IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. McLeod*, 2003 YKSC 70

Date: 20031204
Docket : T.C. 03-00104A,B,C,
S.C. 03-01504
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And:

RICHARD LEE MCLEOD

Before: Mr. Justice L. Gower

Appearances:
Peter Chisholm — For the Crown
Elaine Cairns — For the Defence

MEMORANDUM OF SENTENCE
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): Richard Lee McLeod has entered pleas of guilty to the following charges: the charge of failing to stop his vehicle while being pursued by a peace officer, contrary to s. 249.1(1) of the *Criminal Code.* As an indictable offence, that charge has a maximum prison term of five years. He has also pled guilty to the charge of failing to provide a sample of his breath to a peace officer contrary to s. 254(5) of the *Criminal Code*. As an indictable offence, that is punishable by up to five years in jail. Those charges arose on October 31st and November 1st, 2003, respectively.

[2] Sitting as a Territorial Court judge, pursuant to s. 5 of the *Territorial Court Act*, R.S.Y. 2002, c. 217, I also accepted guilty pleas to two additional charges. The first chronologically is from the 27th of October 2003, being a charge of breach of recognizance for failing to report to his bail supervisor contrary to s. 145(3) of the *Criminal Code.* That is an offence punishable on summary conviction. Lastly, a guilty plea to a charge of failing to attend court, contrary to s. 145(2) of the *Criminal Code,* on October 21st, 2003, again, punishable by summary conviction.

[3] The facts are largely agreed to and they are as follows, and I will deal with the 249.1 count first. At approximately 11:15 p.m., on October 31st, 2003, Constable Thalhofer was on Robert Service Way, near the Ear Lake Road. He noticed an east bound vehicle traveling between 117 and 123 kilometres per hour, which was recorded on radar, in a 70 kilometre per hour zone. Constable Thalhofer, at the time, was in an unmarked police vehicle. He attempted to approach the suspect's vehicle and in doing so made contact with Constable Wessell, who was in a marked vehicle. Constable Thalhofer closed on the suspect vehicle, near the rest area on the Robert Service Way, and it failed to stop. Constable Wessell was traveling southbound from 4th Avenue on Robert Service Way, and observed Constable Thalhofer's emergency lights as well as the headlights of the vehicle that Constable Thalhofer was pursuing.

[4] It appears from the evidence that the emergency lights on Constable Thalhofer's vehicle would have been activated sometime around the rest area on Robert Service Way, which is visible from the intersection of Robert Service Way and 4th Avenue. At that time, the suspect vehicle was noted to be traveling at 87 kilometres per hour by radar in a 70-kilometre zone approaching the 4th Avenue intersection.

[5] Constable Wessell pulled his marked police vehicle partially into the oncoming lane, in an attempt to persuade the suspect vehicle to stop. It did not stop and continued on to 2nd Avenue. Constable Wessell noted passengers in the vehicle as well as a driver, fitting the description of the accused, and, in fact, the accused was later identified to be the driver.

[6] The suspect vehicle continued through the intersection of Robert Service Way, turned left on 2nd Avenue and proceeded north on 2nd Avenue at a speed of approximately 85 kilometres per hour in a 50 kilometre per hour zone. The vehicle stopped briefly at the intersection of 2nd Avenue and Main Street, where there was a red light but then proceeded through the red light northbound on 2nd Avenue.

[7] The vehicle proceeded past Boston Pizza and towards Two Mile Hill, and the speed of the suspect vehicle increased to approximately 100 kilometres per hour. I take judicial notice of the fact that going up Two Mile Hill there is a 60 kilometre per hour zone. It passed the intersection of Industrial Road and, at that time, another police officer was contacted and deployed a spike belt on Two Mile Hill. The suspect vehicle went over the spike belt, and continued past the intersection of Two Mile Hill and Range Road.

[8] At that point, Constable Wessell noted that the left front tire of the suspect vehicle was deflated. The suspect vehicle turned north on the Alaska Highway and then began to decelerate, which allowed Constable Wessell to pull out in front of the suspect vehicle stopping it near the Forestry Office on the Alaska Highway.

[9] As I said, the driver was identified as Richard McLeod. The officer noted, while having Mr. McLeod in his police vehicle, the following indicia of impairment: a

strong smell of alcohol on his breath and his person; slightly slurred speech; his head was drooping; and his body movement was sluggish. Afterwards, Constable Wessell noted, while the accused was moved from one police vehicle to another, that he walked slowly, that he shuffled, and that he was unbalanced, although he did not require assistance walking and was not close to falling down.

