Citation: *R.* v. *McBride*, 2010 YKTC 136

Date: 20101129
Docket: 10-06848
Registry: Whitehorse

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

REGINA

v.

JAMIE WILLIAM MCBRIDE

Appearances:

	Counsel for the Crown
David McWhinnie	Counsel for the Defence
J. Grant Hardwick	

REASONS FOR SENTENCING

[1] GOWER T.C.J. (Oral): For the record, I am sitting as a Territorial Court judge for the sake of disposing of this matter.

[2] Mr. Jamie William McBride pled guilty this morning to a charge of driving without due care and attention on July 13, 2008, in Whitehorse, contrary to s. 186 of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153.

[3] Pursuant to s. 247(9)(a) of that same *Act*, a person who is guilty of such an offence is liable, on a first offence, to a fine of not less than $200 and not more than $1,000, or to imprisonment for as long as 90 days, or both. In addition, the Court can consider an order, under s. 252 of that same *Act,* suspending the offender's operator's

licence for a period of up to three months. Those are the maximum parameters of any sentence that can be imposed by this Court.

[4] Crown counsel advised me that this matter originally began in the courts through the issuance of a motor vehicle ticket to Mr. McBride in the summer of 2008. At that time he was unrepresented and the ticket was subsequently withdrawn and criminal charges were laid. The two charges that I am aware of are charges under s. 255(3.1) of operating a motor vehicle while having a blood alcohol content exceeding 80 milligrams and causing an accident resulting in death, as well as a charge of operating a motor vehicle in a dangerous manner, contrary to s. 249(4) of the *Criminal Code*. Once those charges were laid, Mr. McBride retained legal counsel and these matters proceeded to a preliminary inquiry.

[5] I am advised further that the investigation into this matter continued throughout and, following some intensive discussions between Crown and defence counsel, a decision was made to lay the Information which is now before me charging the offence under s. 186 of the *Motor Vehicles Act*, the charge to which Mr. McBride has entered his guilty plea. That is with the consent of Mr. McBride, since the Information had to be laid beyond the six-month limitation period for summary conviction matters.

[6] This is quite correctly characterized by Crown counsel as a difficult and contentious case. In *R.* v. *Biondelli,* 2006 YKSC 16, Justice Veale, at para. 21, quoted Judge Bennett in *R.* v. *Pekrul*, Port Coquitlam, June 23, 1999, as follows:

> "A charge and conviction under the *Motor Vehicles Act* carries with it less moral blameworthiness, less of a social

> stigma, and, certainly, less of a penalty than a conviction for a *Criminal Code* offence."

The judge continued (and I am paraphrasing here), that because the conviction is for an offence under the *Motor Vehicle Act*, he was not sentencing Mr. Pekrul for causing the death of the victim, but rather that he was sentencing for driving without due care and attention. The quote continues:

> "This is a very important difference in the law, although I can understand how the public may be critical of what appears to be a form of legal hairsplitting...."

[7] Further, in *R.* v. *Cameron,* 2004 BCPC 500, Stansfield Prov. J. stated:

> "Many different kinds of cases come into Canadian courts. In the criminal and quasi criminal environment, many of those cases have to do with persons who set out to cause harm to other persons or property with a criminal intention to cause that harm. There are other cases in which a person answers to a charge which does not include any element of intention to cause harm, and rather is based on an assessment of negligence or failure to take adequate care."

Cameron cited another case by Judge Klinger, *R.* v. *Johnstone* (March 14, 2001), unreported, where Klinger Prov. J. (B.C. Prov. Ct.) stated:

> "It should not be considered that this sentence or any fine that arises is the value that is placed on human life. That would be a complete distortion of what this sentencing process is about."

[8] In the case of *R.* v. *Uphill,* 2007 BCPC 478, Gill Prov. J. said at para. 15:

> "Sentencing for matters such as these is a very difficult thing. While there must be a consideration of the consequences of the careless driving in this case, in other words, that it did indeed result in the death of a human being, I must not place undue weight on it. Clearly, any act causing the death of a

> human life must be treated with the utmost of seriousness, but to be clear, the purpose of this sentencing is not to compensate with respect to that loss."

[9] In *R.* v. *Chand*, 2009 BCPC 242, Jardine Prov. J. said at paras. 19 and 20, and I am paraphrasing, that the imposition of a fine in such cases does not place a monetary value on the life. At para. 20, the quote continues:

> "The paramount principle for a judge in sentencing is that the sentence should balance two aspects: (1) the degree of responsibility of the offender; and (2) the seriousness of the offence."

