PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Snell*, 2014 NSPC 3

Date: 2014-01-30
Docket: 2627734
Registry: Pictou

Between:

Her Majesty the Queen

v.

Todd Stewart Snell

SENTENCING DECISION

Revised Decision: The date at the top right has been corrected from 2013-01-30 to 2014-01-30.

Judge: The Honourable Judge Del W. Atwood

Heard: 30 January 2014 in Pictou, Nova Scotia

Charge: Sub-section 259(4) of the *Criminal Code*

Counsel: Jody McNeill, for the Nova Scotia Public Prosecution Service
Douglas J. Lloy Q.C., Nova Scotia Legal Aid Commission for Todd Stewart Snell

By the Court:

[1] Todd Stewart Snell is before the court to be sentenced for a single count of driving while prohibited, contrary to sub-section 259(4) of the *Criminal Code*. The prosecution chose to proceed by indictment, Mr. Snell elected to have his charge dealt with in this court and pleaded guilty at his last appearance on 25 November, 2013.

[2] There is a pre-sentence report before the court that describes Mr. Snell's educational and employment history, and his significant efforts to remain substance free that, by and large, have been successful. The report describes as well Mr. Snell's remorse for having operated a motor vehicle while under a court-ordered prohibition.

[3] An aggravating factor is that Mr. Snell has a significant record for criminal offences involving the operation of motor vehicles. He was convicted on 1 September 1998 of a para. 253(b) *Code* offence; he of another on 31 May 1999. He was convicted of a sub-s. 254(5) refusal count on 14 November 2007, and another on 11 March 2009. He was placed on a 5-year sub-s. 259(1) prohibition

for that latter charge; it is that order that Mr. Snell violated when he drove on 19 July 2013, giving rise to the charge before the court today. The prosecution referred the court to two prior drive-while-prohibited convictions, one entered on 23 November 1998, and the other on 31 May 1999; however, it is clear to me that when Mr. Snell was sentenced for the refusal on 11 March 2009, it was for an offence that occurred while he was subject to a four-year prohibition imposed at the time of his 14 November 2007 refusal sentencing.

[4] Also aggravating is the fact that Mr. Snell's criminal offence arises from the violation of a court-ordered prohibition. When the court orders that an offender refrain from doing something, the court does not send the offender home with a custodian to superintend the offender's conduct 27/7. The court must rely on offenders subject to court orders to comply with those orders. When orders are breached, the public loses confidence in the ability of the court to fulfil its important administration-of-justice function. In my view, the violation of court orders should, typically, attract a period of custody, absent highly mitigating circumstances.

[5] I am of the view that a purely probationary sentence would not be appropriate, as it would not accomplish the necessary degree of denunciation and

deterrence. The maximum penalty for an indictable para. 259(4)(a) violation is a term of imprisonment not exceeding five years. Mr. Snell's conduct does not require the imposition of a sentence anywhere approaching that length of time. I am of the view that a period of custody of less than two years is the correct range. I note that the prosecution has sought an actual jail term of 4-6 months, which is very fair in the circumstances. Accordingly, pursuant to the principles outlined in *R. v. Proulx*, 2000 SCC 5 at para. 127, I turn my mind to the imposition of a conditional sentence under the provisions of section 742.1 of the *Code*. The offence before the court is not excluded from the conditional-sentencing regime. The offence does not attract a mandatory-minimum penalty; although it was prosecuted by indictment, the maximum term of imprisonment is five years only, so that para. 742.1(c) does not apply. I agree with Mr. Lloy that Mr. Snell would appear to be a good candidate for a rehabilitative, community-based sentence: he has managed to remain free of alcohol for a considerable period of time with the support of his wife; he has been gainfully employed for a number of years with Mr. Blaine F. MacLane out in MacLellan's Brook, and anyone from this county knows that if you are not working hard for Mr. MacLane, then you're working for somebody else. Indeed, Mr. Snell is described very positively by his employer. Although the offence before the court involved the breach of a court order, it did

not involve a risk to public safety. Mr. Snell was stopped for a burnt-out brake light; there is no evidence at all of any alcohol consumption or erratic operation. Furthermore, the prohibition order had almost reached its expiry date.

