Citation: *R.* v. *Reeves*, 2006 YKTC 2

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Docket: T.C. 05-00168
05-00319
05-04627A
Registry: Whitehorse

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

REGINA

v.
JOHN MICHAEL REEVES

Appearances:
Malcolm Campbell — Counsel for Defence
Kevin Drolet — Counsel for Federal Crown
Kim Sova — Counsel for Territorial Crown

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): John Michael Reeves is fast proving himself to be something of a menace on the roads of Whitehorse. There are over two dozen motor vehicle infractions on his driver's abstract and his licence has been either disqualified or suspended over a dozen times. He is now before me for sentencing on a number of driving related offences. He has entered guilty pleas for driving while disqualified, contrary to s. 266 of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153, and for breaching his probation order. He has also entered pleas for taking a motor vehicle without consent, for driving that vehicle while the concentration of alcohol in his blood exceeded 80 milligrams percent and for failing to stop that vehicle in an attempt to evade the police.

[2] In terms of facts, on June 11th, Mr. Reeves was observed driving without a seatbelt; further investigation revealed that he was also driving while disqualified. He provided a false name to the RCMP and was noted to be under the influence of alcohol in contravention of the abstain condition on his probation order. He provided a breath sample of 70 milligrams percent.

[3] On September 8, 2005, Mr. Reeves was found behind the wheel of a vehicle which had been reported stolen. He was observed failing to stop at a stop sign. The RCMP activated emergency equipment but Mr. Reeves continued northbound on the Alaska Highway at speeds of 80 to 100 kilometers per hour. He was noted to cross both the centre and fog lines on several occasions. Two police vehicles attempted to box him in, but he accelerated and continued until he was ultimately forced off the road and into the ditch. He attempted to flee on foot, but was apprehended. Indicia of impairment were noted and Mr. Reeves provided a breath sample of 130 milligrams percent.

[4] In addition to his unenviable driving record, Mr. Reeves comes before the Court with both a youth and an adult criminal record, largely for property and process related offences. His longest sentence was four months for a break and enter offence.

[5] Mr. Reeves is still a young man of only 24, a native of Whitehorse. He is the father of two young children. He is anxious to provide for his children and has expressed an interest in addressing the problem of alcohol in his life. Appropriate sentences for the *Criminal Code* offences are not a contentious issue. Mr. Reeves has

been in remand for 91 days. Counsel are in agreement that he should be credited for the equivalent of six months in custody and given an effective sentence of time served.

[6] In light of Mr. Reeves' driving record, counsel for the Territorial Crown was not feeling quite so generous. Ms. Sova took the position that as the drive while disqualified before me is Mr. Reeves' fifth conviction for driving while disqualified, a sentence of one year in custody is appropriate. In support of this position, Territorial Crown has filed a notice of intention to seek greater punishment pursuant to the provisions of s. 266(1) of the *Motor Vehicles Act*. The relevant portions of s. 266(1) are as follows:

> Every person who operates a vehicle on a highway at a time when they are disqualified under this Part from holding an operator's licence commits an offence and is liable on summary conviction
>
> …
>
> b) to imprisonment for not less than three months and not more than six months, if the person has been convicted of one such offence committed anywhere in Canada in the period of five years immediately proceeding the date of the new offence; and
>
> c) to imprisonment for not less than six months and not more than two years less one day, if the person has been convicted of more than one such offence committed anywhere in Canada in the period of five years immediately proceeding the date of the new offence.

[7] Mr. Reeves' driving record shows three prior convictions for offences contrary to s. 266, or its predecessor, s. 237, and one conviction for an offence of driving while disqualified contrary to s. 19, now s. 20 of the *Motor Vehicles Act*. Mr. Reeves has admitted the entirety of his record and it has been filed before me as an exhibit. Furthermore, Mr. Reeves does not dispute that he was served with a notice of intention

to seek greater punishment, dated June 20, 2005. The wrinkle in this particular case stems from the fact that the notice served on Mr. Reeves, and filed in this proceeding, refers to only two of Mr. Reeves' prior convictions. Those two convictions are referenced by date and file number, but not by offence section. Cross-referencing the notice with the driving record reveals that one of the two convictions referred to is the s. 19 conviction.

