PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v.Reddick,* 2015 NSPC 62

Date: 2015-09-23
Docket: 2798777
Registry: Pictou

Between:

Her Majesty the Queen

v.

Cora Louise Reddick

DECISION: APPLICATION FOR CURATIVE DISCHARGE

Judge:	The Honourable Judge Del W. Atwood
Heard:	23 September 2015 in Pictou, Nova Scotia
Charge:	Para. 253(1)(a) of the Criminal Code
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Douglas Lloy, Q.C. for Cora Louise Reddick

By the Court:

[1] At the conclusion of this hearing for a curative discharge, I gave a brief oral judgment granting the application; I informed counsel that I would issue more detailed written reasons in short order as the application involved the resolution of a number of issues that might be of assistance to counsel in future proceedings.

[2] The facts of this case are straightforward: police were called to the scene of a single-vehicle accident the early morning of 12 October 2014. Ms. Reddick was identified as having been the operator. Based on his observations, the investigator concluded that Ms. Reddick's ability to operate a motor vehicle was impaired by alcohol and made a breath demand; Ms. Reddick complied and provided two samples of her breath suitable for chemical analysis. Ms. Reddick's para. 258(1)(c) presumptive blood-alcohol concentration at the last time of driving was 180 mgETOH/100ml blood. Ms. Reddick pleaded guilty to a single summary count of para. 253(1)(a) of the *Criminal Code*.

[3] At the outset of the hearing, the court had the benefit of a useful exchange with the prosecution and defence on a number of practical points. While each application is to be judged on its own merits, the procedures settled upon in this

case will, I have no doubt, offer beneficial forward guidance to the court and counsel.

[4] It was agreed that it is preferable that medical and counselling notes and records not be filed with or faxed into the court in advance of a curative-discharge hearing. While notes and reports might well be admissible as business records under section 30 of the *Canada Evidence Act*, or under the *Ares v. Venner* common-law duty-record hearsay exception,[1] and while hearsay is admissible in a sentencing proceeding pursuant to sub-s. 723(5) of the *Criminal Code*, the fact is that notes are often composed in a manner requiring testimonial interpretation, or subject to redaction for privacy reasons by the records custodian, leaving them shrouded in mystery if simply left at the court counter for the judge's pre-trial perusal. Furthermore, filing such material with the court in advance of a hearing, without the clear consent of opposing counsel, runs the risk of exposing the presiding judge to controversial evidence, presuming a favourable admissibility ruling. In this case, the helpful consensus was that notes and reports be held back and used as memory aids, if so required, for the benefit of witnesses giving their testimony in court.

[1] [1970] S.C.R. 608.

[5] It was agreed as well that counsel follow the procedure outlined in s. 657.3 of the *Code* when putting expert evidence before the court in a sentencing hearing. When defence counsel is seeking to present expert evidence to the court by *viva voce* evidence, the basic notice and informational requirements of para. 657.3(3)(a) would need to be followed. A qualificational affidavit would be required only if counsel were seeking to present expert evidence by way of a written report.

[6] As the burden rests with the offender to demonstrate the appropriateness of the court imposing a discharge, it will generally be the case that the offender will be called to give evidence and be subject to cross examination. Having said that, an offender has the right to speak to sentence pursuant to s. 726 of the *Code*. While an allocution under that provision might not carry the same impact as evidence given under oath or affirmation and subject to cross examination, it will be assigned appropriate weight, given that the right to make an allocution is constitutionally protected.[2]

[7] In determining whether to impose a curative discharge, the court must focus on two key criteria: the offender's need for treatment is one, and will require the court to consider the effectiveness of past interventions, and, of greater

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[2] *R. v. Dennison*, [1990] N.B.J. No. 856 (C.A.); leave to appeal dismissed, [1990] S.C.C.A. No. 448. And see *R. v. Gorrill*, [1995] N.S.J. No. 82 (C.A.) at para. 112.

significance, the likely effectiveness of future substance-use management in helping the offender remain alcohol and offence free. The other core criterion is the public interest; although this involves the consideration of a constellation of factors—such as the consistency of a discharge with the fundamental purposes of sentencing, sentence parity and the like—the assessment of risk to the public is an integral component of, yes, the public interest. The risk of substance-use relapse looms large in the public-interest analysis. These two criteria overlap greatly; and because evidence relevant to their critical assessment often will involve opinions and judgments regarding the particular offender before the court that would be outside the common knowledge of the court, the martialling of expert evidence in the fields of substance-use disorder and treatment will be the norm. Accordingly, placing before the court counselling or treatment attendance records only, without informing the court what therapeutic success might look like for the specific offender and the prospects for achieving it, will not be regarded as good quality evidence.