[10] It is common ground that Constable Wessell described Mr. McLeod as having a moderate level of impairment, but he was not grossly impaired.

[11] After being arrested and taken to the detachment, where Constable Thalhofer attended to take the breath samples, the accused refused to provide a sample. He was noted to be staggering, at one point struck a locker; he was also noted to be uncooperative and resistant to directions.

[12] It is an admitted fact that the suspect vehicle belonged to the accused's father, Gerald McLeod, and the vehicle was taken without Gerald McLeod's consent, and, in fact; Gerald had been looking for his son earlier in the evening and had reported that vehicle as being stolen.

[13] At the time, the accused only had a learner's driver's licence and was required by law to have an adult accompany him while driving. It was a further rule of the house, imposed by his father, that that adult be either himself, Gerald McLeod, or Richard's mother.

[14] There were four passengers in the vehicle; one was the sister of the accused, Rachael McLeod, who was quite intoxicated. There were three other passengers, apparently known to the accused, who he had picked up earlier. All passengers gave

statements to the police indicating that they had, to use the words of the Crown, pleaded with the accused to stop during the chase. All had been drinking.

[15] The accused has a criminal record. The Crown referred to six previous convictions for failure to comply with dispositions. I counted five, but then there are an additional three convictions for failing to comply with a recognizance, as well as one conviction for escaping lawful custody, and others. It is noteworthy that there was a conviction for taking a motor vehicle without consent, also, in 1991. There are, therefore, a total of nine offences related to breaching court orders or indicating disrespect for authority.

[16] The Crown's position is that Mr. McLeod be given approximately 60 days credit for his 35 days in remand. The Crown is asking for a jail sentence of between seven and nine months on the 249.1 count, and an additional one-month consecutive globally for the two breach of recognizance charges. That would result in a global sentence of eight to ten months, which, after credit for 60 days, would result in a global sentence of six to eight months.

[17] The aggravating circumstances noted by the Crown are that, and in the Crown's words were, "it was extremely significant" that the accused was on an recognizance at the time and that in fact he had breached that recognizance twice. One of those breaches included a failure to appear for trial on the very day of the offence. The Crown also says that it is aggravating that the offence was located through downtown Whitehorse, that there was potential for bodily harm and death, that the vehicle was in effect a potential weapon, and that the accused was moderately impaired.

[18] In mitigation, the Crown says that it recognizes the accused's relatively early guilty pleas and the fact that he has taken some responsibility for his actions.

[19] The defence position is that the court impose a conditional sentence of four months for the 249.1 count, and an additional 30 days as time served for the two breach counts, and a fine for the 254(5), failure to provide a sample, count. That is premised on the notion that Mr. McLeod receive 70 days credit for 35 days in remand. The defence also suggests a period of probation of nine to 12 months.

[20] Leaving aside, for the moment, the issue of whether I can impose a conditional sentence plus a jail sentence of time served, plus a fine, plus probation, I will go on to mention the mitigating circumstances noted by the defence.

[21] She, again, speaks of his guilty pleas, the fact that the accused is a youthful male at 25 years of age, that no one was injured, that the only property damage was a flat tire, and that the accused is seeking assistance for substance abuse. She mentioned the circumstances of Mr. McLeod, that he is a First Nation male, a member of the Tr'ondek Hwechin First Nation through his mother, but also has connections to the Kwanlin Dun First Nation through his father. His mother died when he was six years old. I was told that the accused had a son who died when he, Mr. McLeod, was eighteen years old. There are, therefore, significant grief issues in the family. As well, I am told of the death of a niece of Mr. McLeod in the last several months, which resulted in a coroner's inquest and placed a serious strain on the family.

[22] As if that were not enough, his grandmother who has been present here in court today, has some heart and lung problems, and his aunt Marion has recently

been diagnosed with terminal cancer. This has caused stress for the accused.

[23] There was also mentioned a troubled background in the family, but Gerald McLeod was identified as someone who is sober and supportive, currently, for his son.

