COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Stone,***
2004 YKCA 11

Date: 20040819
Docket: YU490

Between:

Regina

Respondent

And

Martin Stone

Appellant

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine
The Honourable Mr. Justice Thackray

E.B. Cairns — Counsel for the Appellant

K. Drolet — Counsel for the Respondent

Place and Date of Hearing: Whitehorse, Yukon Territory
May 26, 2004

Place and Date of Judgment: Vancouver, British Columbia
Augut 19, 2004

Written Reasons by:
The Honourable Mr. Justice Thackray

Concurred in by:
The Honourable Madam Justice Levine

Dissenting Reasons by:
The Honourable Madam Justice Saunders (Page 11, Paragraph 28)

Reasons for Judgment of the Honourable Mr. Justice Thackray:

[1] This is an appeal by Mr. Stone against that portion of a sentence that imposed a five year driving prohibition.

[2] The appellant, Mr. Martin Stone, was charged and convicted pursuant to s. 253(b) of the ***Criminal Code of Canada*** that on 22 November 2000 he operated a motor vehicle while having in his bloodstream a concentration of alcohol exceeding 80 milligrams per 100 millilitres of blood.

[3] Mr. Stone was released on his own recognizance, a term being that he was not to operate a motor vehicle. On 15 June 2002, before the case came to trial, he was found operating a motor vehicle and charged with breach of recognizance.

[4] Both charges came to trial before Her Honour Judge Maltby on 1 October 2002. Mr. Stone pleaded guilty. In her reasons for sentencing the judge referred to the criminal record of Mr. Stone of five convictions between 1978 and 1997. She noted that this was the sixth time that Mr. Stone had been charged with alcohol related driving offences, the earlier five all resulting in convictions. Further that Mr. Stone had double the allowable level of alcohol in his bloodstream.

[5] The judge expressed concern that Mr. Stone had not learned from earlier convictions and sentences and that he was

a danger to society. In spite of submissions that lengthy incarceration would be especially hard on Mr. Stone's family, the judge, on the over .08 count, sentenced Mr. Stone to nine months incarceration and prohibited him from driving for five years. She sentenced him to three months incarceration, to be served concurrently, on the breach of recognizance.

[6] Counsel for Mr. Stone brought to this Court's attention the facts of this case and branded them as "not unusual." The circumstances were that on 22 November 2000 Mr. Stone was observed by an R.C.M.P. constable to be driving in an erratic manner and that he made a turn without a proper signal.

[7] The appellant exhibited signs of intoxication when he exited his vehicle and admitted to having consumed alcohol. Mr. Stone was taken to the police detachment and provided breath samples. His blood alcohol content was .17%.

[8] Mr. Stone's criminal record was tendered at the sentence hearing. It contained a significant number of convictions that were not related to driving offences and it would appear that they were not considered by the judge in the sentence that she imposed.

[9] The offences and sentences that were considered are as follows:

> 1978 Impaired driving. Sentence: $600 fine and one year probation.
>
> 1984 Driving with a blood alcohol level over .08%. Sentence: $750 fine.
>
> 1984 Impaired driving. Sentence: $600 fine.
>
> 1986 Driving with a blood alcohol level over .08%. Sentence: 3 months incarceration and one year probation.
>
> 1997 Driving with a blood alcohol level over .08%. Sentence 3 months incarceration and a 6 month driving prohibition.

[10] Crown counsel filed a Notice of Intention to Seek Greater Punishment pursuant to s. 255.1 of the ***Criminal Code***. The relevant portion of that section provides:

> … where a court imposes a sentence for an offence committed under this Act by means of a motor vehicle … evidence that the concentration of alcohol in the blood of the offender at the time when the offence was committed exceeded one hundred and sixty milligrams of alcohol in one hundred millilitres of blood shall be deemed to be aggravating circumstances relating to the offence that the court shall consider under paragraph 718.2(a).

[11] Section 259(1)(c) of the ***Criminal Code*** provides that when a person is convicted of an offence under s. 253 of the ***Code*** and has been convicted under that section on at least two previous occasions, there shall be a driving prohibition “of

not less than three years plus any period to which the offender is sentenced to imprisonment.”

