

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

RAELEEN VILLEBRUN

REASONS FOR DECISION
of the
HONOURABLE CHIEF JUDGE ROBERT GORIN

Heard at: Yellowknife, Northwest Territories
Date of Decision: October 20, 2023
Date of Written Judgment: November 6, 2023
Counsel for the Crown: Matthew Scott
Defence Counsel: Keith Chadwick-Garrett

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A. INTRODUCTION

[1] The accused, Raeleen Villebrun, has been charged and convicted of having a blood alcohol level that was equal to or greater than 80 milligrams percent within two hours after ceasing to operate a motor vehicle, contrary to s. 320.14(1)(b) of the *Criminal Code*. Both the Crown and Ms. Villebreun submit that I should impose the mandatory minimum punishments that apply to a first-time offender with a blood alcohol level at the lower end of the prohibited range. In other words, they ask that I impose a \$1,000 fine and a 1-year driving prohibition.

[2] However, Ms. Villebrun asks that I grant her credit for the 90-day suspension of her driver's licence that was imposed on her pursuant to s. 116.6 of the *Motor Vehicles Act*, RSNWT 1988, c.M-16 (as revised), following her arrest for the within offence. She submits that the prospective driving prohibition I impose should be one of 9 months. The Crown opposes Ms. Villebrun's request.

[3] I have concluded that I am unable to provide the credit proposed by Ms. Villebrun.

B. ANALYSIS

[4] Ms. Villebrun relies on the recent case of *Basque*, 2023 SCC 18, decided by the Supreme Court of Canada on June 30th of this year. Ms. Basque had been

convicted of impaired operation of a motor vehicle. At the time of the offence, s. 259(1) of the *Criminal Code* was still in effect. The wording of section 259(1) was very similar to that of the relevant section currently in effect, s. 320.24(2). S. 259(1) stated:

259 (1) When an offender is convicted of an offence committed under section 253 or 254 [. . .], 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, or from operating a vessel or an aircraft or railway equipment, as the case may be,

(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.

[5] S. 320.24 now states:

320.24 (1) If an offender is found guilty of an offence under subsection 320.14(1) or 320.15(1), 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 the type of conveyance in question during a period to be determined in accordance with subsection (2).

(2) The prohibition period is

(a) for a first offence, not less than one year and not more than three years, plus the entire period to which the offender is sentenced to imprisonment;

(b) for a second offence, not less than two years and not more than 10 years, plus the entire period to which the offender is sentenced to imprisonment; and

(c) for each subsequent offence, not less than three years, plus the entire period to which the offender is sentenced to imprisonment.

[6] In *Basque*, the court held that where an accused has previously been prohibited from driving as a result of the offence that is before the court for sentencing, the court can apply credit for that driving prohibition and reduce the prospective driving prohibition below the statutory mandatory minimum set out in the *Criminal Code*. The court stated that this is so, since s. 259(1) required a mandatory minimum *punishment* as opposed to a mandatory minimum *sentence*. The court held that where the accused has previously been placed under a driving

prohibition for their conduct, they have already been punished. Accordingly, the mandatory minimum driving prohibition will be imposed where the sentencing judge provides credit for that punishment so long as the total combined driving prohibition amounts to the mandatory minimum.

[7] The court observed that it matters not whether the driving prohibition was imposed in order to mete out punishment so long as it has punitive effect. In *Basque*, the driving prohibition in question had been a term in the release order initially imposed on Ms. Basque that, among other things, required she not operate a motor vehicle.

[8] The court affirmed that the common law provides authority to credit pretrial punishment to reduce a prospective sentence to less than the mandatory minimum, noting that in the case of pretrial detention, sentencing courts had the power to do so prior to the enactment of s. 719(3) of the *Code*. Paragraphs 3 through 8 of *Basque* state:

[3] If not for the requirement in s. 259(1)(a), granting credit would undoubtedly be possible. Indeed, in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 — a case that did not concern a mandatory minimum prohibition — this Court confirmed that there is a common law judicial discretion to grant credit for a pre-sentence driving prohibition. This discretion is a natural extension of the longstanding practice of crediting offenders for periods of pre-sentence custody.

