

Citation: *R. v. Silverfox*, 2020 YKTC 50

Date: 20201117  
Docket: 17-00509  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before Her Honour Judge Ruddy

REGINA

v.

WAYNE SILVERFOX

Appearances:

Leo Lane

Amy Steele

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR SENTENCE**

[1] RUDDY T.C.J. (Oral): Wayne Silverfox is before me for sentencing in relation to two counts to which he has entered pleas of guilty. The first, and most serious, is for operating a motor vehicle while the concentration of alcohol in his blood exceeded the legal limit. The second is for possession of stolen property, to wit: a motorcycle. The offences occurred on September 16, 2017.

[2] There is an Agreed Statement of Facts that has been filed. In brief, the facts that are admitted are that the RCMP attempted to stop Mr. Silverfox's truck near the site of a recent break-in. A motorcycle that had been stolen in the break-in was noted to be in the box of his truck. Mr. Silverfox has admitted that he was aware that the motorcycle was there and that it had been obtained by crime.

[3] Mr. Silverfox did not stop when the RCMP initiated a traffic stop. It is admitted that he narrowly missed hitting one of the officers and led the police on a chase through the industrial area of McRae and into a wooded area. He hit a tree with his vehicle and then fled into the woods on foot. He was ultimately apprehended. There was a strong smell of liquor and indicia of intoxication. He ultimately provided two samples of his breath, both registering at 130 mg/%. At the time, he was subject to a driving prohibition.

[4] In terms of determining an appropriate sentence, I will note that I have had the benefit of reviewing a psychological assessment, a Community Wellness Court ("CWC") Treatment Summary, and a *Gladue* report that had been prepared a couple of years ago. I have reviewed all of the information provided and have factored it into the determination of an appropriate disposition.

[5] In terms of background, Mr. Silverfox is now 64 years of age and is a member of the Little Salmon Carmacks First Nation. He has a criminal record dating back to 1973 with some 80 priors. Of particular note, there are a number of impaired driving-related convictions that are predominantly from the 1970s and 1980s. There are two convictions that are more recent: one in 2005, for which he received a sentence of 15 months; and one in 2009, for which he received a sentence of 729 days.

[6] Mr. Silverfox also has a number of convictions for driving while disqualified, which appear to be somewhat problematic as defence counsel has raised an issue as to whether or not a previously imposed lifetime driving prohibition imposed at some point

in the 1980s, was or was not legal. I understand that that is likely to be challenged by Mr. Silverfox at some point.

[7] The information that I have been provided indicates that Mr. Silverfox was born in Whitehorse to a mother who spoke only Northern Tutchone. His father was murdered when Mr. Silverfox was an infant. He was raised by a stepfather who was abusive.

[8] His home life was characterized by early exposure to substance abuse and domestic violence. It would appear that most of his own relationships have mirrored the same pattern of substance abuse and violence in which he was raised. Mr. Silverfox has five adult children.

[9] Mr. Silverfox, as a child, attended three different residential schools where he experienced both physical and sexual abuse. He has a grade 10 education, followed by an apprenticeship in automotive mechanics, and has been self-employed as a mechanic since 1990. It would appear that Mr. Silverfox had struggles learning in school and he has expressed concern about the potential impact of his mother having consumed alcohol while pregnant with him.

[10] The psychological assessment does indicate what the psychologist describes as an uneven cognitive profile. There are a number of noted strengths, in the areas of executive functioning, non-verbal reasoning, and problem-solving, but noted struggles with verbal comprehension and working memory. Ultimately, he was diagnosed in the assessment as suffering from Attention Deficit Hyperactivity Disorder (“ADHD”), noted to be moderate, and an alcohol use disorder, noted to be severe.

[11] He began drinking alcohol at the age of 10. Assessments throughout his time with us in the CWC process have indicated that he has significant problems in relation to the use and abuse of alcohol. Drugs have not been noted to be an issue at any point during his time in CWC.

[12] The psychological assessment does indicate a strong potential of reoffending if Mr. Silverfox does drink alcohol, as he loses his awareness of self and how his actions may impact on others.

[13] To his credit, Mr. Silverfox did accept responsibility for the offences that I am sentencing him for today and entered into CWC on November 19, 2018. He was noted to be extremely motivated and was largely successful at addressing sobriety and programming needs for just over one year in CWC. He completed the inpatient treatment program with Mental Wellness and Substance Use Services in February 2019, the Living Without Violence program in July 2019, and the Substance Abuse Management (“SAM”) program in March 2020.

[14] He had a very strong counselling relationship throughout his time in CWC with counselling psychologist Svenja Weber, participating in more than 21 one-to-one counselling sessions with her. I understand he has continued that counselling relationship while in custody.

[15] There were no positive tests during his time in CWC.