[24] Defence counsel referred to Mr. McLeod as being on a healing path, to use his words. He has contacted the Tr'ondek Hwechin in Dawson about substance abuse treatment. He is not a beneficiary of the Kwanlin Dun First Nation final agreement, apparently, and that has caused some problems. He has also made an application with Alcohol and Drug Services here in Whitehorse for the men's program commencing in January 2004. He did receive some substance abuse treatment as a youth when he was a teenager in about 1992. He has been working with a spiritual counsellor at the Whitehorse Correctional Centre by the name of Eleanor Velarde. She has helped him to prepare a plan, which I will speak about shortly.

[25] Mr. McLeod has been attending Alcoholics Anonomyous meetings about three times in total since he was incarcerated, and those meetings are held once a week at the Whitehorse Correctional Centre. He has also attended one meeting of Narcotics Anonomyous, which are held less regularly at the Correctional Centre.

[26] Mr. McLeod has been employed for the last several years, as I understand it, on a seasonal basis as an outfitter for Kluane Outfitters. He enjoys the work and is looking forward to doing the same work again this spring.

[27] Mr. McLeod has had periods of being able to remain clean and sober while in the bush and while being employed. He is noted to have cut wood for elders and

there is a letter on the file to confirm that. About two years ago, he went to Fort Nelson for a brief period of about six months where he worked hard at pursuing some training in the oil and gas field and then returned to Whitehorse because he missed his family.

[28] I generally agree with the aggravating and mitigating circumstances as described by both counsel. I would like to add that some of the circumstances, in my respectful view, are particularly aggravating:

(1) At 11:15 in the evening, on October 31st, being Halloween night, one would expect both vehicular and pedestrian traffic, which is a particular problem.

(2) The speeds were significant: 117 to 123 kilometres per hour in a 70-kilometre zone, 85 kilometres in a 50-kilometre zone; and approaching 100 kilometres in a 60-kilometre zone.

(3) Notwithstanding that the initial R.C.M.P. vehicle driven by Constable Thalhofer activated his emergency lights somewhere in the vicinity of the rest area on Robert Service Way, the accused continued to drive his vehicle through downtown Whitehorse, through some of the busiest thoroughfares in downtown Whitehorse, until being stopped on the Alaska Highway, which in turn is a busy thoroughfare, a total distance of several kilometers.

(4) The accused went through a red light after stopping only briefly, again, at one of the main intersections in downtown Whitehorse, that being 2nd Avenue and Main Street.

(5) He continued to drive onto the Alaska Highway after going over a spike belt and deflating his front left tire, creating an additional risk of losing control of the vehicle.

(6) He was proceeding with the chase with four passengers in his vehicle all of whom were apparently pleading with him to stop. That is very distinct from a situation, which is not uncommon, of being egged-on by peers to try and outrun the police. This shows that Mr. McLeod was deliberately acting of his own volition, and to use the words in the *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344, case, this was a situation of "intentional risk taking".

(7) The accused was moderately impaired.

(8) He was on a recognizance for a trial that was to have occurred that very day and, therefore, he should have been particularly aware of the fact that he was on a recognizance.

[29] In mitigation, however, Mr. McLeod admits that he has a substance abuse problem and that is a very big step, it is a huge step, to make that admission, but it is not enough.

[30] Mr. McLeod, you have the support of your father who is sober and knowledgeable about treatment programs and recovery. You have the support of your spiritual counselor, Ms. Velarde, who has known you for about seven years, and here I am going to quote from part of her letter, where she says:

> Richard has expressed a deep desire (and I hear it as sincere) to
> - ❖ follow the positive direction his life has been taking, as evidenced by the good job he has been doing for 4 years as an outdoor guide;
> - ❖ quit the negative influences (alcohol, drugs) he knows are damaging him;
> - ❖ use the many resources he knows he has available to him;
> - ❖ develop and follow a plan for the overall

improvement of his life.

[31] These and your other family supports are very important, Richard, but they are not enough. Your ability to work as an outfitter and as a woodcutter is important, but it is not enough. Your applications for treatment are important, but they are not enough. You must want to pursue your recovery more than anything else. You must not let yourself be discouraged by case workers or other officials who are less than supportive. You cannot use that as an excuse not to continue to try and remain clean and sober. You cannot rely on excuses such as your grief issues and the illnesses in your family, which I am not downplaying, but you cannot rely on those as excuses. You cannot rely on your family history or the fact that you might be unemployed from time to time; you cannot use that as an excuse.

