Citation: *R. v. Redies*, 2004 YKTC 88 Date: 20041124
Docket: T.C. 03-00607
Registry: Whitehorse

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

R e g i n a

v.

Allan Raymond Redies

Appearances:
Ludovic Gouaillier Counsel for Crown
Malcolm Campbell Counsel for Defence

REASONS FOR SENTENCING

[1] Allan Raymond Redies has entered guilty pleas and stands convicted of driving a motor vehicle having consumed alcohol in such a quantity that the concentration in his blood exceeded eighty milligrams of alcohol in 100 millilitres of blood, contrary to s. 253(b) of the *Criminal Code* and of operating a motor vehicle while disqualified from doing so, contrary to s. 259(4) of the *Criminal Code*. The Crown proceeded by indictment.

[2] Mr. Redies was operating a motor vehicle in the Village of Ross River on December 23, 2003. Mr. Redies came to the attention of an R.C.M.P. officer when he drove through a stop sign. Mr. Redies was stopped and exhibited substantial symptoms of impairment. Mr. Redies subsequently provided breath samples, which, on analysis, revealed a blood alcohol content of 190 milligrams of alcohol per 100 millilitres of blood. Mr. Redies was disqualified from driving on the date in question as a result of an earlier drinking and driving conviction.

[3] Mr. Redies has five prior convictions for drinking and driving and two prior convictions for driving while disqualified. The last drinking and driving conviction was in 1998 but he had unrelated convictions in 2000 and 2002. In 1998, Mr. Redies received a total of seven months in prison for two separate drinking and driving offences which were dealt with on the same day.

[4] There is nothing remarkable or unusually aggravating about the present offences save for the fact that his blood alcohol was more than twice the legal limit. Mr. Redies was cooperative with the police and entered guilty pleas.

[5] Mr. Redies is a First Nations man of thirty-three years-of-age. As indicated above, Mr. Redies has a substantial prior record of related offences, but he also has a history of violent behaviour and convictions for failing to abide by court orders. Mr. Redies has a common-law wife and a blended family of three children. He is currently employed by the Ross River Dena Council doing building maintenance work. According to Mr. Redies, this work is expected to last until February 2005.

[6] As seems obvious from his criminal record, and as Mr. Redies himself admits, he is an alcoholic. Alcohol abuse has caused problems in Mr. Redies' family as well as most of his difficulties with the law. Mr. Redies indicated to the probation officer that he has attempted to seek assistance for his addiction in Ross River but has not been able to find the support he needs.

[7] Given the circumstances of the offence and the prior record of this offender, a sentence in the range of one year would be fit for the offence contrary to s. 253(b). Mr. Redies is also facing imprisonment with respect to the charge contrary to s. 259(4). See *R. v. Battaja*, [1990] Y.J. No. 208.

[8] The defence conceded that a substantial custodial sentence was warranted. However, Mr. Campbell argued that the sentence should be served conditionally. The Crown did not tender notice pursuant to s. 727(1) of an intention to seek greater punishment. As a result, no minimum sentence of imprisonment applies and it is open to the court to impose a conditional sentence assuming that a sentence of less than two years is imposed. Neither party contended for a sentence of two years or more.

[9] The question to be answered is whether or not a conditional sentence is appropriate. Mr. Campbell placed great reliance on the decision of Mr. Justice Veale in *R. v. Fordyce*, [2004] Y.J. No. 66, 2004 YKSC 36. Mr. Fordyce was convicted of an offence contrary to s. 253(b) of the *Criminal Code*. He had five prior drinking and driving convictions, although the most recent of these was recorded in 1990. Veale, J. overturned my decision refusing Mr. Fordyce's request to have his sentence served conditionally.

[10] Although *Fordyce* is suggested as standing for the proposition that conditional sentences are a generally appropriate sanction in impaired driving cases, I remain of the view that, while a conditional sentence is clearly an available option, there are goods reasons for scrutinizing such applications with care.

