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CANADA / JUDGMENT

## R. v. Gourlay

2018 BCSC 884

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 884 R. v. Gourlay

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gourlay,

2018 BCSC 884

Date: 20180528

Docket: 103554

Registry: Kamloops

Regina

v.

Jason Charles Gourlay

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Sentence

Counsel for the Crown:

N. Flanagan

Counsel for the Accused:

J. Jensen

M. Putnam

Place and Date of Hearing:

Kamloops, B.C.

April 11 and 17, 2018

Place and Date of Judgment:

Kamloops, B.C.

May 28, 2018

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## Introduction

- [1] This is my sentencing decision with respect to Jason Charles Gourlay's guilty pleas to the two counts with which he is charged on the indictment. The first count is for failing to stop his vehicle to offer assistance and give his name and address after an accident which resulted in the death of Jennifer Gatey, contrary to s. 252(1.3)(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The second count is for obstructing justice contrary to s. 139(2) of the Code. In this decision, I will refer to the first offence in the indictment as leaving the scene of an accident and the second offence as obstruction.
- [2] Before I begin my reasons for sentence, I wish to acknowledge that a number of family and community members attended to hear Mr. Gourlay's guilty pleas, the sentencing submissions, and all here today.

- [3] As I proceed with delivering these sentencing reasons, I am acutely aware of the devastating impact that the tragic death of Jennifer has had on her family and friends. Jennifer was to celebrate her 17th birthday the day following her death, and the promise of her future lay before her. Her father's Victim Impact Statement was heart wrenching. The effect of Ms. Gatey's death, and the tragic circumstances in which it occurred, was also evident from the intense public interest in this case.
- [4] I am also mindful that the sentence I impose today cannot possibly remedy or make up for the pain and suffering Ms. Gatey's family and friends have endured, and will continue to endure, from the loss of their daughter, sister, niece, granddaughter, and friend. For some, no sanction would be harsh enough.
- [5] However, Mr. Gourlay is not criminally liable for causing Ms. Gatey's death. He did not commit a criminal act resulting in her death. Ms. Gatey's death was caused by a non-criminal driving error.
- [6] In sentencing Mr. Gourlay for the offences to which he has pled guilty, I must be guided by the legal purposes of a sentence and the principles of sentencing which apply to my task. The purposes of sentencing and the applicable principles are set out in the Code. Those purposes and principles, and the relevant cases applying them, are the basis of determining a fit sentence in this case.

### **The Positions of the Crown and the Defence**

- [7] The Crown submits that a fit sentence for the leaving the scene offence, in the circumstances of this case, is a term of imprisonment from 11-14 months.
- [8] In addition, the Crown submits that Mr. Gourlay should receive a 12-month conditional sentence for the offence of obstructing justice, to be served consecutively.
- [9] The Crown acknowledges that Mr. Gourlay should receive credit for the equivalent of 156 days that he has already spent in custody.
- [10] The Crown also seeks an order prohibiting Mr. Gourlay from driving for two years and an order that, pursuant to s. 487.051(3) of the Code, he provide a DNA sample for inclusion in national DNA databanks.
- [11] The defence submits that a fit sentence, in the circumstances of this case, is a term of imprisonment of five months for the leaving the scene offence and two months for the obstructing justice offence, to be served concurrently or, if not concurrently, to be served intermittently or in the community. Taking into account the time Mr. Gourlay has already served, the defence submits that a fit sanction for Mr. Gourlay's offences has already been satisfied.

- [12] In this decision, I will consider the circumstances of the offences, Mr. Gourlay's circumstances, and the impact of the offences on Ms. Gatey, her family and the community. I will then consider the legal parameters in which a sentencing decision is made and the cases which I have found most helpful to my decision. I will then determine a fit sentence for Mr. Gourlay.

## The Facts

### Circumstances of the Offences

- [13] As Mr. Gourlay has pled guilty to the offences, the Crown and the defence have agreed that the following are the circumstances of the offences:
- (a) The charges before the court arise from an incident that occurred at around 6:30 p.m. on Friday, November 4, 2016. Sixteen-year-old Jennifer Gatey was sitting on the curb, feet on the road, under a streetlight, at a bus stop on Pacific Way in Kamloops. She was waiting for a bus that would take her to Thompson Rivers University where she was going to meet her boyfriend. Jennifer was small in stature, and wearing dark clothing.
  - (b) The accused, Jason Gourlay, was driving his blue Jeep northbound past the curb where Ms. Gatey was seated. He was travelling at a speed of around 55 km/hr. He had just taken his mother's dog for a walk, and was on his way to his mother's home to return the dog.
  - (c) Mr. Gourlay advises, and the Crown accepts, that as Mr. Gourlay was driving by the place where Ms. Gatey was seated, he was momentarily distracted by movements of the dog inside his vehicle. This momentary distraction resulted in Mr. Gourlay veering to the right and colliding with Ms. Gatey. The area just below the Jeep's right front signal light (passenger side) came in contact with Ms. Gatey's head, resulting in her immediate death. The Crown accepts that Mr. Gourlay did not see Ms. Gatey either before or after the collision.
  - (d) Security video from nearby homes, and a witness who heard the collision, confirm that Mr. Gourlay did not stop at the scene of the collision, but continued on his way at an unchanged speed. In pleading guilty to failing to remain at the scene of an accident, Mr. Gourlay acknowledges that the sound created by the impact was such that he should have stopped to determine what had happened. He was willfully blind as to whether he had struck a person, causing bodily harm to that person, and reckless as to whether that bodily harm had resulted in death. Mr. Gourlay further acknowledges that he left the scene of the collision to escape criminal or civil liability.
  - (e) Mr. Gourlay drove a short distance from the scene of the collision to his mother's home where he dropped off the dog. In the course of a very quick visual inspection of his Jeep, he did not see any obvious damage. After dropping the dog off, he drove to his home in Dufferin. On his way, he noticed emergency vehicles heading toward Aberdeen.

