PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Denny*, 2016 NSPC 25

Date: 2016-04-28
Docket: 2985044, 2914170
Registry: Pictou

Between:

Her Majesty the Queen

v.

Leroy David Denny

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	April 28, 2016 in Pictou, Nova Scotia
Charge:	Sub-section 254(5) of the *Criminal Code of Canada*
Counsel:	Jody McNeill for the Nova Scotia Public Prosecution Service Stephen Robertson for Leroy David Denny

By the Court:

[1] Leroy David Denny was behind the wheel when stopped by police on 1 August 2015 at 2305hrs and on 24 October 2015 at 0230hrs. On both occasions, the officers who stopped Mr. Denny believed that his ability to drive was impaired by alcohol and made breath demands. Mr. Denny refused both.

[2] So it is that Mr. Denny is before the Court in relation to two charges under sub-section 254(5) of the *Criminal Code of Canada*. The charges proceeded summarily, and Mr. Denny pleaded guilty to both. The prosecution seeks a conditional-sentence order of six-to-nine months, or a term of imprisonment of thirty to sixty days, along with a three-year driving prohibition. Defence counsel applies for a purely-community based sentence.

Sentencing factors--proportionality

[3] Drinking-and-driving offences—and a charge of refusal falls within that category—place public safety in jeopardy. In a recent article in the *Criminal Law Quarterly*, the authors report the following:

> Impairment-related crashes are the leading criminal cause of death in Canada, claiming almost twice as many lives per year as all categories of homicide combined. While impaired driving deaths fell sharply from the early 1980s until the late 1990s, little progress has been made in the interim. In fact, the number of impairment-related crash deaths and injuries in 2008, the latest year for which

> there are national data, are roughly comparable to the 2000 levels. Thus, despite the current sobriety checkpoint campaigns, countless awareness campaigns, various server-training programs, alternate transportation policies, progressive provincial and territorial legislation, and numerous Criminal Code amendments, impaired driving continues to be a serious problem in Canada.[1]

[4] This is not novel information, in *R. v. Bernshaw*, Cory J. observed:

> Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has far greater impact on society than any other crime. In terms of death and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the Country.[2]

[5] However, as with any offence, there are degrees of seriousness. In Mr. Denny's case, both stops occurred during times of the day when traffic volumes would have been quite light, making the risk to the public reduced substantially. Although Mr. Denny refused to provide breath samples as he was required by law to do, there is no evidence before the court Mr. Denny was disruptive or combative with police.

[6] In assessing these facts, I find that the seriousness of these offences falls at the lower end of the scale of severity.

[7] In considering Mr. Denny's degree of responsibility, I feel it necessary to look at Mr. Denny's history before the court. Mr. Denny has a significant criminal

---

[1] R. Solomon, S. Pitel, B. Tinholt & R. Wulkan, "Predicting the Impact of Random Breath Testing on the Social Costs of Crashes, Police Resources, and Driver Inconvenience in Canada" (2011), C.L.Q. 438 at 438-9.
[2] [1994] S.C.J. No. 87 at para. 16.

record, including a youth record that is admissible before the court in accordance with the provisions of s. 119 of the *Youth Criminal Justice Act*. Mr. Denny's last findings of guilt were in July of 2010 when he received, yes, a federal sentence; however, reckoning forward from the warrant-expiry date, it is clear to me Mr. Denny has gone several years being offence free; it supports strongly the proposition advanced by defence counsel that the programming that Mr. Denny took while in custody, and also counselling that he has taken since being released, have helped Mr. Denny to confront a serious problem with alcohol use. I believe that what happened in August and October when Mr. Denny got stopped were isolated aberrations from what has been otherwise a concerted effort by Mr. Denny to live substance free and to contribute to his community. This would place Mr. Denny's degree of criminal responsibility at the lower end of the range.

Sentencing factors—Aboriginal persons

[8] Mr. Denny, as is noted in the presentence report, is an aboriginal person of Mi'kmaq decent, and is a member of the Pictou Landing First Nation. He understands the Mi'kmaq, although cannot speak it fluently. Members of the Pictou Landing First Nation feel that Mr. Denny has been doing better over the years. Mr. Denny attended the Eagles' Nest Rehabilitation Program and attended a similar program in the Eskasoni First Nation in Cape Breton. Mr. Denny attended

sweats during his time in Springhill Institution, so that Mr. Denny has been focused on his personal wellness for over half a decade now. Mr. Denny participates in First-Nations' cultural activities and events such as the yearly Pow-wow. He has done a significant amount of work for his Band and is expected to resume shortly employment as a fisher.

[9] The report of the Truth and Reconciliation Commission which was released last year described in poignant detail the inauguration of a national policy, almost from the time of Confederation, that was intended to rob First-Nations' communities of their familial, cultural, political, social, economic and linguistic integrity.[3]

[10] Members of First-Nations' communities were robbed of their languages, lands, economic vitality—and of their children. First-Nations' communities were reduced to economic and social poverty. First-Nations' communities were denied social, economic, educational and legal support, programmes to which the dominant culture assumed entitlement. This culture of oppression is evident fully in the history of the Pictou Landing First Nation.

---

[3] Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: The Commission, 2015) at 1-6.