[11] Firstly, a careful reading of *Fordyce* shows that the true ratio of Veale, J's decision was evidence put before the appeal court respecting efforts Mr. Fordyce had made since the original sentencing to deal with his alcohol addiction.

[12] *Fordyce* can also be read as holding that I was wrong to presume against a conditional sentence in light of the decision of the Supreme Court of Canada in *R. v. Proulx*, [2000] S.C.R. 61. The general proposition emanating from *Proulx* is that conditional sentences are available for all offences falling within the "no minimum" and "two year" guidelines.

[13] Nevertheless, a conditional sentence cannot be imposed unless the court is satisfied that the safety of the public would not be endangered, and such a sentence would be consistent with the fundamental purpose and principles of sentencing. The fundamental purpose, objectives and principles of sentencing are set out in s. 718 to s. 718.2 of the *Criminal Code*. Among these objectives is the necessity to deter unlawful conduct.

[14] In *Proulx,* the court states that a conditional sentence may also have a deterrent component and, as a result, judges should be wary of placing too much reliance on the need for deterrence in choosing between a conditional sentence and incarceration. However, it must be remembered that the Supreme Court specifically mentioned dangerous driving and impaired driving as crimes for which an actual custodial sentence might provide a greater deterrent effect. Driving while disqualified could be easily added to this list.

[15] Thus, *Proulx* cannot be taken as holding that a conditional sentence is as appropriate a sentence for offenders convicted of impaired driving and similar offences as it might be for offenders convicted of other offences.

[16] The requirement that the court consider public safety in any decision to impose a conditional sentence also has a particular relevance to impaired drivers. As *Proulx* points out, risk involves two things, the probability that the offender may commit further crimes and the degree of harm that would result should a further offence be committed. Where great harm could be caused, even a small probability that the offender will commit a further offence would lead to the conclusion that a conditional sentence is inappropriate. Impaired drivers, especially those with high blood alcohol levels, clearly pose a substantial risk to cause injury or death.

[17] Parliament has provided for minimum sentences for repeat impaired drivers – subject, of course, to the requirements of notice. There are very few offences for which minimum sentences are prescribed, and the inclusion of drinking and driving offences in this category clearly indicates the legislature's view of the seriousness of these offences and it's intention that impaired drivers be dealt with sternly.

[18] I also remain of the view that there is a further distinction between impaired driving cases and crimes generally when it comes time to consider an appropriate sentence. That difference is the availability of a curative discharge. This provision continues to provide an alternative to incarceration for those persons convicted of impaired driving who are committed to dealing with their alcohol addiction.

[19] Finally, this court cannot lose sight of what the Yukon Court of Appeal had to say in *R. v. Donnessey*, [1990] Y.J. No. 138 and in *R. v. Allan*, [1990] Y.J. No. 137. In both cases, the court made it clear that general deterrence was the paramount concern in sentencing drunk drivers. In both cases, the court cited with approval the following statement made by Associate Chief Justice MacKinnon in *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.):

> In my view, the sentences for the so-called lesser offences in this field should be increased. The variations in the penalties imposed for drinking and driving are greater and increasing sentences for offences at the "lower end" would emphasise that it is the conduct of the accused, not just the consequences, that is the criminality punished. If such an approach acts as a general deterrent then the possibilities of serious and tragic results from such driving are reduced. No one takes to the road after drinking with the thought that someone may be killed as the result of his drinking. The sentences should be such as to make it very much less attractive for the drinker to get behind the wheel of a car after drinking. The public should not have to wait until members of

> the public are killed before the court's repudiation of the conduct that led to the killing is made clear. It is trite to say that every drinking driver is a potential killer.
>
> Members of the public when they exercise their lawful right to use the highways of this province should not live in the fear that they may meet with a driver whose faculties are impaired by alcohol. It is true that many of those convicted of these crimes have never been convicted of other crimes and have good family and work records. It can be said on behalf of all such people that a light sentence would be in their best interests and be the most effective form of rehabilitation. However, it is obvious that such an approach has not gone any length towards solving the problem. In my opinion, these are the very ones who could be deterred by the prospect of a substantial sentence for drinking and driving if caught. General deterrence in these cases should be the predominant concern, and such deterrence is not realized by overemphasizing that individual deterrence is seldom needed once tragedy has resulted from the driving.