[10] Finally, by way of introductory remarks, I am to be alive to the general principle of sentencing under s. 718.2(b) of the *Criminal Code,* that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. That principle was applied in the case of *R.* v. *Chisholm,* 2009 BCPC 23, at paras. 19 and 20.

[11] The facts of this case are that Mr. McBride, acting in his capacity as franchise sales manager for Western Canada for the Brick, was in Whitehorse working with the local franchisee for about a week prior to the offence date. He indicated to a neurologist whom he consulted after the offence in November of 2008, that he had been having difficulties with his sleep the week before because of the 24-hour (or close to it) daylight in Whitehorse at that time of year. He was estimating that he was perhaps getting four hours of sleep a night, was often waking up at two or three in the morning, and that it would be light out, and then he would have difficulty getting back to sleep. He would end up staying awake for quite a number of hours, and perhaps have a nap at around

eight in the morning, and then would start his work day at about ten, when the Brick store in Whitehorse would be open.

[12] On July 12th, which was his last day of work on that occasion, he had woken early, I believe it was at about 4:00 a.m., and worked throughout the day until about 6:00 p.m. He then returned to his bed and breakfast, which I understand was on the Alaska Highway, for about an hour. He then returned to the downtown area, purchasing a bottle of wine, and went to the residence of the local franchisee where, over the space of about one to one and a half hours, he consumed two glasses of wine. The group then, or at least some of them, adjourned to a local club in Whitehorse. I am advised that Mr. McBride only consumed non-alcoholic beverages after that time, that he stayed until closing, and decided to drive back to his bed and breakfast.

[13] It was at about 2:30 to 2:40 in the morning that he was observed by witnesses driving his blue sedan in a southbound direction and, while the sedan was passing by one of the entrances to the Whitehorse airport, he was seen to be crossing over the centre line into the northbound lane. This alarmed the witnesses sufficiently that they decided to follow the vehicle, which they did for about a kilometre and a half, occasionally losing sight of it, and then regaining sight of it. At the point of the accident, which was just north of the weigh scales area on the Alaska Highway, between the airport and the Robert Service Way intersection, Mr. McBride again fell asleep and crossed over the centre line at least 2.5 metres into the northbound lane, where effectively he had a head-on collision with the vehicle being driven by the victim in this case, Ms. Diane Roby. Ms. Diane Roby had a passenger with her in the vehicle. All three persons were taken to Whitehorse hospital. Ms. Roby was subsequently

medevaced to Vancouver where she later passed away. I will come to the passenger's injuries in a minute. Mr. McBride himself also suffered significant injuries including two fractured arms and a deep leg laceration.

[14] He was noted to make some statements at the scene soon after the arrival of medical technicians and the police, one of which was quoted to me by Crown counsel [as read in], "I am responsible. I fell asleep. Is everyone okay," and other such similar statements indicating that his primary concern at that time was the degree to which others had been injured.

[15] There were no observations made by any of the professionals involved in this investigation as to indicia of impairment by alcohol or drugs on Mr. McBride's part. Indeed, I am told that the only reference in the investigation to the involvement of alcohol at all was through the admission made by Mr. McBride as to the two glasses of wine he consumed earlier in the evening.

[16] The circumstances of Mr. McBride are that he is 50 years old, he has a Grade 12 education, and has been residing in Kelowna, British Columbia, for about the last 13 years. He has been married twice, has two adult children from his first marriage and one grandchild. Also he has two step-children. He has been an employee of the Brick for over 25 years, and a letter from his employer dated November 24, 2010, was filed with the Court indicating that if he continues to perform at or above expectations that he would continue to be employed by that company, and that they are aware of the matter before this Court.

[17] To Mr. McBride's credit, in the early stages of this case, before criminal charges were laid, he was sufficiently concerned about his problems with sleep during the week before the accident that he, on his own initiative, consulted with his doctor and was referred to a neurologist. As I mentioned earlier, he was assessed by the neurologist to see if there was something more serious that needed to be addressed. However, the neurologist concluded that this was essentially a one-off type of phenomenon where Mr. McBride's sleep the days before the accident was largely due to the problems with the daylight hours in Whitehorse.

[18] I also note that Mr. McBride, at the completion of his lawyer's remarks, turned to face the members of the family present in this courtroom and issued an apology for his actions.