[12] The appellant contended that there were a number of factors that should have been taken into account to lighten the sentence. He particularized these as the guilty plea, that it was tendered one year after the offence, that there were no passengers in the vehicle, that there were no injuries and the eleven year hiatus between offences in 1986 and 1997.

[13] Mr. Stone further submitted that the sentence represented an inappropriately large increase from the last related offence. The inappropriateness, according to the appellant, was heightened by the hardship that the driving suspension would have upon him taking into account his life style, his responsibilities and the geographical situation in which he lives. The judge was informed that Mr. Stone was the sole provider for his family, that he has consistently found employment to support his family and that he required a driver’s licence to make the best use of his skills and training in employment.

[14] On behalf of the appellant, defence counsel referred this Court to a significant number of cases that he submitted establish a range of sentence with respect to both branches. He submitted that the sentence does not comply with s. 718.2

of the ***Criminal Code***, i.e., a similar sentence to sentences imposed on similar offenders for similar offences in similar circumstances.

[15] The cases upon which he placed particular emphasis and the sentences are as follows: ***R. v. Gagnon***, 2003 YKTC 89, six months incarceration and a three year driving prohibition; ***R. v. Mullin***, 2003 YKTC 3, nine months incarceration and a 3 year driving prohibition; ***R. v. Charlie,*** 2002 YKTC 86, three months incarceration and an eighteen month driving prohibition; ***R. v. Croswell***, 2002 SKQB 179, six months incarceration and a 3 year driving prohibition; ***R. v. Morisseau*** (3 June 2002), (Montreal Qc., 500-10-002309-027), twelve months incarceration and a 3 year driving prohibition; ***R. v. McLellan***, 2002 BCPC 248, six months incarceration and a three year driving prohibition; ***R. v. Jones***, 2001 BCCA 680, 30 months incarceration and a three year driving prohibition; and ***R. v. MacDonald***, [1997] M.J. No. 415 (C.A.) (QL), two years incarceration and a three year driving prohibition.

[16] It will be seen that several of those cases arose in the Yukon Territory. This was stressed on the issue of consistency. ***R. v. Jones*** is not helpful in that it was concerned with the length of incarceration and involved the driving prohibition only in that it had been overlooked by the

judge. In ***R. v. MacDonald*** the conviction was only the second one and other than that Mr. MacDonald "was a responsible young adult with a family." The Court of Appeal noted that the "usual driving prohibition was for a period of two years" and it reduced the five year prohibition to three years.

[17] As is usual in these cases, the Crown was able to cite several cases wherein the driving prohibition exceeded three years. In ***R. v. Tabor*** the judge imposed a lifetime driving prohibition on the basis that Mr. Tabor was a menace. He had seven convictions for impaired driving but the relevant conviction was for failing to remain at the scene of an accident. This meant that pursuant to the ***Criminal Code*** the maximum driving prohibition was three years. On appeal the Court reduced the driving prohibition to three years but added a concurrent ten year prohibition under the provisions of the ***Motor Vehicle Act***.

[18] Crown counsel also cited the following: ***R. v. Hunt***, [2001] N.J. No. 352 (Nfld. S.C.), incarceration of twenty-six months and a fifteen year driving prohibition; ***R. v. Westerman***, [2002] O.J. No. 1412, (Ont. Ct.), incarceration for 350 days "followed by" a driving prohibition of thirty-six months; and ***R. v. Lacourse***, [2001] O.J. No. 5940 (Ont. Sup.

Ct. of Justice), two and a half years incarceration and a ten year driving prohibition.

[19] In ***Hunt*** there had been five previous convictions since 1985 and Mr. Hunt was an alcoholic who was unwilling to deal with his alcohol problem. In ***Westerman*** the blood alcohol reading was .225% and there had been seven convictions under s.253 of the ***Code***. In ***Lacourse*** there had been ten previous convictions.

[20] I will accept the standard of review urged upon us by the appellant as being that this Court "should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit": ***R. v. M.(C.A.)***, [1996] 1 S.C.R. 500. I am satisfied that the "usual" driving suspension is three years. However, it is clear from the cases that suspensions may well exceed that figure. The issue is if the five year driving prohibition, in the circumstances of this case, is demonstrably unfit.

