Citation: *R. v. MacLeod*, 2016 YKTC 40

Date: 20160727
Docket: 16-00032A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

EARL JOHN MACLEOD

Appearances:
Joanna Phillips — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

REASONS FOR SENTENCE

[1] COZENS J. (Oral): Earl MacLeod has entered a guilty plea to having committed an offence of operating a motor vehicle while disqualified by doing so, contrary to s. 259(4) of the *Criminal Code*.

[2] Circumstances are that on April 13, 2016, RCMP were conducting a traffic stop on Lewes Boulevard. They observed the vehicle being operated by Mr. MacLeod going what they considered to be an excessive speed. They stopped the vehicle. Upon being stopped, Mr. MacLeod told the RCMP that he was a prohibited driver. They checked; that was true. He was released on a promise to appear.

[3] At the time, Mr. MacLeod was on parole. He was sentenced on August 25, 2014, in respect of two impaired driving offences and two s. 259 offences, to 30 months' jail. After credit for time served, it was 24 months' time jail on the two impaired, concurrent to each other, and six months concurrent on each of the 259 charges.

[4] Mr. MacLeod spoke to the counsellor he had been dealing with, Mr. Craig Dempsey, a psychologist/counsellor, and explained what happened. Mr. Dempsey suggested that he advise his parole officer. He advised his parole officer. The parole officer said, “You should probably go turn yourself in.” He had been released on parole in April of 2015 and the expiry date of his sentence is August 23, I believe, of this year.

[5] Mr. MacLeod went and spoke to his parole officer. She suggested he turn himself in. He went to the RCMP, turned himself in, and he has been in custody since May 9 as a result of the parole violation.

[6] In law, Mr. MacLeod is serving the sentence that was imposed on him on August 25, 2014, but certainly I am aware that the time in jail since May is as a result of the occurrence of this offence, however, initially and substantively, due to the offences he committed in the first place. It is certainly not something I am prepared to look at for the purpose of granting credit, as he is still serving the time on his other sentence, but it is a factor I am certainly aware of when I look at the specific deterrence aspect of sentencing here.

[7] In my opinion, there is an aspect of general deterrence, denunciation that is imposed, again, because other than the commission of this offence, given what Mr. MacLeod had been doing, he likely would have been able to continue working and be

out of custody. So it is not time served in the strict sense, but it is certainly a consequence of his actions.

[8] Mr. MacLeod has a pretty horrendous criminal record for impaired driving offences, no doubt about that. He is 55 years of age at this point in time and I believe he has 12 prior impaired driving convictions and he has the two prior driving disqualifieds for which he was sentenced on the same day. These go back to 1981, 1984, two in 1990, two in 1994, two in 1995, two in 2011, and two in 2014. He was subject to a driving prohibition of five years for the 2011 offences that came into effect and ran for five years from the conclusion of the two-year-less-a-day conditional sentence. So that driving order was clearly in effect.

[9] With respect to the driving order that was imposed by Judge Ruddy of a 10-year driving prohibition, I do not need to deal with the issue that seems to have been raised by the recent Supreme Court of Canada decision in *R. v. Lacasse*, 2015 SCC 64, that that driving prohibition may not actually be in effect, as he has not completed his sentence yet. However, there is no question he was on the other five-year prohibition at the time.

[10] Crown is suggesting nine months is appropriate, noting that he got six months on the case before Judge Ruddy. Certainly it is an aggravating factor. Crown points out that he has been previously sentenced for similar offences. Crown points out, and has filed the case before me, of that sentencing. This was, in fact, a joint submission. In reviewing the case, there is obviously not, in the context of being a joint submission, any in-depth analysis of the sentence for the driving while prohibited. They were imposed

concurrent. The main issue here was the length of time overall, given the two impaired offences. That is not to say the six months was inappropriate; it is simply not a case that leaves me, understandably, with a wealth of consideration of the issues surrounding the sentence for the driving disqualifieds in that case.

[11] It is interesting, with all the disqualifications that he has been under over the years, that 2014 is the first set of driving disqualified convictions that he had and each of those took place while he was driving intoxicated.

[12] Crown points to the aggravating factors of Mr. MacLeod being on parole at the time and the prior criminal history.

[13] Defence counsel is suggesting a lesser sentence of three to four months, and points to the lack of any alcohol in connection with this driving disqualification, the cooperation of Mr. MacLeod at the time of commission of this offence, right from the moment he was stopped, and the steps he has taken to actually deal with the real critical issue, which is underlying alcohol consumption.

[14] Of course, sentences for driving disqualification offences are important because of general deterrence and because of the offence underneath, which is generally, although not always, but more often impaired driving offences which are, of course, offences that cause incredible tragedy and harm. Driving disqualifications are imposed to deter others from drinking and driving, knowing that they will lose their licence, and when individuals drive in contravention of a driving disqualification, it has the ability of knocking back the general deterrent effect of a driving prohibition at a sentencing.

[15] With this said, certainly Mr. MacLeod appears to have made significant strides in dealing with his alcohol issue. As I understand it, he has not consumed alcohol at all since he has been released on parole in April of last year, other than one occasion, which I understand was the consumption of the .5 percent non-beers, basically, now that you can buy in drugstores, which, you know, in accordance with the terms of his parole, he could not do. As I understand it, nothing of consequence happened of any particular significance in that regard. He has managed to maintain sobriety since he was released. He just came out of treatment for alcohol at Abbotsford, B.C. not long before this.

[16] The circumstances that were provided to me for the offence is that he had been waiting about a year for a medical appointment. He received notice the day before of the medical appointment and made arrangements with the person he is working with to pick him up and take him to the appointment. That person did not show up. He says he missed the bus. He tried to call for the appointment, was unsuccessful in making contact or alternative arrangements, and made the decision to not miss the appointment by jumping into a vehicle of another person and driving to the hospital.