[19] A number of victim impact statements were filed with this Court. The first of which I will refer to is from Diane Roby's mother, Helen Roby, indicating that Diane was somebody who spent a lot of time with her family and was well loved by all. She talks about how this last year and a half has been an extremely emotional year for all those who knew Diane and that she is sadly and dearly missed. Diane's sister, Linda Hill, also provided a statement indicating that Diane has lived in the Yukon for about 21 years and that over that time, Diane and her family have interacted with Linda and her two children and have spent almost every holiday together. She describes Diane as being her best friend, her closest confidant and second mother to her two children, Taryn and Richard Hill. She says this year has been really painful for her and for the last year and a half she was running on pure stress. It has only hit home how very

alone she feels. She periodically wakes up in the night crying and sometimes even has to leave work early for the same reason.

[20] Linda's daughter, Taryn, also provided a statement indicating that her Aunt Diane was a best friend and a second mother, that she was loved by so many, and that she wants Mr. McBride to be aware that, because of his bad decision, a lot more than one of the family has had to suffer.

[21] Finally, there is a victim impact statement from Robert Stevenson whom I assume was the passenger in Diane Roby's vehicle. He described physical injuries, including neck and disk problems as well as facial scars, and he says that his heart is still broken and that the incident has affected his life forever.

[22] The Crown's position on this case is that I should impose the maximum fine of $1,000, as well as a jail term of 30 days to be served as a conditional sentence. As well, Crown says I should consider prohibiting Mr. McBride from driving for a period of two or three months, but under the terms of a probation order rather than under the provision in the *Motor Vehicles Act,* in order that that prohibition could be enforced in British Columbia where Mr. McBride resides.

[23] Defence counsel takes the position that nothing more than the maximum fine and perhaps a short driving prohibition is required in order to satisfy the need for denunciation in this case.

[24] I begin my analysis of the case law with consideration of the *Biondelli* decision of Justice Veale in this Court, which I referred to earlier. That case can be distinguished

from Mr. McBride's situation for the reasons given by defence counsel. There were a number of aggravating circumstances in that case which are not present in the one at bar. There was a higher degree of deliberate conduct and advertently negligent conduct in that the offender there had travelled a distance of about 160 kilometres under potentially dangerous circumstances, which he was aware of. He was pulling an overloaded trailer. He had exceeded the gross vehicle weight for the towing vehicle that he was driving. The towing vehicle itself did not have adequate brakes. The trailer brakes were not connected. There was a heavy load on the trailer which was insecurely fastened, and Mr. Biondelli had a lack of appreciation for the potentially poor road conditions in the middle of winter at that time, all of which were causal factors in the accident resulting in a death.

[25] It is interesting to note that Justice Veale said, at para. 39 of the decision:

> "In my view, a $1,000 fine and a suspended sentence with probation is not a fit sentence."

I should digress by saying that this was an appeal from the Territorial Court to the Supreme Court, and that was the sentence imposed below.

> "It is a sentence more appropriate for the model citizen who is a first offender, who had a momentary lapse of attention, and where bodily harm or death do not occur."

To the extent that one interpretation of that paragraph could be that, wherever bodily harm or death occur, but in circumstances where there is nevertheless a low degree of moral blameworthiness on the offender, a non-custodial sentence would not be appropriate, then, with due respect to Justice Veale and with due regard to the principle

of judicial comity, I would not go that far. Indeed, as Justice Veale noted earlier in the case, at para. 34, it is well recognized that every case is different on its facts and that there is a continuum within careless driving from the morally innocent driver, who has had a momentary lapse, to the driver who is more careless or perhaps even completely careless, and it is for that reason that the *Motor Vehicles Act* provides a range of sentence from a fine to imprisonment.

[26] Another case which was referred to me, which is helpful, is that of *R.* v. *Matta*, 2010 YKTC 128, decided by Judge Faulkner in the Territorial Court in 2009. In that case Judge Faulkner said at para. 7:

> "In assessing the appropriate penalty in cases of careless driving, it is well settled that the Court may have regard to the consequences. (See, for example, *R.* v. *Martinez*, [1996] O.J. No. 544) In those cases that I was referred to, originating from Canadian courts outside the Yukon, it appears that a custodial sentence is generally, though not invariably, imposed in cases where careless driving have resulted in death."