[6] Based on Mr. Lloy's detailed and articulate submissions, I agree that a condition sentence order of twelve months would be appropriate here, would not endanger public safety and would be consistent with the fundamental purposes and principles of sentencing. There will also be a $1000.00 fine, along with a $150.00 victim-surcharge amount—as this offence predated the victim-surcharge amendments to s. 737 of the *Code*—and you will have until 30 January 2015 to pay those amounts.

[7] In this case, the prosecution sought a five-year prohibition order. Just prior to our recess, I inquired of the prosecutor whether a notice of greater penalty had been served; I was advised that the prosecutor did not have a proof of service to tender in court. While a five-year prohibition would not be inappropriate, given Mr. Snell's prior record, the court must adhere to the requirements of the law. Sub-s. 259(1) of the *Code* states as follows:

> 259. (1) When an offender is convicted of an offence committed under . . . this section . . . the court that sentences the offender shall, *in addition to any other punishment that may be imposed for that offence,* make an order prohibiting the

> offender from operating a motor vehicle on any street, road, highway or other public place . . .
>
> (a) for a first offence, during 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;
>
> (b) for a second offence, during a period of not more than five years plus any period to which the offender is sentenced to imprisonment, and not less than two years; and
>
> (c) for each subsequent offence, during a period of not less than three years plus any period to which the offender is sentenced to imprisonment.
>
> *[Emphasis added]*

[8] Prior to the recess, I referred to the Keldsen decision, which I said was out of Alberta. I was mistaken; in fact it is *R. v. Keldsen*, [1987] B.C.J. No. 25 (S.C.). It stands for the proposition that, if the prosecution seeks an elevated period of driving prohibition under what are now paras. 259(1)(b)-(c) of the *Code*, it must serve a s. 665 notice of greater penalty upon the offender prior to plea. *Keldsen* was followed by the British Columbia Court of Appeal in *R. v. Tabor*, 2004 BCCA 191 at para. 14; it was cited with approval by the New Brunswick Court of Queen's Bench in *R. v. Ryan*, [2003] N.B.J. No. 125 at paras. 25-27, and by the Ontario Court of Appeal in *R. v. Shewchuck*, 2012 ONCA 304 at para. 2. While these authorities are not binding on me, I find that they state the law correctly, as a prohibition order made under sub-s. 259(1) is a "punishment". The subsection says so, itself. Accordingly, absent a notice of greater penalty, the maximum

prohibition which the court may impose upon Mr. Snell is as laid out in the first-offender provisions of para. 259(1)(a). Mr. Snell, the court prohibits you from operating a motor vehicle on any street, road, highway or other public place for three years as of today's date. That will be ordered to be served consecutively to any prohibition currently in effect, pursuant to sub-s. 259(2.1) of the *Code*. There will be an extended 12-month waiting period for your interlock-program eligibility.

[9] Given that the court has imposed a period of conditional-sentence custody as well as a fine, a term of probation is impermissible under para. 733(1)(b). I would not have imposed one in any event, as I am satisfied that the rehabilitative aspects of sentencing should be able to be accomplished within the lifetime of the CSO.

[10] Now, it's important to understand, Mr. Snell, that a conditional sentence order is not a get-out-of-jail free card. If, at any time over the next twelve months, you should be found to have violated any of the terms of this order, the presumption would be that you would serve any unexpired portion of the sentence in jail. The past paragraph in your pre-sentence report says this: "He is willing to do anything the court orders. He says it would cause his family hardship, should he be unable to continue with his employment." I want to make it clear, Mr. Snell: it's not the sentence of the court that places your job in jeopardy; it's your actions.

If somebody takes a chainsaw and stupidly cuts down a tree next to a house and the tree lands on the roof, it's not the saw's fault; it's the fault of the actions of the fellow with the saw doing the cutting. What jeopardizes your job is your determination to drive when you've been ordered by a court not to do so. Look. Your lawyer, Mr. Lloy made a very strong case for you to get a conditional sentence. You're a hard worker in an occupation that demands hard work. You've succeeded in staying away for liquor for a long time now. You have the strong support of your wife. You have more than the potential to succeed. You have achieved real successes. Build on that over the next twelve months, and you will never see the inside of a courtroom again.

[11] Just wait outside in the lobby please, sir, to sign you papers, and I wish you more success.

JPC.