

**IN THE SUPREME COURT OF THE YUKON TERRITORY**

Citation: *R. v. Fordyce*, 2004 YKSC 36

Date: 20040315  
Docket: S.C. 03-AP007  
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

STANLEY JAMES FORDYCE

Before: Mr. Justice R. Veale

Appearances:  
David McWhinnie  
Elaine Cairns

For the Crown  
For the Defence

**MEMORANDUM OF SENTENCE  
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): I have changed my mind. I am going to give the oral judgment in this matter rather than having a reserve.

[2] Mr. Fordyce entered a plea of guilty to a charge of operating a motor vehicle, having consumed alcohol in such a quantity that its concentration in his blood exceeded 80 milligrams in 100 millilitres of blood contrary to s. 253(b) of the *Criminal Code*.

[3] He now appeals from a sentence of four months in jail, but he does not appeal a three-year driving prohibition and a \$50 victim fine surcharge.

[4] Counsel for Mr. Fordyce seeks a conditional sentence or intermittent sentence of 90 days.

[5] The Crown submits the sentence of four months in jail is appropriate.

[6] The admitted facts are as follows:

- a. On July 20, 2003 at 20:15 hours the R.C.M.P. in Whitehorse responded to a call from the Carcross R.C.M.P. who had received information that a Capitol Towing flatbed truck was hauling a car from Carcross to Whitehorse and the driver was highly intoxicated.
- b. The Whitehorse R.C.M.P. on patrol located the vehicle on the Alaska Highway near the Meadow Lakes Golf Course. They followed the vehicle for a period and observed the vehicle to be swerving in its lane, put a right-hand turn signal on, move over into the right turning lane, not turn, and continue through the intersection; then put its left signal on. At this point the vehicle was stopped by the R.C.M.P.
- c. Mr. Fordyce, when spoken to by the R.C.M.P., slipped down two steps on the way out of the truck and had difficulty locating his wallet.
- d. The R.C.M.P. noted that Mr. Fordyce had droopy, glassy eyes, staggered, swayed and had slurred speech.
- e. Mr. Fordyce was given a breath demand and taken back to the detachment. He provided breath samples with readings of 220 milligrams.

[7] Mr. Fordyce's criminal record was tendered on the date of sentencing. He has a criminal record with five related drinking and driving convictions. The most recent entry on his criminal record is from 1990 and is for an offence contrary to s. 253(b) of

the *Criminal Code* and for that offence he received a \$900 fine.

[8] In 1982, he was convicted of a charge contrary to s. 236, which is driving over .08 and received a sentence of 90 days intermittent.

[9] In 1979, he was convicted of a charge contrary to s. 234, driving while ability impaired and received 14 days intermittent.

[10] In 1978 and 1973, he was convicted of offences contrary to s. 234 and s. 236 respectively, and received a fine on each occasion.

[11] The Crown proceeded summarily in this case and did not file a Notice of Intention to seek greater punishment.

[12] At the sentence hearing, counsel for the Crown proposed a four to six-month custodial sentence.

[13] Counsel for Mr. Fordyce advised the court that the appellant had struggled with alcohol for a number of years but had maintained sobriety since July 21, 2003 and was attending Alcoholics Anonymous at least five days per week. The court was also advised that Mr. Fordyce had been in contact with Alcohol and Drug Services with respect to counseling.

[14] Counsel for Mr. Fordyce advised the court that he was a long-time resident of Whitehorse and was employed as a journeyman insulator and aside from the period of time off the year prior, had been so employed for 17 years.

[15] At the sentence hearing counsel for the Crown took no position on the imposition of the conditional sentence.

[16] Counsel for Mr. Fordyce has provided additional facts on appeal that were not

available at the time of the sentencing.

[17] Mr. Fordyce was released on bail on October 21, 2003, pending this appeal and he served 14 days in jail prior to that time.

[18] He has complied with all his conditions of release, which include reporting to his bail supervisor, not leaving the territory except with approval, abstaining from the possession, consumption and purchase of alcohol, not operating a motor vehicle and not attending any licensed premises whose primary purpose is the sale of alcohol.

