

Citation: *R. v. Charlie*, 2016 YKTC 50

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Registry: Whitehorse

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

REGINA

v.

FRANKLIN JUNIOR CHARLIE

Appearances:
Ludovic Gouaillier
Lynn MacDiarmid

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCE

[1] RUDDY C.J. (Oral): Franklin Charlie is before me for sentencing in relation to four counts to which he has entered pleas of guilty, the first being the offence of driving while the concentration of alcohol in his blood exceeded the legal limit; the second, for evading the police by failing to stop as required; and there are two offences for breaching the terms of his probation order.

[2] There is an Agreed Statement of Facts that has been filed setting out the facts in detail. In brief, the two driving related offences involve an incident on January 5, 2016. The RCMP attended in relation to a complaint of a vehicle that was stuck. When Mr. Charlie observed the RCMP to arrive and, I believe, activate their emergency

equipment, he fled the scene by driving his truck over the train bridge in the Carcross area. I gather there was some concern the police had about Mr. Charlie's safety with his choice of driving away in that particular manner.

[3] Once he was located, after the vehicle was again stuck out by the train tracks, he was arrested for impaired driving. He ultimately provided two samples of his blood registering at 200 and 220 mg%.

[4] At all times, including the dates of the driving offences, Mr. Charlie was subject to a probation order, including conditions that he abstain from the possession or consumption of alcohol and also that he report to a probation officer.

[5] In May of 2016, it appears that Mr. Charlie opted to go mushroom picking and neglected to report to his probation officer as required.

[6] On July 7, 2016, he was found to be in an intoxicated state, also contrary to his probation order.

[7] Mr. Charlie comes before the Court with an extensive criminal record, which includes numerous breaches of court orders. There are a couple of related offences for dangerous driving in the past; however, he has no convictions for impaired driving related offences.

[8] Counsel are somewhat apart in their submissions as to appropriate disposition. They are agreed that Mr. Charlie is entitled to credit for 102 days spent in pre-trial custody, which is the 68 days actually spent credited at 1.5:1. Crown, however, feels

that the sentence should be somewhere in the neighbourhood of six to nine months.

Defence is of the view that the time served by Mr. Charlie is sufficient.

[9] There are numerous documents and court decisions which include extensive background information with respect to Mr. Charlie, including a *Gladue* report; a psychiatric assessment completed by Dr. Lohrasbe; a Fetal Alcohol Spectrum Disorder (“FASD”) diagnosis performed by MediGene; and there are also very comprehensive decisions that have been written in relation to previous matters for Mr. Charlie by His Honour Judge Cozens, His Honour Judge Lilles, and also by the Yukon Court of Appeal.

[10] All of these documents contain extensive information about Mr. Charlie and his circumstances, all of which is relevant to the decision that I make today. For the purposes of this decision, it is not necessary, in my view, to repeat the information.

[11] Briefly, Mr. Charlie is now 31 years of age. He is a member of the Kaska First Nation. This is a case in which there are very clear *Gladue* factors. Both of Mr. Charlie's parents were in the residential school system from the age of six on; both were victimized within that system; and both were, not surprisingly, profoundly negatively impacted as a result of what had happened to them. That, in turn, impacted on Mr. Charlie.

[12] I agree with Judge Lilles that there is a direct link in this case between colonization; the government's residential school policies; and the problems that are experienced by Mr. Charlie, largely because of the impact that those policies had on his parents and, in turn, their parenting of Mr. Charlie.

[13] I should note that it was clear to me from the reports and, it is certainly to their credit, that his parents have now maintained sobriety. It reads 27 years in the report but the report was written a couple of years ago, so I take it that it would be 29 years now, which is certainly an impressive achievement for both of them.

[14] It is important to note that the reports make it clear that Mr. Charlie suffers from a disability which falls in the fetal alcohol spectrum, which impacts on his abilities, his comprehension, his cognitive functioning; all of which affect the way that he processes information and the way that he makes choices.

[15] There are numerous cases here in the Yukon where the Court has talked about the impact of FASD on individuals that we see in the criminal justice system and how that affects application of the sentencing principles that we must apply. It has been said numerous times that when we are dealing with an offender who suffers from FASD, it is important for us in crafting the sentence to be responsive to their needs and their abilities rather than expecting them to conform to our expectations, which their disability prevents them from doing.

[16] The case law articulates a number of factors to be considered, including that while denunciation and deterrence still apply, they are of a much more limited application in circumstances with offenders who suffer from FASD. We often use the phrase that we view their behaviour within the context of what we call "reduced moral

culpability" because they are not able, by virtue of their disability and the way that their brains function, to do the same analysis with respect to action and consequence that the rest of us might be able to apply to circumstances we encounter and the choices we make.

[17] There is extensive evidence with respect to individuals like Mr. Charlie, but also with respect to Mr. Charlie himself, indicating difficulties with impulse control and with executive brain functioning, all of which unfortunately tend to bring them into conflict with the law more often than they or we might like to see.

[18] But there are a number of positives in this case. Mr. Charlie has a very supportive family who have clearly worked very hard to overcome their own past trauma and to provide him with the supports that he needs to be successful.

