NOVA SCOTIA COURT OF APPEAL

Citation: R. v. P.J.S., 2008 NSCA 111

Date: 20081205
Docket: CAC 296403
Registry: Halifax

Between:

P.J.S.
(A Young Person Within the Meaning of the Youth Criminal Justice Act)
Appellant

v.

Her Majesty The Queen
Respondent

Restriction on publication: **Pursuant to s. 110(1) of the Youth Criminal Justice Act.**

Judges: Roscoe, Bateman and Oland, JJ.A.

Appeal Heard: November 24, 2008, in Halifax, Nova Scotia

Held: Appeal is allowed, the probation order is set aside and substituted with an order that P.J.S. be subject to a conditional discharge for a period of nine months, per reasons for judgment of Roscoe, J.A., Bateman and Oland, JJ.A. concurring.

Counsel: Chandra Gosine, for the appellant
Peter Rosinski, for the respondent

Pursuant to s. 110(1) and 111(1) of the Youth Criminal Justice Act.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 110 (1) and s. 111(1) OF THE *YOUTH CRIMINAL JUSTICE ACT* APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

111. (1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

Editorial Note

Identifying information has been removed from this unofficial electronic version of the judgment.

Reasons for judgment:

[1] P.J.S. pled guilty to assault and was sentenced by Youth Court Judge Marc Chisholm to nine months probation with conditions. His sentence appeal, heard by Supreme Court Justice Frank Edwards, was dismissed. [see: 2008 NSSC 128] P.J.S. contends on appeal to this court that if the proper test had been applied by the Youth Court judge, a conditional discharge would have been the appropriate disposition. The Crown agrees that the sentencing judge and the Summary Conviction Appeal Court judge failed to apply the proper principles of sentencing in their consideration of whether a conditional discharge was appropriate, but submits that since the sentence imposed has been served and the appellant now has an adult criminal record, the appeal of that issue is moot and the appeal should be dismissed.

Background:

[2] At the sentencing hearing Mr. Gosine, counsel for P.J.S., disputed the facts read into the record by the Crown. The Crown elected not to attempt to prove the disputed facts and agreed that the facts were as submitted by defence counsel:

> The facts I have from P.J.S. is that he asked a man on the street to buy him pizza. He was just joking. And the car in which he was, pulled away. He asked him again if he would buy him pizza. And the man replied 'why would I buy a pizza for someone like you?' And P.J.S. said he took it the wrong way, and he got out of the car and hit the man twice in the face.

[3] Defence counsel submitted that a conditional discharge was the appropriate sentence while the Crown recommended a term of probation. Judge Chisholm imposed a probation order saying:

> The final issue for the Court to address is whether or not you should be granted a conditional discharge or placed on probation. With respect to the issue of a discharge, it may well be in your best interest that there be a discharge granted with respect to this type of matter because the entry of a conviction may pose some difficulty in terms of employment when you begin your career.

> However, given the nature of the incident, it is my view that it would be contrary to the public interest to grant you a discharge for your actions on the evening in question in relation to Mr. A.. I am going to place you on probation for a period of nine months with the following conditions of probation...

[4] On the appeal, counsel for P.J.S. submitted that Judge Chisholm erred in finding as an aggravating factor that P.J.S. had chased the victim of the assault when that fact had not been admitted by him at the sentencing hearing. As well, counsel for the young person argued that the sentencing judge erred in using the test for an absolute discharge in s. 42(2)(b) of the **Youth Criminal Justice Act** (**YCJA**) in considering a conditional discharge as set out in s. 42(2)(c). Those sections state:

> 42 (2) When a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the Criminal Code, the court shall impose a sanction set out in paragraph (q) or subparagraph (r)(ii) or (iii) and may impose any other of the sanctions set out in this subsection that the court considers appropriate:
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> ...
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> (b) by order direct that the young person be discharged absolutely, if the court considers it to be in the best interests of the young person and not contrary to the public interest;
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> (c) by order direct that the young person be discharged on any conditions that the court considers appropriate and may require the young person to report to and be supervised by the provincial director;
>
> ...

[5] Justice Edwards dismissed the appeal finding that the only reasonable interpretation of the discussion regarding the facts was that defence counsel was taking issue only with the number of blows that were struck and not whether there had been a chase. With respect to the interpretation of s. 42 (2)(c) he wrote:

> 5 Obviously, subparagraph (c) regarding conditional discharges makes no reference to the two criteria (best interests of the young person and the public interest) set out in subparagraph (b) regarding absolute discharges. Incidentally, those criteria are similar to those set out for adult offenders in Section 730(1) of the **Criminal Code**. I have no sympathy for the argument that, because subparagraph (c) is silent, the same criteria do not apply to the granting of conditional sentences under the **Youth Criminal Justice Act**. It is difficult to understand what criteria a judge should otherwise apply. Surely he cannot disregard the interest of the young person and the public interest.
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> 6 I therefore conclude that, when the Learned Judge referenced the two criteria when rejecting the conditional sentence option, he was not in error. On that basis alone, I would dismiss the appeal.

