

Citation: *R. v. Andre*, 2022 YKTC 30

Date: 20220616
Docket: 19-00144
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

ANTHONY ANDRE

Appearances:
Leo Lane
Malcolm Campbell

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] CHISHOLM T.C.J. (Oral): Mr. Anthony Andre was convicted after trial for having committed three *Criminal Code* (the “Code”) offences, namely, two counts of driving a conveyance with a blood alcohol level exceeding the legal limit causing death (s. 320.14(3)), and one count of driving a conveyance with a blood alcohol level exceeding the legal limit causing bodily harm (s. 320.14(2)).

[2] The offences occurred at approximately 6:26 a.m. on May 13, 2019 in Whitehorse when the vehicle that Mr. Andre was driving went off Hamilton Boulevard into the median strip and collided with a light standard. There were four passengers in the vehicle. Two of them, Faith Papineau and Stallion Smarch, were killed as a result of the collision. Additionally, Jay Charlie suffered a number of serious injuries. He

underwent orthopedic surgery for injuries to his forearm. Mr. Andre's blood alcohol concentration at the time of the collision was not less than 160 milligrams of alcohol in 100 millilitres of blood.

Victim and Community Impact Statements

[3] Three Victim Impact Statements have been filed with the Court. The grief, pain, and suffering experienced by family members of Stallion Smarch and Faith Papineau is detailed in these Statements. Both Faith and Stallion were 18 years old, and had much of their lives ahead of them. The loss and heartache endured by the respective families of the victims has been profound, especially in circumstances where the deaths were avoidable.

[4] Although some family members of the victims remain upset with Mr. Andre for the death of their loved ones, I was struck by Gabriel Smarch Jr., Stallion's father, offering his forgiveness to Mr. Andre.

[5] Two Community Impact Statements were filed in this matter, one from the Liard First Nation, and one from the Kwanlin Dun First Nation. The Statements detail the history of each community and the intergenerational issues that both are dealing with as a result of the lingering effects of colonialism, including residential schools.

[6] The Community Impact Statements were helpful in understanding the significant negative impacts which resulted from the deaths of Stallion and Faith. This included young people turning to alcohol and drugs to deal with their sadness, grief, and anger.

[7] The two communities also felt a loss of security, as a result of the daily risks posed by drunk drivers to their children.

Positions of the Parties

[8] The Crown contends that a three-year penitentiary term is the appropriate sentence in this matter. The Crown submits that the primary sentencing principles in this case are to denounce Mr. Andre's unlawful conduct and to deter him from further criminal conduct, while at the same time promoting a sense of responsibility in him. The Crown notes that penalties for drinking and driving offences have been increasing over the last decade, most recently with the 2018 amendments to the *Code*. Additionally, the Crown submits that a 10-year driving prohibition, minus 31 months for the time that Mr. Andre has been subject to a no-driving condition, is appropriate.

[9] The defence maintains that considering Mr. Andre's personal circumstances and his relatively young age, a period of incarceration of two years less a day is the appropriate sentence, but that this quantum should be reduced to 18 months of imprisonment based on strict release conditions that he has been subject to for over one year, followed by a probationary period of two years. The defence submits that a driving prohibition of three to five years, minus the 31 months that he has been subject to a no-driving condition, is appropriate in this matter.

[10] The parties agree that the range of sentence for cases of this nature is from 18 months to eight years' incarceration (*R. v. Berner*, 2013 BCCA 188, at para. 37 and *R. v. Maxwell-Smith*, 2013 YKCA 12, at para. 18).

[11] Additionally, the parties agree that Mr. Andre's pre-sentence custody is the equivalent of 204 days in jail, and that the ultimate sentence should be reduced accordingly.

Circumstances of Mr. Andre

[12] I have the benefit of a comprehensive **Gladue** Report for Mr. Andre. He was approaching his 21st birthday at the time of these offences. He is a member of the Gwichya Gwich'in Council in the Northwest Territories. His mother is a member of the Kwanlin Dun First Nation.

[13] Mr. Andre's father and paternal grandmother attended residential school. Mr. Andre's parents had a chaotic and dysfunctional relationship that ended when Mr. Andre was approximately 14 years old. He and his siblings remained in the care of their father, who was often absent. Mr. Andre found himself taking care of his sisters, and left school as a result. He subsequently enrolled in the Individual Learning Centre in Whitehorse and finished grade 12. He is the father of a 5-year-old son with whom he maintains contact by telephone. He pays monthly child support to his ex-spouse.

[14] Mr. Andre has worked as a labourer for local construction companies. He is also a self-taught mechanic, and enjoys working on vehicles. He would like to become a heavy equipment technician, and plans to attend Yukon University to achieve this goal. Although no supporting documentation was provided, I am advised that he is presently working as a prep cook at a local restaurant.

