SUPREME COURT OF YUKON

Citation: *R.* v. *Johnnie,* 2009 YKSC 42 Date: 20090430
Docket S.C. No.: 08-01510
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

WAYNE JOHNNIE
A.K.A. WAYNE SILVERFOX

Before: Mr. Justice L.F. Gower

Appearances:
Kevin Komosky Appearing for the Crown
James Van Wart Appearing for the Defence

REASONS FOR SENTENCING
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is the sentencing of Wayne Johnnie, also known as Wayne Silverfox. On November 25, 2008, Mr. Johnnie entered guilty pleas to a number of offences, all arising June 15, 2008. They are driving while disqualified, contrary to s. 259(4)(a) of the *Criminal Code;* breach of probation for drinking, contrary to s. 733.1(1) of the *Criminal Code*; driving while impaired, contrary to s. 253(a) of the *Criminal Code*, and failing to stop his vehicle while being pursued by a peace officer, contrary to s. 249.1(1) of the *Criminal Code*.

[2] Mr. Johnnie was arrested for these and other offences on June 15, 2008. He has been in custody since then. Counsel are agreed that he should receive a global sentence of 16 months for his time in custody towards any sentence which I may

impose.

[3] Mr. Johnnie originally waived his right to a preliminary inquiry and had the matter set for trial. However, in the fall of 2008, Mr. Johnnie saw fit to discharge his defence counsel, sought new counsel and subsequently decided to enter guilty pleas, as indicated. He then took steps to apply for a curative discharge. A mandatory bail review was held on March 4, 2009, and Mr. Johnnie's continued detention was ordered. He has since decided to abandon his application for a curative discharge and to proceed with his sentencing in the ordinary manner.

[4] The facts are as follows. Between one and two o'clock in the morning on June 15, 2008, the police received a complaint about an impaired driver driving a 1999 Dodge Ram pickup at a high rate of speed in the downtown area of Whitehorse. A number of other vehicles and pedestrians were in the downtown area at that time as various drinking establishments were in the process of closing.

[5] Police located Mr. Johnnie alone in his vehicle parked in front of the Lizards nightclub on Main Street and Fourth Avenue. Constable Gagnon parked behind Mr. Johnnie, with Constable Greer parked behind Constable Gagnon. Mr. Johnnie backed his pick-up truck out of the parking stall and accelerated heavily towards the intersection of Main Street and Fourth Avenue.

[6] At that time, Corporal Pelletier was driving a police vehicle through the intersection towards Mr. Johnnie. Mr. Johnnie rammed Corporal Pelletier's vehicle head on. He then backed up, striking Constable Gagnon's vehicle. He then went forward a second time, again ramming Corporal Pelletier's vehicle. He then began accelerating

such that he forced the front of his pickup truck onto the hood of Corporal Pelletier's police vehicle.

[7] Constables Gagnon and Greer were able to box in Mr. Johnnie's vehicle. Corporal Pelletier pepper-sprayed Mr. Johnnie through the open window of his pickup. Constable Gagnon drew his sidearm, approached Mr. Johnnie, removed him from the vehicle and arrested him.

[8] Mr. Johnnie was heavily intoxicated. He could barely walk, had a strong odour of alcohol on his breath and had slurred speech. At the detachment, a breath sample demand was made and Mr. Johnnie failed to provide a sample.

[9] At the time of the offences Mr. Johnnie was subject to a lifetime driving prohibition imposed in 1980 and a probation order following convictions in February 2005 for which he received a total of 15 months in jail.

[10] Mr. Johnnie's personal circumstances are as follows. He is 52 years of age. He has lived in Whitehorse most of his life. He is a member of the Little Salmon/Carmacks First Nation. He is a victim of the residential school experience. He was placed in the Carcross residential school in 1962, and four years later in Yukon Hall. In 1967 he was placed in the St. George's residential school in Lytton, British Columbia, 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.

[11] When he returned to Whitehorse he was unable to live with his parents because they were drinking too much. He was able to live with his grandparents who were also

alcoholics but were able to care for him.