[21] The issue of repeated offences is a social problem that was recognized by the judge. She specifically noted his previous convictions and Mr. Stone's record of failing to comply with court orders. She expressed concern that "unless the court imposes a penalty that will be a deterrent to you

and to others that you will continue to disobey court orders and that includes prohibitions about driving."

[22] Her Honour Judge Maltby did not lose sight of the circumstances of Mr. Stone and the hardship that the driving prohibition would cause. She expressed concern with respect to Mr. Stone's family. However she noted that Mr. Stone was not concerned about his family when he imbibed to the extent of having a blood alcohol reading of double the allowable limit.

[23] In ***R. v. Biancofiore*** (1997), 35 O.R. (3d) 782 (C.A.) Mr. Justice Rosenberg noted that the courts in Ontario had determined that light sentences in impaired driving cases had not solved the problem. Further, that harsher sentences might have a deterrent effect in that the offenders are generally law-abiding citizens who have good work and family records. They are thereby the types of people who might be influenced by the threat of more severe penalties.

[24] There can be no suggestion but that Mr. Stone's criminal record and his defiance of court orders put him in line for more than the minimum sentence. The appellant's position comes down to a submission that the sentence is too harsh and too great a step-up from the last conviction. On the latter, it must be recognized that Mr. Stone is a repeat offender and

that while the previous driving prohibition was only six months, the relevant starting point is three years.

[25] As for harshness, I accord significant deference to the judge who, having seen and heard Mr. Stone, said that if the "Crown had asked for a lifetime ban I would have considered it. That is how serious these matters are." It cannot be said that the judge failed to take into account any relevant factors or sentencing principles.

[26] The commencement date for the 5 year driving prohibition is 1 October 2002, the day that it was imposed: see ***R. v. Johnson*** (1996), 112 C.C.C. (3d) 225, 84 B.C.A.C. 261.

[27] In my opinion it cannot be said that the judge imposed a "demonstrably unfit" driving prohibition. I would dismiss the appeal.

"The Honourable Mr. Justice Thackray"

I AGREE:

"The Honourable Madam Justice Levine"

Reasons for Judgment of the Honourable Madam Justice Saunders:

[28] On this appeal from the driving prohibition portion of the sentence imposed upon Mr. Stone, I would, respectfully, allow the appeal and reduce the prohibition to three years plus the period of incarceration.

[29] Mr. Stone pleaded guilty on September 24, 2001 of operating a motor vehicle with a blood alcohol concentration in excess of .08, on or about November 22, 2000. The offence occurred at or near Watson Lake, Yukon Territory, where Mr. Stone resides. He was pulled over by the police because the vehicle he was driving was proceeding in an erratic manner and had turned without signalling. Mr. Stone was the only occupant. The charge does not arise, as so many cases do, from an accident, although that this is so is not of any credit to Mr. Stone in these proceedings.

[30] Mr. Stone has a record of five prior offences involving alcohol and the operation of motor vehicles. It is significant in my view, however, that there was a twelve year hiatus between his first four offences and the fifth, May 14, 1997 when he was convicted of the same offence as this, driving with a blood alcohol level over .08. On that occasion he was given a three month jail sentence and a six month

driving suspension. That sentence was his first that included a driving suspension.

[31] In addition to the offences involving alcohol and the operation of a motor vehicle, Mr. Stone also has a criminal record for other offences including uttering threats and assault. His longest sentence on any other charge was 60 days incarceration and nine months probation.

[32] Although Mr. Stone entered a guilty plea in September 2001, his sentencing hearing did not take place until October 1, 2002, at the same time as he was sentenced on one count of breach of recognizance arising from events that occurred after this charge. On this occasion Crown counsel filed a Notice of Intention to Seek Greater Punishment. Further, as his blood alcohol level tested at .17, s. 255.1 was invoked. That section deems a blood alcohol level in excess of .16 an aggravating circumstance. Mr. Stone chose not to challenge the application of s. 255.1, and he must, therefore, be taken to have a level of blood alcohol that engaged that section.

