C.A.C. No. 02875

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. D.T.M., 1993 NSCA 212

Hallett, Matthews and Pugsley, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN	)	Robert E. Lutes, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	D.A. Rollie Thompson
	)	for the Respondent
M. (D.T.)	)	
	)	
Respondent	)	Appeal Heard:
	)	November 26, 1993
	)	
	)	
	)	Judgment Delivered:
	)	December 8, 1993
	)	

Editorial Notice: Identifying information has been removed in this electronic version of the judgment.

THE COURT: Appeal allowed by the Crown and the matter remitted to the Youth Court judge per reasons for judgment of Matthews, J.A. Hallett and Pugsley, JJ.A. concurring.

MATTHEWS, J.A.:

This is an appeal from a decision of a Youth Court judge who held that a finding of guilt on a charge of theft barred a finding of guilt on a charge of wilfully failing to comply with a probation order.

The facts are not in dispute.

The Information containing two counts alleged that on or about November 8, 1992, the respondent, a young person, did:

> "steal money, the property of Daniel Curry of a value not exceeding one thousand dollars contrary to section 334(b) of the **Criminal Code** of Canada.
>
> AND FURTHERMORE AT THE SAME TIME AND PLACE AFORESAID
>
> Did while bound by a probation order made by Halifax Family Court on the 18th day of June, 1992, wilfully fail to comply to such order to wit: keep the peace and be of good behaviour, contrary to section 26 of the Young Offender's Act."

The respondent, prior to these charges, had been found guilty of an offence and a probation order was imposed. One of the terms of that order was that the respondent keep the peace and be of good behaviour.

On November 9, 1992, the respondent was arraigned and the matter adjourned. It was adjourned again on December 15, 1992 for plea. On January 5, 1993 the respondent pled guilty to both charges.

Section 19(1) and (2) of the **Young Offenders Act** provides:

> "19(1) Where a young person pleads guilty to an offence charged against him and the youth court is satisfied that the facts support the charge, the court shall find the young person guilty of the offence.
>
> (2) Where a young person pleads not guilty to an

> offence charged against him, or where a young person pleads guilty but the youth court is not satisfied that the facts support the charge, the court shall proceed with the trial and shall, after considering the matter, find the young person guilty or not guilty or make an order dismissing the charge, as the case may be."

After considering the facts the trial judge made the necessary finding under s. 19 and found the respondent guilty of the theft charge.

With respect to the second count the trial judge stated the Crown's position to be that the breach consisted of "his being involved in the offence of the theft and that that constitutes the failure to keep the peace and be of good behaviour". The trial judge raised the question of the application of the **Kienapple** principle. **(Kienapple v. R.** (1974), 26 C.R.N.S. 1, [1975] 1 S.C.R. 729.) The charge under s. 26 was then adjourned for a disposition hearing and the preparation of a pre-disposition report.

The issue then became: the respondent having been found guilty of the charge of theft may he also be found guilty of breach of the earlier probation order, that is, of failure to keep the peace and be of good behaviour, when that breach was the theft.

On March 25, 1993 after hearing counsel, the trial judge, in an oral decision, held that the **Kienapple** principle applied to bar conviction on the s. 26 charge. Thus no finding of guilt was made and that charge was dismissed. A written decision respecting the **Kienapple** ruling was rendered on September 13, 1993. The Crown now appeals from that decision.

In the oral decision the trial judge commented:

> "...there is no distinguishing feature in the breach of the disposition order charge to suggest that the failing to

> keep the peace and be of good behaviour was anything other than the fact that he had committed the theft ..."

The written decision is in more complete form, discusses the facts, cites authorities and concludes:

> "Finally, it is my view that in circumstances such as these, where there is no separate and distinct conduct apart from the main offence, the fact that he is on probation could and should more appropriately be a factor to consider in determining the appropriate disposition for the main offence. Thus, the issue of the existence of the probation order is more appropriately addressed at the time of disposition, and should not, in this case, be used to 'pad' the young person's youth court record. The youth's record will speak for itself.
>
> Therefore, I am satisfied that while proof of the theft has been established, there are no additional and distinguishing elements beyond that, to support the second charge; thus an acquittal should be entered to the charge under s. 26."

