

Citation: *R. v. McGinnis*, 2020 YKTC 22

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Docket: 19-00413
18-00859
18-00129
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

DANIEL JOHN MCGINNIS

Appearances:
Paul Battin
J. Robert Dick

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] RUDDY T.C.J. (Oral): Daniel McGinnis is before me for sentencing in relation to five counts to which he has entered pleas of guilty: two for driving while prohibited, firstly, in March 2018 and then in February 2019; and in August 2019, an offence of driving while the concentration of alcohol in his blood exceeded the legal limit, a breach of an abstain condition; and another driving while disqualified.

[2] There is an Agreed Statement of Facts that sets out the circumstances. I do not think it is necessary for me to go through them in detail. In terms of the nature of the driving, in particular, there is nothing in the facts that suggest anything particularly aggravating beyond him driving while he was clearly prohibited from doing so in the first

instance. In the second, there is an indication that the motor vehicle he was driving was neither insured nor registered.

[3] In terms of important factors in relation to the offences in August 2019, Mr. McGinnis came to the attention of the police because he had driven to the emergency shelter and was noted to be sitting in the driver's seat drinking from a bottle of vodka. He failed an approved screening device test and then provided samples that registered at 250 mg% and 240 mg%, which are significant readings. One can perhaps understand why there were not symptoms of impairment that were exhibited consistent with those high readings when one looks at Mr. McGinnis' history.

[4] Mr. McGinnis is now 60 years of age, born and raised in Whitehorse. By all accounts, he had a very stable and supportive childhood. He went through to Grade 9 in school. He took a six-month forestry course, did some additional upgrading, and seems to have had a relatively good history in terms of employment in the mining industry.

[5] However, somewhere in his teens he developed what has become a lifelong and significant alcohol problem. There are numerous reports before me that talk about his struggles to deal with his addiction, which is an issue in and of itself. The difficulty in Mr. McGinnis' case is that he has a history of combining his substance abuse with choosing to operate a motor vehicle, thereby creating a significant danger on the roads and it is that that keeps bringing him before the Court.

[6] His record includes other convictions that are somewhat more dated. The primary concern for me today is the history of driving-related offences, particularly

impaired driving-related offences. There are 12 prior convictions for impaired driving or driving while over 80; two more dated convictions for driving while prohibited; and one conviction for refusing to provide a breath sample pursuant to a lawful demand. His lifelong struggle with substance abuse is very much reflected in his record.

[7] The difficulty with this case, quite frankly, is there are a number of positives that seem to almost invariably be cancelled out by negatives. Mr. McGinnis, when he was first charged with driving while prohibited in March 2018, did ultimately enter into a Community Wellness Court Program and he did complete a number of important steps, including successfully completing the inpatient program at Mental Wellness and Substance Use Services (“MWSUS”).

[8] He has done long-term one-to-one counselling with Ms. Tardiff and appears to have developed a really strong counselling relationship with her. She describes him as very motivated and is very supportive of him. He has a long-term AA sponsor who, similarly, is very supportive of him. Both have taken the time to be here today. Mr. McGinnis has completed some of the foundation sessions at MWSUS as well. He has been supervised by the Justice Wellness Centre for an extended period of time, beginning in November 2018.

[9] The difficulty with Mr. McGinnis — I think the Crown described it best as “we seem to go one step forward and two steps back.” As Mr. McGinnis describes it, everything is going fine until he becomes complacent, he stops worrying about consequences, and then he drops under the radar and starts to drink at home alone to

avoid detection. There are no outward indicators until it manifests into a bigger problem.

[10] This is reflected in his history with the Justice Wellness Centre. There are at least three or four occasions in which he either tested positive for alcohol or was viewed actually drinking. His initial response to each of those instances was to deny his drinking, and then work has to be done to get him to start looking again at consequences in order to get him back on track. It seems to be almost a lifelong pattern.

[11] The reports filed before me give some insight into the reasons for this pattern, in particular the materials provided by Nicole Bringsli including a psychological assessment done back in 2014 and, more particularly, the update that she provided in November 2019 that outlines what appears to have become an entrenched pattern for Mr. McGinnis.

[12] Ms. Bringsli expresses concern that Mr. McGinnis has a long history of saying the right things, doing enough to keep the process going in terms of steps forward, but not quite enough to really get to the point where he starts to incorporate change into his day-to-day thought process in a way that he can sustain it over the long-term.

