Citation: *R.* v. *Leatherbarrow*, 2010 YKTC 89

Date: 20100811
Docket: 09-11007
09-11016
Registry: Dawson City

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

REGINA

v.

ALFRED JAMES LEATHERBARROW

Appearances:
Noel Sinclair — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): I previously summarized the facts of the case when I rendered my decision with respect to the defence of necessity. I will review them again here because they are directly relevant to the decision I am making. The defence of necessity was in relation to two charges of driving while disqualified pursuant to s. 259(1) of the *Criminal Code*, contrary to s. 259(4)(a) of the *Code*.

[2] The two offences before the Court occurred on June the 4th and June 27, 2009, a little over a year ago. On both occasions, Mr. Leatherbarrow was driving an all-terrain vehicle (ATV) on a public trail beside the highway. At the time, Mr. Leatherbarrow was on a five-year driving prohibition, dated November 3, 2004. That prohibition was

imposed when he was convicted of driving with more than 80 milligrams of alcohol in his blood and also driving while disqualified. The five-year prohibition order that was made because Mr. Leatherbarrow has a lengthy, similar record, involving driving while impaired and driving while disqualified.

[3] It is noteworthy that there are two incidents of driving while disqualified some three weeks apart, June the 4th and June 27th. I am prepared to accept that on both dates Mr. Leatherbarrow was driving into town to get groceries. He lives one and a half miles out of town, I believe, on the Bonanza Creek Road.

[4] On June 27th, the second incident, he had consumed two beer and, when given a roadside breath test, registered a warning. Crown counsel indicated that I might consider this as an aggravating factor although I caution myself that he was not driving while impaired. I note that there were direct consequences flowing to him from the resulting impoundment of his ATV. Nevertheless, the fact that he had been drinking underscores, for me, the purpose of driving prohibitions. It is to keep people like Mr. Leatherbarrow away from vehicles because past history has shown that they are unable to control their drinking, and when they drink, they are unable to keep away from motor vehicles.

[5] Crown submissions underscore the fact that the two breaches before the Court are serious. As a result, the Crown asks for a lengthy period of custody, in the range of nine months or more. Crown counsel relies on the Yukon Court of Appeal decision of *R.* v. *Taylor*, 2008 YKCA 1. In that particular case, the Court of Appeal upheld a decision of this Court, which imposed an eight month jail term for driving while

disqualified. That case was similar in that two driving while disqualified charges were before the Court. It is also similar, in that Mr. Taylor was serving a lengthy driving prohibition, ten years as I recall, and he was in his last year of that ten-year driving prohibition when he was apprehended. Like Mr. Taylor, there is an indication that Mr. Leatherbarrow drove from time to time unlawfully, but was only caught these two times.

[6] Mr. Leatherbarrow was not deterred by his apprehension and arrest on the fourth of June. He drove again three weeks later. I am also concerned by the fact that Mr. Leatherbarrow comes here today with seven prior convictions for impaired driving, one for dangerous driving, and three prior driving disqualifications.

[7] In the *Taylor* case the Court of Appeal underscored the importance of the predicate offence or the underlying offence that led to the imposition of a driving prohibition. In that case, it was impaired driving causing death. Mr. Leatherbarrow's convictions are all for impaired driving. There is no indication that there was any accident or bodily injury.

[8] On the other hand, the Court of Appeal in *R.* v. *Donnessey* [1990] Y.J. No. 138 (Y.T.C.A.), expressed the view that Mr. Donnessey, a repeat drinker and driver, who was apprehended for the ninth or tenth time, is a potential murderer. The fact that no one was hurt or injured was largely a matter of luck.

[9] Nevertheless, Mr. Roothman points out that there is a difference between an ATV and a truck or a car. An ATV driving on a trail by the side of a road does not create the same danger to the public that an individual speeding on the highway with a truck does. That is a mitigating factor, although the charge before the Court is one of

breaching a driving prohibition and, as Crown counsel pointed out, the major principles in sentencing are specific deterrence and general deterrence. It is important to send the message that when the Court imposes driving prohibition orders, they must be obeyed, and if they are not obeyed, there will be serious consequences.

[10] There are obviously occasions when people who are prohibited from driving do drive and they do not get caught. For that reason, when individuals such as Mr. Leatherbarrow are apprehended, the Court must send a very clear message to everyone that there will be serious consequences. This is the application of general deterrence in sentencing.

[11] In all of the circumstances, it is my opinion that a period of incarceration of six months is appropriate on the facts of this case. I have taken into account the Court of Appeal's decision in *Taylor*. I thank Mr. Roothman for bringing my attention to the case of *R.* v. *Obal*, 2004 SKCA 167.

[12] I have also considered whether, in the circumstances, the sentencing should be delayed or deferred to permit Mr. Leatherbarrow to finish his employment in the next four weeks. Considering his lengthy related record and the fact that there are two charges before the Court, I have decided that it would be inappropriate to grant such a dispensation to Mr. Leatherbarrow at this time.

[13] Because there is a significant period of incarceration, I will waive the victim fine surcharge.

[14] There is the issue with respect to a further period of driving disqualification. I am

persuaded that there should be, and pursuant to the provisions of the *Criminal Code*, s. 259, I am imposing a further period of driving prohibition of three years to begin upon his release from custody.

[15] Mr. Roothman, is there anything else I need to address from your client's point of view?

[16] MR. ROOTHMAN: No, nothing for me, Your Honour.

[17] THE COURT: As a matter of clarification, the sentence is six months on each charge to run concurrently. Similarly, the driving prohibition would be a three-year driving prohibition on each, concurrent. So it is a total prohibition of three years.

[18] It is my intention that the prohibition begins upon Mr. Leatherbarrow's release from custody. There may or may not be a period of prohibition from the previous order at that point. If there is, it is meant to be concurrent to the existing order as well.

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LILLES T.C.J.