NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Cross, 2004 NSCA 156

Date: 20041231
Docket: CAC 214660
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Kevin Brian Cross

Respondent

Judges:	Roscoe, Oland, Hamilton, JJ.A.
Appeal Heard:	November 15, 2004, in Halifax, Nova Scotia
Held:	Appeal is dismissed per reasons for judgment of Roscoe, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	Peter P. Rosinski, for the appellant Kenneth Greer, for the respondent

Reasons for judgment:

[1] On November 5, 2003 the respondent Kevin Cross was sentenced to an eighteen month conditional sentence order after having pleaded guilty to one indictable and three summary offences. Among the conditions were:

> ... you shall:
>
> a) ... not take or consume alcohol or other intoxicating substances.
>
> b) ... not take or consume drugs except in accordance with a medical prescription. ...
>
> g) ... remain in your residence at all times beginning at 6:00 p.m. on November 5, 2003 and ending at 11:59 p.m. on August 4, 2004. ...
>
> k) ... prove compliance with the house arrest and curfew conditions by presenting yourself at the entrance of your residence should your supervisor or a peace officer attend there to check compliance. ...

[2] Mr. Cross was alleged to have breached these four terms of his conditional sentence. Following a hearing in accordance with the procedure designated in s. 742.6 of the **Criminal Code**, Associate Chief Judge Brian Gibson found that he had breached three of the terms. Based on evidence of Mr. Cross and his girlfriend, the judge found that the allegation regarding consumption of alcohol had not been made out. Pursuant to s. 742.6(9)(c) the conditional sentence was suspended and the respondent was directed to serve three of the remaining 17 months of the sentence in custody.

[3] The Crown appeals the finding by Gibson, A.C.J. that the respondent had not breached the term of the order prohibiting alcohol consumption and submits that the judge erred in refusing the Crown's request for an adjournment to permit it to present rebuttal evidence. An order remitting the matter for a new hearing is the relief sought.

[4] A preliminary issue is whether there is an appeal to this Court from a finding of "no breach". My view is that there is no jurisdiction to hear the appeal.

[5] The sections of the **Criminal Code** setting out the procedure when there is an allegation of breach of a condition in a conditional sentence are:

> 742.6 (1) For the purpose of proceedings under this section,
>
> ...

(3) The hearing of an allegation of a breach of condition shall be commenced within thirty days, or as soon thereafter as is practicable, after

(a) the offender's arrest; or

(b) the compelling of the offender's appearance in accordance with paragraph (1)(d).

(3.1) The allegation may be heard by any court having jurisdiction to hear that allegation in the place where the breach is alleged to have been committed or the offender is found, arrested or in custody.

...

(3.3) A judge may, at any time during a hearing of an allegation of breach of condition, adjourn the hearing for a reasonable period.

(4) An allegation of a breach of condition must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses.

(5) The report is admissible in evidence if the party intending to produce it has, before the hearing, given the offender reasonable notice and a copy of the report.

...

(7) Notwithstanding subsection (6), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of service.

(8) The offender may, with leave of the court, require the attendance, for cross-examination, of the supervisor or of any witness whose signed statement is included in the report.

(9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may

(a) take no action;

(b) change the optional conditions;

(c) suspend the conditional sentence order and direct

(i) that the offender serve in custody a portion of the unexpired sentence, and

(ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or

(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

...

[emphasis added]

[6] Section 676 sets out the rights of appeal of the Attorney General:

676.(1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

...

(d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

(1.1) The Attorney General or counsel instructed by the Attorney General may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a summary conviction or a sentence passed with respect to a summary conviction as if the summary conviction had been a conviction in proceedings by indictment if

(a) there has not been an appeal with respect to the summary conviction;

(b) the summary conviction offence was tried with an indictable offence; and

(c) there is an appeal in respect of the indictable offence.

(2) For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 730 of any other offence.

(3) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.

(4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.

(5) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under section 743.6.

[emphasis added]

[7] “Sentence” is defined in the Code in s. 673:

673. In this Part,

...

