NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. S.A.C.***, 2007 NSCA 55

Date: 20070508
Docket: CAC 270629
Registry: Halifax

Between:

S.A.C.

Appellant

v.

Her Majesty the Queen

Respondent

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

Judges:	Bateman, Hamilton and Fichaud, JJ.A.
Appeal Heard:	April 10, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal dismissed in all respects save for the granting of a DNA order per reasons for judgment of Bateman, J.A.; Hamilton and Fichaud, JJ.A. concurring.
Counsel:	Chandrashakhar Gosine, for the appellant Peter Rosinski, for the respondent

Publishers of this case please take note that s. 110(1) and s. 111(1) of the **Youth Criminal Justice Act** apply and may require editing of this judgment or its heading before publication.

Section 110(1) provides:

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.

Reasons for judgment:

[1] S.A.C. seeks leave of the Court and, if granted, appeals the sentence imposed by Chisholm, J.P.C. under the **Youth Criminal Justice Act**, S.C. 2002, c. 1 (the "**YCJA**").

BACKGROUND

[2] On June 1, 2006, the day scheduled for trial, S.A.C., represented by counsel Hoyte, pleaded guilty to each of three offences on an Information dated April 10, 2006 - three separate breaches (committed on April 7, 2006) of the same responsible person undertaking (contrary to s. 31(1) of the **YCJA**). Sentencing was adjourned to August 22, 2006.

[3] On June 22, 2006, S.A.C., represented by counsel Gosine, entered guilty pleas to 12 of 14 counts contained on an Information dated January 10, 2005. Sentencing was set over to the same August date.

[4] At the August 22, 2006, sentencing before Chisholm, J.P.C., S.A.C. was represented by the same, separate counsel on each information.

[5] Chronologically, the offences for which he was sentenced on that date are (all but the three breaches of house arrest are **Criminal Code** offences):

- May 27, 2005 - 334(b) - stole motor vehicle
- June 6, 2005 - 334(b) - stole motor vehicle
- July 11, 2005 - 334(a) - stole motor vehicle
- July 18, 2005 - 334(b) - stole motor vehicle
- August 1, 2005 - 334(b) - stole motor vehicle
- August 16, 2005 - 334(b) - stole motor vehicle
- August 19, 2005 - 334(b) - stole motor vehicle
- August 22, 2005 - 348(1)(b) - break, enter, theft - dwelling house
- August 30, 2005 - 334(a) - stole motor vehicle
- August 30, 2005 - 348(1)(b) - break, enter, theft - dwelling house
- September 20, 2005 - 348(1)(b) - break, enter, theft - dwelling house
- October 19, 2005 - 334(b) - stole motor vehicle
- April 7, 2006 - 139(1) **Y.C.J.A**. - three breaches of house arrest

[6] The defence did not object to the facts of the offences read into the record by the Crown. In many cases, the property stolen from the residences (primarily jewellery and electronics) was not recovered. Often the stolen vehicles were used as transportation for the dwelling house break-ins and the vehicles later found in damaged condition. The Crown sought a total of 12 months custody and supervision to be followed by 12 months probation for the offences on both Informations. Defence counsel Hoyte proposed a probation order on the 3 count Information. In relation to the 12 offences on the separate Information counsel Gosine also asked that S.A.C. receive probation.

[7] The judge sentenced S.A.C. to a total of 200 days in secure custody followed by 100 days supervision in the community (s. 42(2)(n) **YCJA**), then to be subject to 12 months probation. He ordered that S.A.C. provide a DNA sample.

[8] S.A.C. appeals the sentence on the 12 counts. The sentence for the 3 counts of breach of the responsible person undertaking is not under appeal (three concurrent sentences of 30 days custody and supervision, running consecutively to the sentences on the twelve counts).

ISSUES

[9] S.A.C. says the judge erred in ordering a DNA sample. He further submits that a custodial sentence was not an available disposition in these circumstances (s. 39(1)(c) **YCJA**) and says, in any event, the sentence is excessive.

ANALYSIS

The DNA sample

[10] Conceding that the judge erred in making the DNA order without giving counsel an opportunity to make submissions, the Crown asks that the matter be remitted to the court below. S.A.C. says the order should be vacated because this was not an appropriate case in which to order a DNA sample.

