

Citation: *R. v. Charlie*, 2010 YKTC 53

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Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: Her Honour Chief Judge Ruddy

REGINA

v.

BYRON SHANE CHARLIE

Appearances:

Bonnie Macdonald
David Christie

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY C.J.T.C. (Oral): Byron Charlie is before me having entered pleas of guilty to a number of offences. The first of those is an offence for trafficking in a small amount of cocaine, followed by a fail to appear. There are then a number of offences relating to an incident of driving, which include a refusal to provide a breath sample pursuant to a valid demand, driving while disqualified, and dangerous operation of a motor vehicle. He also has entered pleas of guilty to two tickets for breaching the Old Crow liquor prohibition.

[2] The facts of the trafficking arise on December 10, 2008. The police were midway through an undercover operation, targeting individuals known to be trafficking in drugs in the Whitehorse area. The tip information indicated that drugs were being sold out of the 98 Hotel. An undercover officer went into the 98 Hotel and spoke to a number of individuals in an effort to purchase drugs; that included the accused. They engaged in a conversation wherein the officer indicated a desire to purchase a gram of cocaine. There was a discussion with respect to both the quality of the drugs and the amount, and the cost of those drugs, which was placed at \$100. Ultimately there was an exchange wherein the undercover officer gave Mr. Charlie a hundred dollar bill and was given five rocks of cocaine. There is some dispute before me as to exactly how much the amount was, but I accept for the purposes of the decision it was a relatively small amount of cocaine which was exchanged. Mr. Charlie was observed to then leave the 98. There was an observation of distribution of drugs to two others, one of whom was arrested and found to have a rock of cocaine in her possession. Mr. Charlie was then arrested in the company of his girlfriend. A search incidental to the arrest located a pipe, .05 gram rock of cocaine, alcohol, \$168 cash and an iPod.

[3] He provided a statement in which he indicated to the police that it had actually been his girlfriend that provided the drugs to one of the individuals, that he did not use drugs very often, that he had been partying in Whitehorse following his grandfather's funeral and, after initially denying selling, indicated that he was selling to support a habit, that he had only sold on a couple of occasions, and that this was isolated behaviour. He was released on an undertaking, was required to attend court on October 7, 2009, and failed to do so.

[4] Subsequent to that, there was an incident on October 18th in Watson Lake. It appears Mr. Charlie's girlfriend, Ms. Charette, contacted the police to indicate that he had stolen her car and that he was intoxicated. There was information then provided to indicate that Mr. Charlie had been driving the vehicle up and down a particular street in Watson Lake at a high rate of speed, putting a number of people in danger. A number of people attempted to stop him. There was an incident involving another truck and it appears Ms. Charette was in the truck. Mr. Charlie pulled her from the vehicle and to the ground and then punched out the window in the truck. There was another woman who was able to stop him racing up and down the street. She demanded the keys from him. When he refused, she got in the vehicle and tried to persuade him not to drive. The police arrived at that time. Mr. Charlie left the scene and ran into the bush.

[5] A later call was received from his girlfriend indicating that he was again in the vehicle. It seems at this point he was again driving the vehicle up and down the road at a high rate of speed and swerving towards individuals that were trying to stop him. Eventually, the police located him with the vehicle. The vehicle was still running, although he was outside of the vehicle. He was arrested.

[6] An odour of liquor was noted on his breath and a demand was made for a breath sample into an approved screening device. He was asked to provide the sample on three occasions and refused each time. He was ultimately charged both for the refusal, as well as for driving while disqualified when it was learned that he was disqualified and, of course, given the driving pattern, he was charged with and has pled guilty to dangerous driving as well.

[7] The two *Liquor Act*, R.S.Y. 2002, c. 140, tickets relate to incidents on July 10th and July 12th of 2008. On both occasions he was located by the police in an intoxicated state, contrary to the Old Crow liquor prohibition.

[8] There are a number of issues and a great deal of information before me with respect to this particular matter. I do have the benefit of a pre-sentence report. It is a lengthy pre-sentence report, setting out Mr. Charlie's background and circumstances, as well as including an attached psychological assessment, which was completed, I believe, in 2002, and which outlines some additional information about Mr. Charlie.

