

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Bent, 2007 NSPC 63

Date: 2007/11/14

Docket:1685350

Registry: Halifax

Her Majesty the Queen

v.

Terrence Patrick Bent

Judge: The Honourable Judge Castor H. Williams

Sentence: November 14, 2007

Charge: **Section 380(1)(b) Criminal Code**

Counsel: M. Scott for the Crown
D. Bright for the Defendant

Introduction

[1] This is the sentencing of the accused, Terrence Patrick Bent, a civilian, age fifty-two years old, who was employed by the Department of National Defence (“DND”) for approximately twenty-two years and since 1998 in the position of Dockyard Infrastructure Maintenance Manager. In the course of his employment the DND provided to and permitted him the use of DND Master Cards with which he could credit the Department’s Master Card account for the purchase of work-related expenses. At each months’ end, he was required to file a report that listed the nature and amount of work related expenditures made on these credit cards. Upon the presentation of these reports and DND statements and upon his word, the Department would pay for the credit balance.

[2] However, in the course of his employment, the accused purchased for his own benefit and, in his monthly reports, misrepresented the true identity of the following items:

- On February 15, 2002, a whirlpool washer, totalling \$632.50, listed in the report as “Electrical Equipment.”
- On August 8, 2002, a Whirlpool dryer, totalling \$999.35, listed in the report as “Electrical Equipment.”
- On May 29, 2002, a Honda outboard motor, totalling \$2530.00, listed in the report as “galvanized chain.” He stated to the sales representative that he had no approval/budget for the motor, so the store should likewise list it as “galvanized chain.”
- Further the accused had a personal, residential ventilation system repaired and, on November 5, 2003, paid for it on the same card and reported it as “motor repair,” purporting it to be a work-related repair, totaling \$522.39.
- The total loss is \$4,684.24. However, the police have seized and recovered from the accused home, the washer, dryer and outboard motor.

[3] As a result of these activities, the police have charge him and he has pleaded guilty to the offence of defrauding the Department of National Defence of a value not exceeding \$5000.00, occurring between 24 February 1999 and 17 March 2005.

Position of the Parties

(a) on behalf of the Accused

[4] Here, Defence Counsel urges the Court to consider and award as an appropriate sentence a conditional discharge. He declares that the accused was not in a position of trust but rather one of responsibility and cites that from work related evaluations he was a trusted, highly regarded and well-admired employee. From numerous letters and commendations in support, he cites the accused standing in the community, no prior criminal record, of previous good character and now his suspended fall from grace. Further, there is the possibility that a criminal record may prevent him from travelling to the United States to visit with his resident daughter. Counsel concluded, citing several authorities, that in these set of circumstances, a discharge of the accused,

with conditions, would be in the accused's best interest and would not be contrary to the public's interest.

(b) on behalf of the Crown

[5] On the other hand, the Crown has submitted that, factually, the accused was in a position of trust. Here, counsel inferred that in committing the offences, the accused took advantage of his status and the high regard in which he was held not only in the community but also in his work environment. As a result, this was a crime of breach of trust and the use of his status was a relevant factor as it was utilized in the commission of the offences. However, as a result of intensive discussions, deliberations and cooperation between counsels on certain aspects of the case, the Crown recommends that the Court imposes as an appropriate sentence, a conditional sentence order of between six and nine months.

Did the Accused hold a position of trust?

[6] Defence counsel has submitted that the accused was not in a position

of trust but rather one of responsibility. On the total evidence, I do not doubt that he was in a position of management responsibility where he was entrusted by his employer to use credit cards only for employment business purposes. The extent of his employer's reliance on his fidelity was such that his word, without questioning, was sufficient to engage and to bind the financial and economic interest of his employer. The fact that others also had credit cards issued to them "because of job position" as submitted by Defence Counsel, in my view, only highlights the extent to which the system relies upon the discipline, prudence, and fortitude of trusted employees in the execution of their job-related mandates.

[7] Likewise, in my opinion, the submissions concerning his employment, employment skills, status or reputation in the community, only highlight the magnitude and the degree of trust and confidence attributed to the accused by his employer. Consequently, I think that I should say that despite the somewhat tortuous submission of Defence Counsel, it would be disingenuous of me to conclude, in these set of circumstances as presented and the total evidence, that, in fact, there did not exist a position of trust between the accused and his employer, the DND. In short, I conclude that he was in a

position of trust.

Aggravating and Mitigating Factors

[8] Here, in my opinion, the aggravating factors are that:

- the accused was a well-paid employee and breached a position of trust;
- there were deliberation, planning and intent to deceive, as he intentionally and knowingly misrepresented in his monthly reports the true identity of the items and services that he purchased;
- the offences were not some single episodes but several that were abstracted over many months that appeared to have emboldened him and included the purchase of durable household merchandises, a personal recreational product and home repair expenses. These purchases were not particularly items of necessity but rather lifestyle choices that were repeated, opportunistic and final as there was no apparent intention of rectification.

