# COURT OF APPEAL OF YUKON

Citation: *R. v. Kloepfer*,
2019 YKCA 7

Date: 20190321
Docket: 17-YU812

Between:

**Regina**

Respondent

And

**Paul Kloepfer**

Appellant

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Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of Yukon, dated August 28, 2017 (*R. v. Kloepfer*, 2017 YKSC 44, Whitehorse Docket 15-01505).

## Oral Reasons for Judgment

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|---|---|
| Counsel for the Appellant: | V. Larochelle |
| Counsel for the Respondent: | L. Whyte |
| Place and Date of Hearing: | Vancouver, British Columbia<br>March 21, 2019 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>March 21, 2019 |

***Summary:***

*Mr. Kloepfer appeals his sentence of five months' imprisonment followed by a two-year driving prohibition for dangerous driving causing bodily harm contrary to s. 249(3) of the Criminal Code. He seeks a reduction of one month on the basis that the sentence was imposed in conjunction with concurrent sentences for two convictions for leaving the scene of the accident, which were overturned on appeal, and the judge "wrongly factored in an aggravating factor". Held: appeal dismissed. The conduct underlying both offences arose from the same circumstances. The judge determined an appropriate sentence on each count, to be served concurrently. The judge did not err in principle because the offences protect distinct societal interests. It cannot be said Mr. Kloepfer received a heavier sentence than he otherwise would have. There is no basis to interfere with the original sentence.*

## Overview

[1] **STROMBERG-STEIN J.A.**: Mr. Kloepfer appeals his sentence of five months' imprisonment followed by a two-year driving prohibition for dangerous driving causing bodily harm contrary to s. 249(3) of the *Criminal Code*, R.S.C. 1985, c. C-46. He seeks a reduction of one month on the basis that the sentence was imposed in conjunction with concurrent sentences for two convictions for leaving the scene of the accident, which were overturned on appeal. Notwithstanding the fact that the sentencing judge imposed concurrent sentences, Mr. Klopefer submits that he received a heavier sentence than he would have received had the sentencing judge not found that he was guilty of leaving the scene of an accident. He submits there is an error in principle impacting the sentence, as the judge wrongly factored in an aggravating factor.

[2] It is not argued that the sentence is demonstrably unfit.

[3] For the reasons that follow, I would dismiss the appeal.

## Facts

[4] The facts underlying the offences are that Mr. Kloepfer intentionally accelerated his truck towards a group of four pedestrians and ultimately collided with two of them, an elderly man, Mr. Arnold, and a youth, T.S., causing bodily harm to T.S.: reasons for sentence (RFS) at para. 4. The backdrop to this incident is a history of animosity between the parties.

[5] At trial, the judge found that after the collisions Mr. Kloepfer left the area "without stopping to render assistance or check for injuries. Rather, he continued down the road to his home where he made yet another complaint to the police about mischief caused by [the pedestrians]": RFS at para. 4; 2016 YKSC 55 at para. 80.

[6] The judge found Mr. Kloepfer not guilty of using his motor vehicle as a weapon, contrary to s. 267(a) of the *Criminal Code*, because he did not find the collisions were intentional: RFS at para. 5. However, he found Mr. Kloepfer guilty of a number of related offences and sentenced him as follows (RFS at para. 77):

a) Five months' imprisonment plus a two-year driving prohibition for the offence of dangerous driving causing bodily harm against T.S.;

b) Four months' imprisonment plus a two-year driving prohibition, served concurrently, for the offence of dangerous driving involving Mr. Arnold;

c) Three months' imprisonment, served concurrently, for the offence of leaving the scene of the accident involving T.S.; and

d) Three months' imprisonment, served concurrently, for the offence of leaving the scene of the accident involving Mr. Arnold.

[7] On January 3, 2019, the Court of Appeal allowed Mr. Kloepfer's conviction appeal in part: 2019 YKCA 1 [*Kloepfer* CA]. The conviction for dangerous driving causing bodily harm to T.S. was upheld. A conditional stay was entered for the dangerous driving conviction involving Mr. Arnold. The convictions for failing to stop at the scene of an accident were set aside and acquittals were entered: *Kloepfer* CA at paras. 55–56.