The issue on appeal as expressed by the appellant is:

> "The issue in this case is very simple and that is whether the principle in the case of **Kienapple** applies to a charge of breach of probation or wilful failure to comply with a disposition (s. 26, **Young Offenders Act**) or breach of probation generally (s. 740, **Criminal Code**).

The principle that a conviction on a first count should preclude a conviction on a second count which arose from the one delict was enunciated by Laskin, J. in **Kienapple** and commented upon by him in **R. v. Loyer and Blouin** (1978), 40 C.C.C. (2d) 291, (S.C.C.) at pp. 294-5:

> "...This case presents an opportunity to set out some guidelines on the proper resort to the **Kienapple**

> principle where the facts justify its invocation by the court.
>
> Where a trial before a judge alone or before a Judge and jury proceeds on two or more counts of offenses of different degrees of gravity and the same delict or matter underlies the offences in two of the counts, so as to invite application of the rule against multiple convictions, the trial Judge should direct himself or direct the jury that if he or they find the accused guilty on the more serious charge, there should be an acquittal on the less serious one; but if he or they should acquit on the more serious charge, the question of culpability on the less serious charge should be pursued and a verdict rendered on the merits.
>
> Again, if at the trial, there is a plea of guilty to the more serious charge, and a conviction is registered, an acquittal should be entered or directed on the less serious, alternative charge. However, if, as was the case here, the accused pleads guilty to the less serious charge, the plea should be held in abeyance pending the trial on the more serious offense. If there is a finding of guilty on that charge, and a conviction is entered accordingly, the plea already offered on the less serious charge should be struck out and an acquittal directed."

In **R. v. Pinkerton** (1979), 46 C.C.C. (2d) 284, the British Columbia Court of Appeal considered the issue further. The headnote contains a correct summary of the judgment:

> "The principle which precludes multiple convictions for the same cause or matter is not a bar to a conviction on a charge of breach of probation contrary to s. 666(1) of the **Criminal Code** notwithstanding the accused has already been convicted of the offence which it is alleged constituted the breach of probation. While the charges could be said to arise out of the same incident the prerequisites to relying on the rule against multiple convictions, that the two charges have the same, or substantially the same, elements, or that they can be

> viewed as alternative charges are not fulfilled in such a case. In any event, even if the two charges could be said to arise out of the same cause or matter, the scheme of the provisions of the **Criminal Code** clearly indicate that multiple convictions are envisaged."

Craig, J.A. speaking for the court at p. 289 commented:

> "The two charges arise out of the same incident but they do not have the same, or substantially the same, elements, nor can they be viewed reasonably as alternative charges. Accordingly, the **Kienapple** principle does not apply. Even if they did arise out ot the same cause or matter, I think that the provisions of ss. 663, 664 and 666 justify the conclusion that Parliament has given 'a clear indication' that 'multiple convictions are envisaged'".

Pace, J.A. in **R. v. Forward** (1983), 58 N.S.R. (2d) 343 remarked at p. 343:

> "The principle which precludes multiple convictions for the same cause or matter as enunciated in **R. v. Kienapple** (1974), 1 N.R. 322; 15 C.C.C. (2d) 524, is not a bar to a conviction on a charge of breach of probation contrary to s. 666(1) of the **Code** notwithstanding the appellant has already been convicted of the offence which it is alleged constituted the breach of probation. See: **R. v. Pinkerton** (1979), 46 C.C.C. (2d) 284."

Haliburton, J.C.C. (as he then was) in **R. v. Morrison** (1988), 88 N.S.R. (2d) 56 (N.S. Co. Ct.) reached a similar conclusion. He wrote at p. 59:

> "(18) The two sections quoted above (645(4) and 666(4) appear to make it clear that there was a legislative intent that a breach of probation should carry with it liability to a sentence which is additional and consecutive to any sentence imposed for the incident which gives rise to the breach and is, at the same time, the subject of another charge. This appears to be consistent with an observation in **Ruby on Sentencing** (2nd Ed.), page 252:

> 'The essence of the offence set out in s. 666 of the **Criminal Code** is wilful disobedience of a probation order, and accordingly the plea of autrefois convict will not lie...'