- (f) A witness who heard the collision called 911. The Kamloops Fire Department was at the scene by 6:41 p.m., followed immediately by police. Police did a first media release at 8:45 p.m., advising the public that Pacific Way was closed in both directions due to a motor vehicle incident.
  - (g) The police did a second media release at 12:30 p.m. on Saturday, November 5, 2016, advising the public that they were looking for a vehicle with damage to the "front passenger side". By Saturday afternoon, Mr. Gourlay knew that he had collided with Ms. Gatey. In the hours following the second press release, Mr. Gourlay did two things to disguise this fact. He first attended at a local car wash where he spray cleaned his Jeep between 8:04 p.m. and 8:34 p.m. Video from the car wash shows that the Jeep was missing a right front signal light.
  - (h) Police attended at the home of Mr. Gourlay on Sunday, November 6, 2016, at 10:37 a.m. and saw a blue Jeep parked in the driveway. They noted that the left front (driver's side) signal light was missing, and that the right front signal light appeared to be intact. There was no response to a knock at the door, and police left the property intending to return later in the day.
  - (i) Police re-attended at the residence of Mr. Gourlay the evening of November 6, 2016. On closer examination of the Jeep, they noted that it appeared that the driver's side signal light had been moved to the passenger side. Subsequent forensic examination confirmed that this had occurred, and that steps taken to complete the swap included snapping off alignment tabs on the driver's side signal light to make it fit on the passenger side.
  - (j) In pleading guilty to the charge of obstruction of justice, Mr. Gourlay acknowledged that he washed his vehicle and swapped the front signal lights to obstruct the police investigation into the death of Jennifer Gatey.
- [14] The facts agreed to in the agreed statement of facts are the only facts upon which Mr. Gourlay may be sentenced. That is important because, based on the agreed statement of facts, Mr. Gourlay did not commit any specific civil or criminal act through the manner in which he was driving. For example, he did not drive dangerously at the time of the offences nor, despite what the Crown described as a thorough and extensive investigation, is there any evidence that his ability to drive was impaired by drugs or alcohol.

### Mr. Gourlay's Personal Circumstances

- [15] Mr. Gourlay was born in Edmonton, Alberta on November 26, 1975, and is now 42 years old. When he was about two years old, his family moved to Fort St. John, where they lived for about four years before moving to Kamloops.

- [16] His father, who passed away several years ago, was a teacher. His mother was a homemaker. She lives in Kamloops, and he has a close relationship with her. On the day of the leaving the scene offence, he had just taken his mother's dog for a walk. Mr. Gourlay also has a close relationship with his older sister Shannon. Mr. Gourlay's mother and sister have provided letters in support of him.
- [17] When he was nine years old, Mr. Gourlay was diagnosed with dyslexia, a severe learning disability. He had significant difficulties in school and was severely disabled with respect to reading and writing. In a Student Progress Report prepared in May 3, 1985, and filed as a part of the defence materials on sentencing, a school district counsellor described Mr. Gourlay's continuing struggle to achieve functional literacy.
- [18] Mr. Gourlay continues to live with his severe learning disability, which has posed a number of ongoing problems for him. According to a March 2004 report prepared by Dr. David Worling in support of Mr. Gourlay's claim for a disability tax credit, his reading and writing abilities were assessed as falling between a Grade three and five level.
- [19] After graduating from high school, Mr. Gourlay moved to Williams Lake, BC, where he played Junior A hockey for about a year. During this time, and for about two years, he worked as a full-time stacker for Save-On-Foods.
- [20] Mr. Gourlay then returned to Kamloops and worked as a full-time delivery driver for Pepsi-Cola for about a year and a half. After leaving that job, he travelled to Australia for about four or five months before again returning to Kamloops.
- [21] After his travels, Mr. Gourlay worked for Conway Supplies for about a year.
- [22] In 2000, Mr. Gourlay left Kamloops and moved to the United Kingdom to play semi-professional hockey for about a year. Upon his return to Kamloops, he worked for Ainsworth Lumber for about the following seven years. While working at Ainsworth Lumber, he bought his first Kamloops home. He lived in it for six years before selling it and buying his second Kamloops home.
- [23] After Ainsworth Lumber closed, Mr. Gourlay obtained a technical ticket in refrigeration by attending a course held by the City of Kamloops. He then began volunteering at the Town of Logan Lake's arena to gain experience. He was subsequently hired by Logan Lake to manage its hockey arena. He held that position for the following nine years. He was forced to resign because of these criminal charges.
- [24] While Mr. Gourlay was working in Logan Lake, his father died of cancer. His father's death had a profound and measurable effect on him. They had been the best of friends.
- [25] Mr. Gourlay has struggled over the years with substance abuse problems. Following his arrest on these charges, several months after the incident, he was released on a bail condition that he attend drug treatment. Commencing on July 21, 2017, he attended A Better Place, a supportive recovery home in Surrey, BC. On October 1, 2017, Don Reda, a director of

the home, wrote a letter in support of Mr. Gourlay in which he described the change in Mr. Gourlay's lifestyle and behaviour and how he had become a "role model of recovery" to other residents.

- [26] Since returning to Kamloops in October 2017, Mr. Gourlay has regularly attended a counsellor for substance abuse and mental health issues.
- [27] The defence submitted a number of support letters on Mr. Gourlay's behalf. Those include letters from members of his family and close personal friends. The letters speak to Mr. Gourlay's connection with the Kamloops community and his strong work ethic, dependability, loyalty, and kindness to his friends.