[8] With respect to the convictions for failing to stop at the scene of an accident, the Court of Appeal found that as a result of evidence to the contrary (the fact that Mr. Kloepfer called the police from his home) the presumption in s. 252(2) of the *Criminal Code* did not apply and the judge should have engaged in an analysis to determine whether the Crown had proved Mr. Kloepfer's intention to escape liability beyond a reasonable doubt: *Kloepfer* CA at paras. 26–27. Although the Court

identified a legal error, the trial judge's factual finding that Mr. Kloepfer left the accident scene without checking for injuries was not disturbed on appeal.

**Reasons for Sentence**

[9] The sentencing judge reviewed the circumstances of the offender primarily from the pre-sentence report. Mr. Kloepfer did not have a criminal record in Canada, but he had received a $5,000 fine in 2007 for an incident that occurred with a park ranger in Alaska: RFS at para. 10. Mr. Kloepfer experienced childhood and military trauma, which might have caused some ongoing behavioural problems. While he appeared to be appreciated by his peers and friends, it was noted "'there is a pattern of conflict with individuals when they express an alternative point of view'": RFS at para. 33. The judge commented that Mr. Kloepfer did not take responsibility for the offences and continued to demonstrate considerable hostility towards his victim neighbours: RFS at para. 31. The pre-sentence report indicated Mr. Kloepfer lacked insight into the impact of his behaviour and he had "'significant issues with conflict resolution and cognitive distortions'": RFS at para. 34.

[10] The judge noted that the maximum sentence for dangerous driving causing bodily harm was 10 years: RFS at para. 44. He canvassed the case authorities involving dangerous driving causing bodily harm as well as impaired driving causing bodily harm, which he held were generally comparable: RFS at paras. 44, 52. He also reviewed cases involving leaving the scene of an accident: RFS at paras. 64–70. He considered *R. v. Bhalru*; *R. v. Khosa*, 2003 BCCA 645, which emphasized the importance of general deterrence and denunciation in sentencing for dangerous driving offences and explained how moral culpability for such offences is determined: RFS at paras. 48–50.

[11] The judge concluded Mr. Kloepfer must serve a jail sentence to satisfy the paramount principles of denunciation and deterrence. He sentenced Mr. Kloepfer to five months' imprisonment plus a two-year driving prohibition for the offence of dangerous driving causing bodily harm against T.S. for four reasons.

[12] First, the judge concluded there were no exceptional circumstances to justify a non-custodial sentence: RFS at para. 72. While the injuries in this case were less serious than many of the cases cited, he noted this was a result of “sheer luck”.

[13] Second, the judge found there were few mitigating circumstances. He acknowledged the pre-sentence report, which indicated Mr. Kloepfer was at low risk to reoffend, had relatively positive character references, and did not have a driving record. However, he found these mitigating factors did not reduce Mr. Kloepfer’s moral culpability.

[14] Third, the judge considered Mr. Kloepfer offered no explanation for his irrational behaviour. He considered *R. v. Gill*, 2010 BCCA 338 with respect to the interplay between a deliberate choice to risk killing or maiming a pedestrian and the moral and legal duty to slow down and stop for a pedestrian: RFS at para. 56. The judge found Mr. Kloepfer made a deliberate choice when he accelerated his vehicle towards the pedestrians, even if his choice was not to intentionally collide with them: RFS at para. 75. Referring to *Bhalru*, the judge concluded Mr. Kloepfer’s level of moral culpability was very high in light of “the intentional risk he took, the degree of harm that he caused, and the extent to which his conduct deviated from an acceptable standard of behaviour”.

[15] Fourth, with knowledge of the collisions with T.S. and Mr. Arnold, Mr. Kloepfer fled the scene without stopping to determine whether anyone was injured. Once home, he made a false report to the police alleging that the pedestrians had committed mischief by placing boulders on the road, and he did not report to the police that the pedestrians may have been injured: RFS at para. 76.

## Analysis

[16] Mr. Kloepfer seeks to vary the sentence imposed for dangerous driving causing bodily harm from five to four months’ imprisonment. Relying on *R. v. Vuradin*, 2012 ABCA 55 at para. 9, he submits that he received a heavier sentence than he would have had the sentencing judge not found that he was guilty of the offences of leaving the scene of an accident.