(19) It is consistent as well in **R. v. Pinkerton** (1977), 37 C.C.C. (2d) 538 (B.C.C.C.), where it was held that:

> '**Res judicata** does not bar a conviction for breach of probation based on a conviction for assault for which the accused was sentenced as the two do not embrace the "same cause or matter".'

It seems clear that if the **Oakes** precedent (**R. v. Oakes** (1977), 37 C.C.C. (2d) 84 (Ont. C.A.) is followed, then a sentence could not be imposed on a charge under section 664(4) consecutive to any sentence being served which was imposed upon the accused after the sentence to probation which was the subject of the breach. Thus, if the Crown in the case before me had proceeded under 664(4), any sentence would necessarily have been concurrent to the sentence on a charge which arose after the original probation order was imposed. Those considerations, however, do not apply on this charge under 666(1). While it is true that the charge arises from the same incident which has already led to the conviction for theft, the character of the charge is entirely different. As noted in **Ruby on Sentencing**, it raises the issue of wilful disobedience of a probation order and as argued by Crown counsel in this case, it involves the protection of 'different interests' than did the theft charge. To find otherwise would be to permit a probationer to flaunt the authority of the court with impunity. A probation order which had been imposed upon the accused in lieu of punishment in order to promote his own rehabilitation would, in that case, simply serve as a vehicle to bring the authority of the court into disrepute and derision."

In **R. v. Prince**, [1986] 2 S.C.R. 480 Chief Justice Dickson, due to conflicting

views as to the nature and scope of the principle of **res judicata** articulated by Laskin, J. in **Kienapple** suggested "...that the time may be ripe for a review of the jurisprudence in this area" (p. 487). Commenting upon **Kienapple** at p. 488 he said:

> "In describing the rationale underlying his conclusion Laskin J. referred to a principle that there ought not to be multiple convictions for the same 'delict', 'matter' or 'cause'. At page 750, he explained:
>
> > 'The relevant inquiry so far as **res judicata** is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences.
> >
> > (Emphasis added.)
>
> And at p. 751:
>
> > 'If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions:...'
> >
> > (Emphasis added.)
>
> The majority judgment at p. 753, however, recognized that Parliament could create two separate offences out of the same matter and could mandate multiple convictions if it made clear its intentions in this regard."

Considering the factual nexus between the charges at p. 491 he wrote:

> "It is elementary that **Kienapple** does not prohibit a multiplicity of convictions, each in respect of a different factual incident. Offenders have always been exposed to criminal liability for each occasion on which they have transgressed the law, and **Kienapple** does not purport to alter this perfectly sound principle. It is

> therefore a **sine qua non** for the operation of the rule against multiple convictions that the offences arise from the same transaction.
>
> The degree of factual identify between the charges that is required to sustain the application of the rule is exemplified by the decision of this Court in **Coté v. The Queen**, [1975] 1 S.C.R. 303, which involved two offences normally capable of supporting the rule against multiple convictions: see **Hewson v. The Queen**, [1979] 2 S.C.R. 82, at p. 97. In **Coté**, the accused had been found in possession of property two years after his conviction for a robbery in respect of the same property. The accused had been sentenced for the robbery offence, imprisoned and released from prison when the police found him in possession of the stolen property. Evidently the accused had hidden the fruits of his robbery before he served his jail sentence. It was argued that possession by the original thief was merely a continuation of the act of theft.
>
> The majority of the Court, however, held that the accused's possession was sufficiently removed in time and circumstance from the original taking of the property so that the accused could be convicted of both offences."

