

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Fogarty, 2013 NSSC 298

Date: 20130925

Docket: Ant. No. 390826

Registry: Antigonish

Between:

Her Majesty the Queen

v.

William Lionel Edmund Fogarty

Defendant

Judge:

The Honourable Justice N. M. Scaravelli.

Sentencing Date:

September 25, 2013

Counsel:

Allen Murray and Darlene Oko, for the Crown
Luke Craggs, for the Defendant

By the Court:

[1] Mr. Fogarty appears for sentence following his eight day trial and conviction on two counts each of impaired driving by drug causing death pursuant to **Section 255 (3) of the *Criminal Code*** and dangerous driving causing death contrary to **Section 249 (4) of the *Code***.

CIRCUMSTANCES OF THE OFFENCE

[2] On November 24, 2011 shortly after 3 pm, Mr. Fogarty was involved in a motor vehicle collision with an on coming vehicle on Highway 4 near Tracadie, Nova Scotia resulting in the tragic death of the two young occupants, Nicholas Landry and Kory Mattie. Prior to the collision two motorists , operating their vehicles in different directions on Highway 104 Antigonish County, reported observing Mr. Fogarty's vehicle being operated in an erratic manner.

[3] Colin Delorey was travelling east on the two lane highway near Lower South River, Nova Scotia. Sometime after 2 pm he observed a white Crown Victoria vehicle behind other vehicles in his rear view mirror. The white vehicle

was swaying back and forth both over the yellow centre line and the white shoulder line of the highway. The vehicle passed other vehicles behind Mr. Delorey in an area of a double solid no passing lane. Mr. Delorey continued to observe the white vehicle in his mirror. It appeared to drive at a normal rate of speed then to both speed up and slow down. The white vehicle passed Mr. Delorey near Heatherton in a passing lane at a normal rate of speed after which it continued to speed up and slow down. The speed limit in that area was 100 km/h. At one point Mr. Delorey accelerated to 120 km/h in order to catch the vehicle and record the license plate number. He then called the RCMP to report the erratic driving assuming the driver was either tired or impaired. While travelling behind the white vehicle Mr. Delorey observed the vehicle signal a right hand turn into the Monastery / Tracadie exit no. 37 leading to Highway 4. As this was Mr. Delorey's exit, he followed the vehicle onto the exit lane when the white vehicle moved "abruptly" back onto Highway 104 and continued in an easterly direction.

[4] Later, the second motorist, Brenda Weir was travelling west on Highway 104, having left Sydney earlier in the day travelling to her home in Shubenacadie. She came upon a white Crown Victoria also heading west. The vehicle was being operated in an erratic manner which she described as being "all over the road."

The white vehicle was swaying over the centre line and back over the white shoulder line, causing vehicles approaching in the opposite direction to pull over to the shoulder. The white vehicle would repeatedly speed up to 120 km/h and slow down to 90 km/h. Ms. Weir believed the operator of the vehicle was impaired. She obtained the plate number and dialled 911 as the white vehicle was taking the Monastery / Tracadie Exit 37 to Highway 4. She followed the vehicle while providing location information to 911. Ms. Weir observed the white vehicle stopped at two different locations on Highway 4 before she continued on towards Antigonish.

[5] Just prior to the collision, a Ford Mustang, operated by Nicholas Landry, was travelling east bound on Highway 4 in its proper lane along a slight curve to the right. The Crown Victoria, operated by Mr. Fogarty, was travelling west bound but in the Ford Mustang's lane of the highway. The Ford Mustang took evasive action by heavy braking in its own lane moving left to avoid a collision while Mr. Fogarty, without braking, veered back onto its proper lane colliding with the Ford Mustang. The two vehicles collided at such an angle and with enough impact the Crown Victoria spun around 180 degrees so it was facing east when it landed. The Ford Mustang moved to its left and landed in a shallow ditch

adjacent to the Crown Victoria. The damage to the vehicles was significant. In his police statement Mr. Fogarty estimated his speed at between 80 to 100 kmph in the 70 km speed zone.

[6] Tragically, both occupants of the Ford Mustang died shortly after impact. Nicholas Landry was declared dead at the scene and Kory Mattie succumbed to his injuries at the hospital a few hours later.

[7] Following the impact Mr. Fogarty remained at the scene and called 911. Other motorists arrived to assist Mr. Fogarty and the two young men. Mr. Fogarty expressed no empathy for the occupants of the other vehicle and did not attempt to render assistance. Third party witnesses and RCMP attending the scene observed Mr. Fogarty and reported symptoms of impairment including erratic speech, glassy and unfocused eyes, as well as an agitated demeanor inconsistent with the situation before him. There was no odour of alcohol.