[8] Defence counsel has not alleged nor is there evidence to suggest that Mr. Reeves was mislead or prejudiced by the form of the notice. Instead, defence takes the position that I ought only to rely on those two prior convictions referenced in the notice in addressing the issue of greater punishment. Counsel for Mr. Reeves further argues that the s. 19 conviction is not a prior conviction for the purposes of greater punishment. As a result, Mr. Campbell submits that Mr. Reeves falls into s. 266(1)(b), which provides for a range of three to six months, rather than the range of six months to two years less a day set out in s. 266(1)(c).

[9] Case law concerning s. 727 and its predecessor, s. 712 of the *Criminal Code* provisions dealing with notice of intention to seek greater punishment, defines the notice as a warning to the defendant. In *R*. v. *Zaccaria,* 195 C.C.C. (3d) 198 (QL), the Alberta Court of Appeal noted:

> Taking a purposive approach to the interpretation of s. 727(1) and the meaning of the word 'notified', we share the opinion of Justice Nemetz of the British Columbia Court of Appeal in *R.* v. *Reid*, that the section was clearly intended by Parliament to “forewarn” or to act as a “warning” to a defendant before a plea is made, that a greater punishment would be sought by the Crown by reason of previous conviction. … In our opinion the word “notified” in s. 727(1) requires that the Crown must give the accused an adequate “warning” that a greater punishment would be sought.

[10] In *R.* v. *Taylor,* [1964] 1 C.C.C. 207 (QL), the issue before the Court was as follows:

> On this appeal counsel for the Crown contends that the purpose of s. 712 is to give the accused warning of the intention to seek greater punishment, whereas counsel for the accused contends that the purpose of the section is: (1) to give that warning, and (2) to give particulars of the previous convictions so that the accused may be fully prepared to refute them.

[11] The B.C. Court of Appeal concluded:

> It follows that details of any such previous convictions are not required in the notice but rather the purpose of the notice is as stated, namely, to give warning to the accused of his potential liability for greater punishment by reason of previous conviction.

[12] The case law is clear that the notice functions solely as a warning to the accused, as the Crown is not required to specify the details of prior convictions. It follows that a decision to do so only serves only to augment the warning rather than to bind the Court.

[13] The filing of the notice triggers the greater punishment scheme, but it is, in my view, the actual criminal or driving record which binds the Court in determining where the accused falls within the greater punishment scheme. To decide otherwise would require clear authority enabling the Crown to dictate which convictions on the record are to be considered or clear authority enabling this Court to ignore convictions. I was not provided with, nor could I find any such authority.

[14] The cases also make it clear that a decision by the Crown to reference prior convictions in the notice may become an issue if it can be said that the accused has

been mislead or prejudiced as a result. The defence, as noted earlier, did not make that argument before me, nor would I have made that finding in this particular case. Even if the s. 19 conviction is not a prior conviction for the purposes of s. 266, the notice refers to two prior convictions without specifying offence sections. On its face, a reasonable person would conclude that s. 266(1)(c) applies. Furthermore, I note that Mr. Reeves was represented by counsel and his counsel was provided with both verbal notice of Crown's intentions plus a copy of the driving record.

[15] Accordingly, absent clear authority to ignore convictions on the record or evidence of prejudice, I am bound to consider the entirety of the record before me and must find that s. 266(1)(c) applies.

[16] This leaves the remaining issue of whether the s. 19 conviction is a prior conviction for the purposes of s. 266. During submissions I raised the issue of whether convictions pursuant to s. 19, now s. 20, are incorporated into s. 266 by virtue of s. 266(2), which reads in part:

> A person who operates a motor vehicle on a highway
> …
> (d) while disqualified under section 18 or 20;
>
> is deemed to have operated the motor vehicle on a highway while they are disqualified from holding an operator's licence and commits an offence under subsection (1).

Defence counsel noted that such an interpretation seemingly conflicts with s. 247 of the *Motor Vehicles Act*, which provided for a completely separate greater punishment scheme for s. 20 offences.

[17] After much thought, I have concluded that the only way to reconcile this conflict is to interpret s. 266(2) to mean that where an offence contrary to s. 20 is committed there is an option to proceed with a charge contrary to s. 20 or a charge contrary to s. 266. If the choice is to proceed with a s. 20 charge and a conviction is entered, it would become a prior conviction for the purposes of s. 247. If a s. 266 charge is laid and a conviction entered, it would become a prior conviction for the purposes of s. 266. Having so concluded, I must also conclude that the s. 19 conviction before me is not a prior conviction for the purposes of s. 266, but would be a prior conviction for the purposes of s. 247.