And at p. 493:

> "*The Nexus Between the Offences: Need There be One?*
>
> The next question which must be addressed is whether the presence of a sufficient factual nexus is the only requirement which must be met in order to justify application of the **Kienapple** principle. Counsel for Sandra Price refers in his factum to the **Kienapple** principle as one relating to multiple convictions for the same act. Similarly, Sheppard, in his early commentary on **Kienapple**, propounds a same transaction test for the rule against multiple convictions. Some courts, too, have referred to the 'same act' or 'same transaction' underlying two offences in terms which might suggest that that was sufficient to sustain the operation of the

> rule: see, for example, **R. v. Boyce** (1975), 23 C.C.C. (2d) 16 (Ont. C.A.), **R. v. Allison** (1983), 33 C.R. (3d) 333 (Ont. C.A.) and **Hagenlocher** (Man. C.A.)
>
> In my opinion, the application of **Kienapple** is not so easily triggered. Once it has been established that there is a sufficient factual nexus between the charges, it remains to determine whether there is an adequate relationship between the offences themselves. The requirement of an adequate legal nexus is apparent from the use by the majority in **Kienapple** of the words 'cause', 'matter' or 'delict' in lieu of 'act' or 'transaction' in defining the principle articulated in that case. More telling is the fact that Laskin J. went to considerable pains to discuss the legislative history of rape and carnal knowledge of a female under 14 years and to conclude that the offences were perceived as alternative charges when there was non-consensual intercourse with a female under 14. I am not prepared to regard Laskin J.'s analysis in this regard as unnecessary or irrelevant to the outcome in **Kienapple**, which it would of course be if the rule against multiple convictions applied whenever there was a sufficient factual nexus between the charges.
>
> In my opinion, the weight of authority since **Kienapple** also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions."

At page 495 he cited several cases including **Pinkerton**, supra, and expressed his opinion that "these cases were correctly decided."

After further analysis he said at p. 498-9:

> "I conclude, therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the **Kienapple** principle.

> There is, however, a corollary to this conclusion. Where the offences are of unequal gravity, **Kienapple** may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence."

He characterized a breach of probation at p. 503 in this fashion:

> "Plainly, breach of probation is an offence designed to protect the effective operation of the criminal justice system, a societal interest which is entirely different from that protected by an offence such as assault."

There can be no doubt that the offence of theft triggered that of the breach of the probation order. However, the two are separate. In my opinion, there is not that common element in each charge which is sufficient to attract the **Kienapple** principle. The theft charge is obviously seated in the act of theft itself whereas the breach of probation has as its origin that charge respecting which the probation order was made. There was a wilful failure to comply with that order. That is the distinguishing additional element which removes this case from application of the **Kienapple** principle.

I realize that many of the cases to which I have referred are concerned with probation orders under the **Code** and not the **Young Offenders Act**. The respondent has acknowledged that:

> "It is therefore clear that, in the adult probation setting, the rule against multiple convictions does not preclude the entry of two convictions, one for the substantive offence and another for breach of probation."

Respondent's counsel points out that when the **Young Offenders Act** came into existence, there was no offence for breach of a disposition order. With deference, that is not

determinative of the issue before us. Indeed, it can be argued, that the amendment setting out such an offence, simply reinforces the view that violation of a term of the order should be treated as a separate offence.

That young offenders must be treated differently from adults is not debatable. The philosophy set out in the **Young Offenders Act** makes that clear. However, the disposition imposed upon a crime being committed should not be confused with the first determination: was a crime in fact committed. Here we are concerned with the latter and not the former.

When imposing a probation order under the **Young Offenders Act**, that order, in accordance with subsections (3) and (5) to s. 23, must be read by or to the young person and explained to that person. Care must be taken as dictated in s. 23 at the time the order is imposed. The order must be signed by the probationer. The order is given a significant status similar to but greater than when a probation order is imposed upon an adult. Clear notice must be given concerning the consequence of a breach of the order.

Section 26 of the **Young Offenders Act** provides:

> "A person who is subject to a disposition made under paragraphs 20(1)(b) to (g) or paragraph 20(l)(j) or (l) and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction."

In my opinion a breach of any of the provisions of the order is in itself an offence separate and distinct from any other offence. A breach of the probation order contained that additional and distinguishing element which exempts it the from application of **Kienapple**. While it is true that the two charges here arise out of the same incident, the theft, "they do not have the same, or substantially the same elements, nor can they be viewed reasonably as

alternative charges". (**Prince,** supra).

To rule otherwise, in my opinion, would result in situations such as that before us, in the determination that the disposition imposed in the earlier offence was meaningless and that the young person could violate the probation order with relative impunity. That would not "protect the effective operation of the criminal jsutice system".

I would remit the matter to the Youth Court judge.

J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.