

Citation: *R. v. McGivern*, 2024 YKTC 12

Date: 20240424
Docket: 22-00128
Registry: Whitehorse
Heard: Faro

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Phelps

REX

v.

RORY PATRICK MCGIVERN

Appearances:
William McDiarmid
Jennifer Cunningham

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] Rory Patrick McGivern is before the Court for sentencing on an offence contrary to s. 101(1) of the *Criminal Code* for transferring a restricted firearm without lawful authority. The sentencing follows a guilty plea.

Facts

[2] In the spring or early summer of 2020, Mr. McGivern was residing in the Town of Faro (“Faro”) and was approached by another resident of the town, Ralph Shaw, with an offer to sell Mr. McGivern an older .45 caliber pistol (the “Pistol”) for the sum of \$500.

Mr. McGivern accepted the offer and purchased the Pistol from Mr. Shaw, advising him that if he ever wanted it back, he could have it. In addition to the firearm, Mr. McGivern received some ammunition for the Pistol in the transaction.

[3] On October 26, 2021, Mr. Shaw attended at the residence of Mr. McGivern in Faro and asked for the Pistol back. Mr. Shaw paid Mr. McGivern the \$500 in return for the Pistol and accompanying ammunition, indicating to Mr. McGivern that his friend needed the firearm back and he was going to return it to that friend.

[4] At the time, Mr. McGivern was the lawful owner of other restricted firearms, that were properly registered and stored. Mr. McGivern did not make efforts to lawfully transfer the Pistol in 2020, or in 2021 when he sold the Pistol back to Mr. Shaw.

[5] On that date, after Mr. McGivern sold the Pistol back to Mr. Shaw, shots were fired in Faro which resulted in the deaths of two people. Mr. Shaw was charged in relation to the shootings, and it is believed that the Pistol sold to Mr. Shaw by Mr. McGivern was one of the guns used in the shootings.

[6] Approximately two hours after the shots were fired on October 26, 2021, Mr. McGivern called 911 to report that he believed that he knew something about the shootings. He provided his name, address, phone number, and requested to speak with a police officer. Mr. McGivern was persistent in attempting to provide information to the RCMP and found a police officer on duty and reported again that he had knowledge about the incident. Finally, on October 30, 2021, he met with the RCMP, waived his right to a lawyer, and gave an incriminating statement to the RCMP about the exchanges of the Pistol in 2020 and 2021 with Mr. Shaw.

Position of the Parties

[7] The Crown highlighted the significant difficulty coming up with an appropriate sentencing position on this matter in the face of the tragedy that followed. In doing so, Counsel was clear that the position of the Crown did not reflect the subsequent shooting but rather the significance of the transaction between Mr. McGivern and Mr. Shaw, considering the nature of the Pistol. Mr. McGivern owned properly registered restricted firearms and was fully aware of the legal steps necessary to purchase and transport such a firearm. None of the necessary steps were taken in relation to the Pistol.

[8] The Crown's position is that considering the danger that a firearm such as the Pistol presents to the public this matter requires a significant sentence of general deterrence. The Crown acknowledged that Mr. McGivern showed remorse immediately, provided evidence to the RCMP giving rise to the charges before the Court, and entered a guilty plea to the matter before the Court. They had the benefit of the materials filed on behalf of Mr. McGivern in the form of support letters from several members of the community. They acknowledged that Mr. McGivern himself did not require specific deterrence in relation to the offence before the Court given his remorse that is clear in the materials and in his actions following the shooting.

[9] The Crown's position is for a period of custody between 18 months and two years less one day. The Crown submits that the sentence could be served in the community as a conditional sentence order. The Crown further requested a s. 110 firearm prohibition for a period of 10 years and a DNA order.

[10] The defence position is for a conditional discharge, noting that general deterrence can be achieved through such a sentence. There are a total of ten support letters filed with the Court on behalf of Mr. McGivern from various residents in the community. The common themes throughout the letters go to good character, strong community involvement and volunteer efforts, and strong work ethic. They also speak to the significant remorse noted in Mr. McGivern for his actions that bring him before the Court. The letters of support include one from the spouse of one of the victims of the Faro shootings, who was also in court in support of Mr. McGivern during the sentencing proceedings.