[16] I also consider the fact that he participated in a full psychological assessment, resided for a period of time at the Yukon Adult Resource Centre, and was subject to restrictive conditions for an extended period of time.

[17] Unfortunately, Mr. Silverfox did incur new charges for related offences in December 2019. He did subsequently complete the SAM program and continued to be monitored for several months up until September of this year when further charges were incurred. He has been in custody since September 4, 2020.

[18] The CWC Treatment Summary is extremely positive, with the exception of the new charges for which pleas have not yet been entered, are not before me for sentencing, and have not yet been proven.

[19] Mr. Silverfox did have an extended period of time during which he did extremely well. The only concern raised was after the new charges in December 2019, there were four different opportunities provided to Mr. Silverfox to re-enter into inpatient treatment programming that he declined to take advantage of. The first of those, if I remember correctly, was because he had been injured in a bike accident. The other, I understand, relates to the loss of a young woman whom he had participated in raising, and he did not feel that he was in the right place to fully engage and benefit from residential programming.

[20] The question now is what do I do with all of the information before me. In particular, we have an extended period of time of really exceptional performance, but we have some indicators that there may be some ongoing issues for Mr. Silverfox, in

terms of his ability to sustain sobriety over the longer-term and, more particularly, to make sure that he does not drive while under the influence.

[21] Crown is seeking a sentence of 12 months plus 18 months' probation and a lifetime driving prohibition with respect to the "over 80" charge, and 40 days concurrent on the possession of stolen property.

[22] The Crown argues that Mr. Silverfox is in the rare category of the incorrigible drunk driver, warranting a significant custodial term, and suggests that 12 months would be at the extreme low-end of the range, given Mr. Silverfox's past record, but that it takes into account his considerable work and progress in CWC.

[23] Crown provided two cases: *R. v. McGinnis*, 2020 YKTC 22 and *R. v. Joe*, 2017 YKCA 13.

[24] Mr. McGinnis was also a CWC client, although he was not in CWC in relation to driving "over 80". That charge came later on and led ultimately to his removal from CWC. He was sentenced to 24 months for care and control "over 80". His readings were dramatically higher (240 mg/% and 250 mg/%). He had 12 related priors. While he had some time in CWC related to the charges of driving while disqualified, his performance was very mixed. He would do very well for short periods of time, become complacent, and then would fall off the radar and begin using. It was a cycle that he repeated over and over again. We never saw, for Mr. McGinnis, the sustained period of sobriety and performance that we had from Mr. Silverfox, so there are some significant differences with respect to that case.

[25] The other case the Crown has provided is that of Mr. Joe. It is a Court of Appeal decision in which Mr. Joe was convicted of impaired driving at trial with readings of 150 mg/% and 140 mg/%. He had also entered a guilty plea to a refusal and a breach charge. There is a gap between offence dates of about nine months. He, too, had 12 priors. He was given a global sentence of 43 months by the sentencing judge, but that was reduced on appeal on the basis that the sentencing judge had failed to give tangible effect to Mr. Joe's Aboriginal background. It was reduced to a global sentence of 23 months and five days. In terms of the breakdown, he received 12 months on the refusal and 11 months consecutive on the impaired charge.

[26] Defence is suggesting that the appropriate disposition would be one of four to six months' time in jail, with a driving prohibition of three to five years, and a 30-day sentence on the possession of stolen property. Defence has provided one case, that being the case of *R. v. Tom*, 2012 YKTC 55.

[27] Mr. Tom was sentenced on multiple charges, but on one related offence he received a six-month conditional sentence order. It appears that there were some similarities. He, too, was a member of the Little Salmon Carmacks First Nation. It is unclear from the decision how many priors he had. The listing of dates suggests that there were likely five, but I cannot say for sure. Defence notes that he received a three-year driving prohibition.

[28] As is not unusual, it is difficult to find cases that are exactly on point, and I certainly appreciate counsels' efforts in providing me with cases that give me a sense of the range that I need to consider in terms of determining where Mr. Silverfox falls.

[29] In terms of the cases before me, I would say that Mr. Joe is probably the closest. There are similar readings and a similar number of prior related offences, although Mr. Joe appears to have had a couple more offences than Mr. Silverfox. Where the difference comes in is that Mr. Joe had not participated in a structured and closely supervised program like CWC.

[30] I take, from Crown's comments, that Mr. Lane likely had some involvement in the appeal. He advises me that Mr. Joe was given considerable credit by the Court of Appeal in relation to some self-directed efforts at rehabilitation including a camp that he was operating and some efforts to give back to the community. But I take Ms. Steele's point that Mr. Joe's efforts would not have been to the same extent, I think one can say, as Mr. Silverfox's performance in the very structured and supervised environment of CWC.

