

Citation: *R. v. Hagloff*, 2009 YKTC 132

Date: 20091113
Docket: 09-00146
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

ROBERT JOHN HAGLOFF

Appearances:
Judy Bielefeld
André Roothman

Appearing for the Crown
Appearing for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Robert Hagloff has entered a plea of guilty to having committed the offence of impaired driving, contrary to s. 253(1)(a) of the *Criminal Code*.

[2] Circumstances are that on the 10th day of May, 2009, at about 8:15 in the evening, a civilian was in the parking lot at the McDonald's Restaurant in Whitehorse when he noted a four-by-four truck drive in. Mr. Hagloff poured himself out of the truck, in the words of the civilian who watched him then walk into the McDonald's exit several minutes later, and walk back across to his vehicle and get into it. He observed this individual, Mr. Hagloff, staggering in the parking lot and having trouble getting himself out of his seatbelt.

[3] Concerned, this civilian contacted the RCMP, who arrived at about 8:15 and approached the truck. Mr. Hagloff opened the door. A strong odour of alcohol was noted. There was open liquor in the vehicle beside him, a can of beer, plus six unopened cans of beer in the vehicle. Mr. Hagloff was fumbling. He had slurred speech and bloodshot eyes. He was arrested and taken to the RCMP detachment where he provided breath samples of 110 and 100 milligram percentile.

[4] Mr. Hagloff has a criminal record that has related entries. In 1992 there is a dangerous operation of a motor vehicle and two driving with more than 80 milligrams of alcohol in blood, contrary to s. 253(b). These all went to disposition on the same day, and I note that there were only two police files so it would appear that the dangerous operation was likely in respect of one of the impaireds and then there was a subsequent impaired. On those impaired offences he received 30 days and five days concurrent to the 90 days he received for the dangerous operation of the vehicle.

[5] He has a 1998 conviction and a 1999 conviction for driving with more than 80 milligrams of alcohol in his blood, contrary to s. 253(b). He received sentences of a \$1,200 fine and a six-month driving prohibition on the first, and then an 18-day intermittent sentence and a driving prohibition of 18 months on the latter. Since then there have been no entries.

[6] There are several other entries, going back to 1988, for property-related offences. They are not many and the dispositions on them tended to be low fines. Of some significance is that there is a fail to comply with a probation order in 1988, a fail to

comply with the recognizance three times in 1988, under a different file, two charges of fail to attend court in 1988 and a fail to comply with a probation order in 1994.

[7] Crown is not filing notice, leaving open the possibility for defence counsel to make submissions on the appropriateness of a conditional sentence. There is agreement between Crown and defence that if a conditional sentence is not imposed a minimum of 120 days incarceration is appropriate. Crown is suggesting 120 to 150. Defence is asking for the 120. If the Court imposes a conditional sentence there is again an agreement, that a minimum six-month conditional sentence would be imposed, although Crown is suggesting that the sentence range would more appropriately be in the nine to 12 months.

[8] There is agreement on the three-year driving prohibition because of the fact that notice has not been filed and that is the maximum sentence I am able to impose without further argument on whether I am able to accept the filing of notice for a limited purpose. That is an issue to be resolved at another day, should counsel on another case wish to research and argue that matter.

[9] Crown points to the aggravating features, being, of course, the criminal record and the four directly related entries, the level of impairment observed, the fact that this occurred in a public place in the evening, fairly early evening still, being around eight o'clock - I understand this to be a Sunday evening from the submissions of defence counsel and a review of the calendar - and there was open liquor in the vehicle.

[10] The mitigating factors are, of course, the gap in the criminal record and the fact that there is a guilty plea; however, Crown urges that the mitigation be significantly reduced because of the fact this is on the day of trial.

[11] Crown counsel is opposed to a conditional sentence being imposed in this case, basically stressing that the factors of denunciation and deterrence, that are front and centre in impaired driving offences, cannot be met in this case by the imposition of a conditional sentence.

[12] Mr. Hagloff is 40 years of age. He has a nine-year-old daughter for whom he pays child support in the amount of \$372 a month. He is employed at Tusk Exploration in Whitehorse, full-time, as I understand it, and will be employed through the winter fixing equipment. He started consuming alcohol more heavily in 2005 after a break of a number of years. When his mother died he tried to deal with his alcohol problem himself, unsuccessfully, and then subsequently, about ten months ago, separated from his spouse, which added additional stress.