[13] Ms. Bringsli opines that when Mr. McGinnis is very conscious of the potential for consequences, he is much more consistent in maintaining his counselling relationships and his sobriety. When he gets further away from consequences, he becomes complacent and his commitment to counselling and sobriety starts to drop off.

[14] Mr. McGinnis does seem to be sincere in his desire to change his behaviour, but unable to translate that desire into long-term sobriety. Part of the difficulty with Mr. McGinnis, in addition to his struggles with alcohol, is that he has a very "if I can get away with it, I will" sort of attitude towards driving, which is extremely concerning.

[15] The big question is: What do we do with this?

[16] I am not going to repeat much of what the Crown very kindly went through, in his submissions with respect to the state of the law regarding the real and present danger in this country created by individuals who get behind the wheel when intoxicated. We are fortunate, in Mr. McGinnis' case, that no one was injured or worse. Anytime someone who is drinking gets behind the wheel, he or she is a potential killer.

[17] In terms of appropriate disposition, counsel are agreed that Mr. McGinnis, because of his history of impaired driving, has reached the point where he needs to go into the federal system, but they disagree on length of sentence.

[18] Crown is suggesting two-and-one-half to three years as the appropriate global sentence, with a driving prohibition of 10 years. Defence is suggesting a sentence in the range of 26 months with a driving prohibition of five years.

[19] I will start out by saying I am imposing a 10-year driving prohibition. Quite frankly, the root of the problem here is driving while drinking. The drinking alone is not an offence until combined with driving. I think Mr. McGinnis needs to come to terms with the fact that perhaps he ought never to drive again. Ten years, at the very least, will ensure a lengthy period over which to determine whether or not Mr. McGinnis is

able to maintain long-term sobriety. If not, Mr. McGinnis, you should consider whether the solution for you is to make sure you cannot get anywhere near a vehicle if you have been drinking. In all the circumstances, I have little hesitation in imposing a 10-year driving prohibition.

[20] In terms of the custodial sentence, I am going to start with the first two driving while prohibited offences. Those are the two for which, at least in my view, he was officially in Wellness Court. Crown is suggesting sentences of 60 and 90 days; defence is suggesting 30 and 60 days. I am mindful of the fact that even though Mr. McGinnis was not fully successful, he is entitled to some credit for the effort he put in even though it has not yet translated into long-term change. In consideration of his time in Wellness Court suggested by counsel, I am going to impose the lower of the two submissions. Accordingly, the sentence for the March 2018 offence is going to be 30 days, and the sentence for the February 2019 offence will be 60 days consecutive.

[21] Regarding the impaired driving offence, defence is suggesting 21 months on the basis of *R. v. Joe*, 2016 YKTC 31, a decision in which Mr. Joe had the same number of convictions over a similar period of time as Mr. McGinnis and the Court imposed a sentence of 21 months. The sentence was overturned on appeal, as the Yukon Court of Appeal found that the sentencing judge had not considered, as required, Mr. Joe's Aboriginal heritage. The sentence was reduced on that basis.

[22] Crown submits that, while the *Joe* decision is similar in many ways, the fact that Mr. McGinnis is not of Aboriginal descent, suggests that his sentence should be somewhat longer than in *Joe*. Crown also notes the significant difference in the

readings between the two cases, with Mr. McGinnis' readings being 100 mg% higher than Mr. Joe's, as justifying a longer sentence. Defence argues that that may perhaps be offset by the fact that Mr. Joe exhibited erratic driving, while Mr. McGinnis was found in care and control and not observed actually driving.

[23] I do think that there are some differences between the two cases, though perhaps not quite as marked as the difference in counsels' positions.

[24] In all of the circumstances, I am satisfied that the appropriate sentence on the driving while over 80 is the imposition of a sentence of 24 months to be served consecutively; one month concurrent on the s. 145 abstain breach; and three months consecutive on the drive while disqualified. That takes us to 30 months in total.

[25] There was one day spent in remand. I am not going to reduce the sentence in light of that one day, but I have factored it into my consideration of the appropriate sentence.

[26] The victim surcharge is waived in light of the fact that Mr. McGinnis is not working at the moment, and in consideration of his upcoming custodial sentence.

[27] Under s. 320.24(10), the period that I would recommend would be five years. Interlock might be a solution Mr. McGinnis; otherwise, you may want to focus on how you live a life without a licence and without driving at all.

[28] MR. BATTIN: On Information 413, the Crown enters a stay of proceedings to Count 1 and 4.

[29] THE COURT: Thank you.

RUDDY T.C.J.