[12] He completed his grade ten education. He has worked as a labourer, and for the last 15 to 20 years he has been self-employed in mechanics and construction. He has been an alcoholic since his pre-teen years, although he has had periods of sobriety and has attended alcohol counselling.

[13] Since being detained in custody, Mr. Johnnie has attended Alcoholics Anonymous meetings at the Whitehorse Correctional Centre and has met with a Kwanlin Dun alcohol counsellor on five occasions. He has also enrolled in the White Bison program run by Kevin Barr. He is about halfway through that program, which I understand runs about 16 or 18 weeks, and says that it has been the “most helpful” of all of the things that he has been doing since his arrest.

[14] He has also had a chance to reflect on the events of June 15, 2008. He is thankful that no one was hurt by his actions and apologizes to the RCMP. Mr. Johnnie addressed me personally, and indicated that he has been battling alcohol a long time, although he has denied he had a problem for many years. He says that he has now come to understand he simply “cannot drink” and that Kevin Barr of the White Bison program is willing to work with him on his sobriety.

[15] Mr. Johnnie has an unenviable criminal record totalling 69 convictions from 1973 to 2005. Thirteen of those convictions are for failures to appear or breaches of probation. Ten convictions are for drinking and driving and one is for failing to provide a sample for alcohol analysis. Thirteen of the convictions are for driving while disqualified. In addition, Mr. Johnnie has been sentenced to two separate terms in a federal

penitentiary, one for a sentence of five years and another for a sentence of four and a half years.

[16] The Crown seeks a global sentence of four years, broken down as follows: for the impaired driving, two years; for the breach of probation, one year concurrent; for the drive while disqualified, one year consecutive; and for the failing to stop offence, one year consecutive. In addition, the Crown points out that a five-year driving prohibition is mandatory. Finally, because these offences are secondary designated offences under the *Criminal Code*, the Crown seeks a secondary DNA warrant, pursuant to s. 487.051 of the *Criminal Code*, noting that Mr. Johnnie has already provided such a sample.

[17] The Crown's review of the case law begins with an earlier sentencing decision involving Mr. Johnnie, *R.* v. *Johnny* (as written), (1980) June 20, 1980, Whitehorse, Yukon Territorial Court (unreported), where Judge Stuart was sentencing Mr. Johnnie to some 14 or 15 offences, including numerous drinking and driving and driving while disqualified offences. He said this:

> "… there comes a time when the court simply has to say you have had all the chances to stand up like a man and to be able to deal with your problem with alcohol in a more meaningful way than your record indicates that you have.
>
> There is nothing new before me now, except you have now said to an alcohol counsellor you are willing to admit you have an alcohol problem and intend to do something about it. As I said many times before in this court, words are cheap and that actions speak much louder to the court than words."

[18] The Crown principally relies on the case of *R.* v. *Donnessey*, [1990] Y.J. No. 138, from the Yukon Court of Appeal. That case involved an accused charged with impaired

driving and driving over .08 who had ten prior related convictions. The Court of Appeal quoted from an earlier decision in *R.* v. *McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.), where Associate Chief Justice MacKinnon said the following:

> "…It is trite to say that every drinking driver is a potential killer.
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> Members of the public when they exercise their lawful right to use the highways of this province should not live in the fear that they may meet with a driver whose faculties are impaired by alcohol. It is true that many of those convicted of these crimes have never been convicted of other crimes and have good work and family records. It can be said on behalf of all such people that a light sentence would be in their best interests and be the most effective form of rehabilitation. However, it is obvious that such an approach has not gone any length towards solving the problem. In my opinion, these are the very ones who could be deterred by the prospect of a substantial sentence for drinking and driving if caught. General deterrence in these cases should be the predominant concern, and such deterrence is not realized by over-emphasizing that individual deterrence is seldom needed once tragedy has resulted from the driving."

In that case, the Court imposed a sentence of three years.

