

SUPREME COURT OF YUKON

Citation: *R. v. Schmidt*, 2012 YKSC 17

Date: 20120305
S.C. No. 10-01520
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

MICHAEL PETER SCHMIDT

Before: Mr. Justice R.S. Veale

Appearances:

Bonnie Macdonald
Gordon R. Coffin

Counsel for the Crown
Counsel for the accused

REASONS FOR SENTENCING

INTRODUCTION

[1] Michael Schmidt was convicted of impaired driving causing bodily harm after a trial. The reasons are reported in *R. v. Schmidt*, 2011 YKSC 82. The maximum sentence for this offence is imprisonment for a term of not more than 10 years. Both passengers in Mr. Schmidt's vehicle were injured in the accident. Jessica Frotten's injuries were catastrophic, and, as well as suffering a closed head injury, she is now a paraplegic. Michael Sanderson experienced a concussion, a broken shoulder and a collapsed lung. While Mr. Schmidt's degree of impairment may be described as relatively slight, the consequences of his impaired driving were anything but slight.

THE OFFENCE

[2] Michael Schmidt was 28 years old at the time of the accident on December 14, 2009. In the evening of December 13, 2009, he was drinking with friends at his home. He started drinking around 11 p.m. and had six beers before he went to bed around 3 a.m. He got up the next morning between 10 and 10:30 a.m. and drank about ¼ of a cup of Irish coffee presented to him by Mr. Sanderson.

[3] Sometime before noon, Mr. Schmidt and Mr. Sanderson met up with Jessica Frotten, who at the time was Mr. Schmidt's girlfriend. After splitting up to run some errands, the three met to have lunch together at the Airport Chalet. Mr. Schmidt consumed a glass of water, a large burger and fries and two to three 10-oz glasses of beer. They left the restaurant sometime between 2 and 3:30 p.m.

[4] The three of them next drove to Yukon Brewing where Mr. Schmidt consumed two or three 2-oz samples of beer. Ms. Frotten purchased two flats of rejected beer cans and Mr. Sanderson bought a 15-pack of beer. Mr. Schmidt did not drink any beer after the stop at the brewery, however his passengers may have been drinking in the car. After a stop at the Porter Creek Super A, Mr. Schmidt proceeded to drive north on the Alaska Highway towards Haines Junction.

[5] Mr. Schmidt described the Alaska Highway that day as bare and clear of ice. He said there were frost heaves in the pavement, but noted that he had driven the road before and was not concerned. He was driving at 120 kilometres per hour, but slowed down after a bad patch of highway near the Drury farm. He said that he increased his speed again, although he was trying to keep it under 120 kilometres per hour. He estimated that at the time of the accident he was driving at a speed of 110 to 113

kilometres per hour. I found that there were no bumps or frost heaves of any significance at the scene of the accident. The measured distance from the start of his skid mark on the highway to the resting place of his vehicle was approximately 180 metres. The vehicle was airborne for a portion of this distance.

CIRCUMSTANCES OF THE OFFENDER

[6] Mr. Schmidt was born and raised in Whitehorse, where he attended elementary and secondary school. His mother and father divorced in 1997. They are both supportive of him. He remains close to his sister and may move closer to her in the future. He presently resides in Victoria, British Columbia.

[7] Mr. Schmidt is currently unemployed, and he attributes this to his lack of mobility, on-going criminal matters and post-traumatic stress disorder and depression. He said he is financially destitute. In his pre-sentence report, he describes himself as being the most responsible of his friends and “always the designated driver”. He states that one of the reasons he left the Yukon was the “excessive drug and alcohol use in the society”.

[8] He has completed a Bachelor of Arts degree at Camosun College and has held variety of jobs with the Yukon Government.

[9] I will discuss his circumstances again in the context of his pre-sentence report and apology in the courtroom.

VICTIM IMPACT STATEMENT

[10] A Victim Impact Statement was prepared by Jessica Frotten’s mother and read out in court by her uncle. It indicates the tremendous impact that Mr. Schmidt’s impaired driving had not only upon Jessica, but also on her entire extended family, many of whom were present in court. The Victim Impact Statement begins with the following:

On December the 14, 2009, a beautiful young woman left our home and walked across our yard. She got into your car. That was the last time she walked. The doctors later told her it was the last time she would ever walk again.

That's when our nightmare began.

[11] Jessica Frotten's mother continues:

I spent the next 28 days with Jessica in the intensive care unit in Edmonton while she literally fought for her life. It was a heroic fight. She had 15 broken ribs, collapsed lungs and a torn Aorta. Both her shoulders and both her feet were also shattered.

