SUPREME COURT OF YUKON

Citation: *R v Bland*, 2016 YKSC 61

Date: 20161123
S.C. No. 16-AP003
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND

MICHAEL STEVEN ROSS BLAND

RESPONDENT

Before Mr. Justice L.F. Gower

Appearances:
Keith Parkkari — Counsel for the Appellant
Vincent Larochelle — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a Crown appeal from a sentence imposed by the Territorial Court on a charge of operating a motor vehicle while disqualified, contrary to s 259(4) of the *Criminal Code*, RSC, 1986, c C-46 *(*the *"Code")*. Crown and defence counsel agreed at the sentencing that the offender should receive 30 days jail[1], plus a one-year driving prohibition. The issue is whether the sentencing judge erred in law by crediting the offender for having been prohibited from driving for a period of seven months before the sentencing, pursuant to a condition of his recognizance. In doing so, the sentencing

[1] Counsel were not agreed on the sentence being served intermittently, but that is what the sentencing judge ordered.

judge imposed the minimum driving prohibition of one year pursuant to s 259(1)(a) of the *Code*, and then credited the offender as having served seven months of this prohibition, leaving him with five months left to serve.

[2] The Crown submits that a second issue arises as to whether the "effective driving prohibition of less than one year" (i.e. the five-month remainder left to serve) is an unfit sentence in the circumstances of this case. However, here I agree with the respondent's counsel that this is not a genuine issue. The sentencing judge imposed the minimum driving probation of one year, as jointly requested by both the Crown and the defence. Therefore, the fitness of that sentence cannot be called into question. Rather, the only real issue is whether the sentencing judge could credit the offender for the seven months he was prohibited from driving prior to the sentencing, since the five-month remainder of the prohibition is less than the one year minimum term specified in s 259(1)(a) of the *Code*. Putting it another way, if the sentencing judge erred in allowing the credit, then the appeal will be allowed and the one-year driving prohibition will be imposed, over and above the period of the pre-sentence prohibition. On the other hand, if I conclude that the sentencing judge did not err in allowing the credit, then there is no question as to fitness because the credit is considered to be part of the 12-month driving prohibition which the sentencing judge imposed, before applying the credit.

FACTS

[3] The facts are not in dispute. The single charge before the sentencing judge included two incidents of driving while disqualified pursuant to a one-year driving prohibition which was imposed following a conviction for impaired driving in 2014. The first incident occurred four days after the beginning of the prohibition order, and the

second just under a year later. The offender had a criminal record including a breach of probation conviction from 2006 and a breach of undertaking from 2007. He was 35 years old at the time of sentencing and had lived in Whitehorse for approximately 13 years. The offender was in a common-law relationship and the couple were parents to a one-year-old boy. He sought an intermittent sentence (for the 30 days of jail) for the purpose of trying to find employment.

ANALYSIS

[4] This appeal stands or falls on whether the decision of the Supreme Court of Canada in *R v Lacasse*, 2015 SCC 64, is applicable. In *Lacasse*, the Supreme Court reduced a driving prohibition imposed under s 259(2) of the *Code* from four years and seven months to two years and four months, after crediting the offender for being prohibited from driving pursuant to his recognizance for a period of two years and three months prior to his sentencing date.

[5] The Crown seeks to distinguish *Lacasse* because s 259(2) provides for a discretionary driving prohibition, whereas the prohibition in s 259(1) is mandatory and is to be "not less than one year". The Crown also says that the minimum one year period is a limitation on the trial judge's discretion, pursuant to s 718.3(1) of the *Code*, which states as follows:

> Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence. (my emphasis)

[6] The Crown further submits that there is no statutory basis to reduce the offender's driving prohibition to less than the mandatory minimum of one year.

[7] Accordingly, says the Crown, it is necessary for the offender to bring an application based on s 12 of the *Charter of Rights and Freedoms (*the *"Charter")*, whereby he could assert that not reducing the minimum one year period by the time spent on a pre-sentence driving prohibition would result in cruel and unusual punishment.