[20] With the courts general views on sentencing of drunk drivers in mind, but also keeping in view the provisions of s. 718.2(e) of the *Criminal Code*, I turn to consider the present offender's suitability for a conditional sentence. In the Pre-sentence Report, the probation officer says the following:

> The writer has some reservations about a community disposition, but would be willing to support a Conditional Sentence with a residential treatment component in it. This then would allow Mr. Redies to support his family and maintain his job until it terminates without placing undue stress on his family. Mr. Redies could then be directed into the Alcohol and Drug Services thirty-day residential program in Whitehorse. The program is an on going program that can be accessed about every sixty days.

[21] In my view, there are good reasons to have reservations about Mr. Redies suitability for a community-based disposition. First and foremost, Mr. Redies has an extensive and persistent criminal record, much of it related to the present circumstances. This persistence diminishes the chance that Mr. Redies can successfully complete a conditional sentence without re-offending and increases the risk to public safety.

[22] Second, his record includes two convictions for failing to abide by the conditions of release orders. His convictions (now three in total) for driving while disqualified similarly reflect a disregard of court orders. Taken together, these entries on Mr. Redies' record further undermine confidence that he would, or could, abide the terms of a conditional sentence order.

[23] The third area of concern is that Mr. Redies does not have any existing track record of maintaining sobriety and seeking treatment, -- as was the case in *Fordyce* and is invariably the case with offenders seeking a curative discharge.

[24] Finally, the proposed plan appears somewhat lacking. It must be remembered that Mr. Redies is facing a sentence of a year or more. Presumably, Mr. Redies would continue to work until February, after which he would attend a month-long alcohol treatment program in Whitehorse. What, if anything, would be done after that, is unclear.

[25] On the other hand, it is true that the frequency with which Mr. Redies collects drinking and driving and/or driving while disqualified convictions has lessened. In the period between 1991 and 1998, he amassed seven such convictions. Since 1998, he has racked up a further seven convictions, but none were for related offences until his convictions in the case at bar.

[26] It must also be pointed out that Mr. Redies received a conditional sentence of six months in 2002. The conditional sentence was followed by a

probation order, which was in effect for a further period of one year. It must be presumed that these orders were successfully completed, as there are no entries on his record for breach of either order.

[27] Despite these later points, and having considered the matter as sympathetically as I can, I am, nevertheless, driven to conclude that Mr. Redies is not a suitable candidate for a conditional sentence in view of the risk that he will re-offend and in view of the need to maintain an effective deterrent. This need extends to both offences of which Mr. Redies stands convicted.

[28] I take into account Mr. Redies' personal and family circumstances, his guilty pleas and the fact that he was cooperative with the police. I take into account the global effect of sentencing for multiple offences. On the charge contrary to s. 253(b) of the *Code*, Mr. Redies is sentenced to a period of imprisonment of 10 months. On the charge contrary to s. 259(4) of the *Code,* Mr. Redies is sentenced to two months imprisonment to be served consecutively.

[29] Pursuant to s. 259(1) of the *Code*, Mr. Redies is prohibited from operating a motor vehicle on any street, road, highway or other public place for a period of three years following his release from imprisonment. I authorize the offender to operate a motor vehicle equipped with an ignition interlock device provided he is registered in the territorial alcohol ignition interlock device program. This authorization will come into effect 18 months after the commencement of the prohibition order.

[30] In the circumstances, the surcharges are waived.

Faulkner T.C.J.