### **Impact on the Victim and/or the Community**

- [28] Ms. Gatey's father, Cameron Gatey, read a victim impact statement on his behalf and on behalf of his family and friends. He told me about his greater appreciation for the reality of the impact of serious crime on real people and the emotional scars that Ms. Gatey's family and friends will carry forever. He spoke about the grief he felt when he learned of Ms. Gatey's death and that the driver had fled the scene. He said:

I am still to this day overcome with grief when I think about what has been lost and the circumstances under which it was lost.

- [29] Mr. Gatey said that he thinks about his daughter constantly and that the intensity of his grief may have affected his health and his ability to perform his work as an engineer with the accuracy his job requires. He also spoke about the emotional trauma he felt while awaiting Mr. Gourlay's guilty plea, the sentencing hearing, and, undoubtedly, these reasons.
- [30] As I have said, the impact of Ms. Gatey's death on her family is profoundly saddening. Their lives have been irrevocably changed.
- [31] I will now consider the legal framework in which Mr. Gourlay must be sentenced.

### **The Applicable Sections of the Code**

#### **The Minimum and Maximum Sentences for Mr. Gourlay's Offences**

- [32] Mr. Gourlay has pled guilty under s. 252(1.3)(b) of the Code, the relevant parts of which provide:

#### **Failure to stop at scene of accident**

252 (1) Every person commits an offence who has the care, charge or control of a vehicle that is involved in an accident with

- (a) another person,

and with intent to escape civil or criminal liability fails to stop the vehicle, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

Offence involving bodily harm or death

(1.3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for life if

- (b) the person knows that bodily harm has been caused to another person involved in the accident and is reckless as to whether the death of the other person results from that bodily harm, and the death of that other person so results.

[33] The Code does not set a mandatory minimum sentence for an offence of leaving the scene of an accident under s. 252(1.3). The maximum sentence is life imprisonment.

[34] Under s. 259(2)(a.1), in addition to the sentence imposed, the court may:

make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place during any period that the court considers proper, plus any period to which the offender is sentenced to imprisonment if the sentence imposed is other than imprisonment for life;

[35] The offence of failing to remain at the scene of an accident is listed as a secondary designated offence under s. 487.04 of the Code and therefore, under s. 487.051, the court may, on the Crown's application, make an order for the provision of bodily substances for forensic DNA analysis. The defence does not oppose such an order in this case.

[36] Mr. Gourlay has also pled guilty under s. 139(2) of the Code, the relevant parts of which provide:

### Obstructing justice

139 (2) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[37] The Code does not set a mandatory minimum sentence for the offence of obstructing justice under s. 139(2). The maximum sentence is ten years.

### The Sentencing Provisions in the Code

[38] The principles to be considered by the court in sentencing are established by Parliament in the Code. Section 718 provides that the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions.

[39] Section 718 then lists a number of sentencing objectives which further that purpose:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[40] Sections 718.1 and 718.2 of the Code set out a number of other sentencing principles intended to guide judges in crafting a fit and proper sentence that will give meaningful effect to one or more of the sentencing objectives set out above. The relevant sentencing principles applicable to this case are:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[41] When determining a fit and proper sentence, a sentencing judge must consider all relevant factors.

[42] The principle of parity is also important. What that means is that a sentence in one case should be similar to the sentences imposed in other cases on similar offenders, for similar offences, committed in like circumstances. Not surprisingly, offenders and their circumstances are infinitely variable.

## The Case Law

- [43] The case law clearly establishes that leaving the scene of an accident with intent to avoid liability is an extremely serious offence. In *R. v. Lisi*, 2001 BCCA 559 at paras. 7-8, the Court of Appeal said:
- [7] As in all matters the range of sentence whether it be actually in custody or a conditional sentence of imprisonment is very, very broad. There are no limits in the Criminal Code and there is no minimum sentence for this offence, but this, in my view, is an extremely serious offence. Leaving the scene of an accident with intent to avoid liability can deprive law enforcement authorities of knowing what the accused was like at the time and what condition he was in at the time the offence occurred, quite apart from the dangers to the victim, who may be alive and in need of assistance.
- [8] The accused here knew that he had very seriously injured the deceased, and persons who know such things and leave the scene must be deterred from doing so by the fear of a sentence of imprisonment.
- [44] Other cases have called the offence "morally reprehensible" or "contrary to any standard of decency and humanity": see, for example, *R. v. McAndrew*, 2004 BCCA 368 at para. 11 and the cases referred to therein; *R. v. Sanford*, 2014 ONSC 5555 at para. 19.
- [45] In *R. v. Gummer* (1983), 38 C.R. (3d) 46 (Ont. C.A.), Justice Martin said, at paras. 14 and 16:
- [14] the failure of the respondent to stop his automobile, when, as the trial Judge found, he was aware that he had struck someone, was perhaps the more serious of the two offences which the respondent committed. In failing to stop as required, the respondent exhibited a grave failure to comport with the standards of humanity and decency.
- [16] the Court has a duty to bring home to persons having the charge of a motor vehicle which has been involved [in an accident] that the courts of this country will not countenance the failure to remain at the scene and discharge the duties required by the Criminal Code.
- [46] The gravity of the offence of leaving the scene of an accident is reflected in the Parliament's decision to set a maximum life sentence for the offence when death occurs. Three of the policy reasons for such a significant maximum sentence were fully explored by Justice Germain in *R. v. Didechko*, 2016 ABQB 552 at paras. 19-23. In summary and in brief, those policy reasons are:
- (a) The offence should attract significant legal jeopardy because leaving the scene of the accident may take away any survival chance a victim might have. Victims are at risk of being reinjured by subsequent road users, or placed at greater physical risk by the lack of immediate medical attention.
- (b) Because many cases in which a driver flees the scene of an accident also involve the driver's use of alcohol/drugs or other criminal driving offences, the penalty for fleeing should be substantial enough to remove any strategic incentive available to the accused by fleeing. A

dishonourable driver should not be advantaged by taking their chances of not being caught or being caught after they have sobered up. As Judge Germain said at para. 21, "Anything that minimalizes or trivializes an offence measured against the potential offences one could be attempting to avoid, is bad social policy".