[8] In summary, the Crown's argument reduces to this. Although there is no provision in the *Code* allowing a court to credit an offender for a pre-sentence driving prohibition, it was permissible for the Supreme Court to credit the offender in *Lacasse* because the Court was sentencing under s 250(2) of the *Code*, which gives the Court discretion as to whether or not to impose a driving prohibition and for how long. However, because the trial judge was sentencing the respondent under s 259(1), he was obliged to impose the mandatory minimum one-year driving prohibition and had no discretion to give credit for the pre-sentence prohibition.

[9] All of the Crown's arguments are premised on the sentencing judge having erred in law. Accordingly, the standard of review on this appeal is correctness.

[10] For the following reasons, I am satisfied that the sentencing judge did not err in applying *Lacasse* to the interpretation of s 259(1) of the *Code*.

[11] Unfortunately, the issue of credit for the pre-sentence driving prohibition in *Lacasse* only arose at the hearing before the Supreme Court[2] and, with great respect, Wagner J, for the majority, wrote only four relatively brief paragraphs on the question (it must also be noted that Gascon J, in dissent, concurred in the result on the credit for the pre-sentence driving prohibition):

[2] That is, it was apparently not addressed in the facta of the parties.

> 111 Another question concerning the driving prohibition arose at the hearing. The respondent submits that, because he entered into a recognizance under which he was not to drive from July 5, 2011, the date he was released on conditions, until October 4, 2013, the date of his sentencing, he should be credited for that period. In the same way as the conditions of pre-trial detention, the length of a presentence driving prohibition can be considered in analyzing the reasonableness of the prohibition: *R. v. Bilodeau*, 2013 QCCA 980, at para. 75 (CanLII); see also *R. v. Williams*, 2009 NBPC 16, 346 N.B.R. (2d) 164.
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> 112 The courts have seemed quite reluctant to grant a credit where the release of the accused was subject to restrictions, given that such restrictive release conditions are not equivalent to actually being in custody ("bail is not jail"): *R. v. Downes* (2006), 79 O.R. (3d) 321 (C.A.); *R. v. Ijam*, 2007 ONCA 597, 87 O.R. (3d) 81, at para. 36; *R. v. Panday*, 2007 ONCA 598, 87 O.R. (3d) 1.
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> 113 In the instant case, the driving prohibition has the same effect regardless of whether it was imposed before or after the respondent was sentenced. In *R. v. Sharma*, [1992] 1 S.C.R. 814, Lamer C.J., dissenting, explained that the accused had in fact begun serving his sentence, given that the driving prohibition would have been imposed as part of his sentence had he been tried and found guilty within a reasonable time. In short, where a driving prohibition is not only one of the release conditions imposed on an accused but also part of the sentence imposed upon his or her conviction, the length of the presentence driving prohibition must be subtracted from the prohibition imposed in the context of the sentence.
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> 114 In my view, therefore, the driving prohibition of four years and seven months imposed in this case is demonstrably unfit and must be reduced to two years and four months to take account of the recognizance entered into by the respondent under which he was to refrain from driving from his release date until his sentencing date (two years and three months).

[12] The sentencing judge noted that even before *Lacasse*, in *R v Pham*, 2013 ONCJ 635, Paciocco J, of the Ontario Court of Justice, reached a similar conclusion with

respect to imposing a driving prohibition on an offender who had successfully appealed his first conviction on a charge of impaired driving, but had already completed the 15-month driving prohibition from the first sentence. The offender was convicted on his second trial by Paciocco J. The Crown then sought a new driving prohibition of not less than one year under s 259(1) of the *Code*, the same mandatory provision which is at issue in this appeal. Paciocco J stated that this outcome - imposing a new prohibition on someone who had already served a prohibition for the same charge - was not appealing, “either as a matter of instinct or equity” (para 2). In the result, Paciocco J imposed only a one-day driving prohibition, coupled with “time served” under the earlier completed 15-month prohibition. In coming to that conclusion, Paciocco J relied principally on the Supreme Court of Canada decision in *R v Wust*, 2000 SCC 18. At para 13 of his reasons, he comments on *Wust* as follows:

