PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Denny*, 2015 NSPC 49

Date: 2015-07-29

Cases: 2809929, 2811100, 2811101, 2811103, 2847935, 2847936, 2847937, 2847938, 2847939, 2890812

Registry: Pictou

Between:

Her Majesty the Queen

v.

Hope Denny

DECISION – SHOW CAUSE HEARING

Judge:	The Honourable Judge Del Atwood
Heard:	29 July 2015, in Pictou, Nova Scotia
Decision:	29 July 2015
Charge:	Section 266 Criminal Code of Canada x 3 Section 733.1 Criminal Code of Canada x 2 Para. 348(1)(b) Criminal Code of Canada x 1 Sub-section 145(3) Criminal Code of Canada x 3
Counsel:	Jody McNeill for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Hope Denny

By the Court:

[1] Hope Denny is before the court in custody in relation to a charge under sub-section 145(3) of the *Criminal Code,* case #2890812. The prosecution elected to proceed summarily. The court has also brought forward, on the application of counsel, a number of informations--#712250, #707138, #707140, and #707020--to deal with a prosecution application to revoke Ms. Denny's bail in accordance with the provisions of sub-section 524(8) of the *Criminal Code.* The prosecution elected summary process on those charges, as well.

[2] I canvassed with counsel whether the court should make an order under section 517 of the *Code* for a bail-hearing publication ban; however, no one thought it would be needed.

[3] Ms. Denny is before the court, not for the purposes of determining guilt or innocence, nor for the purposes of imposing a punishment. The only issue before the court today is whether Ms. Denny ought to be admitted to bail.

[4] Ms. Denny is presumed innocent of the charges before the court. That presumption of innocence is guaranteed constitutionally in para. 11(d) of the *Canadian Charter of Rights and Freedoms.* It is also guaranteed statutorily in

Section 6 of the *Code*. Ms. Denny has the right not to be denied reasonable bail without just cause. That is guaranteed constitutionally in para. 11(e) of the *Charter*. Just cause has been defined judicially as any one or more of the grounds set out in Section 515(10) of the *Criminal Code*.

[5] As the Supreme Court of Canada said in the companion decisions of *R. v. Pearson*[1] and *R. v. Morales*[2], bail may be denied only for one or more of the grounds specified in sub-section 515(10), and may not be denied for any ground extraneous to that sub-section.

[6] The most recent charge before the court today, involving an allegation of breach of undertaking from 28 July 2015, invokes the reverse-onus provisions of para. 515(6)(c) of the *Criminal Code*. However, that provision of the *Criminal Code* was interpreted judicially by Anderson, Co.Ct.J., as he was then, in *R. v. Quinn*[3] as not creating any additional or residual grounds for detention. Even when the reverse-onus provisions of the *Code* are engaged, a court may deny bail only if the court were to be satisfied that detention would be justified under one of the grounds set out in sub-section 515(10) of the *Criminal Code*.

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[1] [1992] S.C.J. No. 99.
[2] [1992] S.C.J. No. 98.
[3] [1977] N.S.J. No. 735 at paras. 7-11.

[7] The allegation before the court is that on 28 July 2015, Ms. Denny—who is only nineteen years old and grew up in a First-Nation community—consumed alcohol to excess at a home in the north end of New Glasgow. The occupiers of that home telephoned police. When police arrived on the scene, Ms. Denny was found outdoors, and impaired mightily by alcohol; she was taken into custody, in part for her own safety, but also because she was in violation of the no-alcohol condition imposed upon her release in respect of the charges for which the prosecution is seeking to revoke bail.

[8] The court heard today the evidence of Ms. Denny. Ms. Denny described what happened leading up to the police getting called. Ms. Denny waived her testimonial protection under the provisions of para. 518(1)(b) of the *Criminal Code*, and was questioned by her counsel and cross-examined by the prosecutor regarding what led up to her arrest. Ms. Denny's evidence, which I accept as truthful because it matches pretty much the evidence I heard from the prosecution, was that she had arranged for a drive to get back home, but was unable to connect up with that motorist. She wound up invited into a home in the north end of New Glasgow. She finished off a big bottle of rum. She told me that she has no memory of what led to her being arrested by police. She

admitted to me that she has struggled in the past with alcohol and drug addiction.