[11] These are secondary designated offences calling for an exercise of discretion by the sentencing judge on the question of ordering a DNA sample. Counsel for

S.A.C. could not advise us whether, had the matter been properly raised before the sentencing judge, S.A.C. would have elected to call evidence. In the absence of an indication from counsel that evidence would not be called on behalf of S.A.C., it is not appropriate for this Court to determine whether the DNA sample should be granted. I would remit this issue to the sentencing judge (see **R. v. J.J.R.**, [2003] O.J. No. 4869 (Q.L.); 181 C.C.C. (3d) 7 (Ont.C.A.) and **R. v. J.M.G.**, [2004] A.J. No. 747 (Q.L.); 187 C.C.C. (3d) 7 (Alta.C.A.)).

The Custodial Sentence

[12] The **YCJA** limits the circumstances in which a young person may be sentenced to custody:

> 39. (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless
>
> (a) the young person has committed a violent offence;
>
> (b) the young person has failed to comply with non-custodial sentences;
>
> (c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985; or
>
> (d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.
>
> (Emphasis added)

[13] The judge concluded that the conditions of s. 39(1)(b) were not satisfied here but found that custody was available under s. 39(1)(c). The Crown says the judge erred in his application of s. 39(1)(b), but has not cross-appealed or filed a notice of contention on that issue. As I am of the view that the judge did not err in ordering custody under s. 39(1)(c), I will express no opinion on the judge's interpretation of s. 39(1)(b).

[14] Counsel for S.A.C. says the judge erred in his reliance on s. 39(1)(c) because:

- the offences for which S.A.C. was then being sentenced could not be included in determining a “pattern of findings of guilt”;
- the precise dates of commission for some of the offences were not before the Court and therefore the judge could not conclude there was a “pattern of findings of guilt”;
- even if all offences are considered, there is no “pattern of findings of guilt”.

[15] The term “pattern of findings of guilt” is not defined in the **YCJA**. Bastarache, J. wrote for the Court in **R. v. C.D.; R. v. C.D.K.**, 2005 SCC 78; [2005] S.C.J. No. 79 (Q.L.); 3 S.C.R. 668:

> 27 In order to determine the meaning of an undefined term in a statute, it is now well established that a court is to read the words making up the term "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[16] I agree with the analysis of the Alberta Court of Appeal on this issue in **R. v. C.D.J.**, 2005 ABCA 293; [2005] A.J. No. 1190 (Q.L.); 205 C.C.C. (3d) 56. On the meaning of “pattern of findings of guilt” the court said:

> 23 The section [s. 39(1)(c)] refers to the plural, "findings of guilt", clearly indicating that there must be at least two, and likely more, findings of guilt before a pattern can be found. This is supported by the phrase used in the French version of the section, "plusieurs déclarations de culpabilité", which translates as "several findings of guilt", indicating there must be three or more findings of guilt in order to make out a pattern.
>
> 24 Further, the history referred to is of "findings of guilt", not sentences or dispositions, leading us to conclude that both prior findings of guilt and the

> current findings of guilt for which the young person is being sentenced may be considered.
>
> 25 What, then, is required to establish a "pattern" of findings of guilt? The word "pattern" is defined in *Black's Law Dictionary*, 8th ed. (St. Paul, MN: Thomson, 2004) as a "mode of behavior or series of acts that are recognizably consistent". It has been held that in order to find a pattern of findings of guilt there must be evidence of some regularity or repetition: *R. v. I. (D.A.)*, 2003 BCPC 317, 58 W.C.B. (2d) 98. In *R. v. U. (D.R.)*, 2004 BCPC 271, the Court concluded at para. 42 that the history must tend to show either a pattern of similar offences or a pattern of crime.
>
> 26 We conclude that there must be some recognizable regularity, consistency or similarity to the offences in order to demonstrate a pattern of findings of guilt. If it were sufficient to show merely that the young person had a prior history of findings of guilt, there would have been no need to include the word "pattern" in s. 39(1)(c).
> (Emphasis added)

(see also **R. v. D.R.U.**, 2004 BCPC 271; [2004] B.C.J. No. 1639 (Q.L.)).

[17] I do not accept the appellant's submission that the s.39(1)(c) requirement that the young person have a "history" that indicates a pattern of findings of guilt prevents the sentencing judge from considering, as a part of a pattern, the offences before the court. The meaning of "history" was discussed recently by Franklin, P.C.J. in **R. v. A.E.A.**, [2007] A.J. No. 360 (Q.L.). I would agree with his observation that "history" means the time period prior to the date of sentencing. Therefore, all offences including those currently before the court are to be considered. Had Parliament intended to exclude from consideration those offences for which the young person is currently being sentenced, clear words to that effect would have been used. As Franklin, C.P.J. reasoned:

> ¶ 28 To interpret this *Act* as opening the gateway to custody when the young person pleads guilty or is found guilty on different days for offences separate in time and event but closing it if the accused pleads guilty or is found guilty of offences separate in time and event all on the same day is to create a legal fiction that is not in a young person's interest. It does not deal with young people with the same history of findings of guilt in the same way. It would promote dissimilar sentence options for similar conduct. This cannot be a reasonable interpretation of the *Act*.