> 13 I am also persuaded that to impose the interpretation on section 259(1) that the Crown is seeking in this case would not be an interpretation that is harmonious with the scheme of the Act, and in a manner that is consistent with general principles of sentencing. *R. v. Wust* [2000] 1 S.C.R. 455 provides an example of harmonious construction. There the Supreme Court of Canada held that because of the need to read the provisions of the *Criminal Code of Canada* harmoniously with other sections, the time served in pretrial custody can be credited even where the *Criminal Code of Canada* appears to require sentencing judges to impose minimum sentences of incarceration at the time of sentencing. While the *Wust* decision turned specifically on the statutory authority provided to judges in section 719(3) to give credit for "time spent in custody," the same result is required in the case of driving prohibitions, in my view, after consulting the more general sentencing provisions as well as general principles of sentencing that have not been legislated. (my emphasis)

[13] The respondent's counsel submitted that the "general sentencing provisions" Paciocco J was referring to above are likely those in sections 718 through 718.3 of the *Code*, and that the "general principles of sentencing that have not been legislated" are likely the principles of equity, rationality, fairness, justice and common sense regularly employed as a matter of common law. I agree with this analysis.

[14] *Wust* was a unanimous decision of the Supreme Court written by Arbour J. The issue there was whether pre-sentence custody could be credited towards the mandatory minimum sentence for robbery with a firearm (four years) specified by s 344(a) of the *Code*, if the effect of the credit would be to reduce the sentence to less than the minimum. As noted by the sentencing judge in the present appeal, *Wust* was not a *Charter* case. Rather, Arbour J approached the issue using principles of statutory interpretation. She began by noting that mandatory minimum sentences can lead to "unjustly severe" results, because they prevent the court from exercising its discretion to impose a sentence tailored to the individual case (para 21). Accordingly, Arbour J stated:

> …it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system….(para 22)

And later, "… mandatory minimum sentences must be understood in the full context of the sentencing scheme". Central to Arbour J's analysis was the application of s 719(3) of the *Code*, which provides:

> In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence ...

Arbour J then asked whether Parliament intended to oust the application of s 719(3) by the subsequent legislation of mandatory minimum periods of imprisonment.

[15] Rosenberg JA dealt with the same issue in *R v McDonald* (1998), 40 OR (3d) 641 (CA), holding that s 719(3) could be applied to the mandatory minimum sentence of four years for robbery with a firearm. At paras 20 through 64, Rosenberg JA discussed a number of principles applicable to the interpretation of penal statutes:

1. Where a penal statute is ambiguous, this ambiguity must be resolved in favour of the accused;
2. Courts should attempt to avoid finding a conflict between two pieces of legislation;
3. If a statute is ambiguous and capable of two meetings, such that one is consonant with justice and good sense, whereas the other gives rise to an absurdity, the former should be preferred;
4. Where applicable, reference should be made to other provisions in the same statute; and
5. Where a statute is capable of more than one interpretation, courts should avoid an interpretation that would conflict with *Charter* values.

[16] By and large, Arbour J agreed with the analysis of Rosenberg JA and restored the decision of the sentencing judge, who, after granting credit for pre-sentence custody, sentenced Mr. Wust to a further 3½ years' imprisonment, less than the mandatory minimum of four years.

