PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. George*, 2016 NSPC 12

Date: 2016-03-11
Docket: 2923547
Registry: Pictou

Between:

Her Majesty the Queen

v.

Steven William George

SENTENCING DECISION

Before:	The Honourable Judge Del W. Atwood
Heard:	25 February 2016 in Pictou, Nova Scotia
Charge:	Sub-section 255(2) of the Criminal Code of Canada
Counsel:	William Gorman for the Nova Scotia Public Prosecution Service Stephen Robertson for Stephen William George

By the Court:

Procedural history

[1] The Court has for sentencing Steven William George. Mr. George is charged with a single indictable count under s. 255(2) of the *Criminal Code*. That provision of the *Criminal Code* states that everyone who commits an offence under paragraph 253(1)(a) and causes bodily harm to another person as a result is guilty of an indictable offence and liable to imprisonment for a term of not more than ten years.

[2] Mr. George elected to have his charge dealt with in this court and entered a guilty plea at a very early opportunity.

Circumstances of the offence

[3] The facts that were read into the record by the prosecution pursuant to the provisions of s. 723 and 724 of the *Criminal Code* inform the Court that on 19 September, 2015, just after midnight, police received a 911 call from Mr. George reporting that he had been in a motor-vehicle accident on Reid's Road, in Coalburn, Pictou County; Mr. George told police that his female passenger had been injured.

[4] A Cst. Fraser attended the scene, found that Mr. George's car had left the roadway and landed in a ditch. The constable observed a ninety-degree turn nearby; it was apparent to the officer that Mr. George had failed to negotiate that very sharp turn.

[5] The constable attended to Mr. George's passenger, a Ms. Mattatal, who was on her back and in considerable pain. Cst. Fraser noticed that both of the front airbags in Mr. George's car had deployed.

[6] The officer found an empty beer can on the front passenger side of the motor vehicle. The constable conducted proper roadside *Orbanski* questioning of Mr. George. Mr. George informed the constable that he had drunk approximately one and a half bottles of beer earlier that morning and the evening of the preceding day.

[7] The constable detected an odour of alcohol emitting from Mr. George's breath. At 0059 hours, Cst. Fraser read to Mr. George an approved-roadside-screening demand. Mr. George agreed to provide a sample of his breath; the result of the roadside screening analysis was a failure.

[8] Cst. Fraser then read to Mr. George his right to counsel, as well as a police caution. He arrested Mr. George. Mr. George agreed to comply with a breath demand.

[9] No *Charter* issue has been raised. I simply note parenthetically that the recital of facts informed me that Mr. George told Cst. Fraser that he was uncertain whether he wished to retain counsel. There is no evidence before the Court that the constable made further inquiries of or sought clarification from Mr. George before turning Mr. George over to a qualified technician at the New Glasgow Policing Service. That qualified technician proceeded to conduct two breath analyses. I would assume—well, it's not necessary for the court to assume anything. There has been no s. 10 *Charter* issue raised here. Mr. George entered a guilty plea to the charge and there is nothing for the court to consider in terms of right to counsel, as there is no *Charter* application before the court.

[10] Two suitable samples of Mr. George's breath were received directly into an approved instrument by the qualified technician. At 0149 hours, an analysis of Mr. George's breath resulted in a reading of 160 milligrams of alcohol in 100 millilitres of blood. At 0210 hours, a chemical analysis of Mr. George's breath resulted in a blood-alcohol-concentration reading of 150 milligrams of alcohol in 100 millilitres of blood.

[11] Pursuant to sub-para. 258(1)(c)(iv) of the *Criminal Code*, the 150 milligram percent reading is the presumptive reading.

[12] Police continued their investigation and determined that Ms. Mattatal had been medically evacuated to hospital; diagnostic imaging showed that she had suffered a dislocated hip and required seven stitches to her chin.

[13] Ms. Mattatal gave a statement to police advising that, prior to the accident, she and Mr. George had left a gathering of friends and had travelled to a local fast-food restaurant. They then headed to Ms. Mattatal's home, which is located just beyond the sharp turn where Mr. George had lost control and left the road.

General sentencing principles

[14] Sub-section 255(2) of the *Criminal Code* prescribes a maximum term of imprisonment of ten (10) years. There is no mandatory minimum term of imprisonment, but there is a mandatory fine under sub-s. 255(3.3).

