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Criminal

Cases address question of time on suspension pre-DUI pleas

By **Nathan Baker**

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(March 17, 2022, 1:06 PM EDT) -- The Supreme Court recently granted leave in the case of *Basque v. R.* 2021 NBCA 50. This case deals with whether credit can be given to an offender for pre-sentence time for which a person was unable to drive due to conditions on a release order. A person awaiting trial is presumed innocent. Conditions on their liberty may be imposed, but these should only be to protect the public and ensure the accused attends court. They are not to be rehabilitative. They are not to be punitive.

As recently as *R. v. Antic* 2017 SCC 27, the Supreme Court has continued to remind stakeholders in the criminal justice system of this. However, some releases do act in a punitive manner. Individuals who do not receive release can receive credit for pre-sentence custody at an enhanced rate and this has been codified in s. 719(3) of the *Criminal Code*. Strict bail conditions can be credited in cases to take into account overly punitive conditions as noted in *R. v. Downes* [2006] O.J. No. 555. Pre-sentence custody is taken into account in determining a full sentence. If pre-sentence custody puts a sentence above two years, then a conditional sentence is not available according to *R. v. Fice* 2005 SCC 32. A sentence which is combination with pre-sentence custody exceeds the maximum sentence in the Code is illegal as in *R. v. Walker* 2017 ONCA 39. The Supreme Court in *R. v. Wust* 2000 SCC 18 found that pre-sentence custody should be considered, and may be deducted, when imposing a sentence with a mandatory minimum period of jail.

All that is to say that courts should take into account all restrictions which a person faces while presumed innocent in crafting an appropriate sentence. Where this becomes very complicated is with the issue of driving prohibitions and suspensions. Where a person is charged with a drinking and driving offence, there are two separate ways in which they may not be allowed to drive pending sentence. The first is a release condition imposed by police or court. Breach of this condition exposes the accused party to additional criminal jeopardy. The second way is that driving privileges may be suspended by operation of provincial law.

This sort of suspension is administratively imposed and breaching it leads to regulatory charges. The length of this sort of suspension varies from province to province. For example, in Saskatchewan, a person is generally suspended until sentence is imposed or the charge is withdrawn. In Ontario, a first-time offender generally faces a 90-day suspension of their driver's licence. Manitoba has an immediate 24-hour suspension. Alberta and B.C. have moved most of their first-time cases outside the criminal system.

Presently, the leading case on considering pre-sentence bail conditions which prohibit driving is *R. v. Lacasse* 2015 SCC 64. In that case, the Supreme Court reduced the driving prohibition imposed on Tommy Lacasse by the length of the term that Lacasse had been prohibited from driving by the recognizance entered into at release. Lacasse dealt with a situation where there was no mandatory minimum driving prohibition.

In *R. v. Forestall* 2016 ONSC 3519, Justice Casey Hill sitting as appeal judge, amended the driving prohibition imposed to reflect that it should commence at the conclusion of the period of imprisonment. The offender's suspended driver status at the time of the offence, and the fact that

there was not a condition of release prohibiting driving, meant that no pre-sentence credit should be given. This confirms that the suspension must flow from the criminal charge, rather than some other source to justify any reduction, but leaves open the possibility of a reduction where it does.

The Alberta Court of Appeal in *R. v. Sohal* 2019 ABCA 293, concluded that a mandatory driving prohibition should not be reduced by a pre-sentence administrative suspension. The court distinguished *Lacasse* in two ways. Firstly, *Lacasse* dealt with a driving prohibition imposed by a release, not an administrative suspension. Secondly, there was no mandatory minimum driving prohibition in *Lacasse*. There was such a minimum in *Sohal*. This can be contrasted with *R. v. Bland* 2016 YKSC 61 where Justice Leigh Gower, sitting on appeal, dealt with a case where the accused was prohibited from driving by reason of a recognizance. Applying *Lacasse*, the mandatory minimum driving prohibition was reduced by the time prohibited by the recognizance.

Prior to *Lacasse*, Justice David Paciocco of the Ontario Court of Justice, as he then was, dealt with mandatory driving prohibitions in the case of *R. v. Pham* 2013 ONCJ 635. In that case, the accused had been convicted of impaired driving, sentenced and served his whole sentence before his appeal and a retrial was ordered. Upon retrial, Pham was again found guilty. In considering sentence, Justice Paciocco concluded that a further driving prohibition, where one had already been served, would be inappropriate.

Section 259(1) as it then read should be considered in a way that "'does not offend the integrity of the criminal justice system' is to be preferred to the construction of the section that is sought by the Crown." Common sense prevailed over strictest construction where Justice Paciocco stated that "section 259 (1) must be read to permit credit to be given for 'time served' under a previous prohibition order made on the same charge." It should be noted that this case considered s. 11(h) and 12 of the Charter in coming to this conclusion.

This is the first half of a two-part series.

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