[4] Provided that Parliament respects the relevant constitutional constraints, it can, of course, enact legislation that displaces the common law rule allowing credit to be granted for a pre-sentence driving prohibition. Ms. Basque does not challenge the constitutionality of s. 259(1)(a) but argues that her request for credit is not limited in any way by the imposition of the mandatory minimum prohibition. The respondent Crown, relying on the majority reasons of the Court of Appeal, argues instead that granting credit in this case would conflict with the application of the one-year minimum prohibition, even though the relevant statutory provision is silent on crediting.

[5] Respectfully, I believe that the respondent is mistaken. In my view, granting credit based on the common law discretion recognized in *Lacasse* is perfectly consistent with the application of the minimum prohibition in s. 259(1)(a) *Cr. C.* and with the rule requiring that a sentence commence when it is imposed in s. 719(1) *Cr. C.* It was therefore open to the sentencing judge to take into account the period of 21 months already served by Ms. Basque, as this would not undermine Parliament's intent.

[6] The discretionary authority to grant credit under the common law can coexist harmoniously with judicial adherence to a mandatory minimum established by statute. This coexistence rests on the well-known distinction between the concepts of

“punishment”, understood as a deprivation, and of “sentence”, understood as a judicial decision (in French, the distinction between “*punition*” and “*sentence*”, where the term “*peine*” can also be used to convey both meanings). This distinction, considered by Rosenberg J.A. in the context of credit for pre-sentence custody in *R. v. McDonald* (1998), 1998 CanLII 13327 (ON CA), 40 O.R. (3d) 641 (C.A.), was taken up by Arbour J. of this Court in *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at paras. 35-37, with particular attention to the multiple meanings of the French term “*peine*”. From this perspective, Arbour J. explained that while the term “*peine*” used in the sense of “punishment” refers to the total punishment imposed on an offender, the same word when used to mean “sentence” refers to the decision rendered by the court. It bears noting that a sentence is always prospective in order to prevent the judicial practice of backdating sentences (see s. 719(1) *Cr. C.*).

[7] As a general rule, the purpose of a mandatory minimum is to impose on an offender an effective *punishment* of a specified minimum length. This is so because the objectives underlying a minimum punishment are achieved equally well whether the punishment is served before or after the offender is sentenced. In the instant case, the mandatory minimum provided for in s. 259(1)(a) is no exception to this rule.

[8] Properly interpreted, s. 259(1)(a) requires the court to impose a total *punishment* of one year to be served by the offender, not to hand down a *sentence* imposing a one-year prohibition that must necessarily be served prospectively. As Rosenberg J.A. noted in *McDonald*, Parliament’s intention is respected whether the punishment is served before or after the offender is sentenced, because the effect on the offender is the same in either case. Interpreted in this way, s. 259(1)(a) did not prohibit the sentencing judge from “reducing” the *sentence* by granting credit for the pre-sentence driving prohibition period, as long as the total *punishment* remained consistent with the minimum prescribed by Parliament.

[9] Also, as noted at paragraph 71:

[71] If s. 259(1)(a) *Cr. C.* required that a minimum sentence be handed down, the results could well be counterintuitive, if not absurd. For example, the imposition of an additional driving prohibition for a minimum of one year would amount to double punishment for an offender who had already served all or part of the minimum driving prohibition period while awaiting trial. Such a result would be contrary to the most fundamental interests of justice, raising the spectre of double punishment “without the clearest of evidence to show that Parliament wanted to achieve such an outcome” (*Pham*, at para. 10).

[10] In the present case, Ms. Villebrun’s driver’s licence was suspended as a result of s. 116.6 of the *Motor Vehicles Act*, which states:

116.6. (1) A peace officer shall, on behalf of the Registrar, without delay, take the actions set out in subsection (2), (4), (5), or (8), as the case may be, if, upon demand of the peace officer made under section 320.28 of the Criminal Code on a person who is the operator of or has the care or control of a motor vehicle on a highway to provide a

sample of breath or blood, the person (a) provides a sample of breath which, on analysis by an approved instrument, indicates that the concentration of alcohol in their blood is equal to or exceeds 80 mg of alcohol in 100 mL of blood; or (b) provides a sample of blood which, on analysis, indicates that the concentration of alcohol in their blood is equal to or exceeds 80 mg of alcohol in 100 mL of blood..

