NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. LeBorgne*, 2005 NSCA 156

Date: 20051206
Docket: CAC 248661
Registry: Halifax

Between:

Roger Frederick LeBorgne

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Roscoe, Freeman and Cromwell JJ.A.
Appeal Heard:	October 17, 2005, in Halifax, Nova Scotia
Held:	Leave to appeal granted but appeal dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Roscoe, JJ.A. concurring
Counsel:	Roger Burrill, for the appellant Daniel MacRury, for the respondent

Reasons for judgment:

I. INTRODUCTION:

[1] This appeal raises a narrow issue of considerable practical importance: When an offender is alleged to have breached a conditional sentence order, may hearsay evidence be used to prove the breach? Chisholm, P.C.J. answered this question in the affirmative. I agree.

II. FACTS AND PROCEEDINGS:

[2] The appellant was sentenced to two years less one-day imprisonment to be served in the community — a conditional sentence under s. 742.1 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Among the conditions of the sentence were requirements that he not take alcohol or non-prescription drugs and that he reside at the Rob White Recovery House and comply with all its rules. The appellant's conditional sentence supervisor filed an Allegation of Breach, alleging that the appellant had breached these conditions.

[3] The appellant appeared before Chisholm, P.C.J. for a breach of conditional sentence hearing under s. 742.6 of the **Code**. In addition to the supervisor's report, the Crown presented a signed statement from Mr. Paul Rouleau, Director of the Rob White Recovery House. Mr. Rouleau's witness statement reads as follows:

> On April 15, 2005 after a certain amount of interviews with other clients of the Rob White Recovery House, it has come to my/our attention that Mr. Rodger F. LeBorgne had pulled a knife and threaten[ed] another client of the residence. Mr. LeBorgne has admitted to myself of this situation.

[4] Mr. Rouleau also gave oral evidence at the breach of conditional sentence hearing. He said that the number one rule at the house was that there be no threats of any kind. He also described what he knew of the alleged knife incident:

> Throughout the process while he was with us at the recovery house it was our view that he was unmotivated to do the program. Basically there was a lot of anger there, there was a lot of threats, name-calling not only to other clients in our house but also

> to the staff. There was an altercation that had transpired at the Rob White House that sort of, you know, sort of finalized everything in our minds at the Rob White House that he would no longer be a suitable candidate.
>
> When the matter came with Mr. LeBorgne and another individual, there was somewhat of a word exchanged and Mr. LeBorgne pulled out a knife which is still beyond our understanding that he would have had a knife. That was a threat and as a result of that we felt that there would be no more need for Mr. LeBorgne to reside at our house.

[5] Mr. Rouleau admitted on cross-examination that he did not have first-hand knowledge of the knife incident. However, as noted, his witness statement referred to an admission by Mr. LeBorgne in relation to the incident. Counsel for the appellant did not cross-examine Mr. Rouleau about this admission.

[6] Chisholm, P.C.J. first dealt with the defence argument that hearsay evidence was not admissible on the breach hearing. He rejected this submission, relying on three provisions of the **Code**. Section 518.(1)(e), allowing hearsay on bail hearings, was, he found, incorporated into the breach provisions by s. 742.6(1)(a). He also found that s. 723(5), which permits hearsay at sentencing proceedings, applies to breach hearings. Finally, he noted that s. 742.6(5) makes the report of the supervisor and the attached witness statements admissible in evidence on certain conditions. In the result, he concluded that hearsay is admissible on the breach hearing, but that it is for the court to weigh the evidence in light of the particular circumstances, including the nature and source of the evidence.

[7] Turning to the breach allegations, he found that the quality of the evidence provided did not prove the first two alleged breaches relating to consumption of alcohol and drugs. On the third alleged breach — failing to comply with house rules — the judge found this had been established by evidence that the appellant had threatened another resident with a knife. He relied mainly on Mr. Rouleau's unchallenged statement that the appellant had admitted the incident to him. (The judge, incorrectly, thought that this admission was in Mr. Rouleau's oral testimony, but it was, in fact, referred to in his written witness statement.) The judge ordered the termination of the conditional sentence and directed that the appellant be committed to custody until the expiration of his sentence.