[15] Mr. Andre had a difficult upbringing. He began consuming alcohol and drugs at a young age, and this clearly became problematic for him over time. Since his most recent release on bail in the spring of 2021, he commenced counselling through the Forensic Complex Care Unit. However, after 10 sessions, he realized that he was not ready for the intensive counselling sessions offered through that unit. At the same time, he is aware that he needs to continue down this path in order to become a better person. He is interested in Indigenous counselling programs, which may better prepare him for intensive counselling and treatment programs. However, he has not followed up with Indigenous based programming to date. While waiting for this matter to work its way through the court process, he indicates that he has focused on “reading self-help books, reflecting, drawing, writing and playing the guitar”.

[16] One of Mr. Andre’s sisters died not long after the charges before the Court were laid. Mr. Andre was close to his sister and has struggled with the aftermath of her passing.

[17] Mr. Andre has expressed his remorse for the deaths and injuries caused by his actions.

Sentencing Case Law

[18] The Crown has filed the following sentencing decisions: **Berner**; **R. v. Caprarie-Melville**, [1998] Y.J. No. 182 (S.C.), [2000] YTCA 3 (driving prohibition varied on appeal); **R. v. Carreira**, 2015 ONCA 639; **R. v. Charles**, 2011 BCCA 68; **R. v. Foster**, 2004 YKSC 47; **R. v. Johnson**, 2012 YKTC 47; **R. v. Jones**, [1995] Y.J. No. 118 (T.C.);

R. v. Linden (2000), 135 O.A.C 193; **R. v. Magill**, 2014 YKTC 7; **Maxwell-Smith**; **R. v. Mitchell**, [1990] Y.J. No. 24 (T.C.); and **R. v. Sam**, 2003 YKTC 67.

[19] The defence has filed four sentencing decisions, namely: **R. v. Sandhu**, 2021 BCPC 240; **R. v. Joyce**, 2019 NLSC 77; **R. v. Dan**, 2017 BCSC 2438; and **R. v. Rich**, 2019 NLSC 37.

[20] In **Charles**, the 25-year-old offender was found guilty after trial of two counts of impaired driving causing death and two counts of dangerous driving causing death. He had no adult criminal record. He was Indigenous and had experienced a difficult upbringing. The sentencing judge noted that Mr. Charles displayed a lack of remorse and a failure to recognize his alcohol dependency. Even though the British Columbia Court of Appeal held that the sentencing judge erred in considering an absence of remorse as an aggravating factor, the Court found that the three-year penitentiary term imposed was a fit sentence.

[21] In **Magill**, the 25-year-old offender entered guilty pleas to dangerous driving causing death, obstruction of justice, and breach of an abstention clause while on release. After consuming alcohol with others, he drove a vehicle with four passengers in it at high rates of speed. The vehicle went off the road and into a river. One passenger drowned. The offender and passengers agreed to lie to police by saying that one of the teenage passengers had been driving. The Court found that Mr. Magill's consumption of alcohol was a factor in the accident. Mr. Magill's family had been negatively impacted by the residential school system. Mr. Magill had no prior criminal history. Ruddy J. accepted a joint submission for a 25-month period of incarceration.

After applying pre-sentence custody, there remained approximately 10 months of jail to be served. The Court ordered that the offender serve two years of probation following completion of the jail sentence. He was also prohibited from driving for one year.

[22] In **Maxwell-Smith**, the 27-year-old offender was convicted after trial of impaired driving causing death, breaching his recognizance and failing to attend court. He drove a work van containing coworkers, although he only possessed a learner's license. While speeding in a construction zone, he lost control of the vehicle. One of the passengers was ejected from the vehicle and killed. His blood alcohol concentration was between 134 mg/% and 158 mg/% percent. The offender, who was found guilty after trial, had no criminal record. The effective sentence given for the impaired driving causing death offence was 32.5 months in custody. Once remand time was applied, the remaining sentence to be served was two years imprisonment less a day, to be followed by an 18-month probationary period. The Court imposed a 10-year driving prohibition.

[23] In **Joyce**, the 48-year-old offender pleaded guilty to two counts of impaired driving causing death. He did not have a criminal record. His blood alcohol readings were 100 mg/% and 90 mg/%. He had a good work history and participated in counselling after the accident. He was very remorseful for what he had done. The Court sentenced him to two years imprisonment less a day to be followed by three years of probation. The Court also imposed a two-year driving prohibition in addition to the period of imprisonment imposed.

Analysis

[24] Clearly, due to the gravity of these offences, general and specific deterrence are the primary principles of sentencing in the case at bar. Although the consequences of Mr. Andre's driving were not intended, he put himself behind the wheel of a vehicle when he was unfit to drive due to his consumption of alcohol. His blood alcohol level was two times the legal limit. His actions resulted in the deaths of two teenagers, and significant bodily harm to another passenger, a statutorily aggravating factor under s. 320.22(a) of the *Code*. In this sense, his moral blameworthiness is high.

