

Citation: *R. v. Devellano*, 2022 YKTC 31

Date: 20220519  
Docket: 20-00696A  
Registry: Whitehorse

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

REGINA

v.

BENJAMIN FRANCIS DEVELLANO

Appearances:  
Noel Sinclair  
Benjamin Devellano

Counsel for the Crown  
Appearing on his own behalf

**REASONS FOR SENTENCE**

[1] CHISHOLM T.C.J. (Oral): Benjamin Devellano is being sentenced for committing three *Criminal Code* offences, namely: obstruction (s. 129(a)); dangerous operation of a conveyance (s. 320.13(1)); and failure to remain at the scene of an accident (s. 320.16(1)). The Crown elected to proceed summarily in these matters.

**Facts**

[2] My reasons for judgment at trial are found at 2022 YKTC 19.

[3] In summary, on December 17, 2020, the police received a 911 call from an employee of a local business reporting a possible impaired driver. The police attended the local downtown business and located Mr. Devellano asleep in his vehicle. The

investigating officer made a Mandatory Alcohol Screening demand. After Mr. Devellano provided a sample of his breath into an approved screening device, the result revealed that Mr. Devellano's blood alcohol level was zero percent. The investigating officer immediately contacted another officer on shift, who was trained as a Drug Recognition Expert, and asked that he attend to her location. Mr. Devellano remained in his vehicle for the test and while awaiting the drug recognition expert's arrival. Just prior to the second officer arriving, Mr. Devellano proceeded to put up his window contrary to the instructions of the investigating officer. She attempted to open the driver's side door on two occasions, and, both times, Mr. Devellano closed the door, and after doing so a second time, he locked the doors. She continued to give directions to him to put down his window and unlock the doors.

[4] When the second officer, who was approaching on foot, observed what was happening, he also demanded Mr. Devellano to put his window all the way down. The second officer told Mr. Devellano that if he did not comply with his demand, he would have to break the window. He subsequently took out his baton. After the driver lowered the window somewhat the second officer, who was on the truck's running board, put his hand in the cab to unlock the door. Mr. Devellano, whose vehicle was running, put it in gear and reversed it at a high rate of speed. The passenger side of his truck struck the unoccupied police vehicle that was parked behind it. Mr. Devellano then left the parking lot at a high rate of speed.

[5] The police did not locate Mr. Devellano that evening. He turned himself into the police a couple of days later.

[6] The Crown seeks a global sentence of six to nine months' incarceration, an 18-month driving prohibition, a weapons prohibition, and a DNA order. The Crown acknowledges that a probation order focused on Mr. Devellano's rehabilitation may also be appropriate as part of any sentence the Court imposes.

[7] Mr. Devellano submits that a \$1,000 fine would be the appropriate response in this situation, considering the fact that he spent the equivalent of 15 days in jail on remand prior to being released on conditions by the Court. He argues that he requires his licence to remain gainfully employed.

#### **Personal Circumstances of Mr. Devellano**

[8] Mr. Devellano is 38 years old. He has a good work history, which includes operating a small trucking company. At the sentencing hearing, Mr. Devellano filed a letter of reference from Mike Mickey of Glacier Drilling. Mr. Mickey describes Mr. Devellano as an integral part of Glacier Drilling for the past number of years, with his main duty being a truck driver.

[9] Pierre Allard, social worker, spoke at the sentencing hearing to Mr. Devellano's good character. Mr. Devellano has lived with Mr. Allard and his family for approximately seven years. He described Mr. Devellano as a kind and generous individual who is a good friend. He explained that Mr. Devellano is a good driver and a hard worker, who will, at times, work 12 to 16 hour days. Mr. Devellano assisted Mr. Allard and his family, after Mr. Allard was injured in an accident.

[10] Mr. Allard, who has acted as a surety for Mr. Devellano in the matter before the Court, highlighted Mr. Devellano's demonstrated ability to follow court imposed conditions. Mr. Allard is willing to provide support for Mr. Devellano going forward.

[11] Mr. Devellano is married and has a young child. His wife and daughter presently live in Mexico, but the plan is for them to move to Canada. He provides monthly financial support to them.

[12] Mr. Devellano has prior convictions from 2007. As pointed out by the Crown, one of those convictions is an obstruction of a peace officer for which he received 30 days in custody.

### **Case Law**

[13] The Crown has referred to the decision in *R. v. McDiarmid*, 2014 YKSC 9. As indicated by Gower J. in that case, the case law in this area reveals a broad range of sentences, from absolute discharges and fines to conditional and custodial sentences. Courts have emphasized the importance of specific and general deterrence (i.e. *R. v. Bhalru*, 2003 BCCA 645, at para. 47).