[15] Sentencing is a highly individualized process: *R. v. Ipeelee,* 2012 SCC 13 at para. 38.

[16] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances; that is prescribed by para. 718.2(a) of the *Criminal Code.* The court must consider also objective and

subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R. v. Pham*, 2013 SCC 15 at para 8.

[17] Assessing an offender's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; that fundamental principle is set out in s. 718.1 of the *Criminal Code*.

[18] In *Ipeelee* at para. 37, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims and proportionality seeks to ensure public confidence in the justice system.

[19] In the recent decision of *R. v. Lacasse*, 2015 SCC 64 the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the individual offender. The Court recognized at para. 12 that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of penal justice.

[20] In many respects, the *Lacasse* decision comes close to constitutionalizing the principle of proportionality in the imposition of just and fair sentences.

[21] In determining an appropriate sentence, the court is required to consider, pursuant to para. 718.2(b) of the *Criminal Code*, that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is the principle of sentencing parity. The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances; furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances.

Sentencing submissions

[22] The prosecution has recommended a three-to-four-month prison term, followed by probation, as well as an eighteen-month prohibition term and a secondary-designated-offence DNA collection order. The prosecution referred me to the judgment of the Nova Scotia Court of Appeal in *R. v. Cromwell*, 2005 NSCA 137.

[23] Defence counsel relies on an earlier decision of the Court of Appeal in *R. v. Martin*, [1996] N.S.J. No. 389. Defence counsel urges the court not to impose imprisonment.

Prosecution authorities

[24] In Cromwell, the Court of Appeal was dealing with a prisoner sentence appeal. The offender in that case had operated a motor vehicle while impaired by alcohol, lost control and collided with an oncoming car. She fled the scene, and sought to evade contact with the police. Eventually Ms. Cromwell pleaded guilty to impaired driving causing bodily harm as well as breach of recognizance. The sentencing judge rejected a joint recommendation for a conditional sentence of nine months and imposed a sentence of four-months' imprisonment for impaired driving causing bodily harm and a one-month term of imprisonment to be served consecutively for the breach of recognizance. The Nova Scotia Court of Appeal reviewed the law applicable to joint submissions, found that the sentence imposed by the trial judge was at the very low end of a reasonable range of sentencing, and concluded that the trial judge's sentence was not unreasonable or unfit.

[25] Of particular moment to the Court of Appeal in *Cromwell* was the fact that Ms. Cromwell had evaded justice by failing to attend her sentencing hearing, which went ahead only after her capture.

[26] The prosecution referred me to *R. v. Fraser*, 2014 NSSC 391. Scaravelli J. sentenced a 23-year-old employed offender to a term of three-months' imprisonment, along with a driving prohibition of 18 months and a victim surcharge of $500.00. The circumstances of the offence were that the offender had driven while impaired and was involved in an accident; his passenger suffered injuries including a broken arm, cuts and bruises. Prior to sentencing, the offender had started mental-health and addictions counselling. Scaravelli J. properly placed emphasis on the need for denunciation and deterrence in such cases, and referred specifically to the opinion of Bateman J. in *Cromwell*, para. 29:

> The sentence must provide a clear message to the public that drinking and driving is a crime not simply an error in judgment. Those who would maim or kill by driving their vehicles while impaired are as harmful to public safety as are other violent offenders. The proliferation of this crime and the risk that it will be seen by society as less socially abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features.

Defence authorities

[27] In the *Martin* case, referred to me by defence counsel and which I mentioned a moment ago, the alcohol-impaired offender drove his truck off the highway and sheared a power pole. His two passengers were seriously injured. The offender pleaded guilty to two counts of impaired driving causing bodily harm. The trial judge suspended the passing of sentence, placed the offender on a period of probation for three years, laying on some strict conditions, including no consumption of alcohol, attendance at a 28-day detox program, counselling, reporting to a probation service and suspension of driving privileges. The Nova Scotia Court of Appeal affirmed the sentence and noted that the sentencing judge had considered the appropriate mitigating factors and had not erred in the imposition of a suspended sentence; the Court of Appeal dismissed the sentence appeal brought by the prosecution. A suspended sentence for impaired causing was okay back then as it predated S.C. 2008, c. 18, s. 7, which enacted sub-s. 255(3.3) of the *Code*.