[18] A “history of a pattern of findings of guilt” alone does not fulfill the requirements of s. 39(1)(c). In addition, the young offender must have committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years. Even then there remain meaningful restrictions on the imposition of a custodial sanction. As Bastarache, J. wrote in **R. v. C.D., supra:**

> 39 . . . even if one of the gateways to custody in subs. (1) does apply, subs. (2) prohibits a youth justice court from imposing a custodial sentence under s. 42 (youth sentences) unless the court has determined that there is no reasonable alternative, or combination of alternatives, to custody that is in accordance with the purpose and principles set out in s. 38. Furthermore, subs. (3) sets out a number of factors that a court must consider in determining whether there is a reasonable alternative to custody, such as the alternatives to custody that are available and that have been used in respect of young persons for similar offences committed in similar circumstances, and subs. (9) requires a court that imposes a custodial sentence "[to] state the reasons why ... a non-custodial sentence is not adequate to achieve the purpose set out in subsection 38(1)".

[19] At the time of sentencing S.A.C. had the following criminal record (not including the offences for which he was being sentenced):

Sentence Date	***Offence Date***	***Offence***	***Sentence***
March 21, 2005	August 9, 2004	334(a) - motor vehicle theft	12 mos probation (50 hrs community service)
	September 20, 2004	249.1 - motor vehicle flight from police	12 mos probation (50 hrs community service)
	September 12, 2004	355(a) - poss of motor vehicle	“same as above”
	September 20, 2004	355(b) - poss of stolen property	“same as above”
	September 22, 2004	145(3) - breach of undertaking	“same as above”
October 13, 2005	September 11, 2005	139(2) **Y.C.J.A.** x 2 - breach of undertaking	12 mos probation
	September 11, 2005	137 **Y.C.J.A.** x 2 - breach of probation	12 mos probation
January 30, 2006	August 8, 2005	348(1)(b) - break enter & theft	4 mos deferred custody & 12 mos probation

	August 8, 2005	348(1)(b) - break enter & theft	"same as above"
	August 8, 2005	137 **Y.C.J.A.** (breach of March 21, 2005 Order - p.46 Transcript)	"same as above"
	August 8, 2005	139(2) **Y.C.J.A.** - failure to comply	"same as above"
March 27, 2006	March 20, 2006	139(1) **Y.C.J.A.**	1 day in custody
April 13, 2006		s.42(6), 106, 109(2) **Y.C.J.A.** - breach of conditional supervision order/deferred custody	- suspension cancelled and deferred custody order continued
April 28, 2006		s.42(6), 106, 109(2)(c) **Y.C.J.A.** - breach of conditional supervision order/deferred custody	30 days custody & supervision order

[20] Unfortunately, the young person's record of past offences was not presented to the court in an organized way. The Crown did not provide the date on which the prior offences were committed. She did, however, advise the judge that S.A.C. was sentenced on March 21, 2005, October 13, 2005, January 30, 2006 and March 27, 2006 and provided the details of the offences for which he was sentenced on those dates as well as particulars of the sentences received. The pre-sentence report identified the offences committed on August 9 and September 12, 20 and 22 of 2004. It is clear from the judge's remarks on sentencing that he was aware that S.A.C. committed offences from May through September of 2005 and that the sentencing in January, 2006 related to offences committed in August, 2005. I am satisfied that the judge had sufficient information about the general dates of the prior offences from which to determine that there was a "pattern of findings of guilt".

[21] In deciding whether a pattern of findings of guilt had been established, the judge determined that he was not restricted to considering only offences that are indictable and carry a maximum punishment of more than two years but could look at the full collection of offences. In concluding that the statutory criteria had been met he said:

> In my view, the Court may consider all offences during the appropriate period of time in determining whether or not there is a pattern but may only impose a