[19] The Crown also relies on *R.* v. *Taylor*, 2008 YKCA 001, a more recent decision of the Yukon Court of Appeal. That case involved a sentencing for an offence of driving while disqualified, which was the second such offence for that offender. At para. 10, the Court stated:

> "…The public safety concern to which the judge referred is real and pressing. Generally speaking, driving prohibitions must be obeyed and breaches sanctioned in a meaningful way. Specific deterrence for this man is required because of his bad criminal history and somewhat casual attitude towards the driving restriction."

In my view, those comments are applicable to Mr. Johnnie as well.

[20] The Crown also relies on *R.* v. *Roberts*, 2005 ABCA 11, a decision of the Alberta Court of Appeal involving a charge of fleeing a police officer in pursuit, but also one involving bodily harm, which is more serious than the similar offence with which Mr. Johnnie is charged. The Crown relies on this case as authority for the proposition that the charge of failing to stop for a police officer in pursuit should be given a consecutive sentence. Although that case involved the more aggravating offence of flight causing bodily harm, the Court's comments at paras. 33 and 34 are, nevertheless, relevant to Mr. Johnnie's circumstances:

> "Furthermore, flight causing bodily harm is a new separate crime. Why would anyone lead police on a chase if he had been doing nothing wrong when told to stop, and was not wanted by police? Why would he do it if he were driving his own vehicle with his own license plate? Flight then would be pointless. That rarely occurs. Usually drivers flee because they are either then committing another offence, or have clear evidence of another offence in their vehicle. Often the vehicle is stolen.
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> To give concurrent sentences then would be to wipe out one of the offences, for all practical purposes. So long as the penalty given for flight were not larger, this would be a virtual judicial repeal of Parliament's new criminal flight crime. That would violate Parliament's strong message …. Alternatively, if the flight sentence were equal or higher, a concurrent sentence would wipe out the predicate offence which the criminal was fleeing, and so make the flight successful. It would reward flight, not punish it…"

[21] Defence counsel seeks a global sentence in the range of 24 to 30 months, less the 16 months agreed to as credit for Mr. Johnnie's time in remand. He notes that any sentence of 40 months or less will result in Mr. Johnnie remaining in custody at the Whitehorse Correctional Centre, because, as I understand it, the balance of the time to

be served after credit will not exceed two years. He notes that Mr. Johnnie wants to stay in the Yukon Territory as he feels he is making progress while in jail. Not only is he doing well with the White Bison program, but he also has a girlfriend here who continues to support him, and is making contacts in anticipation of his eventual release.

[22] Defence says that s. 718.2(e) of the *Criminal Code* applies to this case to some degree. That section states:

> "A court that imposes a sentence shall also take into consideration the following principles:
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> . . .
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> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

I disagree with defence counsel on this point. *R.* v. *Wells*, 2000 SCC 10, a decision from the Supreme Court of Canada, stands for the proposition that where the offence is a serious one and the principles of denunciation and deterrence dominate the sentencing calculus, the appropriate sentence often will not differ between aboriginal and non-aboriginal offenders.

[23] Defence counsel referred to a number of cases in support of his proposed range of sentence. I find them all to be distinguishable, for a variety of reasons.

[24] The case of *R.* v. *Aubichon*, [1994] Y.J. No. 84, from the Territorial Court, involved an offender with only six prior related convictions and facts which did not include the type of bad driving or vehicle collision which is present in the case at bar.

[25] The case of *R.* v. *Brown*, 2006 YKTC 34, involved an offender with no prior drinking and driving convictions and who was half the age of Mr. Johnnie.

[26] The case of *R.* v. *Gill*, 2001 YKTC 46, had no element of dangerous driving in the facts.

[27] The case of *R.* v. *McLeod*, 2003 YKSC 70, also involved an accused who was half the age of Mr. Johnnie and had no prior convictions for drinking and driving.