III. ISSUES:

[8] I would divide the single issue raised by the appellant into two: Did the judge err: (1) by admitting hearsay evidence? and (2) by finding the Crown evidence was sufficient to prove the breach? No *Charter* issues were raised and no issue about the judge's admission of Mr. Rouleau's oral evidence called by the Crown is before us.

IV. SCOPE OF APPELLATE REVIEW:

1. Jurisdiction and Scope of Review:

[9] Our jurisdiction to hear the appeal was not challenged. A disposition made under s. 742.6(9) is a "sentence" for the purposes of Part XXI of the **Code**: s. 673(c). Following the reasoning of the Alberta Court of Appeal in **R. v. Buggins**, [2002] A.J. No. 355 (Q.L.) the finding of breach preceding the making of one of the orders contemplated by s. 742.6(9)(a), (b), (c) or (d) is consequential to, and therefore a part of, the disposition under s. 742.6(9). It is therefore part of a "sentence" within the meaning of s. 673(c) and the appellant has a right to appeal to the Court with leave. (I note that we have held, however, that there is no Crown appeal from the dismissal of an allegation of breach because, unlike a finding of breach preceding the making of an order in relation to the conditional sentence, dismissal of the breach allegation is not a disposition and therefore not a "sentence" within the meaning of s. 673(c): **R. v Cross** (2004), 229 N.S.R. (2d) 89; N.S.J. No. 508 (Q.L.)(C.A.)).

[10] I am aware of no case addressing the standard of appellate review of a finding of breach under s. 742.6(9). Following general principles, I would hold that our role is to review the finding of breach for both legal error and palpable and overriding error of fact which makes the conclusion one which no judge, acting judicially, could reach.

2. General Principles:

[11] The purpose of conditional sentences is to keep people out of jail who do not need to be there. But to ensure that offenders abide by the conditions on which they are allowed to remain in the community, Parliament has established a "relatively simple and expeditious procedure" for dealing with alleged breaches of those conditions: **R. v. W.(J.)** (1997), 115 C.C.C. (3d) 18 at p. 32; O.J. No. 1380 (Q.L.) (Ont. C.A.). As Rosenberg, J.A. pointed out in that case:

> ... Parliament intended that committal to prison be a real threat both to indicate to the offender the seriousness of violation ... and to reassure the community. ...

[12] These goals are reflected by the lower standard of proof of the breach — only the balance of probabilities is required (s. 742.6(9)) — and the provisions making the report of the supervisor with the included signed statements of witnesses admissible at the breach hearing (s. 742.6(5)).

[13] All of that said, the breach hearing engages important interests of the offender. While the finding of breach is not a new criminal conviction (see **R. v. Casey** (2000), 141 C.C.C. (3d) 506; O.J. No. 71 (Q.L.)(C.A.) at para. 23; leave to appeal dismissed [2000] S.C.C.A. No. 382) vital interests of the offender are in play and must be scrupulously protected. One must also bear in mind that allegations of breach may relate to a wide variety of conduct, from failure to report as directed or to pay restitution, to conduct which is a free-standing criminal offence: see, for example, **R. v. Johnson**, [1997] O.J. No. 1383 (Q.L.) (Ont. Ct. J.) (Prov. Div.)) at paras. 2 - 3.

[14] The challenge of setting the procedure for breach hearings, therefore, is to ensure that they are scrupulously fair in all of the diverse situations to which they may relate while remaining true to the text of the **Code** provisions and Parliament's clear intent that the process be simple and expeditious.

3. Hearsay at the Breach Hearing:

[15] The judge relied on three provisions in finding that hearsay is admissible at a breach hearing. While I do not agree, respectfully, with all of his reasoning, I do agree with his conclusion.