> period of custody in relation to those offences which meet the other criteria of the provision.
>
> Therefore, with respect to the matter before the Court, I have considered all of the offences committed by S.C. during the period May through September of 2005, which include the three break and enters, and the nine car thefts, which are before the Court this afternoon, one of those being over $5,000, and the two break and enters for which he was sentenced in January of this year, those offences having been committed in August of last year.
>
> I will say as an aside, even if those offences, which are hybrid in nature and do not meet the criteria of indictable offence with a maximum of more than two years, I would still be inclined to the view, given the number of break and enters, that a pattern would have been established.
>
> That I consider not only the break and enters and the car thefts relevant for the following reasons. On more than one occasion, a stolen vehicle was used to carry out the break and enters. Most of the motor vehicles, if not all of the motor vehicles, I believe there is one exception, were stolen from places of residence, multiple dwelling residences or individual dwelling residences. These offences all take place within a period of approximately three months.
>
> In my view, the number of offences, the similarity of circumstances of offences, the similarity of offences themselves, all establish a pattern of behaviour and a pattern of findings of guilt, now that those convictions have been entered with respect to the matters from May through September of 2005.
>
> As I have indicated, having found that a pattern of behaviour has been established, a pattern of findings of guilt during that period of time, the Court may only impose a period of custody for those offences which meet the criteria that they are indictable offences for which an adult could be sentenced to a period of more than two years in custody. That would entail the three break and enters, and the theft over.
>
> Having found that custody is an option with respect to those offences, the Court must go on to consider whether or not custody is the appropriate disposition. In doing so, I remind myself of the purpose and principles of the *Youth Criminal Justice Act*.

[22] While I would agree with the sentencing judge that s. 39(1)(c) does not restrict the "findings of guilt" to indictable offences, a sufficient pattern emerges from the indictable offences alone:

- August 9, 2004: s. 334(a) - motor vehicle theft
- September 12, 2004: s. 355(a) - motor vehicle theft
- July 11, 2005: s. 334(a) - motor vehicle theft
- August 8, 2005: s. 348(1)(b) - break & enter - dwelling
- August 8, 2005: s. 348(1)(b) - break & enter - dwelling
- August 22, 2005: s. 348(1)(b) - break & enter - dwelling
- August 30, 2005: s. 334(a) - motor vehicle theft
- August 30, 2005: s. 348(1)(b) - break & enter - dwelling
- September 20, 2005: s. 348(1)(b) - break & enter - dwelling

[23] Even if the offences that were before the court for sentencing are excluded, there remains a "pattern of findings of guilt" as can be seen from S.A.C.'s prior criminal record (at para. 21, above).

[24] Looking at the collection of offences as a whole, S.A.C. engaged in criminal activity in August and September of 2004; March, April, May, June, July, August, September and October of 2005; and March and April of 2006 - in many of those months he committed multiple offences. Despite being first sentenced and subject to probation in March 2005 his criminal pursuits continued unabated. This activity unquestionably demonstrates the regularity, repetition and similarity sufficient to form a pattern. Indeed, at the sentencing hearing, counsel for S.A.C. agreed that this was so. When invited by the judge to comment on s. 39(1)(c), Mr. Gosine said:

> There is every indication there is a pattern of offences in this matter and the sentences for the break and enters and the thefts over would attract a period of custody of more than two years.
>
> Notwithstanding that, I would suggest that given his cooperation with the police without which there would have been no detection of these crimes, it would not have been possible to place S.C. in jeopardy.

[25] I would conclude that the judge did not err by including for the purposes of s. 39(1)(c) the offences for which S.A.C. was then being sentenced. Nor did he err in finding that S.A.C. had a history that indicates a pattern of findings of guilt.

The Pre-sentence Report

[26] S.A.C. says the pre-sentence report was deficient. The court was provided with a full pre-sentence report and two update letters. The full report had been prepared for the March, 2005, sentencing (for offences committed in August and September, 2004). At that time, S.A.C. came before the court as a first time offender. The report detailed the oversight that would be provided should a community based sentence be ordered and suggested the conditions to be included in any supervision order. S.A.C. was sentenced to twelve months probation.

[27] The same probation officer updated that report by letter dated January 11, 2006, which was submitted for the January, 2006 sentencing (for offences committed on August 8, 2005). At that time S.A.C. was being sentenced for two new break and enters and breach of the March, 2005 supervision order. In that update the author, who had been supervising S.A.C. since the earlier sentence, noted that he appeared to have an improved attitude and a commitment to change. She indicated a willingness to continue to supervise him and to facilitate a mental health assessment and the completion of an anger management course. S.A.C. received a global sentence of four months deferred custody and twelve months probation at that January sentencing.