[19] He has provided a positive report from his bail supervisor and a report from an active member of Alcoholics Anonymous. He has continued his active involvement in Alcoholics Anonymous and attends at least once a day. He has a sponsor through Alcoholics Anonymous. He states that he has successfully stayed out of bars through developing a good support network of Alcoholics Anonymous members. He states that he has been sober since July 21, 2003 and remains motivated to stay sober.

[20] He has some on-call employment but has found it necessary to go on Social Assistance until he becomes fully employed again as a journeyman insulator.

[21] The sentencing Judge identified the real issue as being whether Mr. Fordyce would serve his term of imprisonment in custody or conditionally in the community. He stated the following at paragraphs 8 through 11 inclusive, and I quote:

I was presented with three sentencing precedents which obviously make it clear that a conditional sentence is not foreclosed in cases of impaired driving where there is a substantial prior record. I find myself unable to accept that it is appropriate in the circumstances of the present case. In my view, impaired drivers make unusually poor candidates for conditional sentences. Impaired drivers are difficult to supervise because alcohol consumption is something that is difficult to

monitor. Of course, when they do drink and get into automobiles, they do pose a very high risk to public safety.

There is also the matter that alcohol-related driving offences are prevalent in this jurisdiction. There is, in my view, an overarching need to maintain an effective deterrent with respect to such matters, particularly with repeat or serial offenders.

There is also the factor, with respect to drinking and driving offences, that there is an alternative to custody in the curative discharge provisions of the *Criminal Code*. In those cases, it may be appropriate to consider a non-custodial disposition, because it is almost an inevitable feature of those cases that there is medical intervention to monitor the accused and make sure that the accused is not consuming alcohol at all. Additionally, there is very close supervision of the accused both by probation and, as I say, medical staff. Those dispositions are granted sparingly and on significant evidence being produced that satisfies the court that there will not be an undue risk in proceeding in that fashion.

So while I accept that a conditional sentence is not foreclosed in the case of an impaired driver, it seems to me that such a disposition must be rare and I have not been persuaded that it is an appropriate disposition in the instant case.

[22] Section 742.1 of the *Criminal Code* sets out four criteria that a court must consider before deciding to impose a conditional sentence:

1. The offender must be convicted of an offence that is not punishable by a minimum term of imprisonment. That is the case here as the Crown has not filed a Notice of Intention to seek greater punishment.
2. The Court must impose a term of imprisonment of less than two years.  
That is also the case here, as the maximum punishment of this summary conviction offence is six months.

3. The safety of the community must not be endangered by the offender serving the sentence in the community.
4. A conditional sentence must be consistent with the fundamental purpose and principles of sentencing set out in s. 718 to s. 718.2 of the *Criminal Code*.

[23] In *R. v. Proulx*, [2000] 1 S.C.R. 61, the Supreme Court of Canada rejected the concept that there was a presumption against conditional sentences for certain offences (see paragraph 80-82). The Court stressed the value of individualization in sentencing. This means that the particular circumstances of the offender and the offence must be considered in each case.

[24] The Supreme Court of Canada also addressed the issue of over-incarceration in Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688. It stated that our record of over-incarceration cannot instill a sense of pride for Canada (see paragraph 52). This draws attention to the s. 718.2 (e) sentencing principle that, "all available sanctions, other than imprisonment that are reasonable in the circumstances should be considered for all offenders".

[25] The standard of appellate review is stated in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (QL), and I quote at paragraph 90:

Put simply, absent an error in principle, failure to consider a relevant factor, an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[26] The Crown did not concede that the sentencing Judge made an error, although it was acknowledged that he was close to the line. Rather, the Crown says deference must be given to the trial Judge in sentencing a man with a drinking and driving record over a period of 30 years.

[27] The Crown submits that the judicial experience of the sentencing Judge and the risk to the community supports the sentence of four months in jail. In other words, the Crown is submitting that the denunciation and deterrence are the most pressing sentencing factors.

[28] I have no difficulty accepting the principle that denunciation is an important factor when dealing with drinking and driving offences. I fully agree with the statement that every drinking driver is a potential killer.

[29] However, I am also of the view that incarceration is not the only means to denounce drinking and driving and deter others from drinking and driving. In my view, the sentencing Judge has erred by not considering the particular circumstances of this offender and this offence when he assessed the safety of the community and the fundamental purpose and principles of sentencing.