[8] One thing that is within the common knowledge of the court is that forensic risk assessment is not an exact science, in that it is impossible to predict with certainty whether an offender will re-offend. The identifiable hazard in drinking-and-driving cases arises when a person susceptible to alcohol-use disorder

experiences a relapse and then decides to get behind the wheel of a motor vehicle while her ability to operate a vehicle safely is impaired. This sort of hazard projects a real risk of harm into the community.

[9] When the court considers an offender's risk of relapsing into alcohol abuse, the court must be cautious not to engage axiomatically in a fault- or blame-based analysis. This is because creditable research has shown that relapse can be triggered or caused by factors over which a person in recovery might have no control.[3]

[10] But the fact that an offender might be susceptible to pathologies or situational vulnerabilities outside her control that make the risk of relapse a live issue does not negate the concern about relapse risk.

[11] There are many features of Ms. Reddick's case that make this application for a curative discharge stand out. I mentioned above that risk assessment is not an undertaking with guaranteed outcomes. However, the evidence in this case satisfies me that Ms. Reddick's risk of relapse can be managed safely in the community.

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[3] See, e.g., Dongju Seo et al., "Disrupted Ventromedial Prefrontal Function, Alcohol Craving, and Subsequent Relapse Risk" JAMA Psychiatry. 2013;70(7):727-739. doi:10.1001/jamapsychiatry.2013.762; Marie Claude Ouimet et al., "Neurocognitive characteristics of DUI recidivists" (2007) 39 Accident Analysis and Prevention 743-750.

[12] First of all, Ms. Reddick has no prior record. Furthermore, the evidence put before the court by defense counsel on the application was of high quality. Ms. Reddick's counsellor, Ms. Lorraine MacLean, M.A., was called to give opinion evidence as an expert in the field of addictions counselling and rehabilitation; her expertise was admitted by the prosecution. Ms. MacLean described on direct and cross-examination her extensive counselling experience with Ms. Reddick; she described the effectiveness of Ms. Reddick's sessions thus far in assisting Ms. Reddick to abstain from alcohol; she also offered an opinion on Ms. Reddick's need to have counselling continue in order to promote a healthy lifestyle and to prevent relapse. Ms. MacLean testified that, while recovery from substance-use disorder is different for everybody, there tend to be trajectories typical of those progressing to the stage where they remain at a low risk of relapse; according to Ms. MacLean, Ms. Reddick has advanced beyond the contemplative and preparatory stages, and is almost nine months into the taking of concrete action. Ms. Reddick began with group therapy which focussed on anxiety-reduction acupuncture, the sampling of healthy leisure choices, and what were referred to as "Hour of Power" assemblies. Once committed to total abstention, Ms. Reddick advanced to hour-long individual sessions which helped her to identify relapse triggers and develop coping mechanisms. Ms. MacLean testified that Ms. Reddick

participated fully in her counselling; she said that Ms. Reddick was motivated to stay sober in virtue of her desire to maintain a positive mood about her lifestyle, her wish to serve as a positive role model for her child, her need for job security, and her yearning to preserve a healthy lifestyle. Ms. MacLean emphasised that counselling would have to continue to allow Ms. Reddick to maintain sobriety and build on the successes she has achieved up to this point.

[13] The presentence report confirmed that Ms. Reddick has been engaged fully in her counselling did not need to wait for the court to order it before taking concrete steps to deal with her alcohol use. The court had the benefit of Ms. Reddick's eloquent s. 726 allocution in which she confirmed her strongly held motivation to remain free of alcohol. She described with particular poignancy the effectiveness of her running therapy and her fitness regime in helping her cope with situational stresses. [4]

[14] When considering Ms. Reddick's motivation not to relapse into risk–taking behaviour, it is important that the court avoid the logical fallacy of false dichotomy. I believe very firmly that the desire to keep her job in the school

[4] Indeed, reputable research suggests that running therapy may work as a strong counterbalance to anxiety sensitivity: B.C. Sabourin, S.H. Stewart, M.C. Watt, O.E. Krigolson, "Running as Interoceptive Exposure for Decreasing Anxiety Sensitivity: Replication and Extension" Cognitive Behaviour Therapy 2015;44(4):264-74. doi: 10.1080/16506073.2015.1015163. Epub 2015 Mar 2; see also F. Kruisdijk, I. Hendriksen, E. Tak et al, "Effect of running therapy on depression (EFFORT-D). Design of a randomised controlled trial in adult patients [ISRCTN 1894]" BMC Public Health 2012, 12:50 doi:10.1186/1471-2458-12-50.

system is a very strong motivator for Ms. Reddick. Does this diminish in any way her *bona fides* or her commitment to her recovery? In my view, it does not. The fact that an offender might be moved to obtain a concrete or material to gain from a particular sentencing outcome does not mean that the offender's motives should be seen as suspect. In fact, I would hope that Ms. Reddick would see the importance of her job as an important factor in maintaining her choice to live free of substance abuse. I say this for two reasons: first, keeping her job will be important to preserving her financial security and sense of well-being so as to reduce the situational stresses in her life; but even more significant than that is the fact that Ms. Reddick's work has been of great benefit, yes, to her, but also to the children with whom she interacts well. This work has allowed Ms. Reddick to contribute substantially to her community, and I have no doubt that she will continue to serve as a positive influence in the lives of young people.