[19] The family have indicated to me that the plan would be for Mr. Charlie to return to reside with his parents. He would work with his father; both on the family trap line, hunting, gathering wood, preparing for the winter, and also doing renovations within the Ross River area. He would accompany his mother back and forth to Whitehorse to visit his uncle, her brother, who is in the late stages, sadly, of cancer, and is someone, I understand, that Mr. Charlie is very close to.

[20] The intention would be both to provide them all an opportunity to say good-bye, but also to provide the supports that his uncle needs in his final days. In particular, his mother is very concerned about recognizing that some of those needs are ones where it is more appropriate for him to have assistance from a male relative as opposed to from his sister. She is very sensitive and concerned about making sure that he does not

suffer, as a result, any humiliation, which I think is entirely appropriate in all of the circumstances, given what they are dealing with.

[21] When I consider all of these surrounding circumstances, I have come to a number of conclusions.

[22] Firstly, I am satisfied in all of the circumstances that the time that Mr. Charlie has already served is sufficient when credited at 1.5:1 for the offences that he has committed. I reach that conclusion both by application of the *Gladue* factors and also with consideration of his particular disability. I recognize that Mr. Charlie has an extensive criminal record; however, the majority of his convictions are for failure to comply with court orders, which flows from the fact that we have a system which imposes conditions on individuals that we expect them to comply with when sometimes they cannot.

[23] We need to recognize that in these circumstances, we have continually imposed conditions on a young man who, by virtue of his disability, is inevitably going to struggle with compliance. Compliance for individuals with FASD is problematic unless they have the supports around them to assist them with making appropriate choices. Without those supports and that assistance, quite frankly, we are doomed to failure and a breach is inevitable.

[24] Essentially, if someone is predisposed to breach by virtue of their disability, one has to ask oneself whether it is rational to then punish them for that failure to comply by sending them to jail. I have heard it said that often individuals with FASD serve life sentences in 30-day increments primarily because we put them on conditions they

cannot comply with, and when they breach, we send them to jail. I think we have to recognize that while Mr. Charlie's record is lengthy, it is lengthy because his disability makes it difficult for him to comply with conditions.

[25] As I said, I am satisfied time served is sufficient, but here is how I break it down.

[26] Defence counsel had suggested, because this is a first impaired driving related offence, that a fine was appropriate. I think in Mr. Charlie's circumstances, he is going to have difficulty with paying a fine and it creates another layer of difficulty for him. I do not think, however, that we need a sentence that reflects a significant period of time in custody. What I am going to do is impose a sentence of one day deemed served by his attendance in court today for the driving while the concentration of alcohol in his blood exceeded the legal limit.

[27] With respect to the most serious of the offences before me, his fleeing the police and driving over the train bridge, the sentence is going to be, again, one day deemed served by his attendance in court, but I am going to credit him for 90 days spent in pre-trial custody.

[28] With respect to both of the breaches, harkening back to my comments about breaching individuals for failing to comply with conditions that their disability makes it difficult for them to comply with, what I am going to do is impose sentences of one day deemed served by his attendance in court today on both counts. I am going to credit him with six days on each.

[29] I recognize there are numerous breaches on Mr. Charlie's record. We often look at the step-up principle. When people commit the same offences over and over again, we increase the length of sentence. In this case that makes absolutely no rational sense when those offences are breaches.

[30] On the other hand, I do think that there is a public safety concern with Mr. Charlie driving if he is driving in circumstances where he is drinking. I do think that there needs to be a lengthy driving prohibition because he also has a tendency to flee the police if he is pulled over when he is doing something he ought not to be. That causes a public safety concern. When you are driving a motor vehicle, if you make poor choices, you are going to hurt people.

[31] On both of the driving offences, there are going to be one-year driving prohibitions and they are going to be consecutive to each other, which means Mr. Charlie, you will have a driving prohibition of two years. That is about making sure other people are safe.

[32] I am satisfied, however, that with your family's support there is no need for additional probation. The probation order that Judge Cozens put you on remains in place, and it sounds to me like there is a good plan with your family to help you make smart choices in following those conditions.

[33] That leaves us with the issue of the surcharges.

[34] It would be \$100 on each of the four counts for a total of \$400. I did not impose a fine on the impaired. I have no difficulty with 12 months' time to pay.

[35] There is a program that might allow Mr. Charlie to do work instead of paying the surcharges. It is a particular program and you do hours of work that they then credit at a certain amount as against the surcharges. The easiest way for you to figure out whether that is possible would just be to contact the Court Registry. They can give you more information about how the Fine Option Program works. You could potentially work it off.

[36] Mr. Charlie, I want to wish you good luck. Do not forget that your parents are there to help you out. You are going to need some of that help to make sure that you make some smart choices. Work with them.

[37] I very much want to thank both of you for taking the time to be here, for your ongoing support of Mr. Charlie, and I do want to extend my sympathies with respect to your brother. My best wishes, in terms of how all of that unfolds. Hopefully, it is not too difficult for all of you, but kind of hard to avoid negative consequences when you are dealing with this kind of thing. I am terribly sorry to hear about him and I think he is fortunate to have you and your support for his final days as well.

RUDDY C.J.T.C.