It was mind numbing to see our baby laying there broken, with breathing tubes, chest tubes and wires everywhere, monitors beep and respirators hiss and those sights and sounds continued for 28 agonizing days.

[12] She talks about Jessica's future as follows:

She is living on her own in Saskatchewan where she moved to take advantage of a leading edge rehabilitation program that is helping her reach her goal of walking, dancing and running once again. It cost her \$75 an hour to do exhausting, often painful sometimes tedious and always frustrating work everyday. Two or three hours a day. Her progress has been so hard won she said she can't afford to take a day off.

[13] Her mother continues by indicating that her car now has a handicap placard so that her daughter can get out of the car safely and into her wheelchair. She concludes that she wants Michael Schmidt to have a placard on his car that provides a warning to anyone who drives with him, worded as follows:

Because of my actions on December 14, 2009, a beautiful woman almost died and was left paralyzed. This was my fault.

[14] Mr. Sanderson did not submit a Victim Impact Statement.

MR. SCHMIDT'S REMORSE

[15] Remorse, apology and taking responsibility for one's actions are important considerations in a sentencing decision. Although he proceeded to a full trial in this matter, I find that Mr. Schmidt has demonstrated remorse from an early point in these events.

[16] The trial of this case began with the Crown playing a video recording of Mr. Schmidt in a police interview room following the accident on December 14, 2009. He appeared to be crying and sobbing out of concern for his injured friends and clearly sorry for his role in the accident. He was told by Cst. Hack that it did not look good for Jessica Frotten.

[17] At the trial, he faced two counts of impaired driving causing bodily harm, two counts of driving with his blood alcohol concentration exceeding 80 milligrams percent and two counts of dangerous driving causing bodily harm. He was somewhat defensive about his drinking on December 14 and also said he was angered that his friend Mike had sort of tricked him into drinking part of the Irish coffee "because it's not really my character to drink when I have things to do during the day." He similarly said that it was not his idea to have beer at the Airport Chalet or to go to Yukon Brewing where he drank beer samples. He acknowledged that he told the RCMP:

... that I thought it was maybe pushing it a little, and that just means to have anything to drink at all. There's an inherent amount of risk. I thought more to do with getting a ticket or that sort of thing, not getting into an accident and being impaired. I just know that it's inherently troublesome to drink alcohol in Canada.

[18] Mr. Schmidt was acquitted of the over 80 offences and the dangerous driving, but convicted on two counts of impaired driving causing bodily harm. A Pre-Sentence

Report was requested and prepared on February 14, 2012. The Probation Officer reports that:

Mr. Schmidt feels that he is guilty regardless of what the outcome from the court would have been. However, he states that he was guilty of adjusting to poor road conditions possibly due to the effect of alcohol. He states that he was going too fast which may have been caused by alcohol impairment.

He accepts responsibility for the accident but is sceptical of the alcohol impairment aspect and attempts to justify his decision to drive. The justification he uses is that he did not buy the alcohol and that he ate a large meal with the drinks. He states that "it is the opinion of the scientific community at large that food slows the absorption of alcohol." Mr. Schmidt believes that although the toxicologist mentioned this in court, it was not given as much weight as it should have.

[19] The Probation Officer expressed concern that Mr. Schmidt minimized the impact that alcohol had in the offence and provided minimal details to her on his past and present use of alcohol and drugs. He did say that he was ashamed of the offence. He had no one that he was willing to provide as a reference. The Probation Officer was supportive of a community disposition and suggested conditions.

THE APOLOGY AT SENTENCING

[20] Mr. Schmidt went to the lectern and faced the family of Jessica Frotten. He acknowledged that no words could come close to helping their pain and anger. He said he was deeply sorry for the damage that he had caused. He described it as the worst thing he'd ever done and said that he could never live past it. He said that he now understands the risk of alcohol and driving and that he was wrong and ignorant to believe that being below the legal limit made it safe. He acknowledged that any amount of alcohol increases the risk of accident. He took full responsibility for his passengers,

including their failure to wear seatbelts. He said he should not have driven as he was not 100% sober. He has felt an indescribable shame in having to face the community and Jessica's family.

[21] He also stated the following:

I don't want to minimize Jessica's injuries or Mike's in any way. They were almost killed. It's my fault. At present, the only thing that I can do to help is to be judged and punished because it might make you feel better. It might make the community feel safer and that justice was done. It also may dissuade people in the future from driving after they've had any amount of alcohol, and hopefully set a tone in our culture with a cavalier attitude towards drinking and driving in any amount is looked at with scorn, and people that drink and drive don't feel like they are taking some bold risk but rather are looked at as fools and should feel ashamed of themselves.