[25] At the same time, I note that at the time of this offence he was a young man with no prior criminal history. Additionally, as set out in the **Gladue** Report, he suffered trauma and abuse as a child. I consider these factors in assessing his overall moral culpability, and in turn, determining a sentence that is just and appropriate. I find that these factors attenuate somewhat his moral culpability. I am also of the view that this is a case where the rehabilitation of Mr. Andre remains an important sentencing principle.

[26] I take into account that at the time of these offences, Mr. Andre did not have a criminal record. I should point out that subsequent to these offences, he continued in a downward spiral resulting in further criminal charges. He was in and out of custody on a number of occasions. Ultimately, in April 2021, he was convicted of two counts of failing to comply with his terms of release, and one count of personation with intent. However, for the purposes of this sentencing hearing, I treat Mr. Andre as a first time offender.

[27] Since his most recent release on bail at the end of April 2021, he has resided in supervised residential housing and has not found himself in contravention of his

conditions of release. The conditions included a curfew and an abstention clause. He has demonstrated over the last year that he has the ability to successfully follow conditions of release. I take this into consideration in crafting an appropriate sentence. Additionally, he has made some effort to start to deal with his issues, although it is evident that he has much more work to do.

[28] Although Mr. Andre does not have the benefit of having pleaded guilty, he is obviously remorseful for the significant harm, and resulting loss, that he has caused.

Appropriate Sentence for Mr. Andre

[29] Having considered the purpose and principles of sentencing, the circumstances of Mr. Andre and of the offences, and the relevant case law, I have concluded that the appropriate range of sentence in this matter is between two and one-half and three years' imprisonment. In my view, it would be of benefit to Mr. Andre, a young Indigenous adult, and to his rehabilitation to serve his sentence in the territory, where he has access to supports and his mother's First Nation.

[30] In the result, I impose a sentence of 30 months of imprisonment for the offences of driving with a blood alcohol level exceeding the legal limit causing death. I also impose a sentence of 10 months' imprisonment for the offence of driving with a blood alcohol level exceeding the legal limit causing bodily harm. All sentences are to be served concurrently.

[31] I give credit to Mr. Andre for 204 days of pre-sentence custody and apply it to the 30-month sentence, resulting in 696 days, or just over 23 months to be served.

[32] Following completion of his term of imprisonment, Mr. Andre will be subject to a probation order for a period of two years.

[33] The terms of the probation order are that Mr. Andre:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Notify his Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;
4. Report to a Probation Officer immediately upon release from custody and thereafter, when and in the manner directed by the Probation Officer;
5. Reside as approved by his Probation Officer and not change that residence without the prior written permission of his Probation Officer;
6. Attend and actively participate in all assessment and counselling programs as directed by his Probation Officer, and complete them to the satisfaction of his Probation Officer, for the following issues: substance abuse, alcohol abuse, psychological issues, and any other issues identified by his Probation Officer, and provide consents to release information to his Probation Officer regarding his participation in any program he has been directed to do pursuant to this condition;

7. Perform 50 hours of community service as directed by his Probation Officer or such other person as his Probation Officer may designate. This community service is to be completed at least six months prior to the end of this probation order. Any hours spent in programming may be applied to the community service at the discretion of his Probation Officer;
8. Participate in such educational or life skills programming as directed by his Probation Officer and provide his Probation Officer with consents to release information in relation to his participation in any programs he has been directed to do pursuant to this condition; and
9. Make reasonable efforts to find and maintain suitable employment and provide his Probation Officer with all necessary details concerning his efforts.

Ancillary Orders

[34] As indicated, the Crown seeks the imposition of a 10-year driving prohibition pursuant to s. 320.24(4) of the *Code*. The defence agrees that a prohibition is necessary in this case, but suggests a three to five year term. I have considered the circumstances of this case as well as Mr. Andre's age, and I am satisfied that a six-year driving prohibition is appropriate. I reduce the six years, or 72 months, by 31 months, leaving a further 41 months to be served on the driving prohibition imposed.

[DISCUSSIONS]

[35] Mr. Andre is prohibited from operating any conveyance on any street, road, highway or other public place in Canada for a period of 41 months plus the period of imprisonment imposed today for these offences, namely 23 months. Mr. Andre is eligible for the alcohol ignition interlock device program not earlier than 14 months after his release from custody.

[36] The Crown seeks a DNA order in this matter. As the three offences are secondary designated offences, an order that Mr. Andre provide a sample of his DNA for analysis and recording is discretionary. After considering the factors set out in s. 487.051(3) of the *Code*, I am satisfied that it is in the best interest of the administration of justice to authorize the taking of a sample of bodily substances from him. The samples will be taken while Mr. Andre is in custody and he must submit to the taking of the samples.

[37] There will be no victim surcharge imposed as the provision had been ruled unconstitutional at the time of these offences.

CHISHOLM T.C.J.