[30] The statements that a conditional sentence should be rare for an impaired driver, that impaired drivers make unusually poor candidates for conditional sentences, that impaired drivers are difficult to supervise are all generalizations that do not address the circumstances of this impaired driver.

[31] Mr. Fordyce has in fact made some significant efforts to change his life-style.

Incarceration, unfortunately, does nothing to create the Alcoholics Anonymous support system that he and the safety of this community so badly need.

[32] He has had a taste of incarceration so he understands where drinking and driving leads him.

[33] The question that remains is whether the safety of the community can be protected. This means that the risk of re-offending and the gravity of the damage that could ensue must be considered.

[34] It is my view that the Alcoholics Anonymous program and its support are the best way to minimize both the risk of re-offending and the potential damage.

[35] It allows Mr. Fordyce to remain in the community under strict conditions so that he can learn to control his drinking. If he cannot, he can be brought back to court and be committed to custody for the remainder of the sentence.

[36] I am therefore allowing the appeal of sentence and sentencing Mr. Fordyce to a term of imprisonment for four months to be served under a conditional sentence and a probation for a period of three years. The terms of the conditional sentence are as follows:

- a. To keep the peace and be of good behaviour and appear before the court when required to do so by the court.
- b. Report to a conditional sentence supervisor within two working days after the making of this conditional sentence order and thereafter when required

by the conditional sentence supervisor and in the manner directed by the conditional sentence supervisor.

- c. Remain within the jurisdiction of this court unless written permission to go outside this jurisdiction is obtained from the court or the conditional sentence supervisor.
- d. Notify the conditional sentence supervisor in advance of any change of name or address and promptly notify the court or the conditional sentence supervisor of any change of employment or occupation.
- e. Take such alcohol assessment, counseling and treatment, including attendance at Alcoholics Anonymous as directed by the conditional sentence supervisor, including any residential treatment if so directed.
- f. Abstain absolutely from the possession, consumption or purchase of alcohol, non-prescribed drugs and other intoxicating substances and submit to a breath or urine test upon demand by a peace officer or the conditional sentence supervisor who has reason to suspect that you have failed to comply with this condition.
- g. Not to attend any licensed premises whose primary purpose is the sale of alcohol.
- h. Reside where directed by the conditional sentence supervisor.
- i. Abide by a curfew by remaining in your place of residence between the

hours of 7:00 p.m. and 7:00 a.m. daily unless you have the written permission of the conditional sentence supervisor. You must present yourself at the door in person during reasonable hours for curfew checks by a peace officer or conditional sentence supervisor.

j. Not to drive any automobile for any purpose.

[37] The conditions of the probation order will be the same except that there will be no curfew condition.

[38] There will also be a prohibition from driving for three years and a \$50 victim fine surcharge.

[39] You will have to remain, Mr. Fordyce, in order to sign the conditional and probation documentation that the Clerk will prepare.

[40] Is there anything else arising?

[41] MS. CAIRNS: Just one. With respect to the driving prohibition and granted that this wasn't raised, but with respect to the interlock ignition device there is a section in the *Code* with respect to allowing that after a period of time, we would ask that perhaps Your Lordship address his mind to that and specify when it would be available. We would be seeking it after a year. It commenced -- has not been relieved on the date that he was sentenced so he's partway through and we would be seeking for a year from that date to allow the ignition interlock.

[42] THE COURT: It seems to me it would be appropriate to make an application at that time, would it not?

[43] MR. MCWHINNIE: The Court has indicated on the probation order, as I understand, that there is a "not drive" clause for three years. Did I understand that correctly?

[44] THE COURT: You understood it correctly.

[45] MS. CAIRNS: That's in addition to the driving prohibition?  
It doesn't --

[46] MR. MCWHINNIE: It runs parallel, as I understood what the Court did.

[47] THE COURT: It runs parallel.

[48] MR. MCWHINNIE: And would the interlock order work in that sequence?

[49] THE COURT: Well, the interlock order does not work with the probation order as I have indicated, but as I understand and I forget the section, but you can check the section and tell me if I am wrong, but you can apply at any time for review of the terms of probation and I am leaving it until then.

[50] MS. CAIRNS: Okay.

[51] MR. MCWHINNIE:

Thanks.

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VEALE J.