

Citation: *R. v. McLeod*, 2010 YKTC 146

Date: 20101206
Docket: 10-04302
10-00249
Registry: Whitehorse

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

REGINA

v.

PHILLIP GERALD MCLEOD

Appearances:
Kevin Komosky
Christine Badcock
Emily Hill

Counsel for the Crown
Agent for the Territorial Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Phillip McLeod is before me for sentencing on three counts contrary to the *Criminal Code*, those being driving while the concentration of alcohol in his blood exceeded the legal limit, driving while disqualified, and taking a motor vehicle without consent.

[2] In addition, he is before the Court for an offence contrary to the *Motor Vehicle Act*, R.S.Y. 2002, c. 153, for driving while disqualified. That particular charge occurred on March 28, 2010, when the RCMP observed Mr. McLeod driving a vehicle and failing to stop as required. He was subsequently charged for driving while disqualified as he was disqualified from holding an operator's licence at that point in time.

[3] The criminal charges occurred on May 29, 2010. There had been a complaint from the Whitehorse Liquor Store that they had denied alcohol to two individuals due to their state of intoxication, and subsequently observed those individuals get into a motor vehicle and leave. That was followed by a complaint from the Kwanlin Dun area regarding a possible intoxicated driver. In both cases, the vehicle was described. Ultimately the police located the vehicle in the McIntyre area travelling at a high rate of speed, estimated at between 90 and 100 kilometres per hour in a 50 kilometre zone. A sharp turn was made into the oncoming lane and then back and, ultimately, the vehicle was pulled over.

[4] There were five persons inside the vehicle; an odour of liquor and an opened can of beer between the two front seats. Mr. McLeod was the driver of the vehicle. The police noted indicia of impairment. He also acknowledged that he had been drinking and did make several admissions at the time that he was arrested. It appears that he was cooperative throughout, ultimately provided two samples of his breath, registering at 170 and 180 milligrams percent.

[5] The police then learned that the vehicle Mr. McLeod had been driving belonged to his niece and that he had taken it without her consent. They also learned that he had previously been prohibited from driving as a result of a prior conviction, which I take to be the one in 2007, for driving while impaired. The prohibition itself had expired but had been followed by a Territorial disqualification. It is not entirely clear to me, when that disqualification would have ended, whether he would have been entitled to get his licence back, but in any event, he did not take any steps to do so.

[6] This raised a question about the applicability of s. 259, which led us to take a brief adjournment from Friday to today to consider that issue. The Crown was kind enough to provide us both with a case out of the Alberta Court of Appeal, with respect to whether or not s. 259 can apply in such circumstances. The ruling in that case is that where there is a section, as there is in Alberta and, indeed, as there is in the Yukon, which, in effect, says that a disqualification continues unless and until such time as an individual takes the appropriate necessary steps to regain their licence, and where the original prohibition was related to a *Criminal Code* driving offence, then s. 259 does apply. That allowed us to proceed today.

[7] Mr. McLeod does come before the Court with a prior criminal record. It is an extensive record, dating back to 1991. He does have a considerable history with the justice system. Of particular concern to me, given the nature of the offences before me, are those which are related to the offence that is before me today, in particular, the conviction for impaired driving in 2007 which was followed by a conviction for driving while disqualified. As is pointed out by the Crown, in the wording of the *Code*, those are both considered to be priors for the purposes of the greater punishment scheme in the *Code*, which would then make the conviction, that is the convictions that are entered today, the third for Mr. McLeod.

[8] Notice of intention to seek greater punishment has been filed. That puts me in a situation, as has been pointed out, in which I must order a minimum sentence of 120 days on the *Criminal Code* offences. Crown is suggesting I consider a sentence in the range of four to six months globally in light of Mr. McLeod's history, and that I consider a three to five year driving prohibition. With respect to the Motor Vehicle charge, there is

a driver's abstract before me; there is a prior related history. Notice of intention to seek greater punishment has been filed with respect to that matter as well, which binds me to sentence Mr. McLeod to a sentence of at least three months in custody, but not more than six months. Crown is suggesting, in this case, three months is appropriate, consecutive to any other term he might be serving.

[9] I have been provided a great deal of information with respect to Mr. McLeod through his counsel and by him. He is a 33-year-old member of the Tr'ondek Hwech'in First Nation. He has had what is unfortunately not altogether an unusual background for individuals that I see commonly in the court, where his early years were characterized by exposure to alcohol and violence and, ultimately, a number of years in foster care. He lost a number of his family members at the age of eight, including his mother and grandparents, and was adopted into a white home. He ultimately ran away at the age of 14, developed issues with alcohol himself, and was homeless, it appears, for a period of time. He also, as is evident by his record, became involved frequently in the criminal justice system.