[18] Accordingly, the s. 266 conviction before me must be viewed as Mr. Reeves' fourth, rather than his fifth conviction. Pursuant to s. 266(1)(c), Mr. Reeves must be sentenced to no less than six months and no more than two years.

[19] The fact that I have found this to be Mr. Reeves' fourth rather than his fifth conviction suggests that the sentence should be less than the one year sought by the Crown. The fact that Mr. Reeves has three priors suggests to me that the sentence should be something more than the minimum. I also note that while no erratic driving was viewed, Mr. Reeves was driving while under the influence of alcohol, albeit just below the legal limit, and he did make efforts to mislead the RCMP.

[20] There is some further difficulty in determining where Mr. Reeves should fall within this range as the Territorial Crown was unable to provide me with the sentences of Mr. Reeves' three prior convictions. In effect, I am being asked to apply the step principle

without knowing what the prior steps were. I do not even know if Mr. Reeves has served time in custody on his prior related convictions.

[21] As a result, I am of the view that I must err on the side of caution. On balance, it is my determination that an appropriate sentence for the s. 266 offence is a sentence of eight months. Mr. Reeves is entitled for credit for the time he has already served and his sentence reduced accordingly. On the advice of counsel, I am prepared to credit him for the three months at two to one. Accordingly, the sentence will be two months, and the record will reflect that I have credited him for six months in remand.

[22] With respect to the *Criminal Code* offences, the recommendation of counsel is essentially one of time served. This did cause me some pause, having already credited the remand time to the s. 266 offence, but as I have the power to order sentences to be served concurrently, it is logical that I may also apply credit for remand concurrently, as well. In view of the totality principle, I am prepared to do so in this case.

[23] The sentences on the *Criminal Code* offences will be as follows: on the s. 335, one day deemed served; on the s. 253(b), one day deemed served and a two-year driving prohibition; on the s. 249.1, one day deemed served and the record will reflect credit for six months in custody; on the s. 733.1, one day deemed served and the record will reflect credit for two months in custody. This leaves Mr. Reeves with the remaining two months in custody.

[24] Ms. Sova, he has made application to have that time served intermittently as it is below the 90 day range. What is the Crown's position on his being entitled to serve that intermittently?

[25] MS. SOVA: As was mentioned in submissions, Your Honour, we do consider imprisonment a way to keep Mr. Reeves off the road; however, we would not take serious issue with an intermittent sentence.

[26] THE COURT: Thank you. I am prepared to grant the serving of the sentence intermittently. What is the proposal in terms of when and how he wants to serve that? I note that he does have two small children, and it is my understanding that Christmas this particular year does fall on a weekend, so you may want to consider that in your pitch for what is appropriate.

[27] MR. CAMPBELL: I would suggest that he begin serving his sentence today and then be released on the 12th of December in the -- at seven o'clock in the morning, that he return to WCC on the 16th, which is the Friday, at 7:00 p.m. I'm sorry, I was thinking today was Friday. So I would suggest that it start tomorrow the 9th at 7:00 p.m. and he be released on the 12th and continue thereafter every weekend, but for the weekend of the 23rd to the 26th of December.

[28] THE COURT: Okay. The intermittent sentence will be as follows. Mr. Reeves will report to WCC on the 9th of December at 7:00 p.m., to be released on Monday the 12th of December at 7:00 a.m. He will report thereafter on every Friday at 7:00 p.m., to be released on the following Monday at 7:00 a.m., with the exception of the December 23rd weekend, for which he need not report. At all times while he is not in custody he will be bound by the terms of a probation order. That probation order will include the statutory terms; will also include the condition, Mr. Reeves, that you not consume any alcohol within 48 hours of reporting to WCC, okay? So 48 hours before

you show up, you have to make sure you have had absolutely nothing to drink from that moment on, okay?

[29] Ms. Sova, is there concern about any additional conditions for the period of time when he is not actively serving?

[30] MS. SOVA: My understanding, he is on a driving suspension for the criminal charges?

[31] THE COURT: He is on a prohibition in relation to the criminal charges, yes. So he will not be allowed to drive for some time to come. Okay, he is also to report to a probation officer -- excuse me, probation order will also require him to report to W.C.C. as set out, and that is on the warrant of committal; so it is fine, we do not need it on the probation order. So simply the condition of the statutory terms and the no alcohol within 48 hours.

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RUDDY T.C.J.