*R v O’Connor*, 2020 NWTSC 41

Date:  2020 10 23

Docket:  S-1-CR 2019 000 046

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**-and-**

**KYLE O’CONNOR**

**MEMORANDUM OF JUDGMENT**

**(SUMMARY CONVICTION APPEAL)**

I) INTRODUCTION AND OVERVIEW

1. This is an appeal from a portion of a sentence imposed on the Appellant in the Territorial Court on a charge of having operated a motor vehicle while his blood alcohol content exceeded 80 milligrams of alcohol in 100 millilitres of blood.
2. The charge stemmed from events that occurred on January 16, 2019. Police officers, responding to a complaint, found the Appellant in the driver’s seat of a running vehicle, revving the engine. He was showing extreme signs of intoxication. The lower of the breathalyser readings on the breath samples that he eventually provided was 310 milligrams of alcohol in 100 millilitres of blood.
3. A week later, on January 24, the Appellant was in the Territorial Court, being sentenced on a similar offence. He received a jail term and a 6-year driving prohibition. Counsel who dealt with that matter were not aware of the Appellant’s January 16 charge.
4. The Appellant’s sentencing hearing on the January 16 charge proceeded on April 19, 2019. Counsel presented the Sentencing Judge with a joint submission that the Appellant be sentenced to a jail term of 4 months and a driving prohibition for 9 years, both to run concurrently with the jail term and driving prohibition that had been imposed at the January 24 sentencing hearing.
5. The Sentencing Judge gave his decision immediately after counsel’s submissions. He said:

Under the circumstances I am going to accede to the joint submission that has been provided to me by both lawyers here today, and the jail sentence will run concurrently to the jail sentence that you are currently under. However, the nine-month driving prohibition – nine-year driving prohibition, I am sorry, will run consecutively to the driving prohibition that has been imposed and is in place right now. So that would mean a total of 15 years.

*Transcript of Sentencing Hearing*, p.8, lines 8-16.

1. The Appellant argues that the Sentencing Judge’s decision to make the driving prohibition consecutive should be set aside for two reasons. The first is that under the relevant provisions of the *Criminal Code*, the Sentencing Judge did not have the power to make the driving prohibition consecutive. The second is that the Sentencing Judge erred in departing from the joint submission.
2. This matter was spoken to at List Scheduling, and counsel advised that the Crown would be consenting to the appeal. I directed that counsel file written materials for my consideration and indicated that I would only schedule an in-Court hearing if, upon reviewing those materials, I deemed it necessary to hear further submissions from counsel. Having reviewed those materials, I am satisfied that a hearing is not necessary and that the appeal should be allowed.

II) ANALYSIS

1. The Crown concedes that the appeal should be allowed because it was not open to the Sentencing Judge to make the driving prohibition consecutive to the one imposed at the January 24 sentencing hearing. I agree.
2. The power to issue a driving prohibition is set out in section 320.24 of the *Criminal Code*. Paragraph (9) gives the sentencing court the power to make a prohibition order be consecutive to an existing one:

324.24 (…)

(9) If the offender is, at the time of the commission of the offence, subject to an order made under this Act prohibiting the offender from operating a conveyance, a court that makes a prohibition order under this section that prohibits the offender from operating the same type of conveyance may order that the prohibition order be served consecutively to that order.

1. This is more restrictive than the wording of section 320.24’s predecessor, section 259. Section 259 gave sentencing judges the discretion to make a driving prohibition order consecutive to “any other order made under this section that prohibits the operation of the same means of transport and that is in force”. It required that the order be in force at the time of the sentencing hearing. By contrast, section 320.24 requires the order to be in force at the time of the commission of the offence.
2. Here, the first driving prohibition order was made on January 24. It was not in force when the Appellant committed the January 17 offence. As a result, the Sentencing Judge did not have the power to make the driving prohibition he was imposing consecutive to the existing one.
3. Although this is sufficient to dispose of the appeal, I will make brief comments about the second issue raised by the Appellant.
4. The direction from the Supreme Court of Canada is that joint submissions are to be approached by sentencing judges on an “as is” basis, except if the joint submission fails to include a mandatory order. *R v Anthony-Cook*, 2016 SCC 43, para 51. The concurrent or consecutive nature of jail terms or orders sought as part of a joint submission is an integral part of a joint submission and can have, as this case illustrates, a significant impact on an offender. If a sentencing judge is inclined to depart from that aspect of a joint submission, in my view, the procedural rules set out in *Anthony-Cook* are engaged.
5. Given the extremely high readings and the Appellant’s persistence in committing drinking and driving offenses, the Sentencing Judge’s inclination to make an order that would result in prohibiting him from driving for a lengthy period of time was entirely understandable. However, if he felt that the driving prohibition aspect of the joint submission was not reasonable, he was required to alert counsel to this and to give them an opportunity to make further submissions. And if, in spite of those additional submissions, he had come to the conclusion that this aspect of the joint submission was contrary to the public interest, he would have been required to provide his reasons for so concluding.
6. As this appeal can be disposed on the basis of the other issue raised by the Appellant, and since counsel did not have an opportunity to make additional submissions in support of their position regarding the driving prohibition, I express no view about the reasonableness of the joint submission under the circumstances of this case. And, as is always the case with sentencing decisions arising from joint submission, my Ruling on this appeal has no precedential value as far as the range of sentence. Specifically, the outcome of his appeal should in no way be interpreted as representing this Court’s view as to how long an offender should be prohibited from driving in these circumstances.

III) CONCLUSION

1. The appeal is allowed and the driving prohibition imposed on April 26, 2019 is varied and will run concurrently with the driving prohibition imposed on January 24, 2019. The draft Consent Order provided by counsel will issue.

 L. A. Charbonneau

 J.S.C.

Dated at Yellowknife, NT, this

23th day of October, 2020

Counsel for the Crown : Jeffrey Major-Hansford

Counsel for the Accused : Mallorie Malone

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