- (c) The manner and circumstances of each offence of fleeing the scene may vary greatly. For example, the offence may involve a young driver who momentarily panics and later reports the wrongdoing or a sophisticated, mature driver who assesses the risk and deliberately and intentionally decides to try to avoid legal jeopardy. The widely varying circumstances require a wide potential range of sanctions.
- [47] I would add to these factors that there is a strong public policy basis for allowing the police to investigate the circumstances of an offence without delay. The public has a need to know what happened and why, and police investigations, and hence the public's understanding of the circumstances, are hampered by the failure of a driver to remain at the scene.
- [48] Unquestionably, every sentencing decision must be considered on its own facts. It is an inherently individualized process, and the sentence must fit the circumstances of the crime and the offender. The individualized approach is encompassed by the proportionality requirement in s. 718.1 - a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender.
- [49] A review of the cases relied on by both the Crown and the defence establishes that the paramount sentencing objectives for the offence of failing to remain at the scene of an accident are deterrence, especially general deterrence, and denunciation.
- [50] Most offenders involved in hit and run offences are not career criminals. However, these cases attract public concern and outrage. The objective of general deterrence is premised on the belief that the sentence imposed should deter others from committing similar offences by emphasizing community disapproval of the act. Branding conduct as reprehensible has a moral and educative effect and thereby affects the public's attitude.
- [51] Because deterrence and denunciation are of paramount importance, the objective of rehabilitation of the offender must be given less weight in the sentencing decision.
- [52] The Crown relied heavily on *Didechko*, in which the offender received a global sentence of 30 months' imprisonment, two years for leaving the scene of an accident and six months to be served consecutively for obstructing justice.
- [53] In that case, the offender struck and killed a pedestrian who was on the roadway and then fled the scene. He called his brother and circled back to the scene of the accident where he made a second call to his brother and then parked the vehicle he was driving at his father's home. The judge described the offender's actions in circling back as a "self-centered attempt to assess [his] criminal jeopardy": para. 37. The following morning, the offender drove the vehicle to Northeast Edmonton and abandoned it. He called the police and began what the judge described at para. 5 of his decision as an "elaborate attempt to mislead the police by

reporting the vehicle stolen", including casting suspicion on his brother's friends: see para. 42.

- [54] While the judge was not satisfied beyond a reasonable doubt that the offender's alcohol consumption made him guilty of dangerous driving causing death, he concluded that for sentencing purposes, his alcohol consumption contributed to his decision to leave the scene. He described it at para. 38 as "risk management, pure and simple."
- [55] In addition, the Crown relied on *R. v. West*, 2010 NBPC 28; *R. v. Young*, 2011 NSPC 66; *R. v. Saggu*, 2016 BCPC 289; and *R. v. Zhang*, 2007 BCPC 221. The Crown also commented on *R. v. Basra*, 2015 BCSC 2051.
- [56] In the main, the defence relied on cases in which the offender was sentenced for leaving the scene of an accident that killed a pedestrian, and in which the offender had taken steps to obstruct justice but was not charged separately with obstruction. Instead, the steps taken to obstruct justice were treated as an aggravating factor. Those cases include *R. v. Alves*, 2012 BCPC 403; *R. v. Peragine*, 2012 BCPC 355; *Sanford*; and *Basra*.
- [57] I have reviewed all of these cases and many of the cases referred to in them. They suggest that the appropriate range of sentence for leaving the scene of an accident is imprisonment for between three and 18 months.
- [58] In particular, in *Lisi*, a convicted driver appealed his sentence of three months' imprisonment for failing to remain at the scene of an accident. The appellant's car struck a pedestrian who died as a result. On appeal, the appellant argued that a conditional sentence order, which is now statutorily unavailable, should have been imposed, or that he should be permitted to serve his sentence intermittently. The Court of Appeal dismissed his appeal. In concurring reasons, Justice Southin said at para. 9, "I consider that three months was a perfectly fit sentence and one which I would have imposed myself, at least to that extent, had I been the learned trial judge."
- [59] In *Young*, the offender collided with a 69-year-old man who was crossing a highway looking for his dog. The offender knew that he had hit someone as he first slammed on his brakes and then drove on. He hid his vehicle in his family's garage.
- [60] The offender was driving a vehicle that was unlicensed and uninsured. The offender did not have a driver's license. He lied to the police and had a minor criminal record. The trial judge sentenced him to 18 months' imprisonment for leaving the scene of an accident. The fact that the offender hid the vehicle was treated as an aggravating factor and was not the subject of a separate charge.
- [61] In *R. v. McAndrew*, 2004 BCCA 368, the Court of Appeal dismissed a driver's appeal of a sentence of six months' imprisonment. The appellant pled guilty to leaving the scene of an accident. The appellant and his passenger had left a bar at 2 a.m. The appellant failed to negotiate a curve in the road and rolled his vehicle. His passenger was not wearing her seat belt, and struck her head. Following the accident, the appellant removed his passenger from

the vehicle and abandoned her at the scene, where she died shortly thereafter. The appellant had a record of motor vehicle offences, including a conviction for dangerous operation of a motor vehicle and refusal to provide a breath sample. At para. 18, the court concluded that, in the circumstances, the six-month sentence imposed by the trial judge "was proper and fit."