[32] In your bail supervision report, I quote the following:

> Mr. McLeod admits that he has a problem with cocaine use and that interferes with his ability to live productively when he is in Whitehorse. He says he was using cocaine before he went out to the bush and has taken it up again since his return. He says in the last few weeks he has progressed from smoking to iv use.

And later it continues:

> He believes that they --
>
> [Being the Kwanlin Dun Community Wellness people]
>
> -- told him he has to be clean for six months before he could attend treatment. He feels defeated by that as he knows he could not stay clean for six months without some help. He says he is interested in any treatment that is available to him.

[33] I mention that because your desire to remain clean and sober comes first,

treatment comes from outside. You cannot constantly be looking to outside supports to make it work. You have to drive the bus here and you have to want to remain clean and sober more than anything else. You cannot rely on the excuse that the Crown or the judge is being a jerk in this case, and did not give you the break that you wanted. But you can pursue your sobriety as hard as decide to, you can attend AA and NA as often as you are able to. You can apply for temporary absences, if you are able to, from the WCC. You can get a sponsor. You can pursue treatment and you can stay clean and sober one day at a time.

[34] My concern right now, Richard, is the risk of slippage that you have. Your counsel said that the road to recovery is not a one-way street, meaning that people go forwards and sometimes backwards. I agree with the last part, but not the first. It is a one-way street because when you go backwards you are going against the proper flow of traffic. You are risking both injury to yourself and others and you may well be breaking the law.

[35] I have not got sufficient confidence in you right now that you will not slip if you are released from this court on a conditional sentence. In my opinion, you need more clean and sober time plus time to think about the consequences of your behaviour. It is also of significance and I am concerned about your ability to obey court orders, given several related convictions on your criminal record. As Judge Stuart in the Territorial Court used to say, "You need to walk the talk."

[36] I have reviewed the case law filed by the Crown. I note that there was no case law filed by the defence, which would have been helpful even if not precisely for the offences before the court, but if only for similar fact patterns.

[37] The *R. v. Biancofiore*, *supra*, case, from the Ontario Court of Appeal, 1997, said at paragraph 24 of the QuickLaw version:

> The importance of the general deterrent objective is also, in my view, highlighted by the fact that these offences were committed while the respondent was on probation. In committing these offences while on probation, the respondent displayed an attitude, still not uncommon among some elements of society, of indifference to the criminal nature of drinking and driving offences. The sentence for these crimes must bring home to other like-minded persons that drinking and driving offences will not be tolerated.

[38] The *R. v. Proulx,* [2000] 1 S.C.R. 61, case said, halfway through paragraph 129 of the QuickLaw version:

> ...dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding [citizens], with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties.

Justice Lamer, then, continues to speak for the court and says:

> I hasten to add that these comments should not be taken as a directive that conditional sentences can never be imposed for offences such as dangerous driving or impaired driving.

[39] I recognize that we are not dealing with a sentencing per se of dangerous driving but the fact pattern is similar to that.

[40] In determining an appropriate sentence I must follow the directive in the *Proulx, supra*, case, and the first thing that I have to do is to decide whether I reject a

penitentiary term and probationary measures alone as inappropriate, and I do reject those.

[41] I then must go on to consider if it is appropriate that the sentence be served in the community, and there I will quote from the *Proulx, supra*, decision at page 39, point number 6:

> The requirement in s. 742.1(b) that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence,….

And it continues:

> In making this determination, the judge should consider the risk posed by the specific offender,….

And later:

> Two factors should be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence.

[42] I have also considered the fundamental purpose and principles of sentencing as set out in ss. 718 to 718.2 of the *Criminal Code,* as addressed by defence counsel.

[43] I also note point number 10 from page 40 of the *Proulx, supra*, decision which reads:

> Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. Where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction. This may be so notwithstanding the

fact that restorative goals might be achieved.

[44] This is all a bunch of fancy language to give legal justification for my sentence. I have hope in your ability to regain your sobriety, to remain clean and sober, but I do not see that you are ready to do that today. The sentence that I am about to impose is one which will hopefully give you some time to think and at the same time give you some time to work on a significant plan for your release.

[45] I am also going to impose some probation at the end of this to give you the kind of help and structure that I think that you have been asking for.