[27] One case that I was able to find that was not referred to by counsel where the accused pled guilty to careless driving involving a death, which resulted in a non-custodial disposition, was *R.* v. *Carruthers*, 2003 YKTC 14, being a decision of Chief Judge Stuart, as he then was, in the Territorial Court.

[28] Defence counsel also provided me with a number of authorities from British Columbia involving non-custodial dispositions in cases where the offenders were charged with careless driving, and deaths and serious injury resulted. However, I generally find those cases to be distinguishable on the basis that all of them involved situations of momentary lapses of attention to driving and watching the road.

[29] In the case at bar we know that Mr. McBride was suffering from sleep problems for a number of days before the offence date and that he had decided to socialize into the wee hours of the morning with his co-workers. In those circumstances, it seems to me that being extremely tired and getting behind the wheel of a motor vehicle is almost indistinguishable from being over the legal limit for alcohol and doing so, as both are forms of impairment. In the cases provided by defence counsel the offenders were, for the most part, otherwise totally alert and driving without any difficulties or exhibiting any form of erratic driving. They only allowed their attention to be diverted for only a second or two, resulting in tragic circumstances. It is for this reason that I find that Mr. McBride is more morally blameworthy on the facts than those in the authorities referred to by defence counsel.

[30] In that regard, I find that this case is comparable to the circumstances in the *Matta* decision. Admittedly, in *Matta* there are some distinguishing features in that the doctor there had decided to plead not guilty and the case proceeded to trial. At para. 12 of the decision, Judge Faulkner said:

> "In considering a fit sentence in this case, I therefore consider the consequences, the tragic death of Ms. Shank, as a primary factor. I also find that the facts of this case go beyond what might be considered a minimal case of carelessness or momentary inattention. I say that because some period of time passed as Dr. Matta drove from Main Street toward the crosswalk at Steele Street. Admittedly, that period of time was a matter of seconds, but other motorists were able to assess the situation and slow down or stop. Dr. Matta appears to have been oblivious to the fact that Second Avenue is a dangerous street to drive on or cross. A considerable degree of vigilance is required. She also appears to have been oblivious to what the vehicles around her were doing, and thus oblivious to the strong possibility that a pedestrian was crossing in front of her. I

> would have to say that she failed utterly to meet the standard required by the locale and the circumstances."

[31] In a similar way I find that the actions of Mr. McBride went beyond the minimal case of carelessness or momentary inattention, and that there was an element of deliberateness to his conduct when he decided to step behind the wheel in what he now candidly concedes was an act of bad judgment in the circumstances. Although the facts in *Matta* are different than those in the case at bar, the moral blameworthiness of the offender is roughly equivalent in each case.

[32] I find that specific deterrence is not a significant factor here because this was essentially a one-off situation for Mr. McBride. He has no criminal record whatsoever and only a single speeding ticket from Alberta about three years ago. With respect to general deterrence, that is a factor that I must still be alive to for the reasons specified in *Cameron* at para. 10, where the judge quoted again from the *Pekrul* decision:

> "Deterring others from having momentary lapses of attention is, however, a strong consideration as there is a high standard of safety required of all drivers at all times."

[33] As for the principle of rehabilitation, I am satisfied that that can be addressed through the probation term, which I will come to. With respect to the principle of denunciation, I conclude that more than simply a fine and a driving prohibition is required. Therefore, I will impose the $1,000 maximum fine. I will further impose a sentence of 30 days in jail to be served in the community under a conditional sentence, on terms which I will come to momentarily, and I will further impose a period of probation of two months to follow the expiration of the conditional sentence with the

statutory terms and a specific term that Mr. McBride attend and complete a defensive driving course within that two-month period, to the satisfaction of his probation officer.

[34] The terms of the conditional sentence will be that:

1. You will keep the peace and be of good behaviour;
2. You will report to the Court as and when required;
3. You will report to a Conditional Sentence Supervisor within two working days and thereafter as, when and in the manner directed;
4. You will advise the Conditional Sentence Supervisor in advance of any change of name or address, and promptly notify the supervisor of any change of occupation or employment;
5. You will remain within this jurisdiction unless given permission by the Conditional Sentence Supervisor to go outside of the Yukon.

I pause here, recognizing that you are intending to immediately move back to Kelowna, so I am not sure how the administrative arrangements will be made, but I am assuming here that you may have to make contact with the local Conditional Sentence Supervisor and then that person will arrange to have the sentence administered by a counterpart in Kelowna. So it is not my intention that you remain in the Yukon, but that you remain here until you have made those arrangements.