- the accused presents no issues of mental illness, substance abuse or any pathological addictions and none were diagnosed as factors relevant to the commission of the offences.

- the accused enlisted the aid of a third party in the commission of one of the offences to cover his deception that demonstrates the level of trust and confidence others had in the apparent exercise of his authority.

- the offences were motivated either by petty greed or a sense of impunity and perhaps of self-entitlement and would not have been discovered but for their disclosure to the police by his estranged spouse.

[9] Additionally, in my opinion, the mitigating circumstances are as follows:

- an early guilty plea;

- the period of time over which the offences were committed before disclosure was not lengthy;

- the offences did not total a large sum of money;
- it was not a crime of passion;
- the accused is fifty-two years old and a first time offender;
- he is of previous good character with commendable civilian performance reviews and positive character reports;

The Pre-Sentence Report

[10] Although the Pre-Sentence report may be characterized as positive, among the many things that the Court learned from this Report that was of significance and which concerned the submissions about his “remorse” was that the accused “appear not to accept complete responsibility for his actions in that he indicated the matter was more of an error of improper reporting of products.” Thus, I should add that his purported expression of remorse, in my view, is a neutral factor. Furthermore, in my view, save for his guilty plea, it makes his “remorse” an elusive mitigating factor to assess.

Analysis

[11] Here, the Crown and Defence are poles apart on sentencing. The Crown submits and recommends that an appropriate sentence should be a conditional sentence order of six to nine months with an order of restitution. The Defence, on the other hand submits and recommends that the Court should utilize the discharge provisions of the **Code**.

[12] Concerning a discharge with or without conditions, the applicable relevant and seminal case is **R.v. Fallofield**, [1973] B.C.J. No.559 (B.C.C.A), where the Court pronounced at para. 21:

21 From this review of the authorities and my own view of the meaning of s. 662.1, I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion.

- (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
- (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
- (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course,

is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

- (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
- (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or [*455] to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
- (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
- (7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.
- (8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[13] Additionally, this Court is mindful of and does consider the provisions of the **Criminal Code**, ss. 718 to 718.2 and in particular s.718.2 (a) (iii) that states that evidence of a breach of trust or position of authority in relation to the victim “shall be deemed to be aggravating circumstances.”

[14] First, however, I should add that the fundamental purpose of sentencing mandates that the sentence that the Court imposes, among other objectives,

should be just and proportionate and should assist in contributing to a respect for the law. Likewise, it should assist to promote a sense of responsibility in the offender by acknowledging the harm done to the victim and to the community as a result of his offences. To this end, civilian courts across the nation have ruled that a breach of a position of trust for personal gain requires the imposition of a deterrent sentence and absent exceptional circumstances, some period of imprisonment is required. See for example: **R.v. McEachern** (1978), 42 C.C.C. (2d) 189 (Ont. C.A.); **R.v. Mclvor** (1996), 106 C.C.C. (3d) 285 (Alta. C.A.), **R.v. Bunn**, [2000] 1 S.C.R. 183.

[15] Second, but for the fraud, the accused was a productive citizen however, I conclude that he was not motivated to commit the offences to feed any pathological addictions. Thus, as submitted by the Crown, I would agree that his crime can be characterized as planned and intentional and motivated by petty greed and personal gain. While publicly admitting his guilt, his Pre-sentence Report states that he considers that the “the matter was more of an error of improper reporting of products.” This perception of and self-expressed view of own his criminal activity, despite the presence of his other mitigating factors, in my opinion, indicates that he has little contrition for

or insight into the extent of his moral culpability for the crimes. Interestingly, he had lots of time to correct the books, so to speak, but did not.

[16] Third, I do not doubt, as submitted by the Defence, that the accused is a person of good character with no previous criminal convictions and that it may not be necessary to enter a conviction in order to deter him from committing future crimes or to rehabilitate him. Furthermore, a conviction may or may not prevent him from going to the United States to visit his resident daughter or her mother. Consequently, in my opinion, when considering a discharge on the facts before me, I agree with the Defence that on the first condition as set out in *Fallofield, supra.* , a discharge would be in the best interest of the accused.

[17] Nonetheless, when I consider and bear in mind the totality of the record before me, it is my opinion and I conclude and find, based on the facts before me and that which I accept, that the accused utilized and manipulated his unique employment position of trust and responsibility. Likewise, in my opinion, again based on the record before me, he took advantage of the high regard in which he was held by his employer and used his status and standing

in the community and his reputation as a trusted and skilled employee to commit the index offences.