[16] I do not think the judge was right to rely on s. 518(1)(e). It is true that in s. 742.6(1), some of the provisions of Part XVI of the **Code** (in which s. 518 appears) are made to apply to breach proceedings. However, s. 742.6(1) limits this application to those sections of Part XVI (and XVIII) of the **Code** that deal with "... compelling the appearance of an accused before a justice ...". In my view, this makes it clear that provisions such as s. 518 apply only in relation to compelling the appearance and interim release of an offender against whom an allegation of breach has been made. This view is supported by the text of s. 742.6(1)(a) and the context and purpose of ss. 742.6(1)(b) to (f) and s. 742.6(2). I do not think that s. 518(1)(e) applies to answer the question of whether hearsay may be admitted to prove a breach.

[17] The judge also relied on s. 723(5) which permits hearsay at sentencing proceedings. While "sentencing proceedings" is not a defined term under the **Code**, an order under s. 742.6(9) is deemed to be a "sentence" for appeal purposes (see s. 673(c)) and the case law has held that the breach procedure is an aspect of sentencing: see, for example, **R. v. Casey, supra**; **R. v. Whitty** (1999), 135 C.C.C. (3d) 77; N.J. No. 103 (Q.L.)(N.L.C.A.). However, I am not entirely convinced that this section can be incorporated into breach proceedings. If it were, presumably s. 724(3)(e) might also be argued to apply which in turn could create confusion about the standard of proof. We have not had extensive argument on the applicability of s. 723 and I would prefer to leave that question to another day.

[18] In my view, the judge was on firm ground in relying on s. 742.6(5). It expressly makes admissible the report of supervisor, which by virtue of s. 742.6(4), must include, where appropriate, signed statements of witnesses. Even if, contrary to my view, the word "witnesses" is interpreted to mean persons with first-hand knowledge of the relevant facts, the section clearly contemplates that their evidence be placed before the court in writing and therefore in hearsay form. In my view, s. 742.6(5) provides a full answer to the appeal.

[19] The appellant relies heavily on **R. v. Valentine**, [2004] O.J. No. 1347 (Q.L.) (Ont. Ct. J.) for the proposition that in a breach of conditional sentence hearing,

witness statements under s. 742.6(4) must be first-hand accounts of the alleged breach. Respectfully, I do not agree.

[20] **Valentine** arose from the hearing of an alleged breach of a conditional sentence. Under the sentence, Valentine had been required to remain at his home but he was allegedly seen in Waterloo, contrary to the condition. His supervisor had filed a report with signed witness statements. However, the witness statements were not made by people who had actually seen Valentine in Waterloo. Frazer, J. held that there was thus no admissible evidence of the breach. In short, he decided that "statements of witnesses" in s. 742.6(4) must be by persons with first-hand knowledge. He said:

> ¶ 4 ... I adopt the ordinary meaning of the word witness ... . A witness is a person who observes and can testify if required as to the events observed or perhaps overheard by that witness. ...
> (Emphasis added)

[21] Assuming for the moment that this is correct, it does not assist the appellant in this case. As I understand **Valentine**, it holds that written statements by persons with first-hand knowledge are admissible. In other words, first-hand hearsay is admissible because the evidence is admitted in written form without calling the person to testify. Therefore, even if **Valentine** is correct, the appellant's admission to Mr. Rouleau was properly admitted. Mr. Rouleau's written statement said that the appellant had admitted to him that he had pulled a knife on another client. That is first-hand hearsay admissible under the **Valentine** principle because it is an admission which is admissible under the admissions exception to the hearsay rule. To use the words of Frazer, J. in **Valentine**, Mr. Rouleau was a witness because he would be permitted to give oral testimony of what he overheard the appellant say.

[22] Admissions may be made orally, in writing, or by conduct on the part of the accused. Admissions are received as an exception to the hearsay rule, not as a result of the application of the principles of necessity and reliability, but rather as a result of the adversarial system itself. **R. v. Evans**, [1993] 3 S.C.R. 653, described the rationale for the admissions exception to the hearsay rule. Sopinka, J. wrote at p. 664:

> The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is

> tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in *McCormick on Evidence, supra,* at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

[23] In this case, the signed statement of Mr. Rouleau was properly before Chisholm, P.C.J. pursuant to s. 742.6(5) of the **Criminal Code**. The final paragraph of that statement indicated that Mr. LeBorgne admitted the knife incident to Mr. Rouleau.