[17] However, once Mr. MacLeod was finished his medical appointment, instead of leaving his vehicle in the hospital parking lot, he decided to drive it the few blocks into Riverdale where he was painting, where he was pulled over by the police, which is just a circumstance that happened. It was a risk he took and a risk that cost him, and has cost him dearly. He was working. He had just obtained a residence, furnished it, and may well have lost this, as he said, not being able to have contact with his landlord while in custody due to not having numbers, and other circumstances.

[18] This is a bit of a different case, in the sense that when I look at what Judge Ruddy said, she noted that Mr. MacLeod had been adopted at birth and had a number of unresolved issues: abandonment, depression, grief, and clearly a significant issue with alcohol. He had lost his adopted father at the age of 18. His mother experienced dementia at the time. Ruddy J. said that, in his favour, he appeared to have a good work history as a licensed mechanic technician and seemed to recognize he had a serious problem with alcohol that he needs to start addressing and had indicated a willingness to do so.

[19] It seems to me that once Mr. MacLeod is released from custody, he is in a better position than he was then, because he seems to have done more than just express a willingness, but has actually addressed the issue. Although for an alcoholic, it is a lifetime of daily addressing of the issue. It is never done.

[20] Mr. MacLeod's record for impaired driving offences, as I said, is significant. As regards his record for driving disqualified, he has been sentenced once previously, albeit for two, and then there is the sentencing today. He is certainly not in the same position as Mr. Hunziker was, who was just sentenced by Judge Chisholm recently, in April of this year.

[21] Mr. Hunziker was 46 years of age. He had four drinking and driving offences, the last which was in 2011, but he had 11 driving while disqualified offences, with the last two in 2014. He had received concurrent 16-month jail terms for those convictions, plus a further six-year driving prohibition. He had a significant history under the *Motor Vehicle Act* as well, although there had been some diminishing in the number of

convictions over the years. I do not have before me any *Motor Vehicle Act* records that I could compare this case to Mr. Hunziker's.

[22] Judge Chisholm reviews the sentences and notes that there is a very wide range of sentence, the maximum being five years. He noted Mr. Hunziker had taken responsibility and was cooperative, but he goes on to state Mr. Hunziker displayed an attitude of contempt with respect to driving prohibitions put in place to protect the community. His actions detract from the confidence the public should have in the judicial system, as he amassed convictions for driving while disqualified and drinking and driving offences. Relatively lenient sentences of incarceration were not sufficient to deter his behaviour. Much more substantial jail sentences for two driving while disqualified offences also failed to deter him. He had been warned he would likely face higher penalties if he continued to offend. He was at that time not far along a six-year driving prohibition. He presented no evidence to minimize the circumstances of the offence. The bottom line is that he made a conscious decision to drive a company vehicle, again ignoring an order of the court prohibiting him from driving.

[23] Judge Chisholm found that Mr. Hunziker's moral culpability for this offence was high. Rehabilitation was not completely out of the question. Judge Chisholm noted that Mr. Hunziker may have developed some insight, but his conduct needed to be denounced and he had to be deterred from his chronic and flagrant breaches of driving prohibitions. He received a 20-month sentence.

[24] I do not find Mr. MacLeod to be in the same circumstance as Mr. Hunziker with respect to showing contempt and a flagrant disregard of driving prohibitions (for

impaireds maybe, were that the case) but Mr. MacLeod, as I said earlier, only was sentenced once previously for driving while disqualified. He was out of custody for about a year when this offence took place. There are no indications that he was doing anything but complying during that period of time. He has maintained sobriety. He has done extremely well in that regard.

[25] Denunciation and deterrence, nonetheless, are significant factors in this case, as they always are. Even first-time offenders generally go to jail for 30 days. This is a third-time offender albeit a second-sentenced individual. I am aware of the consequences of his parole revocation as a result of the commission of this offence. That has had a significant negative impact on him and I am quite satisfied specific deterrence has been significantly addressed, so I find the aggravation of the fact that he was on parole dealt with in the context of the time he has spent in custody and the consequences that he has had to suffer as a result.

[26] Further jail is, of course, warranted were Mr. MacLeod not to have dealt with his alcohol issue to the extent that he has been able to do so so far. Had I had concerns that he was flagrantly disregarding the law with an attitude of contempt towards it, I certainly would have had no problem considering the sentence put forward by the Crown. With all the positive steps Mr. MacLeod has taken, the circumstances here, which were somewhat mitigating on the first end, but not with respect to driving from the hospital to his job, the circumstances are not without some degree of merit as far as considering that they were a little bit different, at least with respect to the commencement of the driving, and it was a very unfortunate decision to continue after finishing his medical appointment.

[27] In all the circumstances, and recognizing the positives that Mr. MacLeod has brought before the Court today in dealing with the issues raised by Judge Ruddy, I am satisfied that a sentence of four and one half months, starting from today's date is appropriate.

[28] There will be a fine surcharge of $200. I will order that to be payable forthwith, note Mr. MacLeod to be in default, and direct that an order of committal be issued that he serve his default time concurrent to the time remaining to be served in custody. So that sentence starts now. It will run parallel to whatever time he remains in custody on his prior sentence and continue afterwards.

[29] Your counsel will explain that to you. My main wish for you will be for you to continue the sobriety that you have managed to make so far.

[30] There will be a driving prohibition. It will be, as Crown has not filed notice, three years. He is currently subject to a 10-year driving prohibition. This three-year prohibition will take effect on the expiration of the sentence.

[31] MS. PHILLIPS: Thank you. And the Crown withdraws Count 2.

[32] THE COURT: Thank you.

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COZENS, T.C.J.