[22] He went on to describe his own post-traumatic stress, depression and ill father. He provided no evidence from friends, family or doctors to support his statements.

DRINKING AND DRIVING LAW AND STATISTICS

[23] The Crown presented a number of statistics about accidents caused by alcohol impairment, and specifically provided a report by The Traffic Injury Research Foundation of Canada entitled "Alcohol-Crash Problem in Canada: 2009". These statistics must be treated cautiously, particularly when the data reflects a small population as is the case for the Yukon.

[24] The report uses data from the Serious Injury Database, which compiles information from motor vehicle crash reports completed by investigating police officers. There are a variety of subgroups reported on but I will focus on drivers involved in alcohol-related crashes in which someone was seriously injured. Surprisingly, drivers in

serious injury crashes in the Yukon are seldom tested for alcohol, so an indirect measure is used, i.e. when the police report at least one drinking driver is involved.

[25] The report examines a 15-year period between 1995 and 2009, and there is some fluctuation in the incidence of alcohol-involvement in crashes during this time. However, “in the baseline period (1996 – 2001), an average of 19.1% of drivers in injury crashes were in an alcohol-involved crash. In 2009, the incidence of drivers in alcohol-involved crashes rose to 24.6%, a 28.8% increase.” Despite the statistics fluctuating from year to year, one can conclude that the problem of alcohol-involvement or drinking and driving in the Yukon is, at the very least, persistent.

[26] In a Statistics Canada publication entitled “Police-reported crime statistics in Canada, 2010”, there is a table that indicates a reported 408 incidents of alcohol or drug impaired operation of a vehicle in the Yukon. This compares to 727 incidents for Prince Edward Island, which has roughly four times Yukon’s population. Alcohol and drug impaired driving is a concern in the Yukon.

[27] The *Criminal Code* sets out the purpose and principles of sentencing in s. 718:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[28] Section 718.1 states that a sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender. Section 718.2 requires a court to consider the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender ...

...

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

...

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(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.

[29] While all the sentencing principles set out above must be taken into consideration, there is no doubt that in drinking and driving offences the primary objectives are denunciation and deterrence. In terms of deterrence, both specific and general deterrence are relevant, as the message about the risk of impaired driving needs to be communicated to both the community as a whole and to the offender him- or herself.

[30] Since at least the 1980s, courts across Canada have denounced drinking and driving. The Ontario Court of Appeal in *R. v. McVeigh* (1985), 11 O.A.C. 345, observed that members of the public should be able to exercise their lawful right to use highways

without the fear that they will meet a driver whose faculties are impaired by alcohol.

MacKinnon ACJO went on to say:

... 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.

[31] Similar comments have been made in the North. In *R. v. Norn*, 2007 NWTSC 45,

Charbonneau J. said the following at para. 11:

One wonders what it will take to stop people from drinking and driving. For years there have been ads on television, on the radio, articles in newspapers, that talk about the tragic things that happen as a result of drinking and driving. There are campaigns, there are marches, there are people who give public talks, people who go to the schools, Judges who impose sentences and talk, much in the way that I am doing now, about the devastating impacts of drinking and driving, the ruined lives and the scars that it leaves that can never completely heal. And yet the carnage on the roads continues. People do get behind the wheel of a car or a truck and they kill or hurt other people very badly when they are drunk and they are driving. Sometimes they hurt little children. Sometimes they hurt little children's mothers or fathers or both. Sometimes they kill entire families. Sometimes, as in this case, they hurt a life-long friend. When it happens, everyone is sorry. Everyone sees the waste and after the fact everyone can see how preventable it was. And yet, probably every day, somewhere people continue to make the bad choice and the carnage continues. The Court has the responsibility, then, to continue to try to deter and denounce this conduct and unfortunately, again, this is what I have to do today.

[32] As stated by Ruddy J. in *R. v. Marshall*, 2010 YKTC 81, at para. 30:

... The impaired simpliciter driver presents a serious risk to the safety of the public. For the impaired driver causing bodily harm or death, that risk has been tragically realized. The sentence must reflect the gravity of the consequences to the Spencers. Furthermore, the case law is clear that in order to achieve the principles of general deterrence and denunciation in such cases, the sentence must be of sufficient length to make it unattractive for others to get behind the wheel when intoxicated. ...

[33] Parliament has indicated its intention to also get tough on impaired driving by increasing the mandatory minimum sentences in recent years.