[14] In *McDiarmid*, the police received a call that Mr. McDiarmid had breached a no-contact condition of his undertaking. While responding to the complaint and still in his police vehicle, the officer noted a red truck, which he believed to be the offender's, approaching him. As a result, the officer stopped his vehicle and turned on the vehicle's emergency lights. The red truck accelerated towards the police vehicle, leading the officer to believe that Mr. McDiarmid was going to "ram" his vehicle. At the last second,

the red truck veered past the passenger side of the police vehicle, ending up in the snow bank. The red truck was fully loaded with firewood and the Court accepted that its total weight was over 7,500 pounds.

[15] Despite Mr. McDiarmid's lack of a prior criminal history, and numerous letters of reference, the Court held that he was not a good candidate for successful rehabilitation. The Court was concerned that Mr. McDiarmid, who was on remand, had repeatedly stated that he would not abide by conditions of the Court upon his release from jail. The Court imposed a four-month jail sentence followed by a 12-month driving prohibition.

[16] In *R. v. McLeod*, 2003 YKSC 70, police observed the offender travelling in downtown Whitehorse at speeds as high as approximately 120 km/h in a 70 km/h zone. Despite being chased by two police vehicles for a significant distance, he only stopped after driving over a spike belt. Mr. McLeod only possessed a learner's permit and had four passengers in the vehicle. As noted by the Court, he was moderately impaired. He pleaded guilty to failing to stop his vehicle while being pursued by a peace officer. He also pleaded guilty to having failed to provide a breath sample. He had a prior criminal history, including a joyriding conviction. He was bound by conditions of the Court at the time of the offences. The Court imposed a seven-month jail sentence plus probation on the failing to stop for police charge, followed by a one-year driving prohibition.

[17] On the other end of the spectrum is the decision in *R. v. Sauve*, 2013 YKTC 54. In that case, the Court imposed a fine and a restitution order in a fact situation in which an off-duty police officer operated an aircraft in a dangerous manner. The offender made four passes with his single engine plane over a lake where a number of people,

attending a winter driving event, were standing. On the final pass, the plane was only 34 feet above the lake while travelling at 124 miles (200 kilometres) per hour. During this pass, the left wing of the plane collided with an unoccupied vehicle parked on the shore, causing significant damage. Despite the collision, Mr. Sauve was able to successfully return to the airport with his passenger. He did not report the accident. The Court declined to impose a discharge as sought by Mr. Sauve, and instead imposed a fine in the amount of \$2,000 plus a victim surcharge of \$300, as had been suggested by the Crown.

[18] In *R. v. Patterson*, 2018 NSPC 46, the offender pleaded guilty to dangerous driving and driving while prohibited. Police followed Mr. Patterson in a vehicle that they believed was stolen, however, he would not stop. He drove on the wrong side of a major roadway in an area where children had just crossed the road. He swerved dangerously, and at one point, drove off the road, and into a ditch. He drove at speeds exceeding 100 km/h. Police called off the pursuit of the offender due to public safety concerns. He had a criminal record, including a recent impaired driving conviction. Mr. Patterson accepted responsibility for the offences, recognized the need for counselling and was taking steps in that direction, and had been compliant with conditions of the Court.

[19] Despite the offences being “toward the upper end of the scale of factual seriousness for motor-vehicle crimes not involving injury or death”, the Court suspended the passing of sentence and placed Mr. Patterson on probation for a period of 12 months. The Court imposed a driving prohibition with respect to the offence of driving

while prohibited, but declined to impose a prohibition order on the dangerous driving count.

[20] In *R. v. Hoffman*, 2020 CanLII 232 (NL PC), the Court found Mr. Hoffman guilty after trial of resisting arrest, dangerous operation of a conveyance and mischief. He also entered guilty pleas to two counts of breaching an undertaking. He drove his truck dangerously in a snow covered and slushy parking lot by doing donuts and driving across parking spaces while vehicles were present. He came close to striking a parked vehicle and colliding with another vehicle entering the parking lot. The offender who was 36 years of age, had a partner and two young children. Those children were in the vehicle at the time of the offences.

[21] Eight years previously, Mr. Hoffman had been convicted of driving a motor vehicle with a blood alcohol level exceeding the legal limit.