[33] On October 1, 2002 Mr. Stone was sentenced to nine months incarceration and given a five year driving prohibition. The reasons on sentencing are brief. The learned sentencing judge referred to the grief caused by impaired drivers and the need to deter Mr. Stone and others. She referred to his record and

the breach of recognizance charge which was also before her. And finally, on the length of driving prohibition, and in its entirety, she said:

> I am also, pursuant to s. 259 of the *Criminal Code*, prohibiting you from driving for a period of five years. That is anywhere in Canada, 24 hours a day, seven days a week. If the Crown had asked for a lifetime ban, I would have considered it. That is how serious these matters are.

[34] The sole question is the fitness of the driving prohibition. However, that question cannot be answered in isolation to a consideration of the sentence as a whole. In this one must consider both the period of incarceration imposed, which tripled any of Mr. Stone's prior sentences including that imposed for assault, as well as the period of incarceration that exceeded substantially (by a factor of ten) the previous suspension and exceeded the period required by s. 259.

[35] In considering a sentence, both aggravating and mitigating circumstances must be considered. The sentencing judge in this case properly alluded to the aggravating features of the case, Mr. Stone's record for alcohol related offences, and his blood alcohol level. She did not, however, make reference to the mitigating factor of his guilty plea which avoided the need for a trial and represented an

acknowledgement of responsibility, including of the level of blood alcohol said to trigger s. 255.1. Nor did she refer to the twelve year gap in his criminal record, treating the offences as spread over the years without recognition that for practical purposes Mr. Stone was offence free for a considerable period of his adult life.

[36] Drinking and driving is such a serious offence that Parliament has seen fit to enact s. 259 mandating an order of prohibition. In this case, because of Mr. Stone's substantial record, even given the dated aspect of many of the convictions, Parliament requires a driving prohibition of three years plus the period of incarceration (s. 259(1)(c)).

[37] The question is whether the sentencing judge erred in her applications of the principles of sentencing, or the sentence was otherwise outside the appropriate range for the offence.

[38] In my view, the reasons for sentencing do not display any, or adequate, consideration of the mitigating circumstances here present, and seem to import considerations of events that occurred many months after the events charged, contrary to the principles of sentencing set out in s. 718 of the **Criminal Code**. The question is whether the sentence is in any event, fit, or whether this Court should interfere.

[39] Even given the serious nature of the offence in the context of Mr. Stone's record, as reflected in the provisions of s. 259, the sentence still must be fit in its totality and address the circumstances before the Court. In spite of the sentencing judge's musing on the prospect of a lifetime prohibition (a result that in my respectful view was not available on the facts before the court), Parliament mandated in these circumstances only a three year driving suspension.

[40] My colleague has said that Mr. Stone's record put him in line for more than a minimum sentence. I agree in the sense that even without having been given a Notice of Intention to Seek Greater Punishment, Mr. Stone was in line for more than a short suspension. I do not agree, however, that this means that he was destined to a driving suspension significantly longer than three years.

[41] In the circumstances at bar, including the possibility of rehabilitation which Mr. Stone appears to have achieved in the past, the strong specific deterrent effect that a driving prohibition for a significant period of time will have upon him because of his personal circumstances (and which cannot be said to have failed in the past in deterrent effect because his only previous driving prohibition was relatively short), the strong deterrent effect of a significant driving

suspension in a rural community, and the fact that both the period of incarceration and driving prohibition greatly exceeded any prior sentence imposed upon Mr. Stone, I consider that the sentence imposed was excessive.

[42] My colleague has addressed the legal authorities cited to us. It is desirable that like cases should be treated in like fashion, and it is for that reason that the authorities most relevant on a sentencing case are those from the jurisdiction where the sentencing occurs, for they reflect local conditions. I would give considerable weight, therefore, to the cases from the Yukon Territory, even while recognizing that every case must be decided on its own merits. This factor, too, supports my view that the sentence here should be moderated.

[43] In my view the principles of sentencing in this case may be met by a driving suspension of three years plus the period of incarceration, recognizing that we are not asked to interfere with the length of the period of incarceration.

[44] It follows that I would allow the appeal to the extent only of substituting for the five year driving suspension, a driving suspension of three years plus the period of incarceration.

"The Honourable Madam Justice Saunders"

Corrigendum: October 21, 2004

Para. 35, page 14, the last sentence has been changed to: "Nor did she refer to the twelve year gap..".