6. You will remain within your place of residence at all times except for the following:
   (a) in cases of emergency;
   (b) for purposes of employment;

(c) for complying with the terms of the conditional sentence order which could include, for example, meetings with your Conditional Sentence Supervisor;

(d) attending to the needs for your family providing that you have prior written condition from your Conditional Sentence Supervisor; and

(e) as otherwise permitted in writing in advance by your Conditional Sentence Supervisor.

7. You are to keep a copy of this conditional sentence order in your possession at all times when you are outside of your residence, as well as copies of any written permissions that have been provided to you by your Conditional Sentence Supervisor;

8. When you are in your place of residence you will answer the telephone or the door in response to compliance checks and your failure to do so will be a presumptive breach of the order.

[35] Your counsel will advise you, Mr. McBride, that if you are breached under this conditional sentence order you can be immediately taken into custody, and then it will be up to you to show cause why you should not serve the balance of the term behind bars. So it is extremely important that you abide, by the letter, to the conditions that I have just outlined.

[36] There will also be a probationary period of two months, as I have indicated, and documents will be prepared by the Clerk after we close court, and she will explain them to you. Do you have any questions, sir?

[37] THE ACCUSED: Just the arrangements need to be made here before I can go home, is that it?

[38] THE COURT: I am making that assumption, and I think Mr. McWhinnie is nodding his head, that you have to check in with a local Conditional Sentence Supervisor, who then will make the arrangements to transfer the enforcement of the order to a counterpart in Kelowna.

[39] THE ACCUSED: Okay.

[40] MR. MCWHINNIE: One of our staff members is going to call and I'm hoping somebody will actually come over to the courtroom and meet with him, and meet with him here in the court house right away.

[41] THE COURT: Counsel, have I omitted anything? I think there is the victim crime surcharge?

[42] MR. MCWHINNIE: It's mandatory except in instances where an individual is not of means, and it appears that he is able to pay.

[43] THE COURT: And that amount is $100?

[44] MR. MCWHINNIE: I believe in this case, because it's a territorial matter, I believe its percentages. I believe it's 15 percent, is it, Mr. Hardwick? I believe it's --

[45] MR. HARDWICK; I'm not sure, Your Honour.

[46] MR. MCWHINNIE: I think that's the usual for territorial offence tickets and things of that nature, rather than a fixed amount.

[47] THE COURT: But it's a statutory amount that's mandatory?

[48] MR. MCWHINNIE: Yes, it's a percentage.

[49] THE COURT: So whatever it is, I will impose the victim crime surcharge. It could be $100, $150. How much time will you need to pay the fine plus the surcharge?

[50] MR. HARDWICK: Can that be paid by January 31st?

[51] THE COURT: ` Yes.

[52] MR. HARDWICK: The probation will be the statutory minimum terms coupled with a driving prohibition during the duration of the --

[53] THE COURT: Yes, sorry, that was also my intention. Thank you for pointing that out, that there would be a driving prohibition until such time as Mr. McBride completes the defensive driving course.

[54] MR. HARDWICK: Until such time?

[55] THE COURT: Yes.

[56] MR. HARDWICK: Meaning that were he able to complete it after 30 days or within 30 days, that would operate to terminate the suspension?

[57] THE COURT: Yes.

[58] MR. HARDWICK: Okay.

[59] MR. MCWHINNIE: If that's being done by way of the probation order as just a strictly technical matter, sir, it seems to me that the probation order is not engaged until the completion of the conditional sentence. So you may want to carry that clause over to the conditional sentence, if it is your intention that he not drive during the time he is under house arrest.

[60] THE COURT: It is my intention that he not drive, so there will be a condition of the conditional sentence order that you not drive during that period, and that is an absolute prohibition. So after the end of your conditional sentence your probation term will start to run. If you can get yourself into a defensive driving course and complete that within, say, the first two weeks, then there will be no further driving prohibition after that point in time, but that will be up to you.

[61] MR. HARDWICK: The rest of the counts on the Indictment?

[62] MR. MCWHINNIE: I don't even know if the defendant's been arraigned on that Indictment. If he has not, I can simply withdraw it.

[63] THE COURT: The Indictment is noted to be withdrawn. Anything else?

[64] MR. MCWHINNIE: No, sir.

[65] MR. HARDWICK: No, Your Lordship. Thank you.

[66] THE COURT: Thank you both.

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GOWER T.C.J.