[9] There is no evidence before the court that Ms. Denny was committing any sort of a crime—such as theft, damage to property, break and enter, assault—other than violating the no-alcohol condition of her bail. Had Ms. Denny not been subject to that condition, what would have happened most likely once police showed up was that Ms. Denny would have been issued a summary offence ticket for public intoxication, and she might have been held until sober and safe for release.

[10] There are certain facets of bail that are beset with misconception. One is the misconception that, when an individual is released on bail with the consent of the prosecution, then it develops, through some operation of law, that the prosecution controls the terms of release. And I recognize, Mr. McNeill, that this is not the position that you've taken here today.

[11] The fact is that, regardless of the prosecution's consent, a bail order is an order of the court. It is not an order of the prosecution. Even when the prosecution and defence counsel are in full agreement as to the terms, the court that releases a person changed with an offence must be satisfied that any

proposed optional conditions for bail would be reasonable. This is borne out in sub-section 515(1) of the *Code,* which presumes a release on an undertaking without conditions, unless the prosecution has shown cause for detention or conditional admission to bail. There is nothing in Section 515 that dispenses with the court's obligation to be satisfied that the prosecution has shown cause, although as a matter of practicality, the court will generally not go behind terms negotiated by counsel.

[12] Similarly, misunderstood (and the court hears this proposition repeated not only by the prosecution but by defence counsel, as well) is that somehow the prosecution is entitled, in preparing for a bail hearing—yes, entitled—to a three-clear-day adjournment to get ready. That arises from what I consider to be a profound misunderstanding of the provisions of sub-section 516(1) of the *Code*. The prosecution is certainly entitled to apply to the court for an adjournment of up to three clear days, but it is for the court to determine whether an adjournment ought to be granted.

[13] And so it is that these are some of the common misperceptions about bail that beset frequently even consent releases.

[14] I have referred in the past to the judgment of Moir J. in *R. v. Doncaster*.[4] In that bail-review case, Moir J. pointed out that conditions that are typically imposed upon the release of persons charged with offences may, as a matter of constitutional law, be imposed only if the prosecution has satisfied the court that the conditions are reasonable. Conditional release terms not found to be reasonable would hardly comport with the reasonable-bail standard in para. 11€ of the *Charter*. A corollary of this is that there should be no such thing as automatic or standard conditions of bail. Unfortunately, bail-condition templates do get established over time, I'm as much at fault for doing that as anybody. And so, for example, a condition to keep the peace and be of good behaviour is not a mandatory or statutory condition. A condition that a person charged with an offence abstain from alcohol is not a mandatory condition. As a matter of fact, I have never been presented with what I consider to be persuasive evidence that ordering an individual to abstain from alcohol might have any effect upon public safety or crime control. In fact, in many situations conditions prohibiting a presumptively innocent person charged with an offence from possessing or consuming alcohol may, indeed, be contrary to the principles of constitutional bail; this is so because, if that individual is suffering

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[4] 2013 NSSC 328.

from an alcohol addiction, an absolute abstention may present substantial risk to the health and well-being of that person.

[15] There are numerous epidemiological studies that have been conducted by reputable researchers and published in renown journals that support the proposition very strongly that prohibiting someone with an alcohol addiction from having any access to it may give rise to potentially lethal withdrawal effects unless arrangements are put in place for immediate access to emergency medical treatment.[5]

[16] I can say that, from this point in time forward, when the court is dealing with bail, even if consent bail, the court is going to have to be satisfied and the court is going to have to hear evidence that alcoholic-abstention conditions, if sought, would be justified in the circumstances. I'm not so satisfied here.

