NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Starratt*** **,** 2007 NSCA 21

Date: 20070214
Docket: CAC269727
Registry: Halifax

Between:

Joseph R. Starratt

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	MacDonald, C.J.N.S.; Cromwell & Hamilton, JJ.A.
Appeal Heard:	January 22, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed, as per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. & Cromwell, J.A. concurring
Counsel:	J. Patrick L. Atherton, for the appellant Daniel A. MacRury, Q.C., for the respondent

Reasons for judgment:

[1] The appellant, Joseph Starratt, appeals the August 15, 2006 decision of Provincial Court Judge Claudine MacDonald in which, following his admission that he breached his conditional sentence, she terminated his conditional sentence and directed that he be committed to custody until the expiration of his sentence.

[2] A one year conditional sentence was imposed on Mr. Starratt on July 11, 2006 by another judge after he pled guilty to exposing his private person over the internet to a person he believed to be under the age of 18 contrary to section 172.1(1)(a) of the **Criminal Code,** R.S.C. 1985, c.C-46. Unknown to Mr. Starratt at the time, his exposure was made to a police officer posing as a 13 year old girl in a computer chat room. The conditions of his conditional sentence included house arrest for the first six months. During this period he was permitted to be away from his residence to work and to attend medical, dental, legal and counselling appointments approved by his supervisor. He was required to go to and from work by the most direct route.

[3] As a result of a telephone call to the police on July 23, 2006, twelve days after he received his conditional sentence, Mr. Starratt was arrested for driving under the influence of alcohol contrary to s. 253 of the **Code** and spent five days in jail. He was later convicted and sentenced for this offence, receiving a one year driving prohibition together with a fine as a first time offender for this type of crime who was not involved in an accident.

[4] Also as a result of this incident, it was alleged that Mr. Starratt breached two conditions of his conditional sentence: that he keep the peace and be of good behaviour and that he remain in his residence at all times except when travelling to and from work by the most direct route. While Mr. Starratt indicated that he was on his way to work when he was stopped by the police on July 23, he agreed he was not taking a direct route but instead was near the residence of his now former girlfriend.

[5] Mr. Starratt admitted these breaches at the breach hearing on August 15, 2006. When counsel made their submissions on penalty, they did not use the words "joint recommendation." It was clear however that neither party was seeking termination of his conditional sentence, rather they were recommending a penalty

of time served for the breach. Both parties agree it was a joint recommendation. At that time Mr. Starratt had served five days in jail following his arrest on July 23. In its short submissions to the judge on penalty, the Crown relied heavily on the recommendation of Mr. Starratt's supervisor that the appropriate penalty would be time served. This position was adopted by the defence.

[6] Perhaps because of the manner in which the recommendation on penalty unfolded before her, the judge failed to notify the parties that she was thinking of rejecting it without affording the parties an opportunity to make further submissions. Instead, immediately following their submissions the judge gave her decision that is under appeal, terminating Mr. Starratt's conditional sentence and directing that he be committed into custody until the expiration of his sentence. This would result in Mr. Starratt spending more than eleven months in jail.

[7] The judge's oral decision was as follows:

> . . . That [the imposition of the conditional sentence] should have been the eye-opener. When you were told by a judge that for that charge you were being sentenced to one year's imprisonment, that would be an eye-opener. Then that period of imprisonment was ordered to be served in the community. You would have been told very clearly what the conditions were, what the expectations were, and what the consequences were. You would have known before you left the courthouse there what could happen if you broke any of those conditions.
>
> That all took place on July 11th. Less than two weeks after that, not only are you outside your residence visiting when you're not supposed to be, but you're driving a motor vehicle while impaired. It shows a total, complete blatant disregard for a court order and a court-ordered imprisonment.
>
> Mr. Starrett, I've heard what you had to say. I understand what you had to say, but I'm going to deal with this by terminating the conditional sentence order. It is important, Mr. Starratt, that you understand that these orders have consequences; but not only that, that other people out there in the community who are serving periods of imprisonment in the community understand this is it. If I break any one of these conditions, I better be prepared to serve that period of imprisonment in jail. And it's important that everybody understands that. . . .

[8] Mr. Starratt went to jail following the judge's decision. On August 21st, 2006 he filed an application for leave to appeal her decision and for bail. Justice Fichaud of this Court granted leave to appeal on August 31, 2006 and bail pending

appeal on September 1, 2006. Justice Bateman granted an amended bail order on September 28, 2006. The bail conditions provided for house arrest with similar exceptions for work and medical, legal, dental and counselling appointments as contained in his conditional sentence. The hearing of his appeal was held almost five months later on January 22, 2007. Mr. Starratt's counsel indicated to the panel that it was his understanding that Mr. Starratt had not breached his bail conditions.