[13] The submission of defence counsel and also of Mr. Hagloff is that he has not consumed alcohol since May 10th. He says that he has not done this with the assistance of any counselling or attendance at AA, but that when he has been working and just keeping himself busy and not turning his mind to drinking he was able to abstain. He acknowledges, however, that he needs help; he needs assistance and he will take whatever help and assistance the Court is prepared to provide him by way of an order that requires him to do or attend at any counselling.

[14] Wayne and Norma Risby are present in court today. Wayne Risby spoke. He said he has been a friend of Mr. Hagloff for about ten years. Mr. Hagloff has lived at their residence on and off throughout those years and he is currently living there and is welcome to stay and continue to live there. Mr. Risby indicates that any terms of a conditional sentence order that would require Mr. Hagloff to abstain from the possession or consumption of alcohol would be terms that he would support, and that would be no difficulty maintaining within his residence. He also indicates that house arrest or terms that would require Mr. Hagloff to be in the residence with only exceptions for working or counselling or other matters is also something that is workable within their residence.

[15] As I stated earlier, impaired driving offences are offences that cry out for denunciation and general and specific deterrence. These offences occurred after the change in the legislative scheme which has increased the sentences available for impaired driving offences, thus reflecting society's continued abhorrence of this offence which causes so much harm to so many people in the Canadian community.

[16] In *R. v. Proulx*, [2000] S.C.J. No. 6, that dealt with the conditional sentence regime, it is clear that the Supreme Court stated that conditional sentences may have a deterrent component and that the need for general deterrence and denunciation is not so great that undue reliance on this need should be the deciding factor between a conditional sentence and an actual period of incarceration. At the same time, the Court said that certain offences are going to be less likely to be able to find the balance between the need to protect society and deterrence and the rehabilitative aspects of a conditional sentence, and impaired driving is one of these offences in which they say a custodial disposition may have a greater deterrent effect.

[17] In the Yukon jurisdiction, often when we are dealing with conditional sentence applications on impaired driving offences, we have a fairly good track record of what steps the individual has taken between the time of the offence and the time of sentencing to indicate that their drinking is being addressed and they no longer pose a risk of harm to the community. In this case what we have is the assertion by Mr. Hagloff that he has not been drinking since that date and the support of his friends, who would basically be living with him pretty continuously, that say that they will ensure that he does not have a problem with that while he is living with them.

[18] Counterbalancing to some extent the lack of that kind of information is the gap in the record and the fact that there appears to be, before 2005, some period of time when Mr. Hagloff was able to deal with his drinking. We have also the fact that the readings that we are dealing with are 100 and 110, which are certainly at the lower end of the range, being just above what constitutes the criminal offence of driving while over .08. Impaired driving can certainly occur in cases under .08, so it needs to be remembered that .08 is not the limit at which people are safe to drive up to. Many people are incapable of driving, without committing a criminal offence, well under .08. Certainly in Mr. Hagloff's case, by the observations of the civilian witness, he was very intoxicated, although his readings were in the lower end of what constitutes the criminal offence under the charge of driving while having a blood alcohol level in excess of .08.

[19] I have observed Mr. Hagloff in court. I view the support of his friends that are here. I look at his criminal record, which includes the fail to comply with orders, which can often signal the death knell to any satisfaction that an individual comply with a court order, but I keep in mind that the last of these is 15 years ago. So I do not put any

weight on them as being a factor that would deprive Mr. Hagloff of the ability to serve his sentence conditionally in the community.

[20] It really comes down to the issue of whether I can impose a conditional sentence that sends a message out to the community that impaired driving is an offence that will receive significant and serious sanctions and be satisfied that the community's safety is not endangered. In order to do that in the case of an impaired driving offender, I need to be satisfied that Mr. Hagloff will not consume alcohol, or that I can structure a conditional sentence in such a way that that risk to the safety of the community does not exist, to the extent that any court order can prevent that risk from occurring.

[21] I have to keep in mind at all times still s. 718 and 718.2 of the *Criminal Code*, that deals with the principles of denunciation, deterrence, rehabilitation and reparations. It also has to create a sense of responsibility in the offender and an acknowledgement of harm done to victims in the community. Impaired driving offences are offences that are of great harm to the community, and even if an individual is not harmed in one case and no accident occurs, there is no property harm, there is still harm every time an impaired driver commits that offence because of the nature of the offence itself.

[22] So this case is more borderline than some, because of the fact that we really do not have a huge amount, or really any significant amount, of information about Mr. Hagloff's ability to abstain from the consumption of alcohol, and, in particular, to not be driving a vehicle while under the influence of alcohol to any extent. I do not see any driving while prohibited charges on his record in that regard, because that would be a significantly difficult hurdle for him to overcome, were any such conviction there.