[17] First of all, I am satisfied that Ms. Denny should be released from custody. Ms. Denny's infraction involved the violation of an alcohol-abstention condition. The common-sense of this bail hearing is that alcohol is a widely available product, sold through highly regulated retail outlets. It is a product that is extensively promoted and advertised, and it is easy for persons over the

[5] See, e.g., Hugh Myrick and Raymond F. Anton, "Treatment of Alcohol Withdrawal" (1998) 22 Alcohol Health and Research World at 38-43.

age of nineteen years to have it and consume it, provided they do so responsibly. Ms. Denny has attained the full age of 19 years and is able to purchase alcohol legally. I wish you wouldn't, Ms. Denny, because it's obviously something that is not good for you, but I'm not satisfied that a court order prohibiting you from possessing alcohol would be good for you. Without access to immediate treatment, which is something that the court would not have jurisdiction to order, your life and health could be at risk.

[18] I am satisfied that there has been a bail violation, so I am going to revoke the undertaking, order #1749483. However, I am satisfied that Ms. Denny has discharged the burden of proof that she be released on an undertaking in relation to all charges. That undertaking will specify that Ms. Denny return to court on August 18th, 2015, at 9:30 a.m., when she has other matters before the court.

[19] She is to live at 221 Temperance Street, Apt. 1. Is that still Ms. Denny's address, Mr. Robertson?

[20] **MR. ROBERTSON**: That's another issue, Your Honour. She has moved back in with her mother, and that's where she plans to be for the next little while.

[21] **THE COURT**: Is that 100 Eagle Road?

[22] **MS. DENNY**: 100 Eagle Road.

[23] **THE COURT**: Okay. Got it. So, we have to ensure that these undertakings, in the future, always match up the addresses. So, the now-cancelled undertaking, in the heading, describes 100 Eagle Road, Pictou Landing, as Ms. Denny's address, but then it lays out, in the live-at condition, 221 Temperance Street as Ms. Denny's address. 221 Temperance is to be removed. Paragraph (c) is to be replaced with 100 Eagle Road, Pictou Landing, Nova Scotia. I am sure that was my mistake.

[24] So, no contact with the [redacted witness information].

[25] Continued prohibition in relation to firearms.

[26] Paragraphs (f) and (g) are out. There's no need to prohibit Ms. Denny from possessing controlled substances. That is already prohibited under the *Controlled Drugs and Substances Act*, and it is not necessary for the court to repeat a prohibition that is already well entrenched in the law.

[27] Paragraph (h), participate in the pre-employment program with Heather Tullock, will continue.

[28] And there will be a new paragraph (j). Ms. Denny, you are to report within 24 hours to Addictions Services, and thereafter as they direct it. That is a report-in condition only. I do not have the authority to order you to accept treatment.

[29] So you're going to be released on those conditions, Ms. Denny, so we're taking out the conditions about alcohol and I'm going to have to rely on your good judgment, Ms. Denny. Yes, and Mr. McNeill?

[30] **MR. MCNEILL**: Just a request the status of condition (d). No contact with named victims?

[31] **THE COURT**: I indicated that that's to continue.

[32] **MR. MCNEILL**: My apologies, Your Honour.

[33] **THE COURT**: Thank you. So, Ms. Denny, those will be the conditions. The fact that you don't remember what happened that morning, Ms. Denny, means that you'd had enough to drink that it affected your brain's ability to process memory. As bad as that is, it can get worse. You might stop breathing. Or you might vomit and inhale it. If those things were to happen, you'd probably die. I mean, I remember the last time that you were in court. You're a human being who has made tremendous progress in your life in many ways

and have had to overcome real problems with many successes in that life, and I don't want to see anything bad happen to you, and I know that there are a lot of people out there who feel the same way.

[34] So, what I'll have you do, Ms. Denny, please go back with the sheriffs. We'll have you sign the court papers, and once everything has been signed, you'll be free to go. Thank you very much.

JPC