Citation: *R.* v. *Joe,* 2005 YKTC 21

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Docket: T.C. 00-00119
01-00423
03-00689
Registry: Whitehorse
Heard: Haines Junction

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.
ARTHUR FRANKIE JOE

Appearances:
David McWhinnie — Counsel for Crown
Malcolm Campbell — Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): I am prepared to pass sentence at this point in time. Mr. Joe is before me having plead guilty to two current offences contrary to s. 254 and s. 259 of the *Criminal Code*. He is also before me for sentencing in relation to offences contrary to s. 253(a) and s. 253(b), which arose in 2000 and for which Mr. Joe received a curative discharge in 2002. Upon application by the Crown, that discharge was recently revoked by me as a result of both non-compliance and the disappearance of Mr. Joe.

[2] In terms of the facts on the three offences, beginning with the most current two offences. On February 21, 2005, at 8:10, a complaint was received by the RCMP with respect to a grey truck in a ditch near Haines Junction, as well as information that the driver may be intoxicated.

[3] The RCMP responded to the call and were unable to find the vehicle in the ditch, but recalled a grey truck passing them, which they knew belonged to Mr. Joe. They returned to Haines Junction to the apartment building which Mr. Joe was residing in at the time. They observed him pull his truck into the parking lot. He was noted to be behind the wheel of the vehicle. He advised them that he does not drink anymore, but the RCMP noted a strong smell of alcohol.

[4] They noted other signs of impairment, including uncertain balance, and consequently made a demand to Mr. Joe that he provide appropriate samples of breath for the approved screening device. He was given instruction on how to blow on two occasions and he was also given three opportunities to provide samples, but each of those samples provided were insufficient and he was subsequently charged with refusal.

[5] With respect to the second count arising on February 21, it is noted that Mr. Joe was on a three year driving prohibition at that point in time.

[6] With respect to the two prior offences, the first arose on May 7, 2000, in Whitehorse. Mr. Joe was noted to be driving his truck on Two Mile Hill and was observed to be swerving on the road, including crossing the centre line. When pulled over, he exhibited the usual signs of impairment, a breath demand was made

and he provided samples of 300 and 280 respectively. While on release with respect to that offence, on August 31, 2000, at 11:00 p.m., the RCMP received a complaint of a possible impaired driver in the Takhini River Bridge area. They attended to the area and found Mr. Joe in his vehicle, stopped in his lane. He exhibited the usual signs of impairment, including smell of alcohol on his breath, staggering, flushed face and slurred speech. He provided two breath samples, 250 and 260, respectively.

[7] With respect to Mr. Joe's background, I note that he is 53 years of age and a member of the Champagne Aishihik First Nation. He has been in a common-law relationship for the last four years and has two adult non-dependant children. He has a grade 10 education; however, he has done a certain amount of upgrading and college prep courses, as well as obtaining numerous trade qualifications over the last several years.

[8] It is noted that he has been unemployed for the last two years as a result of a shoulder and back injury, but, prior to that, enjoyed numerous employment opportunities, primarily in the mining industry, also with Parks Canada, and most of those jobs appear to have been either heavy equipment operation or labourer positions.

[9] It is also important to note that the majority of Mr. Joe's education was received through the residential school system, which, as counsel advises me, was a particularly traumatic time for him and that he continues to suffer the effects of his experiences within that system. I understand he is in the process of dealing with

that both legally and through counselling, but nonetheless, I take from those submissions that his clear and significant alcohol problem likely has its roots in that very difficult time period of his life.

[10] Mr. Joe comes before me with a significant criminal record with a number of related offences. In 1979, he was convicted of an offence of driving while over .08 and received a fine of $200. In 1983, he was convicted for another drinking driving offence and received 14 days intermittent. In 1988, another drinking driving offence for which he was fined $1000. In 1990, he pled guilty to two offences of driving while over .08, received 90 days intermittent on one and 30 days intermittent concurrent on the second. In 1993, another driving while over .08, for which he received 90 days, and in 1996, he was convicted for three drinking driving offences for which he received five months plus three years probation on the first, nine months plus three months probation on the second, and two months concurrent on the last.

[11] In addition, his record has three related offences for driving while disqualified, in 1993, 1995 and 1996, for which he received, firstly, a suspended sentence with two years probation; secondly, one day in custody; and lastly, he received a month in custody. In addition, he has numerous breaches of court orders for which he received primarily custodial time, mostly in the range of 21 to 30 days, although I note in 1996 he did receive a sentence of three months in relation to a breach.

[12] With respect to the appropriate disposition of the four matters before me, Crown submits that an appropriate sentence would be in the range of four to six years, plus the maximum driving prohibition. Defence suggests that a more

appropriate sentence would be 10 to 12 months, bearing in mind his rehabilitative efforts as well as time that he has spent in remand.

[13] Crown has provided me with three cases, the first of those being *R.* v. *Donnessey,* [1990] Y.J. No.138 (Y.T.C.A.)(Q.L.), which, of course, stands for the principle that it is the potential danger an individual charged with impaired driving presents that must be kept in mind in determining whether the sentence is fit in all of the circumstances and, of course, notes the significant threat that anyone who chooses to drink and get behind the wheel of a vehicle poses to the public at large. Mr. Donnessey, of course, received a sentence of two years less a day and I note that that was a situation in which he had 10 prior drinking driving offences.