[9] He is currently a 28-year-old member of the Vuntut Gwitchin First Nation. There does appear to have been issues in his background, which are ones which can perhaps at least go some distance in explaining why he is so often seen before the Court. He was raised by his grandparents as it appears his own mother was struggling with issues of alcohol. She has indicated to the Probation Officer that she was in and out of violent relationships and feels that those have had a negative impact on Mr. Charlie.

[10] Clearly, substances have played a really negative role in Mr. Charlie's life, starting with the fact that his mother has admitted to consuming while pregnant, and there is some indication that there may be the potential for a diagnosis of Fetal Alcohol Spectrum Disorder with respect to Mr. Charlie. Although I would note that while not formally diagnosing him, Dr. Boer does indicate that the degree of impairment, if any, due to FASD would appear to be moderate and likely manageable.

[11] In addition to those factors, there is a suggestion that there have been longstanding mental health problems, in particular depression, which led Mr. Charlie to

make two suicide attempts while still a teenager, and it is my understanding from the information before me that depression continues to be a significant issue in his life.

[12] He has been in custody since October of this year. Counsel are agreed, as am I, that he is entitled to credit for seven months. This does fall before the recent amendments and he would be entitled to credit at one and a half to one for time spent in custody. So that is a factor that I need to consider as well.

[13] I have also been provided with a number of letters. One from Mr. Charlie, and I do accept from what he has said; that he is remorseful for his behaviour and that he has hopes of changing that behaviour by accessing treatment. There are also letters from his girlfriend, Ms. Charette, and from her parents, indicating that he is an individual who has been very supportive and helpful to all of them. I understand Ms. Charette's parents have some significant medical difficulties and do rely quite heavily on Mr. Charlie, particularly in the winter months, to assist with things like supplying wood. He is also standing in the role of a step-parent to Ms. Charette's daughter, and I am advised that that is a close and supportive relationship as well. They are all very much in support of him returning home, and Ms. Charette has taken the time to travel down from Mayo here today to be in court in support of him.

[14] There are also a number of letters indicating that there is some professional support for Mr. Charlie within the community of Mayo, which would include some counselling and programming, and some potential training and job prospects that, as I understand through one of the letters, and through Ms. Charette, could commence in the fall of this year. So Mr. Charlie does at least have the stated intention of wishing to

seek assistance and treatment for the problems that continually bring him back before the Court.

[15] There are a number of concerns that I have, however, based on the information that is before me. The first of those is Mr. Charlie's criminal record. It is a lengthy criminal record. It does include at least two prior impaired driving related offences and one prior driving while disqualified. Crown has filed notice, so there will be a mandatory jail term that relates to at least the refusal charge. In addition, his record includes numerous and consistent breaches of court orders.

[16] Mr. Charlie is clearly an individual that has a great deal of difficulty with compliance. I appreciate from what he said to me that he feels that he can comply. I am, however, not certain that his history bears out that he will be capable of doing so. I would also note, in his favour, there are no prior related drug offences on the record, which is something that I will consider in terms of the appropriate length of the sentence on the drug trafficking charge.

[17] Counsel before me have somewhat different positions in terms of range. They are not particularly far apart, at least initially, on length, although defence counsel has asked that I consider that Mr. Charlie be entitled to serve at least part of his sentence within the community pursuant to the terms of a conditional sentence order.

[18] The Crown's position is that a global sentence of 19 months, less credit for remand, is appropriate in all of the circumstances, and I would also note that there are a number of mandatory orders that flow from the charges that are before me. I do not believe there is any issue with respect to any of those. I will address those at the end.

[19] I believe the range that defence is suggesting is along the lines of eight months, with respect to the trafficking, (Crown's position is 12 months on that charge), four months on the driving offences, and asks that I consider a 12 month conditional on the remaining two counts, plus 12 months probation, arguing that it would be more in the public interest for Mr. Charlie to be able to access programming and to keep him on a tighter leash, in the way that we are able to do with conditional sentences.

[20] There have also been a number of cases placed before me that indicate the various sentences that have been given, particularly in relation to the drug trafficking charge. They cover an extremely broad range, from a matter of a few months up to several years. The task, of course, for me, is to figure out where Mr. Charlie falls within that range. As I said, defence counsel is suggesting he is in the eight months area; Crown is suggesting he is in the 12 month area. I then need to consider the appropriateness of a conditional sentence.

