PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Dubois, 2011 NSPC 69

Date: 20110812
Docket: Case No(s) 1868881; 1868885; 1868886; 1868887; 2101445
Registry: Antigonish

Between:

Her Majesty the Queen

v.

Gary Edward Dubois

SENTENCING DECISION

Judge:	The Honourable Judge Del Atwood
Heard:	August 12, 2011, Antigonish, Nova Scotia
Charge:	Section 253(b) CC; Section 259(4) CC; Section 139(2) CC; Section 255(2) CC; Section 145(2)(b)
Counsel:	Allen Murray, Esq., for the Crown Gerald MacDonald, Q.C., for the Defence

By the Court: (Orally)

[1] Thank you, counsel. The Court has for sentencing hearing today Gary Edward Dubois. Mr. Dubois elected provincial court and entered guilty pleas in relation to five ***Criminal Code*** charges: a charge of drive-over-.08 contrary to para. 253(1)(b), drive while disqualified contrary to sub-s. 259(4), obstruction of justice contrary to sub-section 139(2), impaired operation causing bodily harm contrary to sub-s. 255(2), and fail to appear contrary to para. 145(2)(b). He has also pleaded guilty to a drive-without-insurance SOT.

[2] The facts in relation to the para. 253(1)(b) and 129 matter are linked. Mr. Dubois was stopped by police back in 2003, charged with over .08, but gave the police the name of his then-deceased brother, Lewis, along with Lewis' licence. Process was issued and an information was laid by police in the name of Lewis Dubois. Gary Dubois then attorned fraudulently to the jurisdiction of the Court, again, using the name of his deceased sibling; he pleaded guilty and a penalty was imposed by the Court. By giving someone else's name, Mr. Gary Dubois was never in jeopardy.

[3] Eventually, Mr. Dubois' fraud on the Court was discovered; Mr. Dubois was charged in his own name, and he has now entered a proper guilty plea to that 2003 charge, as well as a guilty plea to an obstruction charge. It is noteworthy that Mr. Dubois did not come forward voluntarily and admit to that obstruction of justice. It was detected several years later as a result of Mr. Dubois being involved in a motor vehicle accident, operating a motor vehicle while impaired and causing bodily harm to an innocent motorist on the 30th of January of 2008. Police uncovered the truth of the 2003 matter while investigating the 2008 offence. The re-investigation led police to the additional discovery that, at the time of the 2003 offence, Mr. Dubois was a prohibited driver.

[4] The facts in relation to that 2008case are chilling ; the reading that the Court will take as the blood-alcohol concentration at the last time of driving based on the retrograde extrapolation–251 milligrams percent–would be over triple the prohibited blood alcohol concentration of 80 milligrams percent, well above the aggravated range prescribed by s. 255.1 of the ***Criminal Code***.

[5] Mr. Dubois was uninsured at the time of the 2008 offence, and there was a Summary Offence Ticket that was laid as a result of that.

[6] Mr. Dubois then dropped off the radar and was AWOL for a considerable period of time, brought before the Court a few days ago, not attorning voluntarily, but having been sentenced to a custodial term in the Province of Ontario and transported here on a s. 527 prisoner-get-out order. That gave rise to the para. 145(2)(b) charge.

[7] I have reviewed in detail the sentencing submissions of counsel including the sentencing submissions put before the Court by defence counsel. I have reviewed that material in detail, specifically, ***R. v. Riley*** (1996), 148 N.S.R. (2d) 346 (C.A.).

[8] In my view, the facts of this case are certainly serious and fall within the scope of ***R. v. MacEachern*** (1990), 96 N.S.R. (2d) 68 – another decision of the Court of Appeal, referred to by Chipman J.A. in ***Riley***, *supra*, para. 20. ***MacEachern*** is a well-known, widely cited decision of our Court of Appeal. ***MacEachern*** dealt with facts that, admittedly, are more serious than Mr. Dubois' 255(2), in that ***MacEachern*** involved a fatality. I recall those facts very well. The ***MacEachern*** case occurred on Natal Day 1988 in Halifax. Mr. MacEachern was driving down Robie Street, somewhat in excess of the posted speed limit, as I recall it. There was a young boy

who was crossing Robie Street, in a marked crosswalk. There was signage in the area alerting motorist to the fact that there would be a higher-than-normal level of pedestrian traffic. This was Natal Day. It was right after the fireworks and spectators were leaving Citadel Hill. Mr. MacEachern ran down the young pedestrian who died a short time later.

