

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Kelly*, 2017 NSPC 45

Date: 2017-08-29

Docket: 8093158

Registry: Pictou

Between:

Her Majesty the Queen

v.

Tristan Kirk P. Kelly

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	2017: August 29 in Pictou, Nova Scotia
Charge:	Para. 249(1)(a) of the <i>Criminal Code of Canada</i>
Counsel:	William Gorman for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Tristan Kirk P. Kelly

By the Court:

[1] The court has for sentencing today Tristan Kelly. Mr. Kelly entered a guilty plea at an early opportunity in relation to a charge under para. 249(1)(a) of the *Criminal Code*, dangerous operation of a motor vehicle.

[2] That charge was prosecuted summarily.

[3] It attracts a maximum potential penalty of six-months' imprisonment and/or a \$5,000 fine in accordance with the general-penalty provisions of s. 787 of the *Criminal Code*.

[4] There are no mandatory minimum penalties.

[5] There is a discretionary prohibition of up to three years in duration that may be made by the court in accordance with para. 259(2)(c) of the *Code*.

[6] The primary principle of sentencing is proportionality. A sentence ought to be proportionate to the seriousness of the offence and the degree of responsibility of the offender.

[7] Mr. Kelly operated a motor vehicle in the vicinity of Marshy Hope, Pictou County, Nova Scotia at velocities ranging from 194 to 200 kilometres per hour in a

posted 100-kilometres-per-hour zone. Mr. Kelly weaved in and out of traffic as he evaded an officer who was pursuing him. He proceeded into a lane of oncoming traffic; this was observed by the operator of a tractor-trailer truck who was east bound and saw Mr. Kelly directly in front of him proceeding west bound at a high rate of speed.

[8] I take into account the terrain in that area and the road configuration, as I am permitted to do given the fact that the court is very familiar with that stretch of road from previous cases which I have heard; I accept the principles set out in *R. v. Giffin* (1980), 46 N.S.R. (2d) 541 at para. 13, dealing with repeatedly tried facts. This is a winding roadway, with no passing lanes. A 100-kilometre-per-hour speed limit is pressing the bounds of safety. There was a high risk of lethality here projected onto every motorist who came within Mr. Kelly's trajectory—and to Mr. Kelly himself. Fortunately, no one was hurt.

[9] It is appropriate for the court to examine risks inherent in criminal conduct—and the hazards emanating from them—just as it would do in cases involving drinking and driving. The recognizable riskiness of behaviour is a proper criterion in determining offence seriousness and moral culpability. Focussing too much on outcomes or consequences can skew that analysis. Low-risk, marginally offending behaviour—that is, conduct which might be said to “slip

over the line”: *see, e.g.*, Clayton Ruby et al., *Sentencing*, 9th ed., (Markham: LexisNexis, 2017) at para. 5.206—might lead to tragic ends due to intervening factors that have nothing to do with the wrongdoing; conversely, inherently illegal and dangerous choices might end up with nothing bad happening to anybody. I apply the principles of sentencing set out by the Ontario Court of Appeal in *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145; the Court stated that the focus of sentencing in drunk-driving cases ought to be on conduct—and its inherent risks—not just on consequences. *McVeigh* was followed by our Court of Appeal in *R. v. MacEachern* (1990), 96 N.S.R. (2d) 68 at 74. So it should be in this case.

[10] The risk of lethality in this case was every bit as great as, indeed greater than in cases involving drinking and driving. High velocities endanger the public because of the catastrophic effects of collision, because of reduced reaction time, because of greatly extended stopping distances and because of the risk of mechanical or material failure inherent in operating a motor vehicle at an excessive rate of speed. In fact, 200 kilometres per hour is a velocity that is very close to what is needed to get multi-engine-turbojet aircraft airborne. Accordingly, referring to this case as a flight from police is a very apt description.

[11] I would situate the seriousness of this offence at the high end of the spectrum for a para. 249(1)(a) charge, prosecuted summarily, not involving bodily harm or death.

[12] In assessing Mr. Kelly's moral culpability, I am satisfied from the pre-sentence report that Mr. Kelly is a person who is well committed to pro-social values. He has a well-established work record, is seeking employment, was in the process of upgrading his vocational education which was interrupted by the sudden onset of illness of a family member.

[13] Mr. Kelly entered a guilty plea at an early opportunity; in his allocution to the court today, he expressed profound remorse, which I accept as Mr. Kelly's authentic expression of responsibility and regret.

[14] I do believe this was a panic-induced response—as in *R. v. Fraser*, 2016 NSPC 49—and does appear to be out of character, although I do note that Mr. Kelly was found guilty in the past of a summary-offence-ticket offence involving stunting.

[15] I would situate Mr. Kelly's moral culpability at the mid-range.

[16] There is essentially a common sentencing recommendation before the court which I do believe is appropriate. It takes into account the principle of proportionality as well as the very good prospects for Mr. Kelly's rehabilitation.

[17] Therefore, the sentence of the court will be as follows: pursuant to sub-s. 259(2) of the *Criminal Code*, the court prohibits you, Mr. Kelly, from operating a motor vehicle on any street, road, highway or other public place for a period of 15 months, beginning immediately. As this is not an offence involving drinking and driving, the interlock provisions do not apply and there will be no reference to interlock in the order.

[18] The court is going to fine you, Mr. Kelly, the sum of \$2,000. There will be the mandatory minimum \$600 victim-surcharge amount, and I will allow 18 months for the payment of those amounts. You can always apply to the court for a fine extension and that could actually be done down in Bridgewater so that you would not have to come back to Pictou County if the due date were coming up and the fine and the victim-surcharge amount were not paid.

[19] The court is going to place you on probation for a period of six months with conditions that you:

1. Keep the peace and be of good behaviour.

2. Appear before the court when required.
3. Notify the court or your probation officer in advance of any change of your name address, employment or occupation.
4. You must report to a probation officer at 99 High Street, Suite 216, Bridgewater, N.S., within three business days, and after that as directed.
5. Attend for mental health assessment and counselling and any other assessment, counselling or programming directed by your probation officer.
6. Participate in and cooperate with any assessment, counselling or program directed by the probation officer according to the terms as directed by the probation officer and you must immediately report to the probation officer any missed assessment or counselling appointments.
7. You must not occupy the seat ordinarily occupied by the driver of any motor vehicle, unless and until your privilege of operating a motor vehicle has been restored.

8. You must sign immediately all consents to release of information required by probation officer to arrange rehabilitative services.

[20] Mr. Kelly, I do accept that this was a one-off situation. It is extremely important that it never be repeated. The risk to public here was great.

[21] Having said all that, it is clear that you have the strong support of your family. You have a commitment to a realistic career plan.

[22] What we will have you do, Mr. Kelly, is to have a seat out in lobby to sign the court orders. Once everything has been signed, you will be free to go. Thank you very much.

JPC