[23] I am satisfied that in this case, and by significantly increasing the length of the sentence, that Mr. Hagloff can serve this sentence in the community, but it will be on very strict terms that are going to send a message to Mr. Hagloff and to the community that impaired driving offences are going to have significant consequences, regardless of whether the person is involved in an accident or drives down the wrong side of the street or is simply stopped at a check stop.

[24] The low readings are a factor in this; not the only factor, they are a factor. Many of the cases we have dealt with in the Yukon struggle with the issue of imposing conditional sentences for individuals whose readings are in excess of 200 or in excess of the statutorily aggravating number of 160 milligram percentile. We are dealing with low readings here, and we are dealing with a situation in which I believe the living environment for Mr. Hagloff will provide a form of stability, both personally for him, to give him the strength that he needs to deal with this, and to ensure that he will be complying with the terms of this order, because if he is not, he will be brought back before this Court and may face a collapse of the entirety of his conditional sentence, and it will be double the minimum.

[25] It will be an eight-month conditional sentence. The terms will be:

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 Territory unless you have written permission from your Supervisor or the Court;
5. Notify the Supervisor or the Court in advance of any change of name or address, and promptly notify the Court or the Supervisor of any change of employment or occupation;
6. Reside at 31 Peel Road, Whitehorse, Yukon, and not change that residence without the prior written permission of your Supervisor;
7. At all times remain within your place of residence, except with the prior written permission of your Supervisor for the purposes of employment and attendance at counselling, or on such other occasions as the Supervisor may allow.

It is house arrest: it is work, it is counselling. If there is no work and there are educational opportunities, permission can be sought. There may be other exceptions, but it is house arrest.

You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;

8. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances except in accordance with a prescription given to you by a qualified medical practitioner;

[26] You are to provide a sample -- no, actually, you have not canvassed that with your client, have you, Mr. Roothman?

[27] MR. ROTHMAN: No.

[28] THE COURT: No. Again, one thing I am going to suggest, just put it out there for defence counsel, is the difference sometimes between the imposition of a conditional sentence and not imposing a conditional sentence may come down to the ability of a peace officer, Conditional Sentence Supervisor, to be able to randomly sample the individual to see whether they have been consuming alcohol. I have concerns about the jurisdictional ability to do that without a valid and informed consent. That is something that, generally speaking, should be sought prior to attendance in court and be part of the proposal for a conditional sentence package if that is a case in which defence counsel thinks that may be something the Court wishes, and it may well wish it in most cases that involve impaired driving.

[29] I am not going to impose it in a case where, frankly, the consent is given under the pressure of being in the middle of a proceeding, because it is hard, I would think, to be completely satisfied that the consent is fully informed and valid. But I am making this suggestion. I have made it before, at one time, but I will make it as often as necessary, that in some cases that might be the difference and it is worth canvassing in advance.

9. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
10. Take such alcohol and drug assessment, counselling or programming as directed by your Supervisor and attend and complete a residential program as directed by your Supervisor;

11. Take such other assessment, counselling and programming as directed by your Supervisor;
12. Make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts;
13. Provide your Supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this conditional sentence order;

[30] Even though it is redundant, because you are going to be under a driving prohibition, there is going to be a term to:

14. Not drive a motor vehicle at any time.

Just -- it is a very quick response by the police on a conditional sentence.

[31] There will be a driving prohibition for three years, prohibiting you from operating any motor vehicle on any street, road, highway or other public place. This is for a period of not less than three years plus any period to which you are sentenced to imprisonment. So that will be worked out with --

[32] MR. ROOTHMAN: On that note, Your Honour, I would ask the Court to consider my client's eligibility to apply for Interlock.

[33] THE COURT: It is automatic now, under the amendments to the *Code*.

[34] MR. ROOTHMAN: Is it?

[35] THE COURT: The Court no longer needs to make a recommendation.

[36] MR. ROTHMAN: Oh, I wasn't --

[37] THE COURT: So, yes, the --

[38] MR. ROTHMAN: -- I -- when I reviewed my 2008 --

[39] THE COURT: No, that --

[40] MR. ROTHMAN: -- 2009 edition of Kenkel they still refer to an application being made.