[22] Mr. Hoffman had been consistently employed as a truck driver. Upon his release awaiting trial, he was prohibited from driving a motor vehicle, which led to a loss of employment. A number of months later this condition of release was varied to allow him to drive for work purposes. The Court held that despite the seriousness of the offences committed, a conditional sentence “would serve the sentencing principles of denunciation and deterrence, while promoting Mr. Hoffman’s rehabilitation” (para. 85). The Court concluded that the dangerous driving offence warranted a two-month period of incarceration; and that the other substantive offences should each attract a one-month jail sentence, all to be served consecutively. This four-month total jail sentence was ordered to be served conditionally in the community.

[23] Additionally, the Court imposed a 12-month period of probation. The Court noted that the imposition of a driving prohibition would lead to a loss of the offender's employment. Instead of making a prohibition order, the Court included a condition in the probation order that restricted Mr. Hoffman's driving privileges while at the same time allowing him to drive for employment purposes.

## **Analysis**

### *Gravity of the Offence*

[24] The fundamental principle of sentencing is that a sentence be imposed which is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[25] It is well established that sentencing is a highly individualized process which reflects the circumstances of the offence and of the offender (*R. v. Suter*, 2018 SCC 34, at para. 4; *R. v. Ipeelee*, 2012 SCC 13, at para. 38; *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 92). Sentencing is a "profoundly contextual process" wherein the judge has a broad discretion (*R. v. L.M.*, 2008 SCC 31, at para. 15; *R. v. Lacasse*, 2015 SCC 64, at para. 11).

[26] In *R. v. Bosco*, 2016 BCCA 55, the Court stated at para. 29, that "[t]he fundamental purpose of sentencing is to contribute to respect for the law and to maintain a just, peaceful and safe society".

[27] The offences of dangerous driving and leaving the scene of an accident are serious offences. As emphasized in *Bosco*, the primary sentencing goals in dangerous



driving cases are denunciation and deterrence. The Court, in that decision, also stated at para. 38, that “[m]embers of the public share its highways and are entitled to do so in the expectation of reasonable safety based, in part, on responsible use of motor vehicles by all concerned”.

### *Degree of Responsibility*

[28] The Court in **Bhalru**, at para. 28, explained that an offender’s moral culpability must be assessed “...in part by considering the intentional risks taken by the offenders, the degree of harm that they have caused, and the extent to which their conduct deviates from the acceptable standard of behaviour...”.

[29] In the case at bar, Mr. Devellano’s driving was extremely dangerous in that he created a risk to the police and the public. In fleeing the scene of the accident he caused, he interfered with a lawful police investigation. It was good fortune that there were no significant injuries that resulted from his actions. Additionally, Mr. Devellano has displayed a certain lack of self-awareness in terms of his role in this matter. At the same time, I accept that this was an impulsive act by Mr. Devellano; in other words, there was no planning or premeditation. I also note that unlike the facts in **McLeod**, the dangerous driving was of short duration.

[30] Mr. Devellano does not have a lengthy history of criminal behaviour. His convictions are dated, although I agree with the Crown that the related obstruction of justice charge is worthy of consideration. His relatively limited criminal history does not include acts of violence. He has performed well on strict conditions of release for the past 16 months. Based on what I have learned about Mr. Devellano during the

sentencing process, in my view, his actions on December 17, 2020 were out of character.

*The Sentence*

[31] In all the serious circumstances, I find that these offences warrant a lower end period of imprisonment, in the range of three months. That being said, I am also cognizant that a period of incarceration will lead to a loss of employment for Mr. Devellano. Is an alternative to a straight jail sentence, a conditional sentence, a reasonable and proportionate sentence in the circumstances of these offences?

[32] First, the prerequisites for a conditional sentence are met as a sentence of less than two years' imprisonment is appropriate and there is no mandatory minimum sentence for these offences. The next question is whether his serving a conditional sentence on strict conditions would endanger the community. I again note that Mr. Devellano's criminal history is not lengthy and it is dated. Also, in my view, Mr. Devellano has demonstrated, since these charges arose, that he is fully capable of abiding by court imposed conditions. He is very motivated to continue working and to provide for his wife and child. This is a significant incentive to not further run afoul of the law. Accordingly, serving a sentence in the community would not endanger it.

[33] Next, I am of the view that a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code*. It is important to remember that in *R. v. Proulx*, 2000 SCC 5, the Court found that a properly structured conditional sentence can achieve "...a significant amount of denunciation..." (para. 102).

[34] The Court also noted, in considering the sentencing principle of deterrence, that:

...Moreover, a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences..." (**Proulx**, at para. 107).

[35] Importantly, a conditional sentence may be extended beyond "...the duration of the jail sentence that would ordinarily have been imposed..." in the case (**Proulx**, at para. 102). Also, a conditional sentence is well situated to achieve rehabilitation, reparations and to instill a sense of responsibility in the offender (**Proulx**, at para. 109).