THE CROWN'S POSITION

[34] The Crown submitted that, considering the circumstances of both the offence and the offender, a significant jail sentence of between 18 and 24 months should be imposed along with a driving prohibition of three years.

[35] The Crown has relied upon a number of cases in which the circumstances of the offender are considerably more aggravating than the circumstances of Mr. Schmidt, who, it must be remembered, is a young man with no criminal record. However, with respect to the principle of parity, the Yukon case of *R. v. Marshall* is also relied upon by the Crown, subject to some qualification. In that case, the offender was driving with a blood alcohol concentration of almost twice the legal limit and on the wrong side of the road when she collided with the Spencers, who were visiting tourists. Mr. Spencer, then 60 years old, sustained serious spinal injuries and came close to dying. Although he almost became paraplegic, he had retained his mobility by the time of sentencing but will undoubtedly suffer for the rest of his life. He had five fractured vertebrae in his neck

and back. He had to be cut from the vehicle before receiving medical treatment.

Ms. Spencer was also injured but less seriously.

[36] The offender, Ms. Marshall, had no criminal record, entered an early guilty plea, demonstrated genuine remorse for her actions and drafted a sincere apology letter to the Spencers. Ruddy, J. said of Ms. Marshall at para. 11:

There is absolutely no suggestion that either specific deterrence or rehabilitation are issues for consideration in this case. Indeed, part of what makes this case so difficult is the fact that there is such a gross disparity between the very grave circumstances of the offence and the very positive circumstances of the offender.

[37] Ms. Marshall received a five-month jail sentence and a two-year driving prohibition. She was a resident of England and thus a probation order was not considered.

[38] The Crown submitted that the sentence given in the *Marshall* case is below the appropriate sentence for Mr. Schmidt because of the early guilty plea, Ms. Marshall's genuine remorse, the fact that the injuries of the victims were less severe, and the fact that Ms. Marshall was being deported to England. As well, there was only one count of impaired driving causing bodily harm.

THE DEFENCE'S POSITION

[39] Counsel for Mr. Schmidt submitted that simply because a conditional sentence is not available, it does not mean that another less restrictive sanction such as a suspended sentence or probation would not be appropriate in the circumstances.

Counsel relied upon the cases of *R. v. Riddell*, 2011 SKQB 378 and *R. v. Chapman*, 2000 BCCA 152.

[40] In the *Chapman* case, the offender had driven his vehicle into the back of a flatbed truck illegally parked at the side of the road, rendering his passenger quadriplegic. He was convicted of impaired driving causing bodily harm and dangerous driving causing bodily harm. He was sentenced to two years less a day to be served in the community on conditions of house arrest. The British Columbia Court of Appeal upheld the trial judge's decision that the principles of general deterrence and denunciation could be met by a conditional sentence in appropriate cases. Counsel cites the case, not for the application of a conditional sentence which is no longer available, but rather for the principle that a jail sentence is not the only sentence that can address the relevant sentencing principles.

[41] The *Riddell* case involves an 18-year old man who pled guilty to impaired driving causing bodily harm. He had struck the open door of an illegally parked car causing it to close on the leg of the victim, who was placing a child in a car seat. The car and the door were protruding into the driving portion of the road. Mr. Riddell did not stop after the collision and was arrested at his home. He had been drinking whisky and beer over a five-hour period and gave breath samples at .200 and .190.

[42] Gunn J. imposed a fine of \$2,500 and three years probation with the usual conditions and a curfew for the first six months. He also imposed the maximum driving prohibition of three years. While the offender had failed to stop at the scene, had a high blood alcohol reading and caused serious injury to the victim, he had entered a guilty plea and accepted responsibility for his actions from the outset. He was deeply remorseful and made a public apology in the courtroom to the victim. He had suffered from rheumatoid arthritis and pain since he was 12. He was formally diagnosed with

major depression, anxiety and an eating disorder, and had been placed in the care of a psychiatrist while still in high school. His psychiatrist provided a letter to the court indicating that since the accident, Mr. Riddell “presented with severe adjustment disorder with severe depressive symptoms and suicidality”. The doctor was quite concerned about his safety and gave the opinion that his suicidal risk “will increase significantly if further stress such as incarceration resulted.” A number of individuals filed letters of fully-informed support. The judge did not consider that the necessity for individual deterrence was high. In imposing the fine with probation, the judge also noted a number of impaired driving cases in Saskatchewan where a jail sentence was not imposed.

