

Citation: *R. v. White*, 2018 YKTC 13

Date: 20180302
Docket: 16-00573
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

DARREN WHITE

Appearances:

Jean-Benoit Deschamps
David C. Tarnow (by telephone)

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM J. (Oral): These are my reasons for sentencing in this matter.

[2] Mr. Darren White has been convicted of driving dangerously and, in so doing, having caused bodily harm to his passenger. Mr. White also pleaded guilty to having breached a condition of his probation order, namely, not to possess or consume alcohol. Both of these offences occurred in the City of Whitehorse late in the evening of November 23, 2016.

[3] Mr. White and his passenger, Tyrell Bowie, were returning to Mr. Bowie's residence after having consumed alcohol at a local bar. Mr. White had consumed two alcoholic beverages over the course of the evening. Mr. Bowie's residence is on

MacDonald Road, in the Porter Creek subdivision, an area that is part commercial and part residential.

[4] The dangerous driving consisted of Mr. White intentionally drifting his vehicle around the corner of a road that was snow packed and slippery while travelling at approximately 50 km/h. The action of drifting involved moving the back end of his vehicle to the outside of the turn he was making.

[5] After taking the corner in this fashion, Mr. White's vehicle continued to fishtail along the straight stretch of the road. This led him to lose control of his truck, at which time he locked his brakes causing the vehicle to ultimately strike a gravel pile next to the road, which, in turn, redirected his truck into a parked truck trailer.

[6] As a result of the impact of the collision, Mr. Bowie suffered a broken ankle.

[7] Mr. White left the scene of the accident and accompanied Mr. Bowie to the hospital. He also apologized to Mr. Bowie the day after the incident.

[8] Following the accident, Mr. Bowie underwent surgery, during which two screws were inserted in his ankle. He used a walker for a number of weeks and followed a regime of physiotherapy for a number of months. He has recovered well.

[9] Mr. Bowie still considers Mr. White his friend and he has not submitted a victim impact statement.

[10] The Crown seeks a jail sentence of six months, followed by a period of probation.

[11] The Crown also contends that a one-year driving prohibition and a DNA order are appropriate.

[12] The Crown suggests that Mr. White's drinking alcohol before driving in this erratic fashion and the serious injury to Mr. Bowie are both aggravating factors. The Crown additionally contends that Mr. White's decision to leave the scene of the accident and accompany his passenger to the hospital is aggravating.

[13] Finally, it is argued that consideration be given to Mr. White's previous contraventions for speeding in determining an appropriate penalty in this matter.

[14] The defence submits that an appropriate penalty for this young adult is a non-custodial sentence, based on the fact that the injury to Mr. Bowie is of less gravity than in many cases of this nature, that the dangerous driving was of short duration, that the actions of Mr. White are uncharacteristic, and that he is apologetic for the harm he has caused.

Gravity of the Offence

[15] The fundamental principle of sentencing is that a sentence be imposed which is proportionate to the gravity of the offence and the degree of responsibility of the offender. The offence of dangerous driving causing bodily harm is a serious matter and the case law in this area recognizes that this type of criminal activity must be denounced and deterred. (see *R. v. Bhalru*, 2003 BCCA 645)

[16] As stated in *R. v. Rawn*, 2012 ONCA 487, at para. 41:

... Dangerous driving puts the public at great risk of harm. The crime is all the more egregious when people, often innocent members of the public, are injured.

[17] The decision in *R. v. Bosco*, 2016 BCCA 55 emphasized that:

[38] General deterrence and denunciation are the primary sentencing goals in dangerous driving cases. Members of the public share its highways and are entitled to do so in the expectation of reasonable safety based, in part, on responsible use of motor vehicles by all concerned. As Madam Justice Epstein emphasized in *Rawn* at paras. 49-50, driving is a privilege that can wreak great havoc when it is exercised recklessly. Accordingly, sentences for dangerous driving must unambiguously express society's condemnation of the conduct and serve to warn like-minded others that it will not be tolerated.

[18] Therefore, even if I am satisfied that deterring Mr. White from future conduct of this nature is unnecessary, I must still ensure that the sentence imposed will deter others from similar criminal acts.