(2) If the person is named in a valid driver's licence issued under this Part, the peace officer shall (a) direct the person to surrender his or her driver's licence; (b) issue a temporary driver's permit to the person, if the person is not a novice driver; (c) suspend the person's driver's licence, (i) if the person is not a novice driver, for a period of (A) 24 hours commencing immediately, and (B) 90 days commencing at the time the person's temporary driver's permit expires, or (ii) if the person is a novice driver, for a period of 90 days commencing immediately; and (d) serve a notice of suspension on the person.

[11] When applying *Basque*, there is, in my view, no meaningful reason why a pre-trial license suspension imposed pursuant to territorial legislation that results from the offence before the court for sentencing should be distinguished from a prohibition imposed under a release order. The suspension is effectively a prohibition. The Crown argues that the use of the words "suspend" or "suspension" in relevant parts of the *Motor Vehicles Act*, as opposed to the words "prohibit" or "prohibition" which are used in other parts, requires that the court not consider the suspension a pretrial prohibition. I disagree. The ultimate effect is identical. It is illegal for the accused to operate a motor vehicle as they ordinarily would.

[12] In the case of *R. v. Sohal*, 2019 ABCA 293, decided several years before *Basque*, the Alberta Court of Appeal dealt specifically with the issue of whether a provincial driving suspension following arrest could be applied to reduce the prospective driving prohibition to less than the mandatory minimum.

[13] The court held it could not. It ultimately based its decision on its finding that there was no clear statutory authority and furthermore no common law authority to depart from what it referred to as a mandatory minimum sentence. At paragraphs 19 & 20 of *Sohal*, Slatter J. stated:

[19] *Wust* does not recognize any general mandate of sentencing judges to use abstract considerations of fairness or proportionality to reduce sentences below a mandatory minimum. That result was only achieved because of an interpretive analysis within the four corners of the *Criminal Code*. *Wust* does not, for example, allow a sentencing court to apply provisions of provincial statutes, such as the *Traffic Safety Act*, to depart from a mandatory minimum sentence. In this respect, the provincial legislation has no greater impact than any general, non-statutory considerations of fairness or proportionality that might attract the attention of the

sentencing judge. Further, it is contrary to Canadian constitutional principles to allow provincial legislation to effectively vary provisions of valid federal legislation.

[20] In summary, *Wust* is not authority for the proposition that credit can be given against the mandatory federal driving prohibition because of the provincial pre-conviction driving suspension.

[14] Following *Basque*, much of what was said in *Sohal*, including the foregoing paragraphs, is now of questionable validity. However, it is undeniable that the court in *Sohal* was correct where it stated at paragraphs 10 & 11:

[10] It is a well-established aspect of Canadian constitutional law that both the federal government and the provincial governments have jurisdiction over driving. The *Criminal Code* provisions on impaired and dangerous driving are valid criminal legislation. Provincial legislation granting and refusing the right to drive is valid legislation in support of highway safety: *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at paras. 31-4, [2015] 3 SCR 250; *Sahaluk* at paras. 68-9.

[11] It has also long been recognized that provincial and federal licence suspensions can overlap, and to some extent contradict each other. Provincially imposed licence suspensions may be longer or shorter than the driving prohibitions imposed by the *Criminal Code* arising out of the same facts. Sometimes the accused will be entitled to drive under one regime, but not under the other. In these circumstances, the law is clear that the accused must comply with both regimes, except in the rare circumstances where compliance with provincial legislation would undermine the very purpose of the federal legislation: *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 at para. 11, [2009] 1 SCR 624. To a considerable extent, however, it has repeatedly been found that the provincial and federal regimes can operate together: *Sahaluk* at paras. 72-4.

[15] Undeniably, there are overlapping and, to some extent, disparate driving prohibitions set out in the *Motor Vehicles Act* and the *Criminal Code*. For example, there are automatic mandatory minimum driving prohibitions imposed under s. 116.14(2) & (3) of the *Motor Vehicles Act* following the entry of a conviction for an offence contrary to s. 320.14 of the *Code*. Those driving prohibitions may be of a different duration than those imposed under s. 320.24(1) of the *Code*.