[24] There is no dispute that under s. 742.6(5), even as interpreted in **Valentine**, Mr. Rouleau in relation to this admission, was a person who had observed and could testify if required as to this statement which he had overheard: see **Valentine** at para. 4. His statement as to what the appellant told him is therefore admissible under the rule set out in **Valentine**. The appellant's statement, as repeated by Mr. Rouleau, is admissible through Mr. Rouleau because Mr. Rouleau is reporting what he heard and what he heard falls within the admissions exception to the hearsay rule.

[25] That is enough to dispose of this part of the appeal. However, I should add that, in my respectful view, the narrow approach in **Valentine** to the admissibility of hearsay at breach hearings is not consistent with either the text or the purpose of ss. 742.6(4) and (5). It should not be followed in Nova Scotia. I will explain.

[26] The reasoning in **Valentine** turns on reading into the words "statements of witnesses" a requirement that witnesses have first-hand knowledge. In my view, this overlooks the important point that s. 742.6(5) does not simply make statements of witnesses admissible. It makes admissible the report of supervisor required under s. 742.6(4), which must include, where appropriate, signed statements of witnesses. It is not suggested that the report of supervisor must be confined to the supervisor's first-hand knowledge, so it is difficult for me to understand why such a requirement should be read into the definition of witnesses which appears in the same subsection. In addition, s. 742.6(5) does not deal specifically with hearsay. It simply provides that the documents are admissible. That, to my mind, leaves no room for ambiguity: Parliament has provided that these documents are admissible in evidence.

[27] Moreover, this flexible approach to admissibility is consistent with the intent to make breach hearings relatively simple and expeditious. This intent is underlined, for example, by s. 742.6(7) which leaves it to the discretion of the Court as to whether the supervisor or witnesses will be required to attend for cross-examination. In addition, a requirement that only first-hand information may be admitted at a breach hearing would make the procedure inflexible, which is not in keeping with the intention of Parliament. The breach of conditional sentence hearing is not meant to be an overly legalistic procedure. The offender is entitled to a fair hearing, not a technically intricate one. Thus, and with respect, I see no support in the legislative text or purpose for the **Valentine** approach.

[28] However, the generous admissibility of evidence contemplated by s. 742.6(5) must always result in fairness to the offender. This calls for careful attention by the presiding judge to the weight that should fairly be given to the evidence in all of the circumstances of the particular case. Despite the simple and expeditious nature of the procedure, an allegation of a breach of conditional sentence is a serious matter. The decision as to whether an offender will serve the sentence in the community or in custody is, as I have said, a decision that affects the vital interests of both the offender and the community. Clearly, the **Criminal Code** provisions and our criminal law traditions require a scrupulously fair hearing. Therefore, on the facts of each case, the judge must evaluate the evidence presented by the Crown and the offender and determine whether the Crown has discharged its burden of proof by evidence which is sufficiently reliable in all of the circumstances. The fact that evidence is admissible by statute in no way diminishes the obligation of the judge to assess the proper weight, if any, to be given to such evidence.

[29] This, in essence, was the approach taken by Chisholm, P.C.J. in this case. As he wisely pointed out:

> The weight to be given to such evidence will depend on the nature of the information, the source of the information, the circumstances with respect to the receipt of that information. Obviously first-hand information is likely to be given more weight than second - or third - or fourth-hand information.