[28] I would point out that at para. 56 *Cromwell* Bateman J. referred to the *Martin* decision:

> I am not persuaded that the unique features in *Martin* that permitted a noncustodial disposition are present here. There is no indication that Ms. Cromwell has addressed her long-standing substance abuse, nor that she is remorseful, nor that she has employment. Indeed, Ms. Cromwell's inability to address her addiction is confirmed by the fact that on February 9, 2005, she was sentenced for an impaired driving offence (s. 253(a) of the *Criminal code*) which

> occurred on April 26, 2004. She received a fine and an eighteen month driving prohibition.

R .v Hamilton

[29] I have found it useful to refer to the decision of MacAdam J. in *R. v. Hamilton* 2008 NSSC 217. In that case, the sentencing judge was dealing with an offender who had pleaded guilty to impaired operation causing bodily harm. MacAdam J. found the offender's conduct was uncharacteristic of his background; he noted that the offender had strong family support. Finally, there was a joint recommendation for a conditional sentence, and the judge accepted it.

[30] I would note, that at the time of the imposition of sentence in *Hamilton*, a conditional sentence was a permissible and lawful sentence; however, since the time of the rendering of that decision, s. 742.1 of the *Criminal Code* was amended by the *Safe Streets and Communities Act*, S.C. 2012, c. 1 s. 34, in force 20 November 2012 in virtue of SI/2012-48, which now precludes the imposition of a conditional sentence in cases involving an offence prosecuted by way of indictment for which the maximum term of imprisonment is ten (10) years that resulted in bodily harm.

[31] Accordingly, in this case, today, Mr. George is conditional-sentence ineligible.

Application of law to the circumstances of the offence and the offender

[32] Reviewing the highly individualized factors in this case, I would observe the following: the 150-milligrams-percent presumptive reading determined by chemical analysis of Mr. George's blood/alcohol concentration falls below the aggravated threshold in s. 255.1 of the *Criminal Code*. That section informs me that evidence that the concentration of alcohol in the blood of the offender at the time of the commission of the offence exceeded 160 milligrams of alcohol in 100 millilitres of blood shall be deemed to be an aggravated circumstance. Accordingly, that provision of the *Criminal Code* is inapplicable to this sentencing hearing.

[33] I note that Mr. George's prior record is made up of one prior finding of guilt under para. 334(b) of the *Criminal Code*. Mr. George has no findings of guilt involving the operation of a motor vehicle while impaired.

[34] Mr. George was co-operative with the police, remained at the scene and helped Ms. Mattatal. I take into account, as well, the roadway condition, a ninety-degree, sharp turn as being a distinctive roadway feature in determining the degree of Mr. George's criminality giving rise to liability under s. 255(2) of the *Criminal Code*. Yes, his drinking and driving led to Ms. Mattatal getting hurt; but it's not

unknown completely for people to drive off the road at night when negotiating sharp turns even when unimpaired.

[35] Mr. George elected to have his charge dealt with in this court and pleaded guilty at an early opportunity, which I treat as an authentic expression of remorse and an acceptance of responsibility. That is in distinction to the offender in *Cromwell*.

[36] Mr. George has dealt with his charges promptly, again in contrast to the offender in *Cromwell*. And Mr. George has not been involved in any intervening offences since the date of the commission of this offence.

[37] There is a presentence report before the Court. It informs me that Mr. George completed grade 12 at the Northumberland Regional High School at age 18. Mr. George is gainfully employed with Alan MacKenzie's Roofing and Siding. He has held that job for the past three years. He is described by his supervisor as a good worker. There are no issues with Mr. George's workplace attendance. There is one cautionary note: Mr. George's supervisor observes candidly that Mr. George's only downfall is "the bottle…the drink. I think if he got away from the liquor, you'd never hear tell of him."

[38] Mr. George self-reports the moderate use of alcohol to the author of the presentence report and informed the Court today in his s. 726 allocution that he has abstained from alcohol for the past two and half months; he is committed to remaining alcohol free and seeking appropriate counselling and intervention.