[16] Still, I am of the view that the automatic suspension provided for by s. 116.6 of the *Motor Vehicles Act* clearly has a punitive effect. It would follow that, in the absence of any bar to the court doing so, it should be considered as a pretrial driving prohibition when sentencing the accused for an offence contrary to s. 314 of the *Code* – even to the extent of reducing the prospective prohibition below the minimum durations set out in s. 320.24.

[17] *However*, in his able submissions on behalf of the Crown, Mr. Scott has referred me to s. 116.12 of the *Motor Vehicles Act* which states:

116.12. A suspension, disqualification or cancellation imposed under section 116.1, 116.2, 116.4, 116.6, 116.7, 116.81, 116.82 or 116.84, as the case may be, is in addition to and not in substitution for any proceeding or penalty arising from the same circumstances. SNWT 2004, c.14, s.16 2003, c. 14, s. 16; SNWT 2015, c.28, s.25; SNWT 2018, c.6, Sch. C, s.1.

[18] The wording of the section is very broad, and I am unable to interpret the scope of the section in the limited manner urged by defence counsel, Mr. Chadwick-Garrett, in his succinct submissions. S. 116.12 refers to “*any [. . .] penalty arising from the same circumstances*”. I am unable to see how a penalty imposed under s. 320.24 of the *Criminal Code* could not fall within the scope of s. 116.12. If the driving suspension is “*in addition to and not in substitution for*” the driving prohibition, I am plainly unable to use it to provide the requested credit.

[19] One might well argue that a provision contained in a territorial statute should not eliminate that which would otherwise be within the court’s power when sentencing an accused for an offence contrary to the *Criminal Code*. However, while there may or may not be an issue respecting the constitutionality of s. 116.12 of the *Motor Vehicles Act* insofar as it encroaches on the criminal law, that question is something that I cannot rectify here today. It is not something that I can deal with during a sentencing for a s.320.14 offence since it is not the section under which I am sentencing the accused. Any application regarding the validity of s. 116.12, as worded, would need to be made in different proceedings in another court.

C. CONCLUSION

[20] As stated, I conclude that I do not have the power to apply credit for a post-arrest driving suspension imposed under s. 116.6 of the *Motor Vehicles Act*, resulting from the same offence which is before the court for sentencing, when imposing a driving prohibition under s. 320.24(1) of the *Criminal Code*.

[21] Under the circumstances, I will impose the mandatory minimum punishments of a \$1,000 fine and 1-year driving prohibition. The driving prohibition is prospective. To be clear, it will last for a period of 1 year from today’s date.

[22] For the reasons urged in the submissions of Mr. Chadwick-Garrett there will be no victims of crime surcharge. Ms. Villebrun will be given the requested time to pay her fine.

[23] I have arrived at this sentence after taking into account the absence of a criminal record, the accused's guilty plea, and the Gladue factors referred to by counsel. I have also given weight to the fact that this sentence is one that has been jointly suggested by counsel. However, I would have imposed the same sentence in the absence of a joint submission.

[24] I feel obliged to point out that at the end of the day, my decision not to provide credit for the pretrial driving suspension makes no practical difference whatsoever to Ms. Villebrun. As I am sure counsel are aware, even if I had credited the 90-day driving suspension toward the prospective *Criminal Code* driving prohibition, there would still be the concurrent 1-year driving prohibition required by s. 116.14 of the *Motor Vehicles Act*. The driving prohibitions of various durations set out in s. 116.14 are imposed automatically following a conviction for offences contrary to s. 314 of the Code. Ms. Villebrun is currently subject to the concurrent 1-year prohibition required under the *Motor Vehicles Act* as well as the driving prohibition I have ordered.

[25] I thank both counsel for their assistance.

Robert Gorin
Chief Judge of the
Territorial Court

Dated at Yellowknife, Northwest Territories,
this 6th day of November, 2023.

R. v. Villebrun, 2023 NWTTC 10

Date: 2023 11 06

File: T-1-CR-2023-000782

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[S. 320.14(1)(b) of the *Criminal Code*]