Degree of Responsibility

[19] As set out in *Bhalru*, at para. 28, an offender's moral culpability must be assessed:

...in part by considering the intentional risks taken by the offenders, the degree of harm that they have caused, and the extent to which their conduct deviates from the acceptable standard of behaviour...

[20] As expressed by Madam Justice Ryan in *R. v. Sadler*, 2009 BCCA 386, at para. 34:

... The cases also demonstrate the age of the offender, the circumstances of the accident, the duration of the deficient driving, the existence or not of a criminal record, the degree of aberration of the driving from the norm, the particulars of the highway and use of it, and the driving conditions, are all factors that bear upon the question of moral culpability. Further, the use of alcohol, even if not to the point of impairment, is a factor this Court will consider.

[21] Mr. White decided to engage in a thrill-seeking activity after having consumed two drinks of alcohol. Although he was not speeding, the slippery road conditions warranted prudent driving and at a lower rate of speed than normal. The road conditions also allowed him to engage in this dangerous activity.

[22] I note that the dangerous driving was relatively short-lived and that the injury to Mr. Bowie was not life-threatening and has resolved well. Nonetheless, Mr. White did take an intentional risk by his manner of driving in a partly residential area.

[23] In determining Mr. White's degree of responsibility, I also take into account the following offender-based factors:

- He is a young adult of 22 years, who is single with no dependents;
- He displayed a cooperative attitude with police after his arrest and provided a warned statement to police outlining what had occurred;
- Mr. White does not have a criminal record, although he was serving a term of probation as part of a conditional discharge at the time this of offence;
- He has a supportive family, which has attended all of his court appearances;

- Between 2013 and 2016, he accumulated four speeding infractions on his driver's record;
- He has a Grade 12 education and a good work history;
- The letters of reference which have been received reveal that he is a valuable employee and a productive citizen;
- He appears to be genuinely remorseful for this incident;
- The positive Pre-Sentence Report, which has been filed, rates Mr. White as having a low level of criminogenic needs and suggests that a low level of supervision is required.

[24] In all the circumstances, I do not find that Mr. White departed from community standards to the degree that others have in cases of this nature.

[25] I note, for example, *R. v. Kloepfer*, 2017 YKSC 44, where the offender intentionally accelerated his vehicle towards four pedestrians on the road resulting in bodily harm to one of the pedestrians.

Case Law

[26] In the recent *Kloepfer* decision, the sentencing judge, after having reviewed the case law in this area in detail, stated that:

[72] ... jail is normally imposed as the sentence for impaired driving or dangerous driving causing bodily harm, absent exceptional circumstances. ...

[27] In that case, as mentioned, the offender intentionally accelerated his motor vehicle towards four neighbours walking on a gravel road, resulting in bodily harm to one of the pedestrians. Long-standing animosity existed between the parties.

[28] Although the bodily harm occasioned to the one pedestrian was deemed to have been less serious than in many other cases, the sentencing judge, nonetheless, found the offender's moral culpability in the circumstances to be high. The sentencing judge imposed a five-month prison term for the offence of dangerous driving causing bodily harm, as well as a two-year driving prohibition.

[29] In *R. v. Tom Tom*, 2014 YKTC 22, the offender was convicted of dangerous driving causing bodily harm and leaving the scene of an accident. He had consumed alcohol during the course of the day, prior to operating his all-terrain vehicle with two passengers. Later, he intentionally struck the victim with his ATV, knocking him to the ground. A friend of the offender subsequently attacked the victim as he lay on the ground. The victim suffered severe injuries, although it was impossible to determine the extent of the injuries caused by the dangerous driving.

[30] Despite significant mitigating factors, Mr. Tom Tom received a sentence of six months' imprisonment, followed by an 18-month period of probation. He also received an 18-month driving prohibition and was subject to a DNA order.

[31] The decision in *R. v. Schinkel*, 2014 YKTC 42, involved charges of impaired driving causing bodily harm, dangerous driving causing bodily harm, and refusal to provide a breath sample. The sentencing judge described the facts as "rather egregious".

[32] Ms. Schinkel drove on the Alaska Highway and in Whitehorse at speeds in the range of 130 to 140 km/h. She drove "all over the road", including being in the wrong lane. She went through stop signs and hit medians.

[33] Ms. Schinkel struck another vehicle, causing the driver of the car to suffer a severe head injury and a major concussion. In addition to the serious physical and emotional injuries, the victim suffered property and income loss.