- [62] In *West*, the offender hit a person in a wheelchair who was crossing a street against a light. The offender was aware that she had hit someone but accelerated away from the scene of the accident. Despite being urged by her father to turn herself in, she refused to do so and in an attempt to hide her involvement, had the car repaired. Judge Richards described her efforts to hide her involvement as involving "a high degree of callousness": para. 51. The offender was 19 and had no criminal record. She pled guilty to leaving the scene of an accident and obstructing justice. She was sentenced to 18 months' imprisonment for leaving the scene of an accident, less six months time served, and 12 months plus a day, to be served consecutively, for obstructing justice.
- [63] In *Peragine*, a driver pled guilty to leaving the scene of an accident. He was driving on a busy thoroughfare in Burnaby when he struck and killed a pedestrian. After the collision, the offender continued driving away despite being told by a passenger that she had seen someone lying on the road and confirming that himself by looking back. The offender stopped his car in a parking lot and saw damage to the front of his vehicle and a personal bag lodged in his grill. He placed the bag in the trunk of his car drove away. He did not return to the scene of the accident despite being urged to do so by his passengers, and he told his passengers to forget the accident ever occurred. He subsequently told investigating officers that the damage to his vehicle was caused by previous, unrelated accidents.
- [64] Two years later, the offender pled guilty, but only after he was the subject of a Mr. Big-style undercover operation. After considering the mitigating and aggravating circumstances, the sentencing judge imposed a five-month jail sentence, finding that the offender's lack of consideration for his own passengers was an aggravating factor. The offender was not charged with obstructing justice.
- [65] In *Alves*, the offender was driving a truck which struck a 77-year-old pedestrian crossing the street. After the collision, the offender drove for a short distance and then pulled over. He walked back to the area where the pedestrian was lying and had a conversation with a bystander before leaving the scene. The pedestrian died from her injuries. The offender eventually pled guilty. He had a serious record of motor vehicle offences, including a recent conviction for impaired driving causing bodily harm. The sentencing judge declined to impose a conditional sentence order (which was then available), but imposed a sentence of four months plus 18 months' probation.
- [66] In *Sanford*, the offender, whose licence was suspended at the time, struck a cyclist. He stopped his vehicle and observed that the cyclist was semi-conscious and injured. After others stopped at the scene, the offender drove away at a high speed. The cyclist died of his

injuries. Within a few minutes, the offender was stopped by the police. He was convicted following a trial. After reviewing the case law, Justice Hill imposed a 90-day intermittent sentence, taking into account that the offender had spent 19 days in pre-trial custody and had been under restrictive bail conditions.

- [67] In Basra, the offender struck a pedestrian while driving on the Fraser Highway. The pedestrian was apparently trying to commit suicide. The offender and his girlfriend heard a thud or bang and observed a hole in their windshield. The offender was suspended from driving at the time of the collision and stopped his vehicle to switch seats with his girlfriend. A few minutes later, the couple drove to a residential area where they called an auto glass repair service and sought immediate repairs to the windshield. The windshield was repaired the following day.
- [68] At trial, the offender said he left the scene because he believed someone had thrown a rock at his car. Justice Verhoeven rejected the offender's evidence and found that the offender fled to escape liability and did not investigate the cause of the accident out of a desire to remain wilfully blind. The offender had a significant record of driving offences, including four prior convictions for alcohol-related driving offences.
- [69] Justice Verhoeven imposed a sentence of nine months' imprisonment but declined to order any probation. The offender was not charged with obstructing justice, but his obstructionist behaviour (switching drivers, seeking to have his windshield repaired) was considered as an aggravating factor in the sentence.
- [70] In Saggi, the offender left the scene of an accident in which he made a left turn in front of a motorcycle. The motorcyclist collided with the rear of the offender's vehicle and was killed. Witnesses to the collision chased and stopped the offender. They described him as tumbling out of the vehicle and stumbling around. When the bystanders returned to attend to the victim, the offender abandoned his vehicle and walked home. The following morning, he reported to the police that his vehicle had been stolen.
- [71] Although the trial judge could make no conclusive finding about the offender's intoxication while driving, it was a consideration in sentencing. The offender also had a previous record, and was uninsured and prohibited from driving at the time of the collision. He was sentenced to 15 months' imprisonment for leaving the scene of an accident. He was not separately charged with obstruction.
- [72] As can be seen from a review of the cases, sentences at the higher end of the range appear to be reserved for offenders who are clearly aware of their involvement in a collision in which someone is injured and consciously decide to leave the scene: Didechko, West, Peragine, Alves, and Saggi. Such sentences also appear to be reserved for offenders who engage in obstructionist behaviour after the accident or who have a history of motor vehicle offences: Didechko, Peragine, and Saggi.

