substances except in accordance with a prescription given to you by a qualified medical practitioner;
6. Not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

7. To take such alcohol assessment, counselling or programming as directed by your probation officer and attend and complete a residential treatment program as directed by your probation officer;
8. To take such other assessment, counselling or programming as directed by your probation officer;
9. To provide your probation officer with consents to release of information with regard to your participation in any programming or counselling you have been directed to do pursuant to this probation order.

[31] There will be a driving prohibition. The driving prohibition will be for three years, and with respect to the Interlock, I asked this question before and I am not sure what the answer is, whether the Interlock has come into effect, the automatic inclusion of Interlock and if it has retrospective effect prior to when it came into effect?

[32] MR. GOUAILLIER: I think it is procedural so it would apply to all --

[33] THE COURT: It would apply in any event?

[34] MR. GOUAILLIER: -- to all matters.

[35] THE COURT: Do you have any concern about the time that that can be put on? I am going to make it the minimum because notice has not been filed and frankly I have confidence in the individuals that enforce the *Motor Vehicles Act* and enforce that program, that it will do what it is supposed to do, which is not allow him to drive any vehicle when he has been drinking. So that recommendation will take place. I will make the recommendation in any event, in case an issue comes out of

retrospective application or not, that after three months of the driving prohibition, and that starts today, the three years. Whether in fact they make or require you to do anything before you are allowed to drive with an Interlock device is up to them, not up to me, but you need to do what you can there.

[36] The victim fine surcharge is \$100. That will be applied.

[37] Anything further on the probation order or anything?

[38] MR. GOUAILLIER: No. Time to pay?

[39] MR. COFFIN: I would ask two weeks time to pay the surcharge.

[40] THE COURT: Two weeks. I want to have this reviewed on the next circuit. I want to set this for a review. It will be a term of the conditional sentence order:

12. To attend for a review of this order on June 23, 2009, at 11:00 a.m. so that we can see how you are doing between now and then.

[41] THE COURT: Do you have any questions?

[42] THE ACCUSED: [No audible response].

[43] THE COURT: Pardon?

[44] THE ACCUSED: No.

[45] THE COURT: Okay. I wish you the best, Mr. Johnnie, and as you said, it is up to you. Count 1 is a stay of proceedings?

[46] MR. GOUAILLIER: Yes.

COZENS T.C.J.