[11] What happens when a cultured and civil people are denied, through official structures of oppression, the rights to health, education, livelihood, language, choice and, ultimately, human freedom, and also denied the right to seek formal redress from those injustices? How might a community cope when there are no means of coping effectively or positively with officially imposed discrimination? The evidence is in the dysfunction which has afflicted many First-Nations' communities; it takes time to recover.

[12] There is no one person or one entity that bears the entire blame for the grave wrongs suffered by First-Nations' communities over the past century and a half—indeed, the injustices predated Canadian Confederation—in any event, no one entity or organization bears sole blame; suffice it to say that the justice system is implicated heavily in that history, and that was certainly borne out twenty-five years ago in the proceedings of the Royal Commission on the Donald Marshall Jr. Prosecution.[4]

[13] I must state at once that the court must avoid any air of triumphalism here. The court did not "discover" the history of injustice inflicted upon First-Nations' peoples in Canada; nor was the injustice invisible. Rather, courts were wilfully

---

[4] Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, *Commissioners' Report: Findings and Recommendations 1989*, vol. 1 (Halifax: The Commission, 1989).

blind to it, although the systemic discrimination against aboriginal persons involved in the criminal justice system was plain for all to see.[5] Suffice it to say that courts, judges, lawyers and the criminal-justice system were implicated fully in it.

[14] In many respects, Mr. Denny's personal history reflects the fallout from that historical injustice and the court must take that into account in imposing a sentence here today. Yes, it is mandatory in virtue of *R. v. Gladue*,[6] and also *R. v. Ipeelee*[7]; but it is also imperative morally and normatively that I consider this.

[15] The court is certainly aware of the fact that, as offences become more prevalent and serious, the sentences imposed upon members of the First Nations communities will come to approximate more closely the sentences imposed ordinarily upon non-aboriginal offenders; however, in my view, the period of time that Mr. Denny has gone offence free signifies to the court the considerable success that Mr. Denny has attained through his own efforts in working co-operatively with his community and with those who have provided him with counselling and support over the years.

---

[5] *See* Scott Clark & Tammy Landay, "Aboriginal Justice Policy in Canada" in Karim Ismaili, Jane B. Sprott & Kim Varma, eds., Canadian Criminal Justice Policy (Don Mills: Oxford University Press Canada, 2012) at 135-159.
[6] 1999 1 S.C.R. 688.

[7] 2012 1 S.C.R. 433

Other mitigating factors

[16] I do not believe that a lengthy period of incarceration would be warranted in this case. Yes, Mr. Denny has a significant record; nonetheless, the court must be mindful of the gap principle that was restated authoritatively by the Nova Scotia Court of Appeal in *R. v. Boudreau*, which informs me that a prior record recedes in significance as it recedes in time.[8] The rationale behind the principle is clear: the greater the gap in time between offences, the stronger the circumstantial evidence that the person to be sentenced was rehabilitated effectively by the earlier sentence and can be trusted as being committed to pro-social values.

[17] The presentence report is extremely positive. Mr. Denny has a concrete employment plan. Further, he has been able to maintain sobriety for many years and there is no doubt in my mind that he will be able to do so in the years to come.

[18] There is a minimum penalty that is applicable in relation to both of the charges before the court. Sub-para. 255(1)(a)(i) of the *Code* states that for a first offence, there is a minimum fine to be imposed of not less than $1,000.00.

[19] As was decided by the Newfoundland and Labrador Court of Appeal in *R. v. Hatcher*, a period of imprisonment, however brief, would fulfil the requirements of

---

[8] 2011 NSCA 53; leave to S.C.C. refused, [2011] S.C.C.A. No. 381.

a mandatory-minimum fine.[9] Although that decision is not binding on this court, the logic and legal merit of it is compelling, and I intend to follow it.

[20] What the court intends to do here is impose one day of imprisonment served by Mr. Denny's appearance in court in relation to each of the counts before the court, to be served concurrently to each other.

[21] I recognize that these offences occurred on separate dates; however, in my view, they arise out of connected circumstances and particularly arise out of a brief period of time during which Mr. Denny, due to personal circumstances which include the oppressive circumstances of his First-Nations' history, experienced a lapse in his success in dealing with an alcohol-use disorder; therefore, I find that concurrency is appropriate.

[22] So it will be one day time served concurrently in relation to each of the counts before the court. In my view, that fulfills the mandatory punishment requirement.

[23] The court is going to impose $10.00 fines in relation to each of the counts before the court, along with the mandatory minimum $3.00 victim surcharge amounts and Mr. Denny will have one year to pay those combined amounts.

---

[9] 2000 NFCA 38.

[24] As these are Mr. Denny's first convictions for offences punishable under s. 255, the period of prohibition that would be applicable is described in para. 259(1)(a) of the *Code*: for a first offence, for a period of not more than three years plus any period to which the offender is sentenced to imprisonment and not less than one year. The Court imposes, in relation to each of the charges, a one-year period of prohibition.

[25] The court will not extend the waiting period for Mr. Denny's eligibility for the interlock program and given the fact that the court has imposed a period of imprisonment as well as fines, it would not be permissible for the court to impose a period of probation, given the provisions of para. 731(1)(b) of the *Code*; therefore I decline to do so.

[26] I am grateful to counsel for the thorough sentencing submissions made in this case.

Atwood, JPC