[21] What I do accept from the cases, and what I do think is important to reiterate today, is, firstly, that the dominant sentencing principles as it relates to drug trafficking offences, and, indeed, as it relates to the impaired offences that are before me on the circumstances of this particular case are denunciation and deterrence as opposed to rehabilitation. I also, as it relates to the drug trafficking offence, would reiterate what has been often repeated in such cases and that is the extreme negative impact that drugs have on this community, given the lack of resources that we have as a community to adequately respond to the problems that flow from drug addictions. I cannot lose sight of that, and that reinforces, in my mind, the importance of there being a

denunciatory and deterrent sentence in this particular case with respect to the trafficking charge.

[22] I do accept that it is possible for a conditional sentence to meet the principles of denunciation and deterrence in exceptional circumstances in these types of cases. The question for me is whether or not, in this particular case, I am satisfied that those principles can be met. Given Mr. Charlie's background, I have significant concerns about his ability to comply. I have, as a result of that, a significant concern about whether the pre-conditions of conditional sentence can even be met in this case.

[23] I am required to determine whether or not, in granting a conditional sentence, that conditional sentence would endanger the safety of the community. In this particular case, I am not satisfied that the information before me is sufficient to demonstrate that the public would not be endangered if Mr. Charlie were placed on a conditional sentence, and I come to that conclusion primarily for two reasons. Firstly, his lengthy history of failing to comply with court orders. I accept that that may have something to do with his cognitive limitations, but it nonetheless tells me that he struggles significantly with following court orders, and that includes court orders saying that he cannot drive, and in this particular incident, in breaching that order, he put a number of people at serious risk. That is something that I think is important and relevant in considering the safety of the public.

[24] The other point which has caused me concern in assessing the safety of the public component, in this particular case, is a concern that flows from the pre-sentence report in terms of some of the representations that Mr. Charlie made to the Probation

Officer. There is information in the pre-sentence report about the offences that he has given the Probation Officer that is inconsistent with what he told the police in his statement. There are also representations he made, for instance, that he completed a program while in custody, and contact with the facility has indicated that there is no record of him having completed that program. There are concerns in my mind about some of the representations that Mr. Charlie has made and the degree to which I can rely on them as a result of those inconsistencies.

[25] Defence counsel has asked that I consider some of his cognitive limitations as perhaps an explanation for some of those inconsistencies, and it may well be. I do not have enough information before me on that particular point, but it does cause me concern in assessing the degree to which he is likely to follow through on his stated desire to pursue counselling and programming. The information before me clearly suggests that it is available to him. I do have information saying that at least in January of 2009 he did complete a program, but I also have information before me that suggests, subsequent to completing that program, he continued to be non-compliant with court orders and indeed committed some very serious offences in October of 2009.

[26] It is my hope, certainly, that upon his eventual release, Mr. Charlie will indeed avail himself of the resources out there and get the help that he needs, but there is not sufficient information before me to satisfy me that he will actively do so in a way that I can be certain that his release would not endanger the public. It is for those reasons that I have come to the conclusion that a conditional sentence would not be appropriate.

[27] I have done this a little backwards. Usually I address the length of disposition first, but I am satisfied that the range we are talking about is below the two-year range in any event. As indicated, I am satisfied that a conditional sentence would not be appropriate.

[28] The next area, I suppose, of major dispute would be the actual length of appropriate sentence with respect to the trafficking charge. As stated earlier, I am of the view that denunciation and deterrence should be the dominant sentencing principles.

[29] In considering the appropriate length of sentence, I am of the view that the following factors are appropriate. It was a small amount of cocaine, and the small amount, I think, is relevant. This is not by any means a large scale, sophisticated commercial operation. I accept that Mr. Charlie's behaviour was at least partially motivated by a desire or a need to support an addiction. I think the evidence is somewhat equivocal as to whether or not he was solely motivated by that addiction, but I accept at least it was a factor driving his behaviour.

[30] I also accept the fact that there is information suggesting that Mr. Charlie has some cognitive and intellectual impairments that may well have some significant effect on his behaviour. There is clearly an indication of impulsivity in the report of Dr. Boer and other difficulties that he has in terms of managing his own behaviour. Those are factors which concern me as it relates to a conditional sentence, but they are factors that I do think are relevant in terms of the appropriate length of sentence.