[8] Members of the RCMP responded and interacted with Mr. Fogarty and third party witnesses. Based on observations and information obtained at the scene together with the particulars of erratic driving reported by the other motorists, Mr.

Fogarty was arrested and given a demand that he submit to a drug recognition evaluation. The evaluation was conducted at St. Martha's Hospital, Antigonish, after Mr. Fogarty was examined and treated and following his private conversation with legal counsel.

[9] The drug recognition evaluator determined he had reasonable grounds to demand a blood sample concluding that Mr. Fogarty's ability to operate a motor vehicle was impaired by a drug, namely a central nervous system depressant. With Mr. Fogarty's consent blood samples were taken and forwarded for analysis.

[10] Ms. Campbell, forensic toxicologist, confirmed the presence of drugs in Mr. Fogarty's blood. The purpose of the forensic analysis was to analyse the blood for impaired drugs including central nervous system depressants. The sample was subjected to a qualitative analysis only and not quantification of any confirmed drugs. Present in Mr. Fogarty's blood was Diazepam (known as Valium) together with Nordiazepam, Temazepam and Oxazepam which are active metabolites of Valium. Also present was Mirtazapine. These drugs are central nervous system depressants and have pronounced side effects when taken in combination.

Methadone was also present in Mr. Fogarty's blood stream. Methadone is a potent

narcotic analgesic used as a Morphine substitute for addicts, such as Mr. Fogarty, enrolled in a Methadone maintenance program. The presence of other central nervous system impairing drugs in combination with Methadone is capable of producing significant degrees of impairment.

[11] Mr. Fogarty disclosed extensive knowledge of drug use and their side effects. His daily dosage of Methadone at the time was 170 mgs, which he stated to be a high dose. In addition to prescribed drugs as part of his Methadone treatment program Mr. Fogarty, was also using non prescribed Valium. At the time of his arrest he had a vile of urine in his possession. The purpose was to produce the urine when being tested by his doctor as he was not to consume Valium while under treatment.

CIRCUMSTANCES OF THE OFFENDER

[12] A pre-sentence report has been prepared at the request of the court. Mr. Fogarty is presently 32 years of age. He is single, resides in Antigonish and is unemployed. He is fully certified as a machinist and welder. Although he grew up in a stable family environment, he has had issues with illicit drugs since age 16

which escalated over the years to where he was using hard drugs such as Cocaine, Heroin, and Methamphetamine on a regular basis. He self admitted for drug abuse treatment and has been involved in the Methadone program since 2006. He admits to the occasional use of Valium.

[13] The pre-sentence report indicates Mr. Fogarty would not comment on the offences but experienced sadness that the two lives were lost. The RCMP report that Mr. Fogarty, although co-operative with police, is known to police for motor vehicle offences and drug use.

[14] Mr. Fogarty has a criminal record. In 2007 he was convicted of two charges of theft under \$5,000; failure to appear and failure to comply with conditions; as well as a further charge of theft under \$5,000. In 2009 he was convicted of theft under \$5,000 and was also convicted of assault. The RCMP and Mr. Fogarty report there are outstanding warrants for his arrest in Ontario.

VICTIM IMPACT

[15] The court received a C.D. attached to a blank signed Victim Impact Statement submitted on behalf of Kory Mattie's family. The C.D. depicts photographs of Kory Mattie throughout the years and brings to mind the well known expression that a picture is worth a thousand words. The court also reviewed Victim Impact Statements from family members of Nicholas Landry expressing their grief, sense of loss and how it has affected them. There are few words that could describe the pain and suffering experienced by each of these family members as a result of the loss of Kory Mattie and Nicholas Landry.

PURPOSE AND PRINCIPLES OF SENTENCING

[16] In determining the appropriate sentence I must consider the purpose and principles of sentencing as set out in **Sections 718 to 718.2 of the *Criminal Code***. The courts have consistently confirmed that the principles of deterrence and denunciation are of prime importance in cases of this nature, in particular impaired driving resulting in serious injury or death. The sentence must also be proportionate to the gravity of the offence and the degree of the responsibility of the offender. Aggravating and mitigating circumstances are to be considered by the court. I am also required to consider the rehabilitation of the offender. A

sentence should be in a range imposed on similar offenders in similar circumstances.