[15] As was stated by Griffiths J.A. of the Ontario Court of Appeal in rendering judgment for a unanimous three-member panel in the frequently cited case of *R. v. Ashberry*:

> Parliament has framed the criteria in s. 255(5) of the *Code* in a positive fashion with respect to the offender, placing the primary emphasis on the need of the offender for curative treatment and only in a negative fashion with respect to the public interest, in that the discharge must not be contrary to the public interest. If the court could be satisfied on the evidence that curative treatment would guarantee that the offender would never again drive a motor vehicle while under

the influence of alcohol, then obviously a discharge would be in the public interest. The difficulty is that such absolute assurances can rarely, if ever, be given by those charged with the care and treatment of the alcoholic. However, in those narrow circumstances where the evidence demonstrates that the accused is in need of curative treatment and that his or her rehabilitation is probable, then it would not be contrary to the public interest to grant a discharge subject to stringent terms of probation. Among the considerations relevant to the question of whether a given case is sufficiently exceptional to warrant recourse to the curative treatment/conditional discharge provisions of s. 255(5) of the *Code* are:

(a) The circumstances of the offence and whether the offender was involved in an accident which caused death for serious bodily injury. The need to express social repudiation of an offence where the victim was killed or suffered serious bodily injury will generally militate against the discharge of the offender. Parliament has seen fit to expressly provide for more onerous sentences in those cases (s-ss. 255(2) and (3));

(b) The motivation of the offender as an indication of probable benefit from treatment. One can expect that a person facing a sentence of imprisonment may quite readily agree that he or she will take treatment for alcoholism and give up alcohol. The important question is the *bona fides* of the offender in giving such an undertaking. The efforts of the offender to obtain treatment before his or her conviction is of some importance. If the offender has a history of alcohol-related driving offences and has never before sought treatment for his or her condition, then one may regard with some suspicion his or her efforts to obtain treatment at this stage, when faced with a probable term of imprisonment;

(c) The availability and calibre of the proposed facilities for treatment and the ability of the participant to complete the program;

(d) A probability that the course of treatment will be successful and that the offender will never again drive a motor vehicle while under the influence of alcohol;

(e) The criminal record and, in particular, the alcohol-related driving record of the offender. Normally, where the offender has a previous record of alcohol-related driving offences there is a high risk of the offence being repeated and a greater need for a sentence emphasizing specific and general deterrence. The offender with a previous bad driving record will obviously have a higher burden of satisfying the court that his or her case is exceptional and that a discharge with curative treatment is appropriate and in the public interest.

However, if all other conditions are met, specifically where the evidence establishes both the need for treatment and the probability of rehabilitation, the offender's bad driving record should not by itself deprive the offender of the remedy of a discharge with appropriate safeguards imposed as conditions of probation under s. 255(5) of the Code. The multiple offender may well be a more suitable candidate for curative treatment because of his or her chronic alcoholism

> or drug addiction. In addition, the fact that he or she has on a number of prior occasions received fines or sentences of imprisonment may lead the court to conclude that these penalties have had no deterrent effect on the offender and that the public interest would best be served by directing curative treatment under a formal supervised program.
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> One should not overlook the fact that the principle of specific deterrence is not undermined by granting a conditional discharge under s. 255(5), having regard to the strict obligations imposed on the offender under the probation order and the consequences attendant on a breach by the offender of any of these terms. Unlike s. 736, s. 255(5) of the *Code* does not provide for absolute discharges. The offender who is discharged will always be subject to a probation order with the mandatory condition that he or she attend for curative treatment and, in addition, he or she should be subject to other stringent conditions to afford a measure of protection to the public.[5]

[16] Ms. Reddick's offence did not result in actual injury or death; Ms. Reddick is highly motivated to maintaining a healthy lifestyle, and there are no elements of guile or opportunism in her application for a discharge; Ms. Reddick will be able to continue to benefit from the therapeutic intervention she started last winter, and the prospects of these therapies succeeding are very favourable. Finally, Ms. Reddick has no criminal record. All of this satisfies me that Ms. Reddick is an excellent candidate for a 15-month curative discharge. The court will impose appropriate counselling and substance-use restrictions as part of probation. There will be a one-year driving prohibition, and a $100 victim-surcharge amount payable in twelve months. There will be no extension in the interlock waiting period.

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[5] [1989] O.J. No. 101.

[17] I am grateful to counsel for the entirely thorough and fair manner in which this hearing was conducted.

JPC