- [73] Perhaps most importantly, sentences at the higher end of the range are generally imposed where there is sufficient evidence to find that the offender sought to escape criminal as opposed to civil liability, such as being charged with dangerous or impaired driving offences.
- [74] Having considered all of the cases, the gravity of Mr. Gourlay's offence of leaving the scene of the accident, and his degree of responsibility, I conclude that a fit sentence is not at the high end of the range. Rather, Mr. Gourlay should be sentenced at the lower end or the middle of the range. It is of particular note that Mr. Gourlay did not see Ms. Gatey either before or after the collision, he was not speeding and there was no evidence that drugs or alcohol were a factor in Mr. Gourlay's driving.
- [75] In this case, Mr. Gourlay also pled guilty to obstructing justice.
- [76] The cases involving drivers who took steps to cover up their involvement in an accident after fleeing the scene are more difficult to assess for an appropriate range. That is, in part, because it is not easy to distinguish those cases in which there is a separate charge of obstruction from those in which the obstructionist steps are considered an aggravating sentencing factor.
- [77] For example, in *Peragine and Basra*, the offenders arguably took more extensive obstructionist steps to hide their involvement than those taken by Mr. Gourlay, and yet they were not charged separately with obstruction. In other cases, the steps taken by an offender to cover up their offence were more extensive or prolonged, and separate charges were laid.
- [78] In *R. v. Meads*, 2010 ABPC 109, the offender pled guilty to leaving the scene of an accident and obstructing justice. The sentencing judge described the offender's attempts to deflect suspicion at para. 5 as including, with the help of his father, "washing, scrubbing and dismantling the front portion of his truck" and "cutting up parts of the truck to hide the evidence." In these circumstances, evidencing a concerted effort to conceal the offence, a charge for obstructing justice was laid, and the judge imposed a concurrent sentence of three months' imprisonment.
- [79] In *Didechko*, the obstructionist steps included the offender: parking the vehicle at his father's home; abandoning the vehicle; and, as described in the decision at para. 41, making "three telephone calls to the Edmonton City Police complaint line in which he fabricated, complete with details, a scenario that he had been the victim of crime himself". In a later taped and cautioned police interview, the offender "filled in the theft scenario by casting suspicion on his brother's friends supposedly partying at the house": see para. 42. In respect of the separate charge of obstructing justice, the offender was sentenced to a consecutive six months.

- [80] In *West*, the day after the offender fled the scene of the accident, she told her passengers not to report it, and some of the passengers testified that they felt intimidated by the offender's father. The offender had her vehicle repaired with the intention of ultimately removing it from the jurisdiction. The offender was sentenced to an additional 12 months plus a day, to be served consecutively, for the offence of obstructing justice.
- [81] In *R. v. Casselman*, 2014 ONCJ 198, the accused struck a snowmobile being operated by a 16-year-old, causing life-threatening, permanent injuries. The accused drove away and hid his vehicle. When questioned by the police, he lied and said he had hit a deer. After trial, he was found guilty of impaired driving causing bodily harm, failing to remain at the scene of an accident, and obstructing justice. Justice Paciocco, before his appointment to the Ontario Court of Appeal, imposed a sentence of 60 days for obstructing justice to be served concurrently to the sentence for failing to remain at the scene of an accident.
- [82] In this case, Mr. Gourlay's actions in washing his vehicle and switching the front signal lights are less serious than the obstructionist steps taken by the offenders in *Meads*, *West*, *Didechko*, *Peragine*, or *Basra*. In particular, Mr. Gourlay did not enlist others or threaten them in his effort to obstruct justice. He did not lie to the police or falsely report his vehicle stolen. He did not take his vehicle to be professionally repaired, replace the windshield, or dismantle the front end to conceal the damage.
- [83] Based on the cases, and on the maximum sentences for both offences, the sentence for obstructing justice is typically lower than the sentence for leaving the scene of an accident.
- [84] Having reviewed the cases, I now turn to the mitigating and aggravating circumstances in this case.

### The Mitigating Circumstances

- [85] There are a number of factors which I will take into account in mitigation of any sentence I impose.
- [86] First, Mr. Gourlay is a first-time offender. He does not have a criminal record, nor does he have a serious record of motor vehicle infractions.
- [87] Second, as the Crown acknowledged, Mr. Gourlay's guilty pleas, despite significant triable issues in this case, are a significant mitigating factor. In this case, Mr. Gourlay indicated his intention to plead guilty well in advance of the scheduled trial dates at which a number of witnesses would have been required to testify. In *R. v. Duong*, 2006 BCCA 325 at paras. 9-11, the Court of Appeal explained the significance of a guilty plea:
- [9] A guilty plea involves an acknowledgement of all the legal elements necessary to constitute the crime charged and is meant to be unequivocal: *R. v. McNabb* (1971), 4 C.C.C. (2d) 316 (Sask. C.A.); *R. v. Lucas* (1983), 9 C.C.C. (3d) 71 (Ont. C.A.).

10 Among other things, a guilty plea provides certainty and finality in the criminal proceedings against an accused. When an accused enters a plea of guilty and the trial judge accepts the plea, the court, the prosecution, and the public are led to believe that the accused is accepting responsibility for having committed the offence.

11 In sentencing, a guilty plea may be considered by the trial judge as an admission of responsibility and, depending on the circumstances, as an expression of remorse which invites leniency: *R. v. Fegan* (1993), 80 C.C.C. (3d) 356 at 360-61, 13 O.R. (3d) 88 (C.A.). A guilty plea may also follow plea discussions with the Crown from which an accused may derive a substantial benefit through the withdrawal of additional charges or a more lenient sentencing recommendation from the Crown: *R. v. Roberts*, [1998] O.J. No. 461 (C.A.), at para. 6.

- [88] Duong has since been cited in a number of cases. In the context of the offence of leaving the scene, it was cited in *Peragine* at para. 53.
- [89] In this case, I accept that Mr. Gourlay's guilty pleas, and his remarks to the court and to Ms. Gatey's family at this sentencing hearing, indicate that he is genuinely remorseful for his acts.
- [90] Apart from this single incident involving moral reprehensibility, the letters in support of Mr. Gourlay describe him as a person of good character. He has strong support from his family and long-time friends. He had a strong attachment to the workforce and has been a contributing member of society.
- [91] The offence in this case was the product of tragic circumstances that are unlikely to ever be repeated. Mr. Gourlay is not a person for whom specific deterrence is an overriding consideration.
- [92] Because of the incident giving rise to these guilty pleas, Mr. Gourlay lost his long-term employment with Logan Lake. He has only recently become employed for less money and with fewer benefits. I accept that his dyslexia reduces his prospects of employment. His loss of employment is relevant in terms of him having already been sanctioned.
- [93] I have also taken into account the fact that Mr. Gourlay suffered harsh treatment while being held in pre-trial custody. He was assaulted twice before he was released on bail. The circumstances of the first assault are the most troubling.
- [94] On March 10, 2017, the morning on which Mr. Gourlay was scheduled to be released from the Kamloops Regional Correctional Centre, he was assaulted by another inmate because of the offences to which he has now pled guilty. The Crown does not dispute that the assault was an act of pure vigilante justice.