[46] On the charge under s. 249.1 of the *Criminal Code*, I impose a jail sentence of seven months, less 60 days credit for remand time, resulting in effective sentence of five months. I am not giving you the full 70 days credit because you were incarcerated after your arrest on October 30th largely because you were already in breach of a recognizance. You were already on a recognizance. So the fact that you ended up in remand is largely a result of your own doing.

[47] On the 254(5) count, I impose a jail sentence of one day, deemed served, plus a driving prohibition under s. 259(1) of the *Criminal Code* for a period of one year.

[48] On the charge under s. 145(3) of the *Criminal Code*, on Information 03-00104, I impose a jail sentence of 15 days consecutive.

[49] On the last charge under s. 145(2) of the *Criminal Code*, on Information 03-00104B, I impose a jail sentence of 15 days consecutive to the other time. That results in a total jail sentence of six months.

[50] In addition, I am placing you on probation for a period of two years. This probation order will attach to the 249.1 count.

[51] The terms of that probation order will be as follows:

(a) That you keep the peace and be of good behaviour.

(b) That you notify the probation officer in advance of any change of name, address or employment.

(c) That you are to report to a probation officer within two working days of your release from jail and then as directed by your probation officer.

(d) That you remain within the jurisdiction of the court unless you receive written permission to go outside the Yukon.

(e) That you take such alcohol, drug assessment, counselling, programming and treatment as directed by your probation officer.

(f) That you abstain absolutely from the possession, consumption or purchase of alcohol and non-prescription drugs.

(g) That you make reasonable efforts to find and maintain suitable employment and provide your probationer officer with all the necessary details concerning your efforts.

[52] Lastly, I am going to impose a condition that was imposed in the *R. v. Quock,* [1998] Y.J. No. 171, case by Judge Lilles: That you not operate a motor vehicle on any road, highway or public place in the Yukon without first obtaining permission from this court. In other words, after your driving prohibition under s. 259 expires, which will be after a period of one year, you will still have to come back to court to get the court's permission in order to drive. The expectation is that if you involve yourself in some programming, and the court is satisfied that there is an effort being made on

your behalf to remain clean and sober, then the court will amend that order and allow you to drive.

[53] There is also, as your counsel will explain to you, the option of having the total of length of that probation order reduced.

[54] I direct the clerk of the court to review with you both the terms of the driving prohibition order and the probation order and to explain to you the consequences of not complying with those orders.

[55] Is the defence making an application to waive the victim fine surcharge?

[56] MS. CAIRNS: Yes, the defendant will not be in a position to earn money for the next six months, so we would make application to waive that.

[57] THE COURT: For those reasons, the victim fine surcharge will be waived.

[58] MS. CAIRNS: My Lord, with respect to the driving prohibition, there is set out in the *Code* reference to the interlock program. Mr. McLeod does rely on a vehicle in his work, so if that could be noted that he would be eligible for the interlock program within the timeframe. I believe --

[59] MR. CHISHOLM: I believe it is pursuant to s. 259(1.2).

[60] MS. CAIRNS: With respect to a first offence, I believe that the interlock could be available after three months of the driving prohibition, where it

is a first offence. I note that if you put it in the probation order, he may have to come back to court at the same time to deal with that. I just wanted Your Lordship to be aware that that could have some impact on his employability in that job that he's had.

[61] MR. CHISHOLM: I have no submissions, My Lord.

[62] THE COURT: I am prepared to authorize that he be considered for eligibility under that program after the minimum period of 3 months, is it?

[63] MS. CAIRNS: Yes.

[64] THE COURT: But that in order to drive he will still require the permission of the court. So if that is done through the Driver Control Board and he obtains their authorization to drive under the interlock program, he would still have to come back to court to obtain the court's permission.

[65] Now, Mr. McLeod, I hope you understand that what all this means is that you will be in jail for the next few months, but you are not going to be prevented from earning a living come next spring. There is a lot of work that you can do between now and your release from jail to put you in the best possible position when you are back on the street.

[66] Is there anything more, counsel?

[67] MR. CHISHOLM: Yes, I will direct a stay of proceedings with respect to the other three counts on the indictment, as well, there was another s.

145(3) charge and I will direct a stay of proceedings to that, as well.

[68] THE COURT: On all remaining charges?

[69] MR. CHISHOLM: Yes.

[70] MS. CAIRNS: Thank you, My Lord.

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GOWER J.