Issues:

[6] Although the appellant cites numerous grounds of appeal, in my view it is only necessary to deal with two issues:

1. What are the appropriate principles of sentencing applicable to s. 42(2)(c) of the **YCJA**?

2. What is an appropriate sentence for P.J.S.?

Analysis:

1. Sentencing principles - conditional discharge:

[7] In this case, the sentencing judge determined that a conditional discharge was not an appropriate disposition after concluding that although it might be in the young person's best interests, it would be contrary to the public interest. These are the prerequisites for an absolute discharge as set out in s. 42(2)(b). They are not prerequisites for a conditional discharge as set out in s. 42(2)(c).

[8] In **R. v. B.W.P.**, 2006 SCC 27, the issue involved interpretation of subsections 42(2)(n) and (o) of the **YCJA** and whether the provisions of one subsection should be read into the other subsection. Justice Charron, for the court, explained in ¶ 42 - 45 that it was clear from the wording of the two subsections that they are different, and it should not be assumed that words in one subsection apply to the other subsection which do not contain those words.

[9] The same can be said for sections 42(2)(b) and 42(2)(c). Since the words "if the court considers it to be in the best interests of the young person and not contrary to public interest" are not in s. 42(2)(c) they should not be read into that subsection and assumed to be prerequisites for a conditional discharge.

[10] It is also clear from other parts of the **YCJA** that absolute discharges are intended to be different from conditional discharges. For example, in s. 82, dealing with the effect of the termination of a youth sentence, in the case of an absolute discharge the young person is immediately deemed not to have been found guilty except in specified circumstances. As well, in s.119(2) dealing with the period of access to records, subsection (e) provides for a one-year period of access in respect of a young person sentenced to an absolute discharge, whereas subsection (f) provides for a three-year period of access if the youth is sentenced to a conditional discharge.

[11] Furthermore, several other courts have concluded that s. 42(2)(b) should not be read together with s. 42(2)(c). In the following cases, it was found that the best interests of the young person and the public interest were not statutory conditions of a conditional discharge pursuant to s.42(2)(c): **R. v. M.S.S.**, 2008 SKPC 5,

¶13(item ii); **R. v. S.M.R.**, 2004 SKPC 131, ¶36; **R. v. C.S.W.**,2004 ABCA 352, ¶4- 5; and **R. v. R.P.**, 2004 ONCJ 190, ¶ 11 and footnote #3. For a contrary view, see **L.S.J.P.A. - 0627**, 2006 QCCQ 6900, where the court assumed the test was the same, ¶ 41-42 and 65.

[12] I agree with the submissions made by counsel for the appellant, with which the Crown concurs, that the sentencing judge and the Summary Conviction Appeal Court judge erred in principle in determining that the public interest and the best interests of the young person were prerequisites to a conditional discharge. The sentencing principles that were relevant in this case are those set out in s. 3 and s. 38 of the **YCJA**. (**B.W.P**, *supra*, ¶ 27 - 34.)

2. The appropriate sentence:

[13] The Crown suggests that given that P.J.S. has completed the sentence imposed by the Youth Court judge, and he has since acquired an adult criminal record, it is not necessary at this point for this court to determine whether a conditional discharge was a more appropriate sentence than a probation order. The appellant on the other hand submits that court should now substitute an absolute discharge for the probation order as was done in **C.S.W**., *supra*. Although at the time of sentencing counsel for the appellant did not seek an absolute discharge, he now says that since an error was made, he is entitled to the more lenient disposition.

[14] In **CSW** *supra*, the Alberta Court of Appeal stressed that the case was exceptional. The facts were that the offender was subjected to an ongoing course of bullying. He struck out against the bullies with a small pocket knife striking one in the leg. The Youth Court judge had made the same error in principle as in this case and after rejecting the possibility of a conditional discharge, sentenced the youth to nine months probation. The appeal court indicated that a conditional discharge would have been the appropriate sentence originally. However, given the unusual circumstances, including the fact that the offender had just about completed the probation with conditions very successfully, an absolute discharge was substituted.

[15] The main difference between a probation order and a conditional discharge appears to be the length of time that the youth's record is accessible pursuant to s. 119. The **YCJA** provides that the record of a youth sentenced to a conditional discharge is accessible for up to three years after the finding of guilt pursuant to s. 119(2)(f). Section 119(2)(g) however indicates that the record of a youth sentenced to probation is accessible for up to three years after the sentence is completed. In this case, there is a difference of nine months between the date of the finding of guilt and the date of the completion of sentence. Another difference is that a further youth or adult conviction is immaterial to the length of the period of access in relation to a conditional discharge. However access to a record of a youth sentenced to a probation order is extended if there are further convictions during the period of access (s. 119(2)(i), 119(2)(j)). Of more importance is s. 119(9) which in effect converts a youth record to an adult record if an adult offence is committed during the period of access and the original sentence was not a discharge.