[11] Defence counsel urged this Court to consider the collateral consequences on Mr. McGivern in light of his status in Canada as a permanent resident and the implications of a criminal conviction. In support of this argument, counsel filed a letter from a lawyer practicing in the area of immigration and refugee law, Leigh Salsberg, providing information on the implications of the matter before the Court on Mr. McGivern. Given Mr. McGivern's residency status, a conviction for the offence before the Court, according to Ms. Salsberg, would result in a finding of criminal inadmissibility and result in an appealable removal order if the sentence sought by the Crown is imposed. Ms. Salsberg further states that a conviction is a prerequisite to a finding of criminal inadmissibility for an offence committed in Canada. A conditional discharge does not expose Mr. McGivern to criminal inadmissibility or the loss of immigration status.

Does Mr. McGivern face collateral consequences if he does not receive a conditional discharge for the offence before the Court?

[12] On close review, I find that Ms. Salsberg relied on the incorrect section of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”), being s. 36(2), which applies to foreign nationals. “Foreign national” is a defined term that specifically excludes a permanent resident. As Mr. McGivern has permanent resident status, it is s. 36(1) of the *Act* that applies:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

- (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

...

[13] The maximum sentence set out for an offence contrary to s. 101(1) of the *Criminal Code* is five years. As such, a conviction alone under this section does not constitute serious criminality.

[14] Given that the Crown submission is for a sentence greater than six months in the form of a conditional sentence order, I note that a sentence greater than six months in the form of a conditional sentence order does not meet the requirement for “serious criminality”. The Supreme Court of Canada has clarified that s. 36(1) of the *Act* requires a period of actual incarceration greater than six months to constitute serious criminality (see *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50).

[15] Given the range of sentencing submissions before me, Mr. McGivern only faces collateral consequences if I sentence him to a period of custody greater than six months and decline the Crown's submission to permit him to serve it conditionally in the community.

Circumstances of Mr. McGivern

[16] Without the persistence of Mr. McGivern in reporting to the RCMP against his own interests regarding his involvement with Mr. Shaw and the Pistol, defence suggests that it is possible that his involvement with Mr. Shaw would not have been discovered by the RCMP. While a possibility, I note that the RCMP investigation into the incident in Faro was very thorough and I find it inconclusive that the RCMP would not have learned of his involvement. However, his persistence in disclosing to the RCMP does provide evidence of remorse.

[17] Mr. McGivern did indicate a desire to plead guilty at a very early stage in the proceedings, which was delayed due to the efforts to understand the impact on his residency status in Canada. He should be given credit for an early guilty plea in the circumstances.

[18] Mr. McGivern is currently 58 years old and resides alone in Faro, a small remote northern community. Mr. McGivern moved to the Yukon with his family when he was 12 years old from Belfast, Ireland, to escape the dangerous circumstances in the area at the time arising from the conflict involving the Irish Republican Army, an Irish republican paramilitary force that sought to end British rule in Northern Ireland. His parents returned to Belfast when Mr. McGivern was a young adult, and he chose to

remain in the Yukon. Mr. McGivern had left high school before graduation to enter the workforce, eventually securing a job at the mine in Faro as a young adult.

[19] Mr. McGivern worked and resided in Faro for most of his adult life, except for a period when he worked in Alberta. He currently holds full time employment working at the mine site, which is under reclamation, doing water treatment monitoring. He was a volunteer firefighter in Faro for a number of years and is also an avid photographer of wildlife.

[20] As can be seen on review of the letters of support filed on his behalf, Mr. McGivern has numerous friends and supports in Faro. These are notably long term and strong friendships.

[21] Mr. McGivern's counsel informed the Court that Mr. McGivern has no desire to own a firearm after his involvement in the matter before the Court. His remorse is sincere and he is willing to accept a firearm prohibition and the forfeiture of his firearms that were turned over to the RCMP during the investigation.