- [95] Mr. Gourlay sustained bilateral mandible fractures to his lower jaw, fractures to his nasal bones, a right ramus fracture, and a concussion. He required surgery to repair the fractures, and a metal plate and screws were implanted. He continues to experience concussion symptoms and is scheduled for a CT scan as a result. The inmate who assaulted Mr. Gourlay was convicted of aggravated assault.
- [96] Mr. Gourlay was assaulted for the second time on April 26, 2017, while in custody in the Vancouver Island Regional Correctional Centre. During lock-up, his cellmate assaulted him throughout the evening. He was punched and kicked in the face, resulting in a laceration over his nose and a suspected concussion.
- [97] In *R. v. Summers*, 2014 SCC 26, the Supreme Court of Canada dealt with s. 719(3.1) of the Code in respect of the issue of enhanced credit for offenders on remand. The Court confirmed that enhanced credit is capped at a rate of 1.5:1. Since then, lower courts have been granting enhanced credit as a default position: *R. v. Campbell*, 2014 BCCA 235. The Court in *Summers* recognized that "[t]he unavoidable consequence of capping pre-sentence credit is that it is insufficient to compensate for the harshness of pre-sentence detention in all cases": para. 72. At para. 73, the Court held that "individuals who have suffered a particularly harsh treatment, such as assaults in detention, can often look to other remedies, including under s. 24(1) of the Charter."
- [98] In *R. v. Tulloch*, 2014 ONSC 6120 at para. 29, Justice Hill held that the Court's use of "including" in para. 73 of *Summers* meant that other remedial avenues, in addition to Charter relief, could exist to recognize the mitigatory impact of particularly harsh conditions during pre-trial detention.
- [99] This approach was affirmed in *R. v. Doyle*, 2015 ONCJ 492, a case involving an offender who suffered from Type 1 Diabetes and depended on correctional authorities for his medical welfare. Because of the conditions under which he was held in remand, the offender suffered from perilous blood glucose levels which the trial judge found amounted to "particularly harsh treatment". In reaching that conclusion, the judge in *Doyle* considered harsh treatment in the context of an assault by corrections staff or another inmate:
- [36] An assault by correctional staff, for example, implicates the state in a breach of a prisoner's constitutionally protected rights and thereby affords, at least arguably, a remedy under s. 24(1) of the Charter. On the other hand, it is analytically difficult, if not impossible, to assign responsibility to the state for an unprovoked and unanticipated assault committed by a cellmate in circumstances where a remand facility's administrators made every reasonable effort to ensure the physical security of all inmates. Both "assaults in detention" may well amount to "particularly harsh treatment". If so, both likely merit a remedy of mitigation. But one is rooted in a constitutional claim and the second in the common law.

- [100] In *R. v. Zadeh*, 2015 BCPC 336 at paras. 77-81 and 87, after discussing *Summers*, *Tulloch*, and *Doyle*, Judge G. M. Rideout took into account, as a mitigating sentencing factor, the fact that Mr. Zadeh was assaulted in pre-trial custody.
- [101] In this case, I am satisfied, and the Crown does not dispute, that the seriousness of the first assault and the fact that Mr. Gourlay was assaulted twice should be taken into account as mitigating when determining a fit sentence.
- [102] I have also considered that, since the date of the offences, Mr. Gourlay has spent 104 days in pre-trial custody. While released on bail, he has been subject for 300 days to onerous conditions which are tantamount to house-arrest, including a strict curfew which was regularly enforced, and prohibitive driving conditions.

#### The Aggravating Circumstances

- [103] In this case, I have concluded that there are no aggravating circumstances.
- [104] Although the Crown argued that Mr. Gourlay's failure to stop and check what he had hit in the roadway was an aggravating circumstance, I conclude that it is not. Rather, it is, in my view, an element of the mens rea of the offence of leaving the scene of an accident. In terms of s. 252(1.3) of the Code, willful blindness under subsection (b) is not more morally culpable than actual knowledge under subsection (a).
- [105] In addition, although in some cases the steps taken by the offender to obstruct justice after leaving the scene were considered as aggravating for sentencing purposes, in this case, the steps taken by Mr. Gourlay are the subject of a separate charge and, as a result, should not also be considered as an aggravating circumstance.

#### Concurrent or Consecutive Sentences

- [106] The final question I must address is whether the sentences for the two offences to which Mr. Gourlay has pled guilty should be served concurrently or consecutively.
- [107] As I have said, the Crown seeks consecutive sentences for the two offences, while the defence submits that any such sentences should be served concurrently. The cases relied on by the parties are inconsistent on this issue.
- [108] In sentencing an offender for multiple offences, I must apply the two-stage process outlined in *R. v. Li*, 2009 BCCA 85 at para. 28:
- [28] The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence. See *R. v. P.P.H.*, 2003 BCCA 591.