[16] Other than the record, and the period of access to it, the practical differences between a conditional discharge and probation are not that significant, as described by Duncan, J. in **R. v. R.P.**, *supra*,:

> 14 If I am correct in the above conclusion that the discharge test will almost always be met (particularly in the case of conditional discharges), then candidates for non-custodial sanctions such as probation will usually be eligible for a discharge as well. The question then arises as to whether youth sentencing principles provide any guidance to assist the youth court in choosing between a discharge and other non-custodial disposition. Those sentencing principles are set out in section 38 and in turn are to be read in the context of the general principles of youth justice contained in section 3 of the Act. To roughly summarize, those principles call for sentences that are meaningful (38(1); 3(1)(a)(iii)) and proportionate to the offence and the degree of the offender's responsibility (38(2)(c); 38(2)(e)(iii); 3(1)(b)(ii)); that hold the youth accountable (38(1); 3(2)(C)); that repair harm done to others and the community: (38(2)(e)(iii); 3(1)(c)(ii)) that promote the offender's rehabilitation (38(2)(e)(ii); (3(1)(b)(i)) and also protect the public (38(1)).
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> 15 Dealing with the last point first - rehabilitation and public protection - there is a striking similarity between probation (42(2)(k)) and a discharge on conditions (42(2) (C)). In both cases the offender is out of custody, is under the supervision

> of the court, is subject to and bound to comply with conditions and is liable to prosecution for breach. Any differences are largely, if not completely, technical. It seems to me that whatever protective, restorative or rehabilitative value is possessed by the one sanction is also shared by the other and there is no distinction between the two sanctions in their ability to serve these principles of youth sentencing. The sentencing court can get where it wants to go with either.
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> 16 However there are also the principles that a youth sentence be meaningful, proportional and hold the youth accountable. There is a perception that a youth conditional discharge is a significantly more lenient disposition than youth probation -- and therefore it might be argued that, in many cases, a discharge would not give effect to these principles. The Crown's frequent opposition to discharges, I think, is based on this perception. The perception of leniency may be fostered by the structure of section 42 of the Act that suggests a hierarchy of sanctions with conditional discharges at the lower end. But I think the perception is mainly caused by judges and lawyers habitually - and wrongly - thinking in adult terms when dealing with youth matters. As discussed above, the "big break" of no criminal record that is the central feature of an adult discharge is not part of the youth scheme. The discharge advantage to an offending youth is miniscule. In my view, it is incorrect to consider that a youth conditional discharge under 42(2)(C) is necessarily a more lenient disposition than a youth probation order under 42(2)(K). Rather, it is the length of the term and the conditions that are imposed that determine the strictness/leniency of the sanction and not the vehicle, - probation or discharge - that is used. The leniency of a conditional discharge per se as compared to probation is largely misperceived and over-stated in youth matters. Properly viewed, there is no reason why the principles of proportionality and accountability cannot be achieved as effectively through a discharge as probation.
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> 17 In summary, it is my view that there is little to chose between youth probation and discharge on conditions. ...

[17] In this case, P.J.S. has served his nine months probation which expired on April 25, 2008. He now has a record consisting of five adult convictions: two pursuant to the **Motor Vehicle Act**; one pursuant to the **Liquor Control Act;** and two offences contrary to the **Criminal Code**, theft under $5000 and assault causing bodily harm. If the **YCJA** probation order for the assault is allowed to stand, the finding of guilt would now be deemed to be a conviction and the record will be dealt with as an adult record. In my view, this is a significant enough difference to conclude that the issue of the appropriate sentence is not moot.

[18] I do not agree that the appropriate sentence at this point is an absolute discharge. At the time of sentencing, P.J.S. did not meet both requirements of s. 42 (2)(b). Judge Chisholm found that it was contrary to the public interest, and I would agree with that assessment even assuming that there was no chase as argued by the appellant's counsel. If it was not in the public interest then, there is no reason it would be now. The facts in this case are easily distinguishable from those in **CSW**. There was no hint of provocation or self defence in this case. It appears from P.J.S.'s record that he committed three of the adult offenses prior to being sentenced as a youth and one of them during his nine months probation. That indicates that he did not successfully comply with the conditions of probation as was the case in **CSW**.

[19] Taking into account the principles of sentencing enumerated in s. 3 and s. 38 of the **YCJA**, particularly that the young person be subject to meaningful consequences for his offence given the circumstances of the offence and his level of development, the promotion of a sense of responsibility, and acknowledgment of the harm done to the victim, a conditional discharge is an appropriate sentence for P.J.S. The duration of the order and the conditions should be the same as those included in the probation order.

[20] For these reasons I would allow the appeal, set aside the probation order and substitute an order that P.J.S. be subject to a conditional discharge for a period of nine months effective July 25, 2007, the date of the sentence imposed by the youth court judge.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.