Aggravating and Mitigating Circumstances

[22] The mitigating circumstances to be considered by the Court include:

1. An early guilty plea to the offence before the Court. Mr. McGivern signalled his intention to plead guilty to the offence before the Court very early in the process and is entitled to the mitigation that arises from an early guilty plea.

2. His remorse and pursuit of disclosure to RCMP against his own interests. Mr. McGivern showed significant remorse after he learned about the shooting in Faro and was persistent in his pursuit of the RCMP to share with them his involvement with Mr. Shaw.
3. The community support for him and evidence of good character. Mr. McGivern is a long-time resident of Faro and has significant support from friends and acquaintances who are aware of the offence before the Court. The support letters filed with the Court clearly set out that Mr. McGivern is considered to be a man of good character.
4. His strong employment history. Mr. McGivern currently has full time work in Faro which is consistent with his strong work history and his previous volunteer efforts.

[23] The aggravating circumstances to be considered by the Court include:

1. Mr. McGivern was the lawful owner of restricted firearms at the time of the offence, which were properly registered, and held the requisite licence to do so. As a result, Mr. McGivern had full appreciation for the legality of the exchange of the Pistol with Mr. Shaw and a heightened responsibility in the circumstances to follow the legal requirements for the purchase and registration of a restricted firearm.
2. The Pistol was a restricted handgun that presented as very dangerous if in the hands of the wrong person. There is no disputing that

Mr. McGivern knew that the Pistol, a .45 caliber handgun, is a very dangerous firearm.

3. Mr. McGivern did not know what Mr. Shaw intended to do that day, but he was told by Mr. Shaw that Mr. Shaw intended to give the Pistol to a third party. Mr. McGivern should have been alert to the inherent danger of such activity and should have declined to transfer the Pistol to Mr. Shaw.

[24] Mr. McGivern received a significant benefit from the Crown when they agreed to his plea to s. 101(1) of the *Criminal Code*. The facts as put forward clearly would have supported a conviction for the more serious offence under s. 95(1) of the *Criminal Code* in light of the accompanied ammunition transferred to Mr. Shaw. That section of the *Criminal Code* has a maximum sentence twice the amount available for a s. 101(1) *Criminal Code* conviction, and generally results in harsher sentencing. In the circumstances, I consider the offence before me to be at the more serious end of offences under s. 101(1).

[25] The transaction of selling an unregistered restricted firearm, a high-powered handgun, with ammunition, to an individual intent on transferring it to an unknown third party presents a significant and unacceptable risk to society. That risk is the significant harm to the public that arises from such weapons getting into the wrong hands and resulting in serious injury, intentional or otherwise. It just so happened that the “wrong hands” in the matter before the Court were those of Mr. Shaw. The specific tragedy that

resulted could not have been known by Mr. McGivern, but the risk associated with his actions could not have been clearer.

Is a discharge appropriate for Mr. Shaw?

[26] The availability of a discharge, whether absolute or conditional, is addressed in s. 730 of the *Criminal Code*. The pre-requisites for this outcome include that:

1. A discharge is in the best interest of the accused; and
2. A discharge is not contrary to the public interest.

[27] The British Columbia Court of Appeal in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.), set out the considerations for a discharge at para. 21:

From this review of the authorities and my own view of the meaning of s. 662.1, I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion.

- (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
- (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
- (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

- (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
- (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
- (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
- (7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.
- (8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[28] The Yukon Supreme Court considered a discharge for an offence of domestic violence in *R. v. Sas*, 2018 YKSC 38, at para. 45 to 48:

45 There are two conditions precedent to the exercise of granting a conditional or absolute discharge. The first requirement is that:

- a. a discharge is in the interest of an accused, which normally would be the case if the accused is a person of good character;
- b. the accused has not been previously convicted;
- c. a conviction is not necessary to rehabilitate or to deter the accused from committing future offences; and
- d. a conviction may have significant adverse repercussions.