[9] The standard of review on an appeal from sentence was set out in **R. v. Longaphy** (2000), 189 N.S.R. (2d) 102:

> [20] A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": **R. v. Shropshire (M.T.)**, [1995] 4 S.C.R. 227; 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37; 102 C.C.C. (3d) 193, at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": **R. v. C.A.M.**, [1996] 1 S.C.R. 500; 194 N.R. 321; 73 B.C.A.C. 81; 120 W.A.C. 81; 105 C.C.C. (3d) 327, at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in **R. v. Proulx (J.K.D.)**, [2000], 1 S.C.R. 61; 249 N.R. 201; 142 Man.R. (2d) 161; 212 W.A.C. 161; 140 C.C.C. (3d) 449 at § 123-126.

[10] The same standard of review applies to appeals of penalties imposed for breach of a conditional sentence; **R. v. Monaghan** (2002), 212 Nfld. & P.E.I.R. 261 (PESCAD), ¶ 12.

[11] The issue on appeal is whether the judge erred, by failing to notify them before making her decision that she was considering not accepting it and giving them an opportunity to make further submissions on penalty in light of her concerns, such that this court should intervene.

[12] In support of his argument that the judge erred by not advising the parties that she was considering not accepting their joint recommendation and giving them an opportunity to make further submissions, Mr. Starratt referred to this Court's recent decision in **R. v. P.(G.E.)** (2004), 229 N.S.R. (2d) 61. In that case the sentencing judge did not clearly advise counsel that he may depart from their joint submission and give the parties before him an opportunity to make further submissions. Justice Bateman of this Court commented on the procedure to be

followed by a sentencing judge when he or she is considering not accepting the joint recommendation of counsel:

> [15] In **R. v. Sinclair (E.J.)**, [2004] M.J. No. 144 ; 184 Man.R. (2d) 1; 318 W.A.C. 1; 185 C.C.C. (3d) 569 (C.A.), the Court outlined a recommended procedure for a judge when considering departing from a joint submission arising out of a plea bargain. Steel, J.A., writing for the Court said:
>
> > "[17] Thus, the law with respect to joint submissions may be summarized as follows:
> >
> > > '(1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.
> > >
> > > '(2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.
> > >
> > > (3) In determining whether cogent reasons exist (i.e., in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.
> > >
> > > (4) **The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.**
> > >
> > > (5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone a reason for departing from the proposed sentence. The proposed sentence must meet the

> standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.'" (emphasis added)
>
> (Bolding mine)

[13] As appropriate given the joint submission before the judge, the Crown supports the appellant's position that the judge erred by failing to notify the parties of her concern with the joint recommendation and give them an opportunity to make further submissions.

[14] On the facts of this case, the judge should have alerted counsel to her concerns with their joint recommendation and given them an opportunity to address the issue in detail. I agree with counsel for both parties that her failure to do so amounts to reversible error because if the parties, especially Mr. Starratt, had been notified of her concern and given the opportunity to respond, they may have sought an adjournment to introduce evidence from the supervisor or his now former girlfriend, made further arguments supporting the proposed penalty and provided the judge with cases showing the joint recommendation was within the range of penalties imposed for similar types of first time breaches by similar offenders, which may have affected the outcome. By failing to follow this procedure the judge denied the parties the opportunity to present their arguments as they would have if they had known their joint recommendation was not going to be accepted, which may differ significantly from their presentation when there was a joint recommendation. In light of this error, it falls to this Court under s.687 of the **Code** to allow the appeal and decide what is an appropriate penalty.

[15] To avoid the problem that arose in this case counsel should try to ensure that they make it clear to a sentencing judge that they are making minimal arguments because they are presenting a joint recommendation, and that if the judge has concerns with the recommendation that they want additional time to present their final argument.

[16] Counsel were given an opportunity at the hearing before us to make the case they would have made at the hearing before the judge in support of their joint recommendation had she afforded them the opportunity to do so. They did not seek to introduce evidence but provided additional arguments.

[17] Mr. Starratt argued that the joint recommendation of time served should be accepted, pointing out that time served is now 22 days as opposed to the five days that was the case before the judge. Mr. Starratt argued that while termination for a first breach of a conditional sentence is an option under s.742.2(9), it is not automatic and not appropriate in this case. He argued that all of the principles and purposes of sentencing are to be considered when deciding on the penalty for breach, including a consideration of whether he is still a good candidate for a conditional sentence. He stressed that it is important to consider the particular circumstances of his breach and of himself in determining the penalty, rather than making him an example to other offenders and the public of the validity of the conditional sentencing regime. He highlighted the fact that he learned his lesson about the importance of strictly abiding by the conditions in his sentence by spending five days in jail. That was his first experience in jail. He supports this position by pointing to the fact that he has now spent almost five months under house arrest since bail was granted, without incident.