POSITION OF THE PARTIES

[17] The Crown submits that a global sentence of eight years in custody is appropriate in the circumstances of this case. The Crown further seeks a lifetime driving prohibition pursuant to **Section 259 of the Code**, as well as a DNA Order pursuant to **Section 487.051**.

[18] Counsel for Mr. Fogarty submits a global sentence of five years imprisonment, less remand, on the basis of 1.5 to 1 as an appropriate sentence. The submission for driving prohibition is seven years. There is no contest regarding the DNA Order as the offences for which Mr. Fogarty was convicted are designated offences under **Section 487.04**.

MAXIMUM SENTENCES

[19] The maximum sentence for impaired driving by drug causing death is life imprisonment. The maximum sentence for dangerous driving causing death is fourteen years imprisonment.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

[20] Aggravating factors:

1. Mr. Fogarty has a criminal record.
2. His manner of erratic and dangerous driving, including driving on the wrong side of the road, created a significant risk of injury or death to motorists and to himself.
3. Mr. Fogarty has a history of drug abuse. Despite being under treatment for six years and supported by his family, his prospects for rehabilitation are of concern. He has extensive knowledge of consumption of drugs and their side effects. He was aware that he was not to consume Valium while under Methadone treatment, to the extent he carried in his possession a vile of urine for the purpose of deceiving his drugs tests.
4. The combination of drugs found in Mr. Fogarty's system, their impairing side effects when taken together, his dangerous manner of driving, and his physical and visible signs of impairment following

the collision demonstrated his impairment to be significant at the time.

[21] Mitigating factors:

1. At thirty two years of age Mr. Fogarty is relatively youthful and possesses trade skills.
2. Mr. Fogarty called 911 immediately following the accident. He co-operated with police and assisted in providing a blood sample. This is somewhat tempered, in his statements to police where he lied in his first statement and was not forthcoming about his involvement in the offence. He continues to maintain that his conduct was not criminal.

RANGE OF SENTENCES

[22] Counsel have provided the court with a number of cases for review. The *Criminal Code* makes no distinction between impaired driving by drug or impaired driving by alcohol.

[23] In *R. vs. Morine [2011] N.S.J. 621, Rosinki, J.* sentenced an offender who pled guilty to four offences including impaired driving causing death to a term of six years imprisonment, reduced to five years factoring in totality. There was a

15 year driving prohibition. In that case the offender, operating his motor vehicle while intoxicated, lost control of the vehicle causing it to cross a guardrail, over an embankment and into a river, resulting in the death of a passenger. He fled the scene and ultimately refused the breathalyser and assaulted a police officer. The offender did not have a criminal record.

[24] In *R. vs. Morash [2011] N.S.J. 335* the offender was sentenced to six years imprisonment for one count of impaired driving causing death and two counts of impaired driving causing bodily harm, arising from an instance where his vehicle collided with an oncoming vehicle. The offender was described as being all over the road prior to the collision. The offender pled guilty and had prior convictions for impaired driving. There was a 15 year driving prohibition.

[25] In *R. vs. Cooper [2007] N.S.J. 179* the offender pled guilty to two counts of impaired driving causing death. Having consumed alcohol, and become highly intoxicated, the offender operated a motor vehicle crossing the centre line and colliding with an oncoming vehicle. The two young occupants of the other vehicle, age nineteen and twenty, were killed in the collision. The offender had

one dated impaired driving conviction. The court imposed a sentence of seven years imprisonment. There was a prohibition from driving a motor vehicle for life.

[26] In *R. vs. Shand [1997] N.S.J. 63* the *Nova Scotia Court of Appeal* upheld a sentence of eight years for impaired driving causing death and three counts of impaired driving causing bodily harm. The offender entered a plea of guilty. The offender was a repeat offender and a poor prospect for rehabilitation. He had not taken advantage of previous opportunities to deal with long standing substance abuse problems.

[27] In *R. vs. Junkert [2010] O.J. 3387* the *Ontario Court of Appeal* upheld a sentence of five years for impaired driving causing death and dangerous driving causing death. The offender was significantly impaired and was a first offender.

[28] In *R. vs. Hall [2007] O.J. 49* the *Ontario Court of Appeal* upheld a sentence of four years, ten months, impaired driving causing death and dangerous driving causing death. The driving prohibition was ten years. The offender struck a pedestrian walking on the street.