46 The second condition precedent is:

- a. whether a discharge is contrary to the public interest, as to which;
- b. a discharge should not be routinely granted or treated as a substitute for probation and a suspension of sentence; and
- c. the court must consider the public interest in the deterrence of others, but that does not preclude the judicious grant of a discharge: *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.) pp. 452 and 453, and *R. v. Samson*, 2015 YKCA 7, para. 11.

47 Establishment of specific, disproportionate negative consequences is not a precondition to the grant of a discharge. The test is rather whether a conviction may have consequence, now or in the future: *Samson*, para. 39, *R. v. Rodrigue*, 2015 YKTC 5, *R. v. Malcolm*, [2008] Y.J. no. 59, at paras. 30 - 31 and *R. v. Shortt*, 2002 NWTSC 47, para 32.

48 The public interest test in the second condition precedent:

- a. involves consideration as to whether an ordinary, reasonable, fair-minded member of society, informed as to the circumstances of the case and the relevant sentencing principles, would believe that a conviction is required to maintain public confidence in the administration of justice; and
- b. requires consideration of whether there has been acceptance of responsibility, an early guilty plea, remorse by the offender and the victim's outcome of an assault: *Shortt*, para. 34; *R. v. C.J.D.*, 2012 YKTC 17, paras. 28, 33 and 34 and *Rodrigue*, paras. 99-112.

[29] Defence counsel relied on the Ontario Court of Justice decision of *R. v. Au*, 2009 ONCJ 476, in which a discharge was granted for a s. 101 offence. The case is distinguishable given that the firearms in question were not restricted, and the accused was 18 years old at the time of the offence. The firearms, three shotguns, were also loaned out without ammunition. The Court commented the nature of the offence at para. 6:

Not only was the lending of those guns contrary to the regulations, it was also potentially very dangerous and amounted to the offence of unlawfully transferring firearms without authority. As I indicated, this is a hybrid offence, although the Crown has elected to proceed by way of indictment. In the scheme of firearms offences in the *Criminal Code*, the offence of unlawfully transferring a firearm is toward the low end of the spectrum of offences dealing with firearms. It is a criminal offence but it is certainly not on the scale of offences such as use firearm while committing an offence, point firearm, possess a firearm for a purpose dangerous or carry concealed weapon while attending a public meeting.

[30] Unlike the facts in *Au*, I have found that the offence before me is not considered to be toward the low end of the spectrum considering the nature of the firearm, a restricted firearm that was a high-power handgun, and the provision of ammunition. I consider the circumstances to be far more serious than those set out in *Au*, and distinguishable.

[31] I find, adopting the language from *Sas*, that “an ordinary, reasonable, fair-minded member of society, informed as to the circumstances of the case and the relevant sentencing principles, would believe that a conviction is required to maintain public confidence in the administration of justice”. I come to this conclusion given the nature of the Pistol, Mr. McGivern’s knowledge of firearms regulation as a licenced restricted firearm owner, and the knowledge he had that Mr. Shaw intended to transfer the Pistol to an unknown third party after buying it back from Mr. McGivern.

Sentence Imposed

[32] Considering the facts of this case, and for the reasons that a conditional discharge was denied for Mr. McGivern, I find that the principle of general deterrence calls for a custodial disposition. I accept that Mr. McGivern does not require specific

deterrence. However, the facts of this case and the nature of the firearm involved call for a strong message of general deterrence.

[33] That said, I must also apply the mitigating circumstances outlined, and acknowledge Mr. McGivern's unwavering acceptance of responsibility and remorse.

[34] The Supreme Court of Canada has stated that general deterrence can be achieved through the imposition of a conditional sentence order, permitting an accused to serve a custodial sentence in the community (*R. v. Proulx*, 2000 SCC 5).

[35] To impose a conditional sentence, the Court must consider two things:

1. Am I satisfied that Mr. McGivern serving the sentence in the community would not endanger the community? Based on all the information before me, I am satisfied that Mr. McGivern is sincere in his expression of remorse and does not pose a danger to the community.
2. Is a Conditional Sentence consistent with the Principles of Sentencing?
As noted, I find that general deterrence, not specific deterrence, is the paramount consideration in sentencing Mr. McGivern. Following the Supreme Court of Canada pronouncements in *Proulx*, I accept that this can be achieved through the imposition of a conditional sentence order.