[9] As I recall, the ***MacEachern*** case, the measured BAC was in the range of 100 to 110 milligrams percent, far lower than the blood alcohol concentration measured in Mr. Dubois' 2008 case.

[10] The Court would observe, as well, that although Mr. MacEachern had a previous record that involved a period of federal custody, those federal terms involved break-and-enter charges. Mr. MacEachern had only one prior conviction for an impaired offence as of the date of his fatality, compared to Mr. Dubois' prior record, which discloses sentencing outcomes for drive over .08 in July 1996; drive over .08, July 2000; refusal, August 2000; driving while disqualified, January 2002; and operation while impaired in January 2002.

[11] In imposing sentence, I apply ***R v. Bernard***, 2011 NSCA 53; I take into account the offence-free gap between December 2003 (when Mr. Dubois was picked up for the para. 253(b) and falsely impersonated his brother) and January 2008 (when Mr. Dubois was arrested for impaired causing); however, I believe that any benefit of the gap principle must be attenuated somewhat, given that, between 2003 and 2008, Mr. Dubois continuously enjoyed the benefit of the fraud he worked on the court by using his dead brother's name.

[12] In ***MacEachern , supra,*** the Appeal Division referred favourably to ***R. v. McVeigh*** (1985), 11 O.A.C. 345; 22 CCC (3d) 145 (C.A.). In the ***McVeigh*** decision, the Ontario Court of Appeal stated that sentencing courts should not wait until death or injury has occurred on the highway before taking steps to deter strongly those motorists who are prepared to get behind the wheels of motor vehicles and drive while impaired. The need for denunciation and deterrence is compounded in this case because of the aggravating circumstances arising in relation to Mr. Dubois' impaired-causing and drive-over-.08 offences, in the latter case impersonating somebody else, and indeed going to Court and holding himself out to be someone whom he wasn't; in the former, driving while impaired and causing an accident which seriously injured an innocent motorist.

[13] There is no joint submission before the Court within the context of ***R. v. Knockwood***, 2009 NSCA 98. In my view, the 18-month jail term that has been put before the Court by the Crown does not accomplish the objectives of denunciation and deterrence that I believe are called for in this case.

[14] I do take into account, and I have read in detail, Mr. Dubois' narrative regarding his personal life; however charitable Mr. Dubois might have been in caring for his gravely ill brother Lewis, this charity did not stop Mr. Dubois, after his brother's death, from falsely representing himself as his brother, both to the police and to the Court.

[15] Mr. Dubois' blood alcohol concentration in relation to the impaired-causing offence was at the extremely high range, indicative of a high degree of danger, and in my view a significant degree of denunciation and deterrence is required in relation to that matter, and the Court would certainly have considered a significant penalty, even without the filing of a section 727 notice.

[16] Based on the summary of facts that I have heard, the Court is of the view that the Crown's case would have been very strong in relation to these matters had they gone to trial, and although I do give credit to Mr. Dubois for his guilty pleas, in my view, that mitigating factor is attenuated somewhat by the significant strength of the evidence that has been presented to the Court, and the delay in getting Mr. Dubois to come to court.

[17] In relation to sub-s. 719(3) credit for remand time, in my view, applying the principles that were set out recently by our Court of Appeal in ***R. v. LeBlanc***, 2011 NSCA 60 at para. 22, given the fact that Mr. Dubois has been serving a jail sentence imposed in Ontario for much of the time his has been on remand in relation to the charges before the court today, it is not appropriate to grant credit for remand time.

