

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

WAYNE SILVERFOX

Appearances:
Paul Battin
Baird Makinson

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM C.J.T.C. (Oral): This is the sentencing of Wayne Silverfox.

[2] Mr. Silverfox has pleaded guilty to a drinking and driving offence and also a condition of court release that he not drive a motor vehicle. Both of these offences occurred on December 26, 2019.

[3] Mr. Silverfox was born in 1956, so by my calculation he is 64 years of age.

[4] I have the benefit of a previous sentencing involving Mr. Silverfox, where Mr. Justice Gower of the Supreme Court set out his background. In brief, he is a member of the Little Salmon Carmacks First Nation, as has been pointed out by both counsel today. He had the unfortunate experience of attending residential school in

Carcross and later at Yukon Hall in Whitehorse. He subsequently was placed in a residential school in Lytton, British Columbia, in 1967 and was not returned to Whitehorse until 1969. During this time, he had almost no contact with his family and was physically and sexually abused.

[5] When he returned to Whitehorse, he was unable to live with his parents because of their issues with alcohol abuse. He lived with his grandparents, who were also alcoholics but nonetheless were able to care for him.

[6] Sadly, Mr. Silverfox has an extensive criminal history. What is most relevant to today's hearing is that, with respect to drinking and driving offences, this will be the 12th conviction for offences of that nature. As I understand it, the most recent conviction was in November 2020. It was an offence of drinking and driving under the previous legislation, s. 253(1)(b) of the *Criminal Code*, and Mr. Silverfox received a sentence of 241 days of pre-sentence custody and he was prohibited from operating a motor vehicle for seven years.

[7] The joint submission before me today is for a period of 14 and one-half months, plus a lifetime driving prohibition.

[8] Mr. Silverfox has 24 days of pre-sentence custody since the last conviction in November 2020.

[9] As has been pointed out by the Crown, offences of drinking and driving require a sentence that responds by way of denunciation and deterrence. I, of course, take into

account the *Gladue* factors as have been outlined by counsel today, and as included in the report that was filed, and the sentencing decision that I earlier alluded to.

[10] The positive thing for Mr. Silverfox, as his counsel has indicated, and as he has pointed out himself, is that he has undertaken in the recent past to attend counselling sessions. He also indicated that he is reading self-help books. Mr. Silverfox seems, based on what he has said to me today, to be someone who is articulate and I am sure that he can become, as he wishes, a more productive member of society.

[11] In some ways, I think that it is unfortunate that he was not sentenced to both offences on November 17, 2020, but here we are.

[12] In reaching a decision, I have considered the principles of sentencing, Mr. Silverfox's personal circumstances, and the circumstances of this offence where the readings — as fairly pointed out by the Crown — were at the lower end of the spectrum, in terms of drinking and driving offences (90 mg/%), but, as indicated by the Crown, this was not a situation of simple care and control. This was a situation that was dangerous for the public.

[13] It seems to me in considering all of the appropriate factors that the sentence before me by way of joint submission is an appropriate one. Accordingly, I sentence Mr. Silverfox to 14 and one-half months of custody, which I have worked out to be 435 days of jail.

[14] There is the issue of the pre-sentence custody, although it is not a significant period of time. The Crown submits in this case that it should be 1:1, as opposed to 1.5:1.

[15] The Crown, as I understand it, points to the situation back in November 2020, when this matter was set for trial and Mr. Silverfox ultimately discharged his counsel at that time. The Crown obviously has information that I do not have and the Crown has a certain knowledge that may, in the Crown's mind, bring into question what occurred back on November 13, 2020, I believe, with respect to the discharge of his counsel, but I cannot go behind the discharge of his counsel.

[16] I note as well that in terms of the decision of *R. v. Summers*, 2014 SCC 26, from the Supreme Court of Canada, that the circumstances justifying enhanced credit under s. 719 (3.1) need not be exceptional or unique to the offender:

71 The loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, ...

[17] In this situation, I take into account the following: the fact that, at the end of the day, Mr. Silverfox, although this is not an early guilty plea, it is a guilty plea. And as I understand it, the initial trial that was set for November 2020, was the first time that it had been set for trial.

[18] In all the circumstances, I do not think it is, in my view, appropriate to deviate from the normal grossing up of 1.5:1. I will give Mr. Silverfox credit for 35 days of

pre-sentence custody. That will be subtracted from the 435 days. There will be 400 days remaining to be served.

[19] The Crown also seeks a no-contact condition with Eileen Atlin and Gary MacDonald, both witnesses who would have testified had this matter proceeded to trial. Mr. Silverfox indicates that it is unnecessary for me to impose such a condition; however, based on the information that I have received through Crown counsel, I think that it would be appropriate to impose those no-contact conditions for the period of time he is in custody.

[20] Mr. Silverfox will not have contact, directly or indirectly, or communication in any manner with Eileen Atlin, unless that communication is initiated by Ms. Atlin; and he shall not have contact, directly or indirectly, or communication in the manner with Gary MacDonald.

[21] I also impose the lifetime driving prohibition as jointly submitted to me by counsel.

[22] In terms of the victim surcharge, considering the fact that Mr. Silverfox has been in custody now for almost a year and the fact that he will be in custody for a significant period of time to come, I will waive the imposition of the victim surcharge on each count.

[23] With respect to the remaining matters, Mr. Battin?

[24] MR. BATTIN: If I can just correct the record, Mr. Silverfox has not been in custody for about a year. He was released the day after this and then he's come back into custody in September of this year.

[25] The credit that was used for the sentencing before Judge Ruddy in mid-November was before all of that, just so Your Honour's aware.

[26] THE COURT: I appreciate the correction.

[DISCUSSIONS]

[27] I think that maybe the wording of that condition could include except for contact through a third party — and I will say Linda Silverfox — for the purposes of Mr. Silverfox retrieving his personal items/personal property.

[28] Stay of proceedings on the remaining counts as directed by the Crown.

[29] With respect to Count 5, counsel have not broken that down. Unless I hear differently from counsel, I will order that there be a period of incarceration of 60 days concurrent.

[30] MR. BATTIN: That is fine.

[31] THE COURT: All right.

CHISHOLM C.J.T.C.