IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Wood, 2007 NSPC 39

Date: 20070613
Docket: 1733653
Registry: Kentville

Between:

Her Majesty the Queen

v.

Foster Dewitt Wood

Judge:	The Honourable Judge Alan T. Tufts
Heard:	June 6, 2007, in Kentville, Nova Scotia
Charge:	5(2) CDSA
Counsel:	David R. Greener, for the Crown Brian Vardigans, for the defence

Defence Application under s. 7 Charter of Rights & Freedoms - Allegation of Abuse of Process

By the Court (orally):

[1] This is the matter of Regina v. Foster Dewitt Wood. Mr. Wood is charged under s. 5(2) of the **CDSA** by an Information sworn January 22, 2007. The charges arose as a result of events discovered by the police on December 21, 2006. Mr. Wood appeared in Provincial Court on January 29, 2007 for arraignment when the matter was adjourned until February 12, 2007.

[2] In between those dates Crown and defence counsel agreed that Mr. Wood would plead guilty to the charge under s. 5(2) and that a joint sentence recommendation for a conditional sentence order would be made to the Provincial Court.

[3] Subsequently Mr. Wood entered a guilty plea as agreed and the sentence hearing was adjourned to April 24, 2007. On March 3, 2007 a further police investigation revealed, allegedly, more drugs in Mr. Wood's possession and he has been charged again under s. 5 of the **CDSA** although the Crown has conceded it is limited to proving only so-called 'simple possession' of drugs.

[4] At the April 24, 2007 sentence hearing the Crown sought to repudiate the plea agreement and to seek a sentence other than that which was originally intended to be recommended. The Crown acknowledges that the agreement was not conditional upon a favourable Pre-sentence Report or Mr. Wood's good conduct in the community. The defence argues that the Crown is bound by its agreement and it should be restricted from making any other sentence submissions other than the joint recommendation intended by the plea arrangement. Defence also argues that the subsequent charge is irrelevant to the subject sentence; that is it is an allegation only and because the presumption of innocence operates with respect to the subsequent charge that this new matter should not be taken into account at the sentence hearing.

[5] Although not specifically referred to, the defence suggested the Crown's conduct amounts to an abuse of process at common law or a violation of s. 7 of the **Charter**, although the decision in **R. v. Regan,** 161 CCC (3d) 97 (SCC) suggests that both of those concepts are “dove-tailed” together. In any event the Court

should, it is argued, either restrict the Crown's submissions as argued above or sentence Mr. Wood as if a joint recommendation was made. Defence does not refer the Court to any authority for these propositions.

[6] The Crown argues in response:

> 1. That the plea agreement contains an implied term that Mr. Wood's good conduct was assumed or that he would not commit further offences of the same nature as the subject offence; and
>
> 2. That the Crown's legal and ethical obligation make it impossible to recommend a sentence it now knows or believes is outside a justifiable range.

[7] I will just review my understanding of the law in this area. The Crown's decision to repudiate an agreement is reviewable and may constitute a s. 7 violation, or it may be an abuse of process under common law, see **R. v. M.(R.)** [2006] O.J. No. 3875, a decision by Justice Casey Hill. A trial judge has the authority to make an order to remedy an abuse of process, see **R. v. Jewett**, 21 CCC (3d) 7 (SCC) including the Provincial Court— see **R. v. Weightman & Cunningham** (1977), 37 CCC (2d) 303 (Ont. Prov. Ct.). An abuse of process is conduct which is oppressive, unfair or vexatious and contravenes notions of fundamental justice and undermines the integrity of the judicial process. Repudiating a plea agreement can amount to such conduct unless there is a compelling reason to do so, in my opinion. Breaching such an agreement by the Crown should be a rare or exceptional case—a bargain is a bargain, so to speak, and if the Crown does not wish to be bound by such agreements it should not make them—see **R. v. Goodman** [1981] N.S.J. No. 61. A plea and other agreements between counsel add to the efficient and effective administration of justice. Agreements should be honoured by the Court unless it is contrary to the public interest—see **R. v. Dewald,** (2001) 156 CCC (3d) 405.

[8] In my opinion it is not necessary for the Crown to show that the joint recommendation intended by the agreement would be either outside the appropriate range of sentence or contrary to the public interest. In my opinion the Crown need

only show that its actions are justifiable, not contrary to the administration of justice and do not amount to an abuse of process as I described above.

[9] Defence strongly argues that the subsequent charge is irrelevant and therefore should not be the basis of the Crown's decision to repudiate the plea agreement. In **R. v. Angelillo**, [2006] 2 S.C.R. 728, the Supreme Court of Canada considered a case with very similar circumstances to the case here. In that case the Crown appealed a conditional sentence order imposed after the offender had plead guilty to theft. Apparently the offender was charged with a subsequent offence which was alleged to have occurred while he was awaiting sentence. The Supreme Court of Canada dismissed the appeal finding the introduction of the new allegation was not admissible because of the Crown's failure to act diligently, not because it was irrelevant. Although not necessary to the decision the majority found that the new allegation or the facts underlying it were relevant to the offender's character and reputation and his risk of offending for determining the appropriate sentence for which the offender had been convicted. The new allegation could not be used to further “punish” the offender as the sentence is to be proportionate only to the offence for which the sentence was to be imposed. Accordingly the facts surrounding the new allegations are admissible and it is open to the Crown to introduce evidence to prove those facts beyond a reasonable doubt.

[10] Given this authority I am satisfied that the Crown's discovery of these new circumstances, ie., the subsequent drug allegation, provides the Crown with a justifiable basis for moving away from its commitment to present a joint sentence recommendation. There is no suggestion that the Crown was aware of the circumstances of the new charge or even suspicious of such. The Crown's conduct therefore cannot be described in this regard as oppressive or dishonourable. Furthermore, Mr. Wood was not obliged to provide any incriminating evidence nor did he do so as in **R. v. Smith** (1974), 22 CCC (2d) 268 (BSSC) nor did he fulfill any undertakings as in **R. v. White**, [2006] O.J. No. 