[31] That being said, I also take the Crown's point that there was probably an element, although not stated, of totality in the Court of Appeal's decision in relation to Mr. Joe, so they may well, had it been just one offence, gone higher than 11 or 12 months. Unfortunately, that is not articulated in the decision so it is not fully clear to me what they might otherwise have done.

[32] But, if I accept, as a starting point, a sentence of 11 or 12 months for an individual where there are significant *Gladue* factors present and a history of related convictions, it would seem to me that the appropriate sentence, with respect to Mr. Silverfox, factoring in that there are some gaps in his record, as the majority of offences happened in the 1970s and the 1980s (although I take Crown's point that part



of the period of time over the gap would have been spent in custody) and also factoring in the considerable efforts that Mr. Silverfox made in CWC, I am satisfied that the appropriate sentence would be somewhat less than the 11 or 12 months that Mr. Joe received for each of his related offences.

[33] So, here is the sentence that I believe is appropriate in all of the circumstances, factoring in the criminal record and other aggravating factors, and his efforts in CWC and other mitigating factors. I am satisfied that the appropriate sentence with respect to the impaired driving offence is eight months. I am satisfied that the appropriate disposition on the possession of stolen property is a concurrent sentence of 60 days.

[34] I understand that Mr. Silverfox has a considerable amount, in fact, well in excess of that amount in remand time, credit that he is entitled to.

[DISCUSSIONS]

[35] The sentence on both offences will be one day deemed served by his attendance in court today. Mr. Silverfox's record is going to reflect that he is being credited for 240 days in pre-trial custody on the impaired driving offence and concurrent credit of 60 days on the possession of stolen property. I calculate that, as of today, he is entitled to a total credit of 374 days.

[36] MR. LANE: Your Honour, what I'll ask is, just to avoid any maybe conflicting rulings down the road, would Your Honour be content to just state that his sentence today is one day, taking into account 240 days time served?

[37] THE COURT: And then you can worry about how credit for what is leftover is calculated later —

[38] MR. LANE: Please.

[39] THE COURT: — if it needs to be addressed.

[40] Fair enough. I tend to agree that probably makes more sense, so we will just say taking into account the 240 days time served.

[41] That leaves me the remaining questions of probation and the driving prohibition.

[42] Crown is seeking a lifetime driving prohibition. There is some question about the validity of the lifetime driving prohibition that Mr. Silverfox might already be subject to. I do think that the primary concern, as I have stated more than once already today, Mr. Silverfox, with respect to you, given your long-standing problem with alcohol, is the driving. I do think there needs to be a considerable driving prohibition to make sure that if you are, at times, struggling with maintaining your sobriety, you are not putting other people at risk.

[43] I cannot see imposing a lifetime driving prohibition. I imposed 10 years with respect to Mr. McGinnis. Given the differences in performance in CWC, it would not make sense to impose a longer period on Mr. Silverfox, but I do think that there should be a substantial period. Again, as noted, I see Mr. McGinnis' case as somewhat less favourable than I do Mr. Silverfox's.

[DISCUSSIONS]

[44] The effective driving prohibition will be five years, which is seven years reduced by the, roughly, two years that he was subject to the no-drive condition.

[45] That leaves me with the question of probation.

[DISCUSSIONS]

[46] I want to make sure, Mr. Silverfox, that you have access to the maximum amount of programming that you can have access to. I was leaning towards not imposing any probation on the basis of the time that you have spent subject to conditions in CWC, but that does mean that you do not have access to some of the programming that you can get if you are on probation. Part of what I was thinking of is potentially a 12-month probation order, the terms being that you report and that you do programming, just so that you can access the programming.

[DISCUSSIONS]

[47] There will be a 12-month probationary term that will follow on the "over 80" charge. The conditions are:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify your Case Manager in advance of any change of name or address, and promptly of any change of employment or occupation;

4. Report to your Case Manager at the Justice Wellness Centre immediately upon your release from custody, and thereafter, when and in the manner directed by your Case Manager; and
5. Attend and actively participate in all assessment and counselling programs as directed by your Case Manager, and complete them to the satisfaction of your Case Manager, for the following issues: alcohol abuse, and any other issues identified by your Case Manager, and provide consents to release information to your Case Manager regarding your participation in any program you have been directed to do pursuant to this condition.

[48] That leaves us with the remaining counts on this Information.

[49] MR. LANE: Stay of proceedings.

[50] THE COURT: Mr. Silverfox, we have already had a bit of a chat but I just want to encourage you, again, not to give up. You have made considerable progress. You have some really good relationships that you have developed with counsellors and case managers, so build on those. Use any time you have left in custody to plan for your return to the community because you have certainly demonstrated that you can do it. Good luck.

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RUDDY T.C.J.