[14] Crown has also provided two cases, *R.* v. *Linklater* (1983), 9 C.C.C. (3d) 217 (Y.T.C.A.) and *R.* v. *Marquardt,* [1985] O.J. No.2436 (Ont. Prov. Ct.)(Q.L.), both of which stand for the proposition that an accused who is given a suspended sentence, or as in this case, a discharge, where that disposition is rehabilitative in nature, has not been punished within the meaning of s. 118(h) of *the Charter of Rights and Freedoms* and, therefore, it is not a breach of the *Charter* to re-sentence them.

[15] It is my understanding that the Crown has provided those two cases primarily in relation to the two offences for which Mr. Joe was previously granted a discharge and Crown urges me, as a result, then, to sentence Mr. Joe as if the curative discharge has not been granted and equates both of those prior offences to *Donnessey, supra,* offences, in all of the circumstances, as prior to that time he already had nine drinking driving offences on his criminal record.

[16] However, I note in looking at those two prior offences, while I am, in effect, sentencing Mr. Joe as if he had not been granted that discharge, I am not doing so in a vacuum. I agree with the proposition in both of these cases that the curative discharge cannot be viewed as previous punishment and I am not treating it as such. However, I do distinguish the two previous offences from the *Donnessey, supra,* situation from the perspective that Mr. Joe made substantial and considerable efforts towards rehabilitation at the time that he was granted that discharge.

[17] The common practice in the Yukon is that individuals do a great deal of work before they get to the point of even making the application, and I accept that he made significant efforts before the discharge was granted, as well as significant efforts after, including a one-month residential treatment program. While I do not view any of that as being punitive in nature, I do take the view that Mr. Joe is entitled to receive credit, as he would if I were sentencing him at the time. If it was determined at the time that a curative discharge was not appropriate, he would nonetheless be given credit for the efforts he had made up to that point in time.

[18] So I do take the position that he should receive credit with respect to the efforts that he made, both before and after. It is my determination that an appropriate sentence with respect to those initial matters, bearing in mind the work that he has done, as well as the five year gap in his record between 1996 and 2002, which does change matters somewhat in terms of the appropriateness of any sentence that he should be given for the offences for which he was previously discharged in 2002.

[19] Bearing all of that in mind, with respect to the first offence, arising in May of 2000, Mr. Joe is sentenced to a period of six months in custody. I am going to deal with the driving prohibition with respect to all three at the end because I have a couple of questions for counsel.

[20] With respect to the second offence arising on August 31, 2000, Mr. Joe is hereby sentenced to nine months consecutive.

[21] With respect to the current offences before the court, these are offences which I do take the view are more in line with the *Donnessey, supra,* type of case. I do note that Mr. Joe's record is somewhat more lengthy than Mr. Donnessey's. However, I note the efforts that Mr. Joe has made towards dealing with his significant alcohol problem while in custody. Such efforts are commendable and should be encouraged. For that reason, I am not suggesting any sentence greater than that which Mr. Donnessey received, and that would put, in my view, an appropriate sentence in the range of two years for the refusal.

[22] However, Mr. Joe has spent time in custody, in remand, in relation to the offences before the court, roughly in the three month range, or slightly over, for which I give him credit for six months, and as a result the sentence, with respect to the s. 254 offence, will be a period of 18 month consecutive, which leaves us with the remaining offence of driving while disqualified.

[23] I note that his last related offence was in 1996, for which he received a period of one month, but also note that he has had numerous breaches in the interim, which underscore his difficulty in complying with court orders. In all of the

circumstances, I determine that an appropriate sentence with respect to the driving while disqualified is an additional three month period to be served consecutively. By my calculation, that leaves us with a total period of 36 months or three years.

[24] With respect to the driving prohibition, counsel, I note in reviewing s. 259 of the *Code,* the reference with respect to s. 259(1)(c) for subsequent offences attracting prohibitions in the range of three years in addition to any time served in imprisonment. I have something of a question with respect to, firstly, the ability to make driving prohibitions consecutive to each other, and I am seeking your input on that, and secondly, to the fact that Mr. Joe was, in fact, prohibited from driving as a separate order that related to the curative discharge that he received in 2002. So I am seeking some input with respect to the appropriate way of handling the driving prohibitions.

[25] MR. MCWHINNIE: As I remember, the provisions of the *Code* regarding sentences, it is deemed to be one sentence and so you can only get one, as it were, prohibition period to follow. There is case law they cannot be consecutive to each other and so I think the best view of the law is the maximum period would be three years from the date of his release.

[26] THE COURT: Thank you, Mr. McWhinnie, that is helpful.

[27] MR. CAMPBELL: My observation would be that the -- I agree with my friend's position, but it strikes me that the driving prohibition order was a separate order of the court. So he has already received sentence on that.

[28] THE COURT: Not with respect to the current offences, however.

[29] MR. CAMPBELL: No.

[30] THE COURT: So, in any event, he is looking at three years on that and if three is the most that he is looking at, then I think it is fair to say that my order with respect to the driving prohibition will be three years, from the date of his release.

[31] MR. CAMPBELL: I might ask that the victim fine surcharges be waived.

[32] THE COURT: Any issue with that, Mr. McWhinnie?

[33] MR. MCWHINNIE: I do not anticipate he will have any means to pay, Your Honour.

[34] THE COURT: Agreed. Victim fine surcharges are waived. With respect to the outstanding offences?

[35] MR. MCWHINNIE: They should be stayed, Your Honour.

[36] THE COURT: Thank you. Is there anything else left outstanding?

[37] MR. CAMPBELL: No, Your Honour.

[38] MR. MCWHINNIE: I think that completes that matter.

[39] THE COURT: Thank you.

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RUDDY T.C.J.