[43] Counsel for Mr. Schmidt submits that in this case, the alcohol impairment was slight, the driving not egregious and Mr. Schmidt has apologized and is remorseful. In addition, Mr. Schmidt, albeit without any supporting medical documentation, says he has been depressed, suicidal, suffers from post-traumatic stress disorder and his incarceration would be a hardship on his gravely ill father. As noted, Mr. Schmidt has no criminal record, but he does have four *Motor Vehicle Act* speeding offences between 1998 and 2003.

ANALYSIS

[44] In *R. v. C.A.M.*, [1996] 1 S.C.R. 500, Lamer, C.J., at para. 91, spoke about the role of the sentencing judge in crafting “a just and appropriate sentence”:

... The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. ...

[45] Ruddy J. found in *Marshall* that the Yukon caselaw on impaired driving causing bodily harm indicates a sentencing range of four to ten months. Although a helpful guideline, as stated in *R. v. Aburto*, 2009 BCCA 446, ranges are no more than “suggestions” and they do not impose hard and fast limits:

[19] ... Each case has to be decided on the circumstances of the offence, the principles of sentencing, and any relevant aggravating and mitigating factors: *R. v. E.H.*, 2005 BCCA 3, 192 C.C.C. (3d) 366 at paras. 33, 34; *R. v. Ansari*, 2009 BCCA 381 ...

AGGRAVATING FACTORS

[46] The aggravating factors in this case are:

1. Mr. Schmidt was speeding in winter on a road that was bare and clean of ice but that he knew had frost heaves;
2. Jessica Frotten suffered a catastrophic injury and is a paraplegic;
3. Michael Sanderson was also quite seriously injured.

MITIGATING FACTORS

[47] The mitigating factors are:

1. Mr. Schmidt is a youthful offender and has no criminal record;
2. he is remorseful and offered an eloquent apology in court at the sentencing hearing, although the extent to which he claimed to accept responsibility before me is unfortunately somewhat tempered by the observations of the probation officer in her Pre-Sentence Report.

[48] Mr. Schmidt was convicted after trial of two counts of impaired driving causing bodily harm. This fact distinguishes his case from *R. v. Marshall* and *R. v. Riddell* where the guilty pleas came at the earliest opportunity. However, Mr. Schmidt had very triable

issues and was in fact acquitted on two counts of dangerous driving causing bodily harm and two counts of driving with a blood alcohol concentration over .80.

[49] His remorse in causing the catastrophic injury to Jessica Frotten is genuine and has been evident from the outset. I refer to his tearful statement at the police station and his attempts to speak to and support Jessica Frotten.

[50] What is troubling for me, and also seems to be so for the probation officer, is the disconnect between Mr. Schmidt's remorse for the accident and the injuries he caused and his unwillingness to take full responsibility for his conduct in driving while impaired. His defensiveness at trial can be understood, but not in the Pre-Sentence Report, where he effectively paints himself as a victim of the criminal process.

[51] Even more troubling is his deceptive presentation to the probation officer that he was always the designated driver, that he had been tricked into taking his first drink that day and that not enough consideration was given to his food consumption with the alcohol. I agree with the assessment of the probation officer that he was minimizing the role that alcohol had to play in the accident.

[52] However, his courtroom apology facing the family of Jessica Frotten who has been devastated by her injuries was complete and genuine.

[53] I give little weight to his self-diagnosis of post-traumatic stress disorder, depression and suicidal thoughts. He did not provide any medical evidence to confirm them.

[54] While there is no doubt that a suspended sentence or fine and probation are appropriate dispositions in some circumstances, like those in the *Riddell* case, I do not find them to be appropriate here. The factors of deterrence and denunciation remain

important in this case, both from the public aspect and, unlike the offenders in *Marshall* and *Ridell*, also to Mr. Schmidt personally, who still shows a reluctance to take responsibility for his alcohol consumption and its contribution to the accident right up to his courtroom apology.

[55] Mr. Schmidt's relatively slight degree of impairment and the lack of a marked departure in his driving prior to the accident are relevant considerations, but it was nonetheless his decision to drink, drive and speed that caused the catastrophic consequences that require a sentence with significant emphasis on deterrence and denunciation.

DECISION

[56] I find that in the circumstance of this offence and this offender that a fit and proper sentence is a jail term of eight months for the impaired driving causing bodily harm to Jessica Frotten and a jail term of six months for the offence against Michael Sanderson to be served concurrently. I also impose a driving prohibition of three years. A period of probation is unnecessary.

[57] As this is a secondary designated offence under s. 487.04(a), I order the taking of samples of bodily substances from Mr. Schmidt that are reasonably required for the purpose of forensic DNA analysis.

VEALE J.