PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. MacInnis, 2011 NSPC 94

Date: 20111129
Docket: 2332498
Registry: Pictou

Between:

Her Majesty the Queen

v.

Norman Alexander MacInnis

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	29 November 2011, Pictou, Nova Scotia
Charge:	Para. 253(1)(b) of the *Criminal Code*
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Hector MacIsaac for Norman Alexander MacInnis

By the Court:

[1] Thank you, counsel, for your submissions. The court has for sentencing Norman Alexander MacInnis. Mr. Mr. MacInnis pleaded guilty to a single count of para. 253(1)(b) of the *Criminal Code of Canada*. The statutory penalty for a summary-process drive-over-.08 offence is set out in paras. 255(1)(a) and (c) of the *Code*.

> 255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
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> (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
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> (i) for a first offence, to a fine of not less than $1,000,
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> (ii) for a second offence, to imprisonment for not less than 30 days, and
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> (iii) for each subsequent offence, to imprisonment for not less than 120 days;
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> . . .
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> (c) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.

An offender is subject to the increased-penalty provisions of sub-paras. 255(1)(a)(ii)-(iii) only if the prosecutor should satisfy the court that the offender was notified, prior to plea, of the prosecution's intention to seek a greater penalty. This is a statutory requirement set out in sub-s. 727(1) of the *Code*. In this case, the prosecution has not presented to the Court any evidence of service of a para. 727(1) notice.

[2] Section 255.1 of the *Code* states:

> 255.1 Without limiting the generality of section 718.2, where a court imposes a sentence for an offence committed under this Act by means of a motor vehicle, vessel or aircraft or of railway equipment, evidence that the concentration of alcohol in the blood of the offender at the time when the offence was committed exceeded one hundred and sixty milligrams of alcohol in one hundred millilitres of blood shall be deemed to be aggravating circumstances relating to the offence that the court shall consider under paragraph 718.2(a).

[3] That section is in play here, as the evidence read into the record by the prosecution pursuant to ss. 723 and 724 of the *Code* satisfies the Court at Mr. MacInnis' blood-alcohol concentration at the last time of operation was 329 milligrams of alcohol in 100 millilitres of blood.

[4] The offender has one prior conviction for a drive-over-.08 offence back in 1994, a record quite remote in time. Accordingly, this Court applies the gap principle as re-enunciated recently in *R. v. Bernard.*[1] The Court takes into account Mr. MacInnis' criminal record; however, given the application of the gap principle, the existence of a related record does not carry the same aggravating-factor weight as a recent-and-related record.

[5] Nevertheless, this record convinces the Court that Mr. MacInnis was not deterred sufficiently by his 1994 sentence as to never drink and drive again. For most people charged

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[1]2011 NSCA 53 at paras. 33-42, 303 N.S.R. (2d) 384, 13 M.V.R. (6th) 75.

with these types of offences, one encounter with the criminal-justice system is enough. Indeed, once should be enough. This is because evidence of the ongoing damage inflicted on society by alcohol- and drug-impaired drivers is well documented, has been widely publicized, and ought to have a sobering effect on the consciences of those who might be prepared to take their chances and drive while drunk. In a recent article in the Criminal Law Quarterly, the authors report the folllowing:

> 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.[2]

[6] 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.[3]

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[2]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.

[3][1994] S.C.J. No. 87 at para. 16, [1994] A.C.S. no 87, [1995] 1 S.C.R. 254, [1995] 1 R.C.S. 254, 176 N.R. 81, [1995] 3 W.W.R. 457, 53 B.C.A.C. 1, 95 C.C.C. (3d) 193, 35 C.R. (4th) 201, 26 C.R.R. (2d) 132, 8 M.V.R. (3d) 75.

[7] Thankfully, no one was injured or killed when Mr. MacInnis put his vehicle off the road at 8:35 p.m. on 29 May 2011. Nevertheless, the public were most certainly endangered by Mr. MacInnis' getting behind the wheel and driving, given the time of day–when traffic most definitely would have been traveling on that roadway–and given Mr. MacInnis' very high BAC. Risk of harm may be considered by a court in determining a fit and proper sentence. The focus on "risk" rather than "results" was at the very heart of the opinion of MacKinnon A.C.J.O. in rendering the decision of the Ontario Court of Appeal in *R. v. McVeigh*:

> 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 great and increasing sentences for offences at the "lower end" would emphasize 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 a 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 courts' 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 work and family 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 over-emphasizing that individual deterrence is seldom needed once

> tragedy has resulted from the driving.[4]

McVeigh, *supra*, was cited with approval by Matthews J.A. in *R. v. MacEachern*, in which this eminent jurist stated:

> Society demands that those involved in the criminal justice system . . . do all in their power to reduce the carnage on our highways caused by the drinking driver.[5]

[8] There are many mitigating factors in Mr. MacInnis' favour. The first is his quilty plea. The second is the remoteness of his record, which, as I noted a few moments ago, lessens its aggravating effect. Mr. MacInnis made a significant contribution to his country, as he served for many years in the Airborne Regiment. When not in the military, he worked hard to support his family. Mr. MacInnis has been able to maintain lengthy periods of sobriety, and has sought professional help for his problem of abusing alcohol. But there are no double standards in the criminal justice system. Offenders with records of honourable military service are not held to a lower standard of criminal responsibility in virtue of that service. Allowing those sorts of biographical factors to trump the sentencing process could, indeed, rebound against offenders. For example, it might be argued that Mr. MacInnis ought to be held to a higher standard than other members of the public, given that his military background should have instilled in him a sense of duty, honour, and obedience. Far better that the Court focus on what Parliament has decreed be the core principles of sentencing: the seriousness of the offence and the degree of responsibility of the offender. Balancing the mitigating factors in favour of Mr. MacInnis

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[4](1985), 22 C.C.C. (3d) 145 at 150.

[5](1990), 96 N.S.R. (2d) 68 at paras. 24-25 (A.D.).

against what the Court considers very serious and dangerous conduct, coupled with the related record, observing that the *Criminal Code* was amended in 2008 to increase the maximum penalty for a summary-offence para. 253(1)(b) charge to eighteen-months' imprisonment–reflecting a clear Parliamentary intent to put into effect principles such as those enunciated in McVeigh, *supra*–and, finally, recognizing that Mr. MacInnis was solely responsible for this offence due to his voluntary consumption of alcohol, I sentence Mr. MacInnis to 21-days' imprisonment, followed by a 9-month term of probation with rehabilitative conditions. There will be a two-year prohibition order, and the interlock waiting period will be extended to five months. Finally, the Court imposes a fifty-dollar victim-surcharge amount, with twelve months allowed for payment.

[9] Should this need to be transcribed, I will include the citations for the cases I have relied upon in my decision. The Court will hear from counsel on the issue of intermittent service.

DATED at Pictou, Nova Scotia, 29 November 2011.

Atwood, J.P.C.