[28] The case of *R.* v. *Munkedal*, [1998] Y.J. No. 24, involved an offender with only six priors for drinking and driving, plus a ten-year gap in his criminal record. There was no intentional conduct regarding the motor vehicle accident, such as there was in the case of Mr. Johnnie.

[29] Finally, the case of *R.* v. *Quock*, [1998] Y.J. No. 171, involved a 19-year-old offender who had entered guilty pleas at a relatively early stage and had no prior convictions for drinking and driving.

[30] I agree with the Crown's submissions on consecutive time for the driving while disqualified and failing to stop offences. However, I am also bound to keep in mind the totality of the jail sentence.

[31] There is only one thing which is stopping me from imposing a jail sentence which would result in Mr. Johnnie being sent down south to a federal penitentiary - that is the progress and benefit he is apparently receiving from the White Bison program. I understand this is a relatively new program which has been introduced at the Whitehorse Correctional Centre and that, although it borrows from the principles of the

12-step Alcoholics Anonymous program, it does so through the concept of the medicine wheel and is therefore more relevant to First Nations people suffering from addictions.

[32] While I may be going out on a limb here, and not losing sight of the fact that general deterrence and denunciation are the paramount principles of sentencing in this case, I must also keep in mind that eventually Mr. Johnnie will be released from jail. If he continues to drink and drive, sooner or later he is likely to kill someone. If there is any hope that he will stay sober when he gets back on the street, then that hope should be seized upon. I see a glimmer of such hope in the White Bison program. I do not know whether Mr. Johnnie would have access to that program, or something similar, in a federal penitentiary. Therefore, I intend to err on the side of caution and impose a sentence which will be globally denunciatory, but which will keep him in the Whitehorse Correctional Centre so that he can continue to receive the benefit of the White Bison program.

[33] Therefore, having considered the circumstances of the offences, those of the offender, and the purposes and principles of sentencing set out in s. 718 to 718.2 of the *Criminal Code*, I conclude that Mr. Johnnie should be sentenced as follows. On the charge of impaired driving, which is his 12th such conviction, a sentence of two years less a day. On that charge there will also be a mandatory driving prohibition of five years. On the charge of driving while disqualified I impose a jail sentence of eight months to be served consecutively. On the charge of failing to stop for a police officer in pursuit I impose a jail sentence of eight months to be served consecutively. On the charge of breaching his probation order, I impose a sentence of eight months to be served concurrently. By my calculations, this will result in a global sentence of 40

months less one day, which should result in Mr. Johnnie being allowed to remain in custody at the Whitehorse Correctional Centre.

[34] I also order a secondary DNA warrant, requiring Mr. Johnnie to provide a DNA sample for analysis if required, pursuant to s. 487.051 of the *Criminal Code*.

[35] In the circumstances, the victim of crimes surcharge will be waived.

[36] Counsel, have I omitted anything?

[37] MR. KOMOSKY: My Lord, I believe you indicated that a five-year driving prohibition was mandatory. My understanding is that a driving prohibition is mandatory. The minimum would be one year. I would suggest five.

[38] THE COURT: I am sorry. If I stated it in that fashion, I did not intend to. That a driving prohibition is mandatory, I impose a five-year term.

[39] MR. KOMOSKY: Thank you.

[40] THE COURT: Anything else?

[41] MR. VAN WART: Nothing.

[42] THE COURT: Mr. Johnnie, good luck. Thank you.

(PROCEEDINGS CONCLUDED)
(PROCEEDINGS RECONVENED)

[43] MR. KOMOSKY: My apologies, My Lord, I neglected --

[44] THE COURT: Just one second, before you go on. I neglected to

indicate which count should receive the credit of 16 months, and I am going to direct Madam Clerk to credit the charge of impaired driving, for which I imposed a sentence of two years less a day, to that count. That will be the easiest way to deal with it. Mr. Komosky?

[45] MR. KOMOSKY: Yes. I neglected to deal with the remaining charges, and the Crown would apply to withdraw them.

[46] THE COURT: Very well, so noted. Thank you.

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GOWER J.