[36] I am satisfied that despite the serious nature of these offences, having regard to all the relevant factors, including the personal circumstances of the offender, an appropriately crafted conditional sentence, coupled with Mr. Devellano's remand time in jail, amount to an appropriate sentence that is consistent with the fundamental purpose and principles of sentencing.

[37] A proportionate penalty for these offences is two months in jail for the dangerous driving offence; one month consecutive for the offence of leaving the scene of the accident; and one month consecutive for the offence of obstructing justice. The four-month global sentence will be served in the community. To avoid problems that sometimes are associated with consecutive conditional sentences, I will vary the sentences and impose four months of imprisonment to be served conditionally on each count, to be served concurrently. The conditional sentence will be followed by a 12-month probationary period.

[38] The Crown seeks an 18-month driving prohibition. This is a discretionary order pursuant to s. 320.34(5)(c) of the *Criminal Code*. I appreciate that in many cases of this nature, a driving prohibition is imposed. In this case, upon reflection, I decline to do so. As outlined, Mr. Devellano has been on a condition restricting his driving privileges for the last 16 months. Additionally, pursuant to s. 260 of the *Motor Vehicles Act*, RSY 2002, c. 153, upon conviction for the s. 320.13 *Criminal Code* offence, Mr. Devellano was automatically disqualified from holding a driver's licence for a period of three months. He forfeited his licence to the Court at the time of his conviction. An absolute prohibition to drive as part of this sentence would lead to a loss of employment for Mr. Devellano. Instead of imposing an absolute prohibition as sought by the Crown, I have determined that it would be more appropriate, in this case, to include a condition in his probation order and conditional sentence order restricting his driving privileges.

[39] The terms of the four-month conditional sentence will be as follows. The statutory terms are that Mr. Devellano:

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;
3. Report to a Supervisor immediately and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
4. Remain within the Yukon unless you have written permission from your Supervisor or the court;

5. Notify the Supervisor in advance of any change of name or address and promptly of any change of employment or occupation. You will reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;

[40] Additionally, Mr. Devellano will be subject to the following terms:

6. For the first two months of this order, at all times you are to remain inside your residence or on your property, except with the prior written permission of your Supervisor; except for the purposes of employment, including travel directly to and from your place of employment; except for the purpose of counselling, including travel directly to and directly from the place of counselling; and except for grocery shopping, medical or dental appointments and physical fitness activity, to a maximum of four hours per week, arranged in advance, in consultation with your Supervisor. You must answer the door or the telephone to ensure you are in compliance with this condition;
7. For the final two months of this order, you will abide by a curfew by being inside your residence between 8:00 p.m. and 6:00 a.m. daily except with the prior written permission of your Supervisor or except in the actual presence of a responsible adult approved in advance by your Supervisor. You must answer the door or the telephone for curfew checks;

8. You will not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;
9. You will not attend any premises whose primary purpose is the sale of alcohol, including any liquor store, off-sales, bar, pub, tavern, lounge, or nightclub;
10. You will attend and actively participate in all assessment and counselling programs as directed by your Supervisor and complete them to the satisfaction of your Supervisor for the following issues: psychological issues, and provide consents to release information to your Supervisor regarding your participation in any program you have been directed to do pursuant to this order; and
11. Not drive a conveyance except for the purposes of employment, or for travel directly to or from medical or dental appointments.

[41] A 12-month period of probation will follow the conditional sentence. The statutory terms are that:

1. You will keep the peace and be of good behaviour;
2. You will appear before the court when required to do so by the court;

3. You will notify the Probation Officer in advance of any change of name or address and promptly of any change of employment or occupation;

[42] Additionally, you are subject to the following conditions:

4. You will report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the Probation Officer;
5. You will reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer; and
6. Not drive a conveyance except for the purposes of employment, or for travel directly to or from medical or dental appointments.

[43] I will now consider the ancillary orders sought by the Crown.

[44] The Crown submits that the s. 129 offence may attract a weapons' prohibition, pursuant to s. 110. If the Crown is correct in this submission, I do not find that there is a sufficient safety concern in regards to Mr. Devellano to impose a prohibition in this case.

[45] Similarly, regarding the request by the Crown for a DNA order, I have considered the fact that police knew who Mr. Devellano was when he fled the scene, and the fact that he subsequently turned himself into police, I find that it is unnecessary to impose a DNA order in this matter.

[46] Finally, I order that Mr. Devellano pay the \$300 victim surcharges within the next six months.

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CHISHOLM T.C.J.