

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Lawrence*, 2011 NSCA 84

Date: 20110919
Docket: CAC 347403
Registry: Halifax

Between:

James Joseph Lawrence

Appellant

v.

Her Majesty the Queen

Respondent

Judges: Saunders, Beveridge and Bryson, J.J.A.

Appeal Heard: September 19, 2011, in Halifax, Nova Scotia

Written Judgment: September 19, 2011

Held: Leave to appeal is granted and the appeal is allowed per oral reasons for judgment of Saunders, J.A.; Beveridge and Bryson, J.J.A. concurring.

Counsel: Jean C. Morris, for the appellant
William D. Delaney, for the respondent

Reasons for judgment: (Orally)

[1] On February 4, 2008, the appellant was convicted of aggravated assault and assault and was sentenced to 90 days intermittent followed by 18 months' probation. A term of his probation required him to make restitution of \$3,913.00 to Mr. Daniel Faulkner on or before December 31, 2008. The restitution related to Mr. Faulkner's dental expenses following the assault.

[2] The appellant failed to make restitution as required and was charged with a breach of his probation contrary to s. 733.1 of the **Criminal Code**. The Crown elected to proceed by Indictment. The appellant pleaded not guilty and a trial date was set.

[3] On the date of trial, the appellant who was then represented by counsel, changed his plea to guilty, acknowledging that at least some payments could have been managed although full and immediate payment may have been beyond his means.

[4] After the plea, Crown and defence counsel presented their joint recommendation that the judge impose a one day sentence based on time served, followed by three years' probation, and that as a term of his probation the appellant be required to pay \$100.00 per month for the duration of the 36 month probationary period. The appellant was prepared to pay \$313.00 that day, thus reducing the amount owed to \$3,600.00 which counsel expected would then be "retired" by equal payments of \$100.00 per month for 36 months.

[5] For reasons that are not apparent to us, the trial judge rejected counsels' joint recommendation without giving them an opportunity to make further representations justifying their collaborative submission. He then refused to grant their request for an adjournment for a pre-sentence report. Instead, Castor Williams, P.C.J. ordered the appellant to pay a fine of \$3,600.00, at the rate of \$100.00 per month, plus serve three years on probation. The effect of Judge Williams' decision would be that unless Mr. Faulkner sued the appellant, and was able to collect on his judgment, he might never be reimbursed for his dental expenses. The amount of restitution agreed to be due to the victim would instead be paid, in the form of a fine, to the state, making the potential recovery for the victim even more tenuous.

[6] The Crown concedes that the trial judge erred and that we ought to allow the appeal.

[7] We agree. The trial judge erred by refusing to accept a perfectly reasonable and appropriate sentence which was jointly recommended by counsel, and then failing to follow well-settled law that must be applied whenever a judge chooses to depart from joint submissions on sentence which accompany negotiated admissions of guilt. See for example, **R. v. MacIvor**, 2003 NSCA 60; **R. v. Zinck**, 2003 SCC 6; and **R. v. Wright**, 2010 NSCA 30.

[8] This error in principle vitiates any deference otherwise paid to a trial judge's broad discretion in sentencing. We are free to impose a fit and proper sentence, having regard to the principles of sentencing legislated by Parliament, and the circumstances of his case and this offender. **R. v. Knockwood**, 2009 NSCA 98; **R. v. Bernard**, 2011 NSCA 53.

[9] Based on counsels' joint recommendation as well as the appellant's own acknowledgements during the course of the sentencing hearing, we are satisfied that a restitution order is fair and can be realistically fulfilled. We would grant leave to appeal, allow the appeal, and order that the appellant serve a period of probation of three years. The probation order will contain the usual statutorily mandated terms, as well as a condition that Mr. Lawrence make restitution to Mr. Faulkner in the amount of \$3,913.00 which is to be payable to the clerk of the court at the Halifax Provincial Court, and is to be paid in full within 30 days of the expiry of the order. The trial judge's original order that the appellant pay a fine, is revoked.

Saunders, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.