[36] Mr. McGivern, for the offence contrary to s. 101(1) of the *Criminal Code*, I sentence you to a period of custody of eight months, to be served conditionally in the community.

[37] The conditions on your conditional sentence order are:

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 your Supervisor and in the manner directed by your Supervisor;
4. Remain within the Yukon unless you have written permission from your Supervisor;
5. Notify your Supervisor, in advance, of any change of name or address, and, promptly, of any change of employment or occupation;
6. Reside as approved by your Supervisor, abide by the rules of the residence, and do not change that residence without the prior written permission of your Supervisor;
7. For the first four 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, to include specific time to attend to the necessities of life, and except for the purposes of employment including travel directly to and directly from your place of employment.

- You are to provide your work schedule to your Supervisor within two working days of this order, and thereafter any change to your schedule is to be provided to your Supervisor at least three days in advance of the modified shift, or as directed by your Supervisor;
8. For the final four months of this order, abide by a curfew by being inside your residence or on your property between 8:00 p.m. and 6:00 a.m. daily, except with the prior written permission of your Supervisor, and except for the purposes of employment including travel directly to and directly from your place of employment. You are to provide to your Supervisor any change to your work schedule at least three days in advance of the modified shift, or as directed by your Supervisor;
 9. Not possess or consume alcohol and provide a sample of your breath or urine for the purpose of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition;
 10. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;
 11. Attend and actively participate in all assessment and counselling programs as directed by your Supervisor, and complete them to the satisfaction of your Supervisor, which are to be focussed on assisting

you with the impact of the incident involving Mr. Shaw in the community on your wellbeing;

12. Perform 35 hours of community service as directed by your Supervisor or such other person as your Supervisor may designate. This community service is to be completed no later than 45 days before the end of this order. Any hours spent in programming may be applied to your community service at the discretion of your Supervisor; and

13. Not possess any firearm, ammunition, explosive substance or any weapon as defined by the *Criminal Code*.

Ancillary Orders

[38] In addition to the community sentence order, there are several ancillary orders to be addressed.

1. Prohibition Order

[39] A discretionary prohibition order is available for this offence pursuant to s. 110 of the *Criminal Code*. The Crown is seeking a 10-year order, the maximum available, in light of the facts before the Court.

[40] Defence did not take a position on the prohibition order given that Mr. McGivern no longer wishes to own or use firearms. This position is associated with the remorse he feels for his actions.

[41] I accept the sincerity of Mr. McGivern's remorse and his current view regarding firearm ownership. Despite this, I am required to impose an order that fits the circumstances of the matter before me, including Mr. McGivern's age, limited criminal history and prior responsible gun ownership.

[42] Mr. McGivern, you are prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance for a period of five years.

2. DNA Order

[43] The offence before the Court meets the definition of a secondary designated offence in s. 487.04 of the *Criminal Code*, which allows for an order pursuant to s. 487.051 for a DNA sample to be taken from Mr. McGivern.

[44] The Crown has requested a DNA order, and the defence opposed the imposition of the order considering the circumstances of the offence and of Mr. McGivern. Having considered the entirety of the information placed before me, I am not satisfied that it is in the best interests of the administration of justice to grant the order and decline to do so.

3. Forfeiture of Firearms

[45] There are several firearms in the possession of the RCMP, surrendered by Mr. McGivern during the investigation, that will be forfeited pursuant to s. 115 of the *Criminal Code*.

4. *Victim Surcharge*

[46] A victim surcharge pursuant to s. 737 of the *Criminal Code* applies to the single count that Mr. McGivern is being sentenced on today. Given that the Crown proceeded by indictment, the surcharge is \$200 dollars. As Mr. McGivern is gainfully employed, I will give him one month time to pay.

PHELPS T.C.J.