"sentence" includes

(a) a declaration made under subsection 199(3),

(b) an order made under subsection 109(1) or 110(1), section 161, subsection 164.2(1), 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2), 730(1) or 737(3) or (5) or section 738, 739, 742.1, 742.3, 743.6, 745.4, 745.5 or 747.1,

(c) a disposition made under section 731 or 732 or subsection 732.2(3) or (5), 742.4(3) or 742.6(9); and

> (d) an order made under subsection 16(1) of the **Controlled Drugs and Substances Act**;
>
> [emphasis added]

[8] In order to find that the Crown has a right to appeal the "no breach" finding of Gibson, A.C.J., it would be necessary to conclude that the decision is a disposition made under s.742.6(9) and thus a sentence. Alternatively, as urged by Crown appellate counsel, a right of appeal could be inferred, by interpreting "a disposition made" under s. 742.6(9), as including a refusal to make such an order. We are not aware of any case where this issue has been canvassed.

[9] The starting point for the analysis is the premise that any right of appeal is purely statutory. Absent a statutory right of appeal, there is no right to appeal: **R. v. Wilcox**, 2001 NSCA 45, citing **R. v. Barnes**, [1991] 1 S.C.R. 449 at 466 and **R. v. Keegstra**, [1995] 2 S.C.R. 381 at § 27.

[10] The Crown bases its arguments, on an extension of the principles developed in **R. v. Chaisson** (1995), 99 C.C.C. (3d) 289 (S.C.C.), **R. v. Pawlyk** (1991), 65 C.C.C. (3d) 63 (Man.C.A.) and **R. v. Buggins** (2004), 182 C.C.C. (3d) 418 (Alta.C.A.). In my opinion each of these cases is distinguishable, and the principles established in them are not applicable to this case.

[11] In **Chiasson**, the Supreme Court found that "sentence" included delayed parole orders made pursuant to s. 741.2 as it then was. (now s. 743.6) The rationale of the court was that a delay in parole eligibility was a part of the sentence since it clearly affected the length of time to be served. (Section 673 was later amended to specifically include s. 741.2) The finding of no breach of one of the conditions in this case is not analogous, since it had no impact on the length of the respondent's sentence. Furthermore, when the **Code** was amended to add an order under s. 743.6 as being included in the term sentence as defined in s. 673, there was a corresponding amendment to s. 676 giving the Attorney General the right of appeal "against the decision of the court not to make an order under section 743.6." If "not making an order" was meant to be encompassed within an appeal from "an order made under" pursuant to s. 673, the amendment to s.676 would not have been necessary.

[12] **Pawlyk** is more comparable to the case at hand, since there the Manitoba Court of Appeal was dealing with a Crown appeal from a refusal to order

forfeiture of proceeds of crime pursuant to s. 462.37. Section 462.37 is listed as one of the sections included in the definition of "sentence" in s. 673, but the argument of the respondent was that it was only the making of a forfeiture order that could be appealed; the refusal to make the order was not appealable. Scott, C.J., with Huband, J.A. concurring, reasoned that it made sense to provide a parallel right of appeal by the Crown. In concurring reasons, Twaddle, J. A. said that it was the disposition following conviction that was appealable by the Crown. The refusal to order forfeiture was like a refusal to order imprisonment and likewise was appealable by the Crown.

[13] I would distinguish **Pawlyk** from this case on the basis that here, if the judge had found that Mr. Cross had breached the alcohol prohibition in his conditional sentence order but then did not change the length of or type of sentence, the prerequisites of s.742.6(9) would have been satisfied, that is, "Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, ... breached a condition of the conditional sentence order, the court may ...(a) take no action...". In that situation the Crown could appeal the disposition made under the section. Here, Judge Gibson made a s.742.6(9) order for the three other breaches of condition, but the Crown does not appeal from that disposition suspending the respondent's sentence. Here, it is the failure to find that the allegation of breach was proven that the Crown seeks to appeal. If the appeal was from the disposition which, as a result of s. 673 is permitted by either the Crown or the offender, there would be jurisdiction to hear it.