[30] The judge carefully reviewed the evidence before him concerning the alleged breaches of the conditions relating to alcohol and controlled substances. Although

there was some admissible evidence to support the allegations, the judge was not satisfied that it discharged the Crown's burden. He said:

> In relation to the January test, Mr. Rouleau testified that Mr. LeBorgne said not to bother, that it would not be clean. Again, there was no questioning of Mr. Rouleau to explain to the Court what not clean meant in that context.
>
> The Court may be inclined to think what it probably meant or what it might have meant, but the Court should not be left to draw interpretations from that type of very general, non-specific information where clarity could have easily been provided to the Court.
>
> With respect to a test done in April of 2005, Mr. Rouleau testified that it was positive in his statements and in his oral testimony before the Court he said positive. And he was speaking of drugs, but I did not hear him specifically say positive for drugs.
>
> Even if Mr. Rouleau was intending to say positive for drugs, he provided no information to the Court as to where the test was conducted, who conducted it, how it was conducted, positive for what drugs, whether or not those drugs were drugs that are prohibited drugs under the Controlled Drugs and Substances Act; There simply was virtually no information other than that very basic statement.
>
> While Mr. Rouleau, in my view, was a credible witness who was providing information to the Court, in my view the quality of the evidence that was provided, both in the statement and in his viva voce testimony, was not sufficient to meet the test for proving a breach.

[31] When he turned to the third allegation — the knife incident — he once again scrutinized all of the evidence and carefully assessed its weight. He concluded that it satisfied him that the breach occurred.

[32] In my view, the judge approached his task exactly as he ought to have done. He focussed, not on the technical rules of admissibility that do not apply, but on the key question of whether the evidence presented was of sufficient weight in all of the circumstances to satisfy him that the allegation had been proved. It is impossible to argue with the fairness of his approach. There was evidence that the appellant admitted the conduct to Mr. Rouleau. Mr. Rouleau was present for cross-examination. He was asked nothing about this admission.

[33] I also find the approach in **R. v. Soto**, [2003] B.C.J. No. 1260 (Q.L.); BCPC 179 (Prov. Ct.) instructive. **Soto** was a hearing to determine whether the offender had

breached the terms of his conditional sentence. The Crown did not call any *viva voce* evidence but relied on the Allegation of Breach of Conditional Sentence Report signed by the Conditional Sentence Supervisor. Skilnick, P.C. J. wrote:

> ¶ 13 The Crown ... need only prove the breach on a balance of probabilities by tendering admissible evidence. A report from the conditional sentence supervisor becomes admissible evidence pursuant to section 742.6(5). Defects in the report do not necessarily render the report inadmissible. In some cases, errors or sloppiness in the report may lead a judge to find that the burden of proof has not been met. A common sense approach should be used to determine whether or not the defects in the report result in a failure to prove the breach on a balance of probabilities.
> (Emphasis added)

[34] A common sense approach based on the requirement for absolute fairness should govern the breach hearing. Each breach of conditional sentence hearing is to be decided on its own facts. The nature of the evidence that the Crown must present in order to discharge its burden of proof will vary according to the circumstances. The weight of the admissible evidence must be considered in the particular circumstances of each case: see for example, **R. v. Johnson**, **supra**.

[35] In this case, as in **Soto**, the materials submitted by the Crown to the provincial court judge were presented in a less than ideal manner. These lapses helped to turn what ought to have been a simple and effective process into a multi-appearance odyssey. The apparent inattention to the proper preparation of the allegation and supporting material did little to reflect the importance of what was going on. I hope we do not see this haphazard approach in future cases. I note that neither counsel appearing in this Court was counsel at the breach hearing.

[36] In this case, the evidence at the end of the day amply supported the judge's conclusion that the appellant had breached his conditional sentence order. The signed statement of Mr. Rouleau was properly before the judge under s. 742.6(5) and that statement reported an admission by the appellant that he had "pulled a knife and threaten[ed] another client of the residence." Further, Mr. Rouleau provided oral testimony that the number one rule of the house was that there be no threatening behaviour. Counsel for the appellant at the breach hearing cross-examined Mr. Rouleau. He asked not a single question about this admission. The evidence of Mr. Rouleau, both in terms of the signed statement and his oral testimony, was unchallenged.

[37] Although the judge slightly misstated the evidence as I mentioned earlier, his finding that the appellant had breached his conditional sentence order was reasonably supported by the admissible evidence and should not be disturbed on appeal.

V. DISPOSITION:

[38] As announced at the conclusion of oral argument, leave to appeal is granted but the appeal is dismissed.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.