[17] In coming to her conclusion, Arbour J applied the principle that when a court applies both s 344(a) and s 719(3) of the *Code*, Parliament must not have intended to

perpetrate an injustice or an absurdity. Rather, it should be assumed "that Parliament intended these two sections to be interpreted harmoniously and consistently within the overall context of the criminal justice system's sentencing regime" (para 43). In addition to pointing to the potentially absurd result noted by Rosenberg JA in *McDonald* (at para 55 of *McDonald*) Arbour J referenced her own example at para 42:

> If this Court were to conclude that the discretion provided by s. 719(3) to consider pre-sentencing custody was not applicable to the mandatory minimum sentence of s. 344(a), it is certain that unjust sentences would result. First, courts would be placed in the difficult situation of delivering unequal treatment to similarly situated offenders: for examples, see McDonald, supra, at pp. 80-81. Secondly, because of the gravity of the offence and the concern for public safety, many persons charged under s. 344(a), even first time offenders, would often be remanded in custody while awaiting trial. Consequently, discrepancies in sentencing between least and worst offenders would increase, since the worst offender, whose sentence exceeded the minimum would benefit from pre-sentencing credit, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing detention. An interpretation of s. 719(3) and s. 344(a) that would reward the worst offender and penalize the least offender is surely to be avoided.

[18] A similar type of absurdity could arise under s 259(1) if courts are not entitled to give credit resulting in driving prohibitions below the mandatory minimum of one year. The decision of the Québec Court of Appeal in *R v Bilodeau,* 2013 QCCA 980, gives rise to such a potential absurdity. That case dealt with the mandatory minimum driving prohibition in s 259(3.3)(b) of the *Code*, which applies when an offender has been convicted of causing death by criminal negligence while street racing or dangerous operation of a motor vehicle while street racing, and requires the court to impose a driving prohibition of not less than one year for either of these offences. Bilodeau was

an offender who was originally sentenced to a driving prohibition of seven years. However, the Court of Appeal credited the offender with a pre-sentence driving prohibition, imposed as a bail condition, of three-and-a-half years and reduced the prohibition on appeal from seven to five years. The issue of the mandatory minimum prohibition of one year did not arise because the Court of Appeal was dealing with a sentence well in excess of the minimum. Nevertheless, *Bilodeau* was referred to with approval by both the majority and dissenting decisions in *Lacasse.* The potential absurdity, similar to that referred to by Arbour J in *Wust,* is that the worst offender facing a sentence under s 259(3.3) would benefit from pre-sentence credit, because they would have a prohibition well in excess of the minimum, while the first time offender whose sentence would be set at the minimum, would not receive credit for his or her pre-sentencing driving prohibition. To borrow the words of Arbour J, an interpretation s 259(1) of the *Code* that would reward the worst offender and penalize the least offender is surely to be avoided. In my view, this *reductio ad absurdum* reasoning also neutralizes the Crown's argument on the "limitations" referred to in s 718.3(1) of the *Code*.

[19] The respondent's counsel also referred to the type of absurdity which arose in *Pham*, i.e. persons who successfully appeal a conviction to which a mandatory driving prohibition attaches will have to serve a second identical prohibition if they are convicted a second time. In addition, failing to credit for pre-sentence driving prohibitions could result in disparity between similarly situated offenders, as they could end up serving total driving prohibitions of differing lengths, depending on how long it takes for their

matters to be resolved in court. This, said counsel, offends the principle of parity of sentencing codified pursuant to s 718.2(b) of the *Code*. I agree with these submissions.

[20] The Crown sought to distinguish *Pham* on the basis that the offender there had actually served the 15-month driving prohibition as part of his sentence following the initial conviction, whereas in the case at bar we are dealing with a pre-sentence driving prohibition resulting from a recognizance, which is focused on the issue of public safety and protecting the public, as opposed to a prohibition imposed as part of a sentence, which is intended to be punitive. I do not accept this distinction. First of all, sentencing options such as jail, fines, probation conditions, and driving prohibitions can all be considered to be both for the purpose of punishing the offender as well as for the purpose of protecting the public. Secondly, the Supreme Court in *Lacasse* (at para 113) seemed to have had no difficulty treating a pre-sentence driving prohibition as part of the offender's sentence, noting that even if the driving prohibition was imposed before sentence, an offender can be considered to have "begun serving his sentence" under that pre-sentence prohibition, if a further driving prohibition is imposed upon his or her conviction. Accordingly, credit for the pre-sentence prohibition "must" be given.