[17] While the convictions for failing to stop at the scene of an accident were set aside, the trial judge's underlying findings of fact on this point, including that Mr. Kloepfer left the scene of the accident without stopping to see if anyone was injured, were not disturbed on appeal. The fact that his convictions for leaving the scene of an accident were overturned on appeal is not, in the circumstances of this case, a basis for interfering with the sentence on appeal.

[18] A review of the case law on which the sentencing judge relied demonstrates that a five-month sentence is within the range of fit sentences for this type of offence and offender. The judge found a five-month sentence for dangerous driving causing bodily harm was a fit sentence in the circumstances of this case and this offender, having regard to the principles of sentencing with emphasis on denunciation and deterrence.

[19] In its written argument, the Crown cites *R. v. Hindes*, 2000 ABCA 197 as authority for conceding the sentencing judge committed an error in principle by treating Mr. Kloepfer's failure to stop at the scene of the accident as an aggravating factor in sentencing him for the offence of dangerous driving causing bodily harm while also sentencing him to concurrent time for leaving the scene of the accident. Despite the error, the Crown submits the five-month sentence imposed for dangerous driving causing bodily harm is a fit sentence that should be affirmed on appeal.

[20] In my view, *Hindes* is distinguishable. In *Hindes*, the court stated "it is an error to escalate the sentence for one offence for the very behaviour that forms the justification for a high consecutive sentence in another offence": at para. 24. Here, the factual basis for leaving the scene of the accident was only one of many aggravating factors the sentencing judge relied on in sentencing Mr. Kloepfer for the dangerous driving offence, and the judge did not impose consecutive, or even higher sentences, for leaving the scene of the accident.

[21] In any event, in my view, the sentencing judge did not err in principle by considering the fact that Mr. Kloepfer left the accident scene was an aggravating

factor where he was also being sentenced for leaving the scene of the accident, as distinct societal interests were under consideration, which was noted in *R. v. Gummer* (1983), 25 M.V.R. 282, 38 C.R. (3d) 46 at 49–50 (Ont. C.A.), cited in *R. v. Grewal* (1991), 30 M.V.R. (2d) 139 at para. 12 (B.C.C.A.) (both cases sanctioned consecutive sentences for the offences of dangerous driving and leaving the scene arising from the same incident):

> The offences of dangerous driving and "failing to remain" protect different social interests. The offence of dangerous driving is to protect the public from driving of the proscribed kind. The offence of failing to remain under s. 233(2) of the Code imposes a duty on the person having the care of a motor vehicle which has been involved in an accident, whether or not fault is attributable to him in respect of the accident, to remain and discharge the duties imposed upon him in such circumstances.

[22] I also note the comments in *R. v. Kandola*, 2014 BCCA 443 at para. 40, where, in the context of imposing consecutive sentences for offences arising from the same conduct and one offence being considered as both an aggravating factor and the basis for a consecutive sentence, the court rejected the argument that the offender is, essentially, punished twice for the same conduct, as the overlapping offences were directed at “different societal interests”. See also *R. v. Berry*, 2015 BCCA 210 to the same effect.

[23] In this case, there was an overlap in that the conduct underlying both offences arose from the same circumstances. But these were separate offences and the judge determined an appropriate sentence on each count, to be served concurrently. Although the convictions for leaving the accident scene were overturned on appeal, in my view it cannot be said Mr. Kloepfer received a heavier sentence than he otherwise would have. There is no basis for this Court to interfere with the original sentence.

[24] In any event, even if it could be said to be an error in principle, it did not impact the otherwise fit sentence imposed by the trial judge. While I appreciate the reduction of the sentence by one month is significant to Mr. Kloepfer, to do so in my view would be tinkering, contrary to the Court’s admonition in *R. v. Lacasse*, 2015 SCC 64 and the standard of appellate review warranting intervention.

[25] I would dismiss the appeal. By consent, I would quash the imposition of the mandatory victim surcharge in light of the recent change in the law: *R. v. Boudreault*, 2018 SCC 58.

[26] **FISHER J.A.**: I agree.

[27] **BUTLER J.A.**: I agree.

[28] **STROMBERG-STEIN J.A.**: The sentence appeal is dismissed. The imposition of the mandatory victim surcharge is quashed.

"The Honourable Madam Justice Stromberg-Stein"