[28] By letter dated August 10, 2006, the same probation officer provided a further update for the sentencing now under appeal. She noted that at the time of the last update S.A.C. had stated an intention to obtain work, however, he had not held any steady employment since the last sentencing nor had he resumed his education. The anger management issues continued and his mother was concerned that he may have resumed his drug use. After several breaches of his January deferred custody sentence on April 28, 2006, he had been ordered to serve the balance in secure custody. He was released from custody on May 17, 2006. His current supervisor advised the report writer that S.A.C. presented with no motivation and did not follow through with any of the programs put in place to assist him. That supervisor believed he continued to associate with a negative peer group and was at risk to re-offend. In view of S.A.C.'s inability or unwillingness to engage in support services the writer opined that his ability to abide by any further conditions within the community was questionable.

[29] Counsel took no issue with the form or contents of these reports at the sentencing. He now says the sentence is illegal because the reports do not strictly

comply with s. 40 of the **YCJA**. In particular, he says the reports do not adequately set out the availability and appropriateness of community services and facilities for S.A.C. (s. 40(2)(d)(v)). I disagree.

[30] I am satisfied that the reports, collectively, fulfill the requirements of s. 40, the purpose of which is to provide the sentencing judge with sufficient individualized information to craft a sentence appropriate for the offender, in keeping with ss.38 and 39 of the **YCJA**. The obligation under s. 40(2)(d) is to provide information "that is applicable to the case". The first report fully details the community resources available. S.A.C. received the benefit of those services but continued to re-offend and failed to comply with the terms of his community-based sanction. At the January sentencing he again received a community based sanction which he breached, causing him to serve the balance in secure custody. In the final report the writer indicated that S.A.C., if released into the community, was unlikely to abide by conditions or take advantage of programs. It was clear from the information provided in the reports that S.A.C. had exhausted the available community resources.

[31] At the sentencing, counsel for S.A.C. sought a period of probation for the twelve offences. It was his position that a custodial sentence was not available. He did not elaborate on how a further community-based sentence would contribute to S.A.C.'s rehabilitation or protect the public. He made no reference to S.A.C.'s past breaches of probation orders. Glaringly absent from his submissions was any suggestion that S.A.C. was likely to comply with a non-custodial sentence (s. 39(3)(b)). Counsel did not outline any plan under which S.A.C. could continue to reside in the community. He did not suggest conditions of probation which might succeed in curbing S.A.C.'s continuing criminal conduct. Nor, on appeal, did counsel advise what additional information should have been included in the pre-sentence reports or suggest any further information which would have been of assistance to the sentencing judge.

Unfit Sentence

[32] S.A.C. makes general arguments that the judge failed to consider the proper principles of sentencing or otherwise misdirected himself and that the sentence is "inappropriate". In my view, these submissions are without merit.

[33] Although finding that a custodial sentence was available in these circumstances the judge expressly considered whether alternatives to custody could effect an appropriate disposition. He mentioned several factors as particularly relevant to his determination that custody was warranted: S.A.C. was subject to probation orders throughout the period of these offences; break and entry into a private home is particularly serious; prior community-based sentences had failed to rehabilitate S.A.C. S.A.C. has a history of violating community-based sanctions. In these circumstances, the judge reasoned that further probation would fail to hold S.A.C. appropriately accountable nor would it provide meaningful consequences for his repeated and serious criminal behaviour. A period of custody, the judge found, would best promote rehabilitation. He further considered totality.

[34] I am not persuaded that the judge erred in principle or that the sentence is excessive.

[35] As noted above, S.A.C.'s criminal record was not presented to the judge in an organized way. It appears that the judge determined the dates of prior offences from a review of the running file. S.A.C. says the sentencing judge was not entitled to do so. I disagree. Pursuant to s. 40(2)(d)(iii) of the **YCJA**, the pre-sentence report is to contain full information about the young person's criminal history. It is clearly intended that a sentencing judge have access to this information. The cases cited by S.A.C. on this point prohibit a trial judge from reviewing an accused young offender's running file where it discloses past criminal conduct. They are of no relevance here (**R. v. R.T.J.T.**, [1989] N.S.J. No. 318 (Q.L.); 93 N.S.R. (2d) 101 (C.A.) and **R. v. Melanson** (1993), 21 W.C.B. (2d) 18 (B.C.S.C.)). **Re N.(F.)**, 2000 SCC 35; [2000] 1 S.C.R. 880, also cited by S.A.C., which addresses the privacy provisions of the **Young Offenders Act**, R.S.C. 1985, c. Y-1, as amended is unhelpful as well.

DISPOSITION

[36] While I would grant leave I would dismiss the appeal in all respects save for the granting of the DNA order. If issued, the DNA order is set aside and any sample taken is to be destroyed. I would remit the issue of a potential order pursuant to s. 487.051(1)(b) of the **Code** to the sentencing judge.

Bateman, J.A.

Concurred in:
Hamilton, J.A.
Fichaud, J.A.