[21] As I understand the Crown's first argument on this appeal, the sentencing judge erred in principle by relying on *Wust*, because that case was an exercise in statutory interpretation in order to resolve the apparent conflict between ss 344(a) and 719(3) of the *Code*. However, in the case at bar, the Crown says there is no such statutory provision equivalent to s 719(3) that allows for credit to be applied upon sentencing based on release conditions imposed in a recognizance (such as in the case at bar) or other forms of process while on judicial interim release. Absent such a statutory

provision, the sentencing judge had no statutory basis to reduce the offender's driving prohibition.

[22] The flaw in this argument is that the absence of such a statutory provision did not trouble the Supreme Court of Canada in *Lacasse* when it credited the offender with the time served under the pre-sentence driving prohibition and reduced the length of the prohibition imposed at sentencing accordingly. Further, to the extent that s 259(1) is silent on the issue of credit, I agree with the respondent's counsel that it creates an ambiguity which must be resolved in favour of offenders in a manner consistent with the *Charter*.

[23] It must also be remembered that prior to the enactment of ss 719(3) to (3.3) of the *Code*, courts routinely credited offenders with pre-sentence custody on the basis of the unlegislated general principles of sentencing referred to by Paciocco J in *Pham,* such as equity, rationality, fairness, justice and common sense.

[24] The other argument raised by the Crown is that, in the absence of any statutory provision authorizing credit for pre-sentence release conditions, the offender ought to have brought an application based on s 12 of the *Charter* alleging a cruel and unusual punishment. The short answer to this argument is that such an application is simply unnecessary.

[25] In *McDonald*, Rosenberg JA found that it was unnecessary to consider whether s 344(a) of the *Code* violated s 12 of the *Charter*, because he was able to resolve the apparent conflict between that section and s 719(3) through an exercise of statutory interpretation. As he put it, at para 62:

> … If… the court as a matter of interpretation is able to take pre-sentence custody into account in fixing the length of the sentence then in my view the s.12 problem dissolves.

In my opinion, one could just as easily substitute "driving prohibition" for the words "custody" and "sentence" in this paragraph and obtain the same result.

[26] I also agree with the respondent's counsel that, if the courts required a *Charter* application every time an offender wanted to receive credit for a pre-sentence recognizance that resulted in a post-sentence prohibition lower than the mandatory minimum, this would result in many otherwise unnecessary applications, would cause prejudice to offenders, and would be contrary to the efficient administration of justice.

[27] Lastly, I find support for my approach to this appeal in the case of *R v Edwards*, [2016] NJ No 165, a decision of the Newfoundland and Labrador Provincial Court which also dealt with the mandatory minimum driving prohibition under s 259(1) of the *Code*. In that case, the offender had been on a pre-sentence driving prohibition for over 13 months prior to his sentencing. As in the present appeal, the issue was whether the sentencing judge could credit the offender for the pre-sentence prohibition. Similar to the sentencing judge in the present appeal, the judge in *Edwards* placed significant reliance upon the Supreme Court of Canada decision in *Wust*, noting in particular Arbour J's reliance in turn upon Rosenberg JA's decision in *McDonald*. At para 24 of *Edwards*, the Court concluded:

> … I see no reason to distinguish between mandatory driving prohibitions and discretionary driving prohibitions in terms of accounting for any credit that must be given to reflect the presence of a presentence driving prohibition.

CONCLUSION

[28] The appeal is dismissed. The 12-month driving prohibition imposed by the sentencing judge remains. However, in the administration of that prohibition, the offender will receive credit for the “time served” of seven months under the pre-sentence prohibition.

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GOWER J