[39] In my view, those mitigating factors are of considerable weight and offer strong evidence that Mr. George would be a good candidate for a rehabilitative sentence.

[40] In my view, the foregoing factors satisfy me that, although Mr. George's degree of responsibility was substantial, applying the principles of proportionality, the seriousness of the offence is at the lower end of the range of fact-severity when the court considers offences involving impaired operation of a motor vehicle resulting in bodily harm.

Imposition of sentence

[41] I believe that these mitigating factors bring Mr. George's case within the range of sentencing as outlined in *Martin*. I feel that an appropriate outcome in this case, taking into account those factors, would placing Mr. George on probation for a period of twenty-four months, starting immediately.

[42] There will be an eighteen-month driving prohibition, also starting immediately. Mr. George is prohibited from operating a motor vehicle on any street, road, highway or other public place for a period of eighteen months, commencing immediately. The Court is going to order and direct that there be an interlock eligibility delay under s. 259(2) of the *Criminal Code*, for a period of six months.

[43] The Court is going to order and direct that Mr. George pay a $500.00 victim surcharge amount within six months, which reflects the seriousness of the offence, and is in line with the amount ordered in *Fraser*. There will be the mandatory $1000.00 fine with 12 months to pay.

[44] With respect to the issue of DNA collection, I apply the judgment of Rosinski J. in *R. v. Morine* 2011 NSSC 46 and the Court orders and directs that there be a secondary-designated-offence DNA collection order in relation to case #2923547.

[45] The probation order, which starts immediately and will run for twenty-four months, will include the following conditions:

- Keep the peace and be of good behaviour;
- Appear before the Court when required;

- Notify the Court or the Probation Officer in advance of any change of name; address, employment or occupation;

- You must report to a probation officer at 115 MacLean Street, New Glasgow, Mr. George, no later than 4 pm March 2, 2016 and after that as directed.

- You are not to possess, take or consume alcohol or any other intoxicating substances.

- You are not to be in any place or business where alcohol is the primary product for sale, including liquor stores, agencies of liquor stores, taverns, lounges, bars, pool halls, beverage rooms, show bars or cabarets. The purpose of that, Mr. George, is to not place you in locations where the urge to drink might overcome your good judgement.

- You are to attend for substance abuse assessment and counselling as directed by your Probation Officer as well as any other assessment, counselling or programming directed by your probation officer.

- You must participate in and co-operate with any assessment, counselling or program directed by the probation officer according to the terms as directed by your probation officer and you must immediately report

to your probation officer any missed counselling or assessment appointments.

- You must comply immediately with any demand for urinalysis made of you by a peace officer or a probation officer in accordance with the terms of s. 732.1(3)(c.1) and (c.2) of the *Criminal Code*.

- You must comply with any voice recognition house arrest check program as directed by your probation officer and you must sign immediately all consents to release of information required by your probation officer to arrange rehabilitative services.

[46] You are to remain confined to your property starting immediately and ending after ninety (90) days. There will be exceptions to that house arrest and when travelling to and from any of the exceptions to the "house arrest" provision, you are to travel by the most direct route from your residence, no stop offs, detours or side trips.

[47] And the exceptions will be:

- When at regularly scheduled employment;

- When dealing with a medical emergency or medical appointment involving you or a member of your household but you must notify your probation officer within 24 hours of any emergency hospital visit;

- When attending a scheduled appointment with your lawyer or probation officer;

- Attending Court at a scheduled appearance or under subpoena;

- Attending a counselling appointment or a treatment program at the direction of or with the written permission of your supervisor;

- When looking after your personal needs for not more than three (3) hours per week approved in advance by your probation officer in writing as well as any other valid exception approved in writing in advance by your probation officer setting out in writing the precise times when and places where you may be outside your residence;

- Prove compliance with the "house arrest" condition by presenting yourself immediately at the entrance of you residence should a probation officer or a peace officer attend there to check and you are to carry at all times when outside your residence a copy of your sentence orders and a copy of any permission slips from your Probation Officer.

[48] The final sentence of the court will be twenty-four months of probation starting now; a $500.00 victim surcharge amount to be paid in six months; a $1000 fine to be paid in 12 months; an eighteen-month driving prohibition with a six-month interlock waiting period; a DNA secondary designated offence collection order.

Atwood JPC