[29] In *R. vs. Cantelo [2013] PEI.J. 2* the offender was sentenced to five years imprisonment for impaired driving causing death, and impaired driving causing bodily harm, and leaving the scene of an accident. The offender, impaired by alcohol, ran a stop sign and collided with a motorcycle. The offender had no prior convictions.

[30] In *R. vs. Hughes [2012] O.J. 5137* the offender was sentenced to four years imprisonment for two counts of impaired driving causing death. The offender, impaired by alcohol, lost control of his vehicle striking a telephone pole, killing two passengers. He fled the scene. The offender entered a plea of guilty and had no prior criminal or driving record. There was a ten year driving prohibition.

[31] There is no sentence this court can impose that can compensate for the death of Nicholas Landry and Kory Mattie and I know the families will feel this way. A sentence must reflect the principles of sentencing set out in the *Criminal Code*. General deterrence and denunciation are of paramount concern for offences of this kind. Mr. Fogarty will have to live with the consequences of his actions regardless of the sentence imposed.

[32] Mr. Fogarty, on November 24, 2011, you were a motorist's worst nightmare. You operated your vehicle on public highways with complete disregard for the safety of other motorists. Your ability to operate a vehicle was significantly impaired by a combination of drugs that you knew, or ought to have known, would cause you to become high and, therefore, impaired. The head on collision was not an unfortunate accident. It was the commission of a criminal offence. Your sentence must send a message to the public that impaired drivers who seriously injure or kill people will be treated as serious offenders.

[33] It is my view that the appropriate sentence in this case is a total sentence of six years imprisonment as follows:

For the offence of impaired driving causing the death of Nicholas Landry, contrary to **Section 255 (3) of the Code**, I sentence you to a period of six years imprisonment;

For the offence of impaired driving causing the death of Kory Mattie, six years concurrent;

For dangerous driving causing the death of Nicholas Landry, contrary to **Section 249 (4) of the Code**, three years concurrent;

For dangerous driving causing the death of Kory Mattie, three years concurrent;

[34] I hope that your period of incarceration will allow you to successfully deal with your drug rehabilitation and enable you to lead a productive life.

REMAND CREDIT

[35] I must consider a request for remand credit on the basis one and one half to one credit for time spent in pre-sentence custody. Prior to the introduction of *Bill C-25 Truth and Sentencing Act Amendments*, two for one credit for time spent in pre-sentence custody was the norm. The amendment to **Section 717 (3) of the Code** limits a sentencing Judge's discretion to award pre-trial and pre-sentence custody to a maximum of one day for each day spent in custody, with a provision for enhanced credit to a maximum of one and one half days "if the circumstances justify it".

[36] The approach to be taken to **Section 719 (3.1)** has been dealt with recently by the *Nova Scotia Court of Appeal in R. vs. Carvery [2012] N.S.C.A. 107* and the *Ontario Court of Appeal in R. vs. Summers [2013] ON.C.A. 147*, where the

courts have concluded that exceptional circumstances are not required under **Section 719 (3.1)**. Relevant circumstances in determining whether the enhanced credit should apply include, lack of remission and parole eligibility, whether there was misconduct on the part of the offender in delaying proceedings to extend remand time or refusal to participate in programs.

[37] The information before the court is that Mr. Fogarty was arrested on November 24, 2011. He was denied bail by the Provincial Court. A bail review hearing was conducted in Supreme Court on April 25, 2013. Mr. Fogarty was released on conditions including house arrest. His remand period was 154 days. Mr. Fogarty remained at large on house arrest until July, 2013 when his bail was revoked following conviction. His remand period, following conviction, to date is 77 days, for a total of 231 days remand credit.

[38] Potential loss for Mr. Fogarty of earned and statutory remission and parole is a relevant consideration. Moreover, I am satisfied Mr. Fogarty did not attempt to extend remand time to take advantage of the system and there is no evidence of any other misconduct on his part. Under these circumstances I exercise my

discretion and award him, enhanced credit of one and one half days for each day spent in pre-sentence custody.

[39] I have sentenced Mr. Fogarty to a total of six years imprisonment. He has served 231 days in custody. With enhanced credit Mr. Fogarty is credited with 346 days served. The balance he will serve is 1,844 days or five years and 19 days.

[40] I will also grant a DNA Order. In addition Mr. Fogarty is prohibited from operating a motor vehicle for a period of ten years.

[41] I am recommending to the Federal Institution, where Mr. Fogarty will be imprisoned, that steps be taken to continue with his drug rehabilitation and counselling at the earliest opportunity.