[18] He argued that while no excuse, there was a reason for his breach. He was very upset over the then recent death of his grandmother with whom he had a very close relationship and was seeking consolation from his now former girlfriend. He pointed out that this was his first offence for driving while under the influence of alcohol and that he was picked up as a result of a telephone call to the police about his condition, not as a result of erratic driving or an accident. He pointed out that his second offence was unrelated to his first offence and that he had only a minor criminal record. He argued that his early admission of breach had saved time and effort, that it saved the need for the Crown to bring in witnesses from out of area. He stressed that the main concern of the Crown on sentences for his first offence is assessment and treatment and that this treatment is available to him if he serves his sentence in the community but not if he serves it in jail. He pointed out that the penalty for the breach is separate and apart from the sentence for his conviction for driving while under the influence, for which he was separately sentenced.

[19] In addition Mr. Starratt indicated that his circumstances today are different than they were before the judge. It has now been over 6 months since the conditional sentence was imposed and out of that time he has spent over 22 days in jail and has lived under house arrest as a result of the bail provisions. He also pointed out that if this Court accepts the joint recommendation that the penalty be

time served, his house arrest will effectively have been extended by five months, since his conditional sentence has been suspended during bail.

[20] Appropriately, the Crown continues to recommend the acceptance of the joint recommendation, pointing out that this recommendation was made by an experienced senior crown counsel relying on the recommendation of the person closest to the situation, Mr. Starratt's supervisor. He highlighted the point that it appears Mr. Starratt had learned his lesson after spending his first five nights in jail given his behaviour since.

[21] Taking into account these arguments, especially that treatment is available to Mr. Starratt if he serves the balance of his sentence in the community but not if he serves it in jail, his indication of the role his grandmother's death played in his breach, that he has been under house arrest for almost five months without breach as a result of his bail conditions, the fact his conditional sentence has been suspended for almost five months as a result of bail and that he has now spent over 22 days in jail, I am satisfied the joint recommendation should be accepted.

[22] If it is necessary that any additional orders be issued by this Court to give effect to this decision, I would ask the Crown to prepare such orders and forward them to the Court, with a copy to Mr. Starratt's counsel, within two weeks of the release of this decision.

[23] As set out in ¶ 14 above I would allow this appeal because of the procedural error made by the judge faced with a joint recommendation on penalty and determine the appropriate penalty in accordance with s. 684 of the **Code**. Without that error the result may well have been different. Had the judge told counsel of her concerns with their joint recommendation and given them an opportunity to address them, and had then made the same decision, I may have dismissed the appeal. Applying the standard of review, the question would then be whether the sentence she imposed was demonstrably unfit.

[24] The starting point for any court called upon to consider an application for termination of a conditional sentence is **R. v. Proulx**, [2000] 1 S.C.R. 61, 2000 SCC 5, 140 C.C.C. (3d) 449, and particularly the following at ¶ 39:

> More importantly, where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the

> remainder of his or her sentence in jail. This constant threat of incarceration will help to ensure that the offender complies with the conditions imposed: see *R. v. Brady* (1998), 121 C.C.C. (3d) 504 (Alta. C.A.); J. V. Roberts, "Conditional Sentencing: Sword of Damocles or Pandora's Box?" (1997), 2 *Can. Crim. L. Rev.* 183. It also assists in distinguishing the conditional sentence from probation by making the consequences of a breach of condition more severe.

[25] Since **Proulx**, supra, other appellate courts have emphasized that post-sentence criminal conduct will justify termination; **R. v. L.(T.E.)**, 202 C.C.C. (3d) 431, ¶ 10.

[26] Termination of Mr. Starratt's conditional sentence may be within the range of acceptable penalties, for a breach that involved the commission of a criminal offence in a place Mr. Starratt was forbidden to be less than two weeks after his conditional sentence was imposed, making this Court's intervention inappropriate.

[27] In her decision which is reproduced in ¶ 7 above, the judge focussed on an important aspect of the conditional sentencing regime; that persons who are given conditional sentences and the public generally must understand that a breach of a conditional sentence has serious consequences and may well result in jail, especially if that breach involves the commission of another criminal offence as is the case here. These consequences are of fundamental importance to the conditional sentence provisions of the **Code** and their usefulness as a sentencing option.

[28] I would allow the appeal and order that Mr. Starratt's penalty for breach of his conditional sentence be time served.

[29] One of the conditions of Mr. Starratt's bail order is as follows:

> THAT he surrender into the custody of the Keeper of the Central Nova Scotia Correctional Facility in Dartmouth, Nova Scotia, within twenty-four (24) hours of being notified that the judgment of this Court is to be released; in the event the appeal is sooner dismissed, quashed or abandoned, he surrender into the custody of the Keeper of the Central Nova Scotia Correctional Facility within twenty-four (24) hours of the filing with the Registrar of this Court of the Order dismissing or quashing the appeal or the notice of abandonment of the appeal, as the case may be.

[30] There seems to be no reason to require Mr. Starratt to report to jail given the outcome of his appeal and, accordingly, I would alter his bail order to delete condition number 8. In addition, I would release this decision without prior notice to the parties.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Cromwell, J.A.