[18] Furthermore, it is my opinion that he also used all his social credits and employment accolades to his own personal advantage and to effectively conceal his transgressions, all to the detriment and expense of his employer. Therefore, it is my opinion that the accomplishments of his employment, employment skills, status or reputation in the community that would otherwise act in mitigation, in the set of circumstances, as presented, it would be inconsistent with the established purposes and objectives of sentencing if now he were to be permitted to rely upon them in mitigation. That is so, as in my opinion, they were the very instrumentalities through which he was able to commit the offences and they were used in and were critical and relevant in the commission of these offences. Therefore, in the circumstances, I do not consider these factors as mitigating. (See also: **Criminal Code**, s.380.1). In short, corrupt means produce corrupt ends.

[19] Thus, for the reasons stated, this Court is of the view that a conditional discharge for a fraud of this duration and magnitude committed through a

breach of trust will neither sufficiently denounce his conduct nor sufficiently deter others from committing similar offences. As a result, on the above analysis, it is my opinion that it is not in the public interest to grant the accused a discharge.

[20] Given his age and no prior criminal record, early guilty plea, the duration and amount of the offence and how it came to the attention of the authorities, in my opinion, the accused is neither a candidate for a penitentiary sentence, a period of probation nor, as I have said, a discharge. Moreover, I have instructed myself on the principles applicable to the imposition of a conditional sentence order as outlined by the Supreme Court of Canada and I appreciate that the conditional sentence regime provides for denunciation and deterrence.

[21] Consequently, upon hearing Counsels and reviewing the many authorities that they have submitted and the book of support documents on behalf of the accused, in all the circumstances, I conclude that to protect society in this case of breach of trust requires denunciation and deterrence both specific and general. In addition, in my opinion, the sentence that I will

impose on the accused will denounce his unlawful conduct, deter him and others from emulating his example, promote in him a sense of responsibility, provide reparations to his victim and will promote respect for the law by fostering confidence in the criminal justice system.

Disposition

[22] On the totality of the circumstances and the provisions and principles that I have relied upon and my above analysis, I am satisfied that pursuant to the **Criminal Code**, s.742.1, serving his sentence in the community would not endanger its safety and it would be consistent with the fundamental purposes and principles of sentencing as set out in the **Criminal Code**, ss. 718 to 718.2. As a result, I will impose the following sentence:

[23] Nine months imprisonment that pursuant to the **Criminal Code**, s.742.1 he can serve in the community under the following conditions:

- Keep the peace and be of good behaviour;

- Appear before the Court when required to do so by the Court.

- Report to a supervisor at Halifax within two working days of today's date and as directed.

- Remain within the Province of Nova Scotia unless written permission is obtained.

- Notify the supervisor in advance of any change of name, address, employment or occupation.

- Attend for assessment, counselling or a program as directed by the supervisor

- Provide proof of attendance and completion of any such assessment, counselling and treatment directed by the supervisor.

- Maintain a land line telephone at his residence to facilitate contact with the supervisor and when not in his residence, carry a copy of this

Order with him at all times.

- As the restorative objective of reparations to the community, perform twenty-four hours of community service work, times and places to the satisfaction of the supervisor and to complete same within seven months of today's date.

- For the first three months of this Order remain in his residence twenty-four hours a day, seven days a week. For the second three months period of this Order abide by a curfew between the hours of 1800 hours and 0600 hours seven days a week. For the remaining three months period of this Order abide by a curfew between the hours of 2359 hours and 0600 hours.

- The exceptions to the house arrest and the curfews are only permitted if you have the written permission of the supervisor, or when at a regularly scheduled employment, which the supervisor knows about, and travelling to and from that employment by a direct route; when dealing with a medical emergency or medical appointment involving you

or an immediate family member and travelling to and from it by a direct route; when attending court at a scheduled appearance or under subpoena, and travelling to and from court by a direct route; when attending a scheduled appointment with his lawyer, or the supervisor, and travelling to and from the appointment by a direct route; when attending a counselling appointment, a treatment program at the direction of or with the permission of the supervisor and travelling to and from that appointment, program or meeting by a direct route; when performing community service work arranged with the supervisor, and travelling to and from that location by a direct route; for not more than four hours a week, approved in advance by the supervisor, for the purpose of attending to personal needs.

- He will prove compliance with the curfew/house arrest conditions by presenting himself at the entrance of his residence should a peace officer or the supervisor attend there to check compliance.

[24] I will also order that pursuant to the ***Criminal Code***, s.738 he makes restitution to his victim the Department of National Defence in the amount of

\$522.39, being the unrecovered amount of his acknowledged fraud. The restitution shall be made through the clerk of the Court and, in full, no later than seven months from today's date. In the circumstances, there will be no Victim Fine Surcharge.

J.