[10] It appears he has taken more positive steps in the past couple of years. He had been asked to leave the community of Carcross by chief and council. He is now back in the community of Carcross. He is in a relationship with Donna Jones. They share two children, two boys, ages 12 and three. There is information before me that describes Mr. McLeod as being a very dedicated and caring parent, and it was obvious by his comments to me today, about missing his child's birthday, that he is clearly close to his children and concerned about their welfare.

[11] With that in mind, he has taken a number of steps. He has had periods of sobriety. I am advised that these offences occurred during a slip, when he was having difficulty in his relationship. He has, since the offence, been sober. He also has become involved in the community of Carcross as a member of the Carcross/Tagish dance group, and as, first, a student and then a facilitator of the program which includes: the Pursuit of Excellence, the Wall, and the Advancement. I understand that he attended and completed all three of those courses on his own initiative. He then went back to co-facilitate the Pursuit of Excellence and the Wall for other members of the Carcross community.

[12] I have a number of letters before me which speak highly of Mr. McLeod, but which recognize the struggles and issues that he is facing. It is noted that he has strong leadership qualities, and it is evident that he is a good father and an individual with a commitment to his own healing and to addressing his issues.

[13] He comes before the Court now for sentencing. The minimum sentence he could get would be seven months. There are a number of letters before me, as I have said, that speak to him as an individual. Many of those letters also speak, to some extent, to considerations that they would like me to take into account in terms of what the sentence ought to be. One letter asked me to consider community-based options. Another letter asked me to consider the length of sentence. In this particular case, because of the notices of intention to seek greater punishment, I am bound to certain custodial limits and it would not be open to me to consider any of those other options which, I trust, Ms. Hill, you will convey to those that wrote the letters. In any event, we are speaking of a sentence that will have to be at least seven months and somewhere

in the range of seven to nine if I consider the Crown's position with respect to the *Criminal Code* matters.

[14] Mr. McLeod was put in a position, then, where he needed to make a choice as to whether these matters were put off until the new year to allow him to be there for his child's birthday and to spend Christmas with his family, but that, in turn, may have resulted, and likely would have resulted, in his losing an employment opportunity. Last year, it appears that he had his first stable employment position with White Pass, doing track maintenance. He is guaranteed a job in May. If he did not deal with this matter until the new year, he would not have been in a position to take that employment. It is evident to me, from his comments to the Court, that this was an extremely difficult choice for him to make. He ultimately decided that it was important to be in a position to financially care for his family. He spoke to me about the pride that he took last year in being able to do so, in holding down a job with a good salary and good benefits that put him in a position to provide for his family. That was ultimately the choice, as difficult as it was, that he made today.

[15] At the end of the day, I am satisfied, in this particular case, that the minimum sentences that I am bound to apply as a result of the legislation are appropriate. I am satisfied that Mr. McLeod has a commitment to dealing with his issues; he has taken very concrete steps to do so. In addition to what I have already discussed, he is also doing one-to-one counselling with Many Rivers. It is clear to me he has some strong insight into what his issues are and what he needs to do, and some long term potential for not being a frequent visitor to the justice system and the courts in the future.

[16] In those circumstances, I am satisfied that the minimums are appropriate. Here is what I am going to do: On the charge of driving while the concentration of alcohol in his blood exceeded the legal limit, there will be a sentence of four months, or 120 days. Perhaps we should say 120 days, depending on what months are coming up. So 120 days on that. With respect to the drive while disqualified, I am going to make it a concurrent sentence, but because there is one prior and there is clearly a history of driving issues, I am actually going to make it a little bit longer than suggested by the Crown. It is going to be a 60 day sentence, but it will be concurrent to the sentence that you are serving, which means you serve it at the same time. On the take auto without consent, 30 days as well, concurrent. So a total of 120 days for the *Criminal Code* charges.

[17] For the *Motor Vehicle* offence, the Crown's position in putting it in the lower end of the mandatory range, I think, is entirely appropriate in the circumstances. So there will be a sentence of three months with respect to that charge. It will be consecutive to the others, which I am required to do in all of the circumstances. They are separate offences, whereas the other ones all occurred together.

[18] So, Mr. McLeod, you have seven months to be served starting today. I am not of the view that it is necessary to follow that up with probation. I think it will give you a long time to be thinking about whether you want to be missing your children's birthdays in the future and to continue the work you have already started.

[19] Driving prohibition: I am going to make it a four year driving prohibition, in the middle of the range suggested by me, which I think is appropriate.

[20] Victim fine surcharge: While he has had some employment last summer as well as some snow clearing, he is not going to be working for the next few months, so I will waive that in all of the circumstances.

[21] I think that just leaves us with the remaining counts. Mr. Komosky.

[22] MR. KOMOSKY: If the remaining Counts 1 and 5 could be withdrawn, please.

[23] THE COURT: Good. Okay. Thank you. My thanks to counsel for all of your assistance, and my apologies for making what was likely a fairly straightforward matter more complicated, but I appreciate the assistance. Good luck to you, Mr. McLeod.

RUDDY C.J.T.C.