[18] Accordingly, the sentence of the Court will be as follows. In accordance with the decision of our Court of Appeal in ***R. v. Naugle***, 2011 NSCA 33, dealing with the application of the principle of totality, what I intend to do is give an initial tally of what the Court would have imposed in relation to each charge independently. I then

intend to revise that tally, taking into account the principle of totality. Accordingly, the initial tally that I give will not be the sentence of the Court.

[19] In relation to the indictable offence 253(b) case no. 1868885, which was prosecuted indictably, the preliminary, pre-totality sentence is a sentence of 9-months' incarceration.

[20] In relation to case 1868886 which is the indictable case of 259(4), drive while prohibited, in my view, there is a need there for consecutive sentencing given the fact that there is a distinctive element of violating a Court order - a one-month term of incarceration, to be served consecutively, would be the preliminary, pre-totality sentence.

[21] In relation to the indictable charge of perverting of the course of justice, a case that carries a maximum term of imprisonment of 10 years incarceration, sub-s. 139(2), case 1868887, the pre-totality sentence is a 12-month jail term, served consecutively.

[22] In relation to the indictable case involving impaired driving of a motor vehicle causing injury, sub-s. 255(2), case 1868881, the pre-totality sentence is a 12-month jail term, served consecutively.

[23] And finally, in relation to the charge of failing to attend Court, para. 145(2)(b), the pre-totality sentence is 3 months in jail, served consecutively.

[24] Taking into account the principle of totality, the Court will revise downward its preliminary tally, and this will be the final sentence of the Court. In relation to the 253(b) count, case no. 1868885, an indictable matter, the Court imposes a sentence of 6-months' incarceration.

[25] In relation to the case 1868886, drive while prohibited, one month consecutive.

[26] In relation to case no. 1868887, the justice related charge, which was prosecuted indictably, the Court will impose a sentence of 9 months consecutive.

[27] In relation to case no. 1868881, the impaired causing injury, which carries a maximum sentence of 10 years incarceration, the Court will impose a sentence of 9 months consecutive.

[28] In relation to case no. 2101445 which was the summary matter of 145, the Court imposes a sentence of 2 months consecutive, for a total sentence of 27 months incarceration. Given that this would involve the imposition of a federal term of incarceration, a period of probation cannot be ordered.

[29] In relation to case no. 1868885, which is the charge of drive over .08, the Court would impose a period of driver prohibition – the Court is imposing a period of driver prohibition of 10 years commencing on today's date and expiring 10 years after the expiration of the sentence of imprisonment.

[30] In relation to S. 259(4) matter, the Court would note that, at the time of the commission of that offence, the imposition of a driving prohibition order in relation to a s. 259 charge was within the discretion of the court; the Court declines to impose a period of driver prohibition for that charge.

[31] And finally, in relation to case no. 1868881, the charge of impaired operation causing bodily harm, the Court will impose a period of driver prohibition of 10 years. That will be 10 years commencing today's date and expiring 10 years after the expiration of the period of imprisonment. Given that the consecutive-prohibition-order provisions of 259(2.1) were not in effect at the time of the commission of either offences, both terms of driver prohibition will be served concurrently.

[32] As indicated, given the nature of the sentence that has been imposed by the Court, a period of probation cannot be imposed. I am satisfied, given the totality of the sentence that has been imposed by the Court, the that the imposition of Victim Surcharge amounts would work an undue hardship, and therefore, the Court declines to impose Victim Surcharge amounts.

[33] In relation to Summary Offence Ticket - 3992209, the Court imposes a fine of $1,257.00 payable forthwith. If the default time is to be served, then that will be served concurrently to any time – to the time being served by Mr. Dubois.

[34] Anything further in relation to Mr. Dubois either Mr. MacDonald, or Mr. Murray.

[35] **MR. MURRAY**: No, Your Honour.

[36] **MR. MACDONALD**: No. Your Honour.

[37] **THE COURT**: Mr. Dubois, I'll have you accompany the Sheriffs please, sir. And I believe that's everything for today so we can close Court.

J.