[14] There is no requirement to read in a parallel right as was done in **Pawlyk**. In **Pawlyk** there had been a finding of guilt on the underlying offences, and it was the sentencing disposition that was appealed. If there had been an acquittal on the underlying offences, the Crown would also have had a right of appeal. In this case, however, the finding of no breach of the alcohol prohibition is not the equivalent of an acquittal because there was no charge of breaching an order like there is, for example, in a breach of probation situation. There is rather an "allegation" (s.742.6(3)) of a breach followed by a summary procedure with a diminished standard of proof (s.742.6(9)).

[15] In **Buggins**, the offender was found to have breached terms of his conditional sentence, but the judge "took no action" pursuant to s. 742.6(9). Instead, because there had been delay involved in the process, an order reducing the balance of the conditional sentence was made pursuant to s. 742.6(14) or (16). The Crown appealed from the order reducing the balance of the time left to be served on the conditional sentence. The Alberta Court

of Appeal found that there was jurisdiction to hear the appeal because orders made pursuant to subsections (14) and (16) are "consequential to and, therefore, a part of s.742.6(9)" and it made sense, when reviewing a sentencing judge's decision, to be able to review all parts of it that directly affect the duration and quality of the sentence.

[16] The **Buggins** reasoning does not assist the Crown in this case. Again, in that case the conditions of s. 742.6(9) were met; there was a finding that the offender had breached a condition which then gave the sentencing judge reason to amend the original sentence. An order, of the type included within the definition of sentence in s. 763, was made. As a result of the breach, the disposition was open to variation and then appeal. Here, the judge having found that there was no breach of the alcohol prohibition, s.742.6(9) was not engaged; therefore there was no sentence variation for this Court to review.

[17] One other case that the Crown refers to for support is **R. v. Whitty** (1999), 135 C.C.C. (3d) 77 (Nfld. C.A.) In that case the sentencing judge refused to make an order pursuant to s.742.6(9) after declaring that the section violated the offender's rights under sections 7 and 11 of the **Charter**. The jurisdiction of the Crown to appeal from the refusal to vary the sentence was not discussed by the Court of Appeal, and it is not known how jurisdiction was acquired. Presumably it was not put in issue by the respondent, or perhaps it was assumed that the jurisdiction to hear a Crown appeal from an acquittal was engaged, or perhaps through some sort of constitutional questions process not mentioned by the Court. In any event, entertaining an appeal from a declaration that the section violated the **Charter** is quite different from the situation in this case where the sentencing judge found that there was insufficient evidence to substantiate the allegation of breach of condition.

[18] Crown counsel also suggests that there are policy reasons for inferring a right of appeal from a finding of no breach, chiefly because otherwise serious legal errors could go unchecked, as in **Whitty**, or in this case where the Crown alleges a denial of their right to call rebuttal evidence. In my view, there are more compelling policy reasons not to find a right of appeal unless expressly authorized. The conditional sentence regime is designed to offer an alternative to imprisonment for offenders who do not pose a threat to the safety of the community. The legislative scheme includes s.742.6 which provides for this unique method of supervising compliance, which emphasizes expedience and provides for a hearing with a lower standard of admissibility and proof and a reverse onus. The sentence being served is

suspended during the process. If, given the relaxed standards and the reverse onus, the Crown is not able to satisfy the supervising judge that there has been a breach, it does not seem reasonable to allow an appeal, necessitating further delay and the possibility of a re-hearing. That would eliminate expediency.

[19] I return to the basic premise, absent a statutory right of appeal, there is no right to appeal. The words of LaForest J. in **Kourtessis et al. v. M.N.R. et al.** (1993), 81 C.C.C. (3d) 286 at p. 294 are particularly relevant:

> Appeals are solely creatures of statute: see **R. v. Meltzer** (1989), 49 C.C.C. (3d) 453 at p. 460, [1989] 1 S.C.R. 1764, 70 C.R. (3d) 383. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.
>
> There are various policy reasons for enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice. A trial court, for example, is in a better position to assess the factual record. Thus, most criminal appeals are restricted to questions of law or mixed questions of law and fact. A further policy rationale, and one that is important to the case before this court, is that there should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character. ...

[20] For these reasons I conclude that there is no appeal from a dismissal of an allegation of a breach of a conditional sentence and the appeal should accordingly be dismissed.

Roscoe, J.A.

Concurring:

Oland, J.A.