[41] THE COURT: Yes. If you look at s. 259(1.1), he of course would need to be registered in an alcohol ignition interlock program established under the laws of the Yukon Territory, and this is counted as a first offence for that purpose, which is three months. Yes, Ms. Bielefeld?

[42] MS. BIELEFELD: Your Honour, I was just wondering if I could make some submissions with respect to conditions?

[43] THE COURT: Yes, I will come back --

[44] MS. BIELEFELD: I'm sorry.

[45] THE COURT: No, that is fine, because normally I would do that before the driving prohibition, so I understand. So, yes, with respect to conditions; first, Ms. Bielefeld?

[46] MS. BIELEFELD: I would insert, just to clarify, I believe you already made this condition, that he not be able to attend where the primary purpose is to sell alcohol?

[47] THE COURT: Yes.

[48] MS. BIELEFELD: The other condition that I would suggest is that he not be either in the front seat of a motor vehicle or in the driver's seat.

[49] THE COURT: Well, I am not going to say front seat because the only vehicle he may be in may be a two-seater vehicle, but --

[50] MR. ROTHMAN: That may be problematic in the work context.

[51] THE COURT: He is a mechanic, right?

[52] MR. ROTHMAN: Yeah.

[53] THE COURT: As I understand it, works on equipment --

[54] MR. ROTHMAN: Yes.

[55] THE COURT: -- in a shop.

[56] MR. ROTHMAN: Yes.

[57] THE COURT: I mean it is easy to say in a public place, but --

[58] MR. ROTHMAN: I assume there may be cases where, situations where, in town, although it may be during winter where he is working in the shop, that

he may be with somebody else for work purposes in the vehicle, in the front passenger seat.

[59] THE COURT: Well, the passenger seat, I am not going to impose that for sure.

[60] MR. ROOTHMAN: Yeah. Okay, no, then it's fine.

[61] THE COURT: I am thinking about the other. While I understand the potential utility of that clause, I am not going to impose it. But I will make it really clear that you do not want to be in a situation where it might be thought you might have been about to operate a motor vehicle, which is what, I think, the Crown is getting at with that request. Anything else in any of the terms of this?

[62] MR. ROOTHMAN: Not as far as -- no.

[63] THE COURT: I am not going to impose a probation order to follow this.

[64] This sentence, Mr. Hagloff, is actually, in many ways, going to be more difficult to serve than had you been sentenced to a period of four months incarceration, because it is going to require you to exercise restraint, self-control and discipline, which is not that difficult when someone else is doing it for you in a lock-down facility. It is also longer, and, potentially, should you breach any of the terms of this order, could end up having you receive a longer actual jail sentence than you would have received had you received the minimum of four months today, had the Crown filed notice. So in some

ways it is much more difficult, and anyone that looks at this can probably see that, yes, this is a difficult sentence because it does require that kind of discipline.

[65] It also, however, gives you the ability to do some things that maybe you would not have done otherwise, and get real control on your life and put all of this behind you. I will let you know that the terms of this conditional sentence are open to review upon application, either by yourself or your Conditional Sentence Supervisor, at a future date. So even though it is house arrest for the eight months right now, depending on how you are doing and what steps you have taken, you may be successful in an application to somehow loosen some of the terms of this order, primarily that term, at a future date. But that will require the support of your Conditional Sentence Supervisor, in order for you to be successful, and that will require you to do something you have not done before, which is get help for your alcohol problem. So look at this as an opportunity to be in a completely different head space a year from now than you are right now, an opportunity to keep working, keep doing the things you need to do in order to meet your obligations towards your daughter and her mother, not just financially, but to be there for your daughter completely as she grows up.

[66] You need to appreciate the support you have of the Risbys, because, frankly, if their home was not available to you, I do not think you would have been successful in an application for a conditional sentence. Their support is going to be critical and you need to lean on it and use it; and of your other friends as well.

[67] Victim fine surcharge will be \$50. How long will you need to pay that?

[68] THE ACCUSED: I'll deal with that.

[69] THE COURT: Forthwith. There will be paperwork for you to sign.
Anything else, Ms. Bielefeld?

[70] MS. BIELEFELD: Your Honour, I think you indicated you are not
imposing a probation order?

[71] THE COURT: I am not going to, no. He is going to deal with this
within the terms of his conditional sentence. I keep in mind there is a ten-year gap, this
is a lengthy conditional sentence, and probation, while it may be of assistance, I believe
would probably be excessive in these circumstances. Remaining charge?

[72] MS. BIELEFELD: Stay of proceedings, please.

[73] THE COURT: Okay.

COZENS T.C.J.