[34] The offender, who pleaded guilty, was Aboriginal and had endured a difficult childhood.

[35] The sentencing judge took these factors into account in imposing a 60-day concurrent jail sentence on each count, followed by a two-year probationary period. The sentencing judge also imposed a 12-month driving prohibition.

[36] The Court of Appeal upheld the sentence imposed, even though it was below the range of sentence for impaired driving causing bodily harm sentences established in *R. v. Lommerse*, 2013 YKCA 13.

[37] The decision in *R. v. Hagwood*, 2017 YKSC 48, involved an offender who had driven at a high rate of speed on a narrow gravel road in a rural area. He lost control of the vehicle while driving at more than twice the legal speed limit.

[38] One of the three passengers in the vehicle was transported to the closest hospital in serious condition. Despite the initial diagnosis of a skull fracture, the victim's hospital stay ended within a number of days of the accident. He suffered back and neck issues, as well as some memory loss.

[39] He and the offender remained good friends, despite this incident.

[40] Mr. Hagwood was a 24-year-old Aboriginal. Although he had no criminal record in Canada, he had received a prison term in Alaska for the importation of a controlled substance when he was 18.

[41] He was gainfully employed, despite what the sentencing judge referred to as a "dysfunctional upbringing". He showed remorse for what he had done. He pleaded guilty sometime after a preliminary inquiry.

[42] The Court imposed a sentence of 90 days' imprisonment to be served intermittently, as well as a probation order for the entirety of the intermittent sentence. The judge imposed a one-year driving prohibition and restitution to one of the passengers.

[43] In *R. v. Sullivan*, 2015 NSPC 40, the sentencing judge reviewed a wide variety of sentencing precedents for dangerous driving causing bodily harm before coming to her decision. The range of sentences for matters of a similar nature span two months to 15 months' incarceration.

[44] Mr. Sullivan lost control of his vehicle after reacting to being cut off by a vehicle in front of him by accelerating past the vehicle at a high rate of speed. Mr. Sullivan's dangerous driving resulted in a collision with three other vehicles causing injuries to four people. At para. 43, the sentencing judge found that his actions were "a brief but objectively dangerous lapse in judgment."

[45] Mr. Sullivan was 47 years of age with no criminal record at the time. He had the support of family and friends, was deeply remorseful for his actions, and maintained full-time employment.

[46] He received a sentence of 90 days in jail to be served intermittently, plus two years' probation, and a lengthy driving prohibition.

[47] The decision in *Bosco* involved a serious collision caused by Mr. Bosco's dangerous driving.

[48] While driving in an area with dangerous road conditions, he tailgated the driver in front of him before passing it and several other vehicles on the two-lane road. He did not move back into his own lane of traffic before cresting a hill, resulting in a head-on collision with a vehicle travelling in the opposite direction.

[49] The injuries to the victim were described as "significant".

[50] The judge did not accept Mr. Bosco's explanation at trial that he could not merge back into his lane of traffic safely before cresting the hill.

[51] Mr. Bosco was 48 years of age and had no prior criminal record.

[52] The British Columbia Court of Appeal described him as "a most impressive individual". A former professional soccer player, he ran a successful soccer academy and, as a result, he enjoyed strong community support. He also had overcome personal tragedy stemming from the Rwandan genocide. The only negative aspect of

his background was his driving record, which included a number of speeding and unsafe driving violations.

[53] The Court of Appeal rejected Mr. Bosco's arguments that a conditional discharge should be substituted for the intermittent jail sentence imposed by the sentencing judge. The Court held that the sentence, which equated to 60 days in custody, respected the principles of sentencing, including those of proportionality, parity, and restraint.

[54] In summary, the case law demonstrates that the circumstances of this offence vary significantly and the range of sentences is broad. I am mindful of the fact that sentencing is an individualized process and that the facts of each offence and offender are different.

Sentence

[55] My task is to determine a fit and proper sentence for Mr. White, keeping in mind that the sentence should be comparable to sentences imposed in similar cases and that it should be the least restrictive sentence necessary to accomplish the relevant sentencing objectives.

[56] The case law clearly highlights the seriousness of the offence of dangerous driving causing bodily harm. The lives of victims may be shattered in a matter of seconds as a result of this crime.