- [109] In determining whether the sentence for an offence should be consecutive or concurrent, the test is "whether the acts constituting the offence were part of a linked series of acts within a single endeavour": Li at para. 42. The cases relied on by the parties divide on the issue of whether the acts constituting the offence of obstruction are part of a linked series of acts with the offence of failing to remain at the scene.
- [110] Cases in which a charge of leaving the scene is combined with another criminal charge are not uncommon. Often, the driver who left the scene is also charged with dangerous or careless driving or impaired driving. Cases in which a charge of leaving the scene is combined with an obstruction charge are less common as, in many cases where obstruction is alleged, it is treated as an aggravating sentencing factor rather than as founding a separate charge.
- [111] The cases relied on by the Crown, only Didechko and West, involved consecutive sentences for leaving the scene and obstruction.
- [112] In Didechko at para. 45, the sentencing judge discussed whether consecutive or concurrent sentences were appropriate in the circumstances of that case. In determining that consecutive sentences were appropriate, he said:

These two crimes do not relate to the same incident, such as would be the case, with by example dangerous driving and hit-and-run. These are separate and distinct crimes with a common motive. Both of the crimes were motivated by the self-serving interest of avoiding civil or criminal responsibility. Were I to make these two sentences concurrent, it would mean that in Canada, we actually have free crime. The nature of these two offenses, one building on the other but with distinctly separate essential elements and apart in time, means that the sentences should be consecutive. The first offense, that of hit-and-run, was fully completed when the accused drove away without stopping. The second offense began with the planning that occurred when the accused woke up. By then, any alcohol still in his system would have likely been eliminated and he was coolly and dispassionately planning his next crime that of obstructing justice. A common motive for his first crime and his midday crime do not make them appropriate for concurrent sentences. This would of course be militated if an individual sentence imposed consecutively offended the totality principle, where a sentence in totality should not be excessively harsh [Code s 718.2(c)]. In that latter case, courts will sometimes impose concurrent sentences even though the individual crimes are distinctly different.

- [113] In West, the judge sentenced the offender to consecutive sentences of 18 months, less six months time served, for obstruction of justice and 12 months plus a day for leaving the scene. The judge relied on R. v. Howe, 2007 NBCA 84 in support of his conclusion. In doing so, the judge said, at para. 49:

Ms. West committed the second act of obstruction of justice which had to be planned and carried out over a lengthy period of time in order to have the evidence destroyed. The obstruction offence is clearly an offence which must be sentenced in a consecutive manner due to the separate societal interests being protected

[114] Didechko and West contrast with two of the cases relied on by the defence. In Meads, the court imposed a three-month sentence of imprisonment for obstructing justice to be served concurrently with a two-year term of imprisonment for failing to remain at the scene of an accident.

[115] In Casselman, the judge imposed a 60-day sentence for obstructing justice, to be served concurrently with the sentence for failing to remain at the scene. He said:

[26] The Crown seeks a sentence of 18 months on the "fail to remain" charge and 60 days concurrent on the charge of obstructing a peace officer, with that 18 month period being consecutive to the sentence imposed for the impaired driving causing bodily harm conviction. I agree that it is appropriate to deal with these offences together and to sentence the fail to remain and obstruction charges concurrently. The lie about hitting the deer was a continuation of Mr. Casselman's reprehensible conduct in fleeing the scene of the accident.

He went on to sentence consecutively for the impaired driving charge, determining that the offence of failing to remain is an "invasion of a differently protected interest" than the underlying driving offence was meant to protect.

[116] In both Didechko and West, the steps taken to obstruct justice took place over a prolonged period and were part of a concerted effort to avoid responsibility. In contrast, the steps taken by Mr. Gourlay were all completed within 24 hours of the incident.

[117] In addition, I note that in West, the judge's reliance on Howe may have been misguided because in Howe the accused was not charged with obstruction of justice in conjunction with leaving the scene of an accident, but with impaired driving in conjunction with leaving the scene. Arguably, the acts involved which led to the impaired driving charge were separate from the acts involved in leaving the scene, and were not linked to a single endeavour.

[118] Finally, as I have said, many of the cases relied on by the Crown and the defence which involve obstruction steps do not involve charges of obstruction. Rather, the obstruction steps are considered an aggravating factor in sentencing. This suggests that, in those cases, there is a conceptual link between the two acts - one aggravating the other - and that they are thus linked to a single endeavour.

[119] I am satisfied that, in the circumstances of this case, Mr. Gourlay should be sentenced concurrently for the two offences to which he has pled guilty. I conclude that both offences target the same societal interest of preventing drivers from evading liability. As a result, the acts involved were part of a single endeavour by Mr. Gourlay of seeking to avoid liability by failing to remain followed by the steps of washing the vehicle and swapping the signal lights of his Jeep for the same purpose.

## Conclusion

[120] Having considered all of the relevant facts, the circumstances of these offences and of Mr. Gourlay, the sentencing principles and case authorities, I conclude that a sentence of 10 months' imprisonment should be imposed for the offence of leaving the scene of an accident and a further two months should be imposed for the offence of obstruction of justice. Both sentences are to be served concurrently. Mr. Gourlay is entitled to 156 days credit for the time he spent in pre-trial custody.

[121] The Crown did not seek an additional term of probation, and I conclude that a term of probation would likely serve little purpose in this case.

[122] The Crown sought a two-year driving suspension. I am satisfied that as a result of a conviction for leaving the scene of an accident, Mr. Gourlay will be subject to an automatic one-year suspension under s. 99 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 and that, pursuant to R. v. Burke, 2017 BCCA 381 at paras. 14-22, Mr. Gourlay should be given credit for the bail condition which has prevented him from driving for over a year. The combined effect of these two considerations will result in a driving suspension of more than two years. No additional driving suspension is required as a part of a fit sentence for Mr. Gourlay.

[123] Mr. Gourlay, will you please stand.

[124] For the reasons I have indicated, I am sentencing you to a term of ten months' imprisonment for the offence of leaving the scene of an accident and to a sentence of two months, to be served concurrently, for the offence of obstructing justice.

[125] As I have already said in these reasons, I order that you provide a DNA sample in accordance with s. 487.051 of the Code.

[126] A victim fine surcharge is mandatory in this case.

[127] I impose a \$200 victim fine surcharge for each offence payable immediately.

"MacNaughton J."

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