[31] Having considered, I am not going to go through them at length, I think it has been a long morning for everyone involved, but having considered the cases, in my view, the facts of this case, as it relates to the trafficking and the circumstances of Mr. Charlie, would place him in roughly the eight to ten month range. I will put him at the lower end of that range considering some of the efforts he did make in terms of treatment. So, Mr. Charlie, I am giving you some credit for what you did try to do, and taking you down to the lower end of that range. I am also factoring into that the information I have with respect to his cognitive impairments, which as I indicated, I think is relevant.

[32] So I am satisfied that the appropriate sentence on the trafficking charge is one of eight months. What I am going to do is reduce that by the credit for remand, so the actual sentence on paper will be a sentence of one month, but the record will reflect that he is being credited for seven months in pre-trial custody.

[33] With respect to the driving offences, I am in agreement with the sentences as proposed by the Crown. Firstly, on the s. 254, it is mandatory that there be a sentence of four months, the notice having been filed, and in light of his prior related record. So on the refusal, there will be a sentence of four months, consecutive to the sentence on the trafficking charge.

[34] With respect to the dangerous driving, I am satisfied that the proposal of the Crown that six months, on these circumstances, is entirely appropriate. The reason I have come to that conclusion is that the driving was particularly egregious in this particular case. A number of people were put at risk, and Mr. Charlie got back in the

vehicle on more than one occasion to continue driving and putting people at risk, notwithstanding the number of people that attempted to intervene. For that reason, I am satisfied that a sentence of six months is appropriate on the s. 249. That will be consecutive to the trafficking charge but concurrent to the impaired driving charge. On the fail to appear there will be a 30 day consecutive sentence.

[35] On each of the Old Crow liquor tickets there will be sentences of one week, consecutive to each other but concurrent to everything else.

[36] At the end of the day, Mr. Charlie, I have to break down the sentences on paper, because some are concurrent, which means they are served at the same time, and others that are consecutive, which means they follow the other sentences. When it is all said and done, what you have is another seven months to serve.

[37] In addition to that, there will be a driving prohibition of three years. My understanding is that would take effect once the custodial term is completed. That, again, is mandatory, given that notices have been filed.

[38] DNA, the trafficking charge is a primary designated offence for DNA, so I will make the order that Mr. Charlie provide such samples of his blood as are necessary for DNA testing and banking.

[39] My understanding is that the trafficking charges also make the firearms prohibition mandatory. I do not have any information with respect to any prior prohibitions, so my understanding is that ten years would be the relevant period of time.

I would make an order that Mr. Charlie be prohibited from having in his possession any firearms, ammunitions, or explosive substances for a period of ten years.

[40] I would waive the victim fine surcharge, given his custodial status. Is there anything that I have forgotten?

[41] MS. MACDONALD: Oh, I'm not sure if I just didn't hear it, but with respect to the s. 254, there is a four month minimum. With respect to the dangerous driving there is six months, and I didn't hear what the Court imposed with respect to the drive disqualified.

[42] THE COURT: Oh, sorry. I actually did not, you are right. I must confess I did do the dangerous driving, but I did not do the drive while disqualified. He does have a prior. I will have the record reflect a 90 day sentence on that, but I will make it concurrent. So it does not add to the seven months, but I do think, given his prior and given the facts of this case, that a lengthier sentence is appropriate on the drive while disqualified, at least on paper.

[43] I will say, I did give some consideration to the notion of a probationary term. I am going to decline to put him on probation after this order for two reasons. Firstly, the sentence, in my mind, is intended to be deterrent and denunciatory and not rehabilitative in nature. Secondly, I am concerned, with his history of breaching, that I would simply be setting him up for further breaches.

[44] That being said, Mr. Charlie, it is my hope that once you are released that you do actively pursue treatment, because if you do not it is only a matter of time before you

are back again. You have support around you and Ms. Charette is clearly prepared to go through treatment and programming with you. You need to take advantage of that if you want to stop coming back to jail, but given that the focus is on deterrence, I am not going to add a probation order.

[45] The remaining counts?

[46] MS. MACDONALD: Crown enters a stay of proceedings to any counts to which guilty pleas were not entered.

RUDDY C.J.T.C.