[57] I have already considered the offender-based considerations in assessing Mr. White's level of responsibility. I reiterate that the duration of Mr. White's dangerous driving when compared to other cases was relatively brief. Although Mr. White's

consumption of alcohol is an aggravating factor, he had not consumed a significant amount over the course of the evening. Even though the ankle injury to Mr. Bowie required surgical intervention, he is fully recovered and he suffers no ill effects.

[58] The Crown argues that Mr. White's leaving the scene of the accident is an aggravating factor in this case. However, I take a different view. Mr. White assisted the victim in receiving medical attention and I am unable to say that leaving the scene of the accident to aid his friend should be deemed an aggravating factor.

[59] I do, however, consider his driving record for speeding violations to be an aggravating factor. Although speed was not a factor of significance in this offence, the speeding violations demonstrate a lack of consideration for the rules of the road.

[60] As indicated, I accept that Mr. White is remorseful for the harm he has caused. I am also of the view that since this incident, he has made good efforts to become more responsible and to show deference to authority. The fact that he successfully abided by onerous bail conditions over an extended period of time speaks to this.

[61] After having spent one night in custody, he has abided by a number of conditions, including a restrictive curfew and an abstention clause.

[62] I am advised by his family that he has diligently followed each and every condition for the past 15 months.

[63] Mr. White continues to live with his supportive family. His mother attests to the fact that Mr. White has performed exceptionally well since the offence.

[64] Mr. White's strong employment history is also to his credit. The letters of reference reveal that he is a valuable asset to his employers, as a result of his work ethic and strong work skills. One of the letters describes him as "respectful, honest, conscientious, and reliable."

[65] I am satisfied from what I have learned about Mr. White, by way of the positive Pre-Sentence Report and information presented in court, that he is very unlikely to ever find himself back in the criminal justice system. As such, the goal of specific deterrence has been achieved.

[66] The defence argues that a suspended sentence and probation is the appropriate penalty. While I appreciate that prison is a sentence of last resort, I am unable to find that exceptional circumstances are present in this case that would justify a non-custodial sentence. On the other hand, I find that the six-month prison term sought by the Crown is more severe than is necessary in this case to satisfy the principles of sentencing, including denunciation and general deterrence.

[67] I am cognizant that Mr. White's employment is an important part of his life and that he is a valuable employee.

[68] In all the circumstances, I am of the view that a jail sentence in the intermittent range plus a fine is a proper sentence for Mr. White in this matter. In the result, I sentence Mr. White to a 90-day jail sentence, plus a \$500 fine.

[69] Counsel did not specifically address the issue of an intermittent sentence. Based on the fact that Mr. White is presently working with Territorial Contracting and that he

will subsequently renew his work with P.S. Sidhu Trucking this spring, I am prepared to permit the jail sentence to be served intermittently.

[70] Additionally, as requested, I impose a driving prohibition of one year.

[71] The Crown seeks a DNA order pursuant to s. 487.051(3)(b), which reads:

... In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

[72] The burden is on the Crown to persuade me that an order would be in the best interests of the administration of justice. (see *R. v. R.C.*, 2005 SCC 61, para. 20)

[73] I have already noted Mr. White's young age, his prior lack of criminal record, and the fact that he is described as a person of good character. I have concluded that he has been specifically deterred since the commencement of these proceedings and it is very unlikely for him to ever come in contact with the criminal justice system again.

[74] I am not convinced that it is in the best interests of the administration of justice to make the DNA order and, therefore, I decline to do so.

[75] The breach of probation charge consists of Mr. White having consumed alcohol on the evening in question. Considering Mr. White's lack of antecedents for such matters and the fact that he pleaded guilty to the offence, I find that a fine in the amount of \$300 is a fit sentence.

[76] The total victim surcharge flowing from these sentences is \$240. For both the fines and the victim surcharges, I will allow Mr. White nine months of time to pay.

[77] A stay of proceedings has been recorded with respect to the allegation of failing to keep the peace and be of good behaviour.

[78] Mr. White, this is the last hurdle for you. You will have no probation after this. You will have the driving prohibition that you have to complete, of course. But as I said earlier, I am confident that you will be able to get through this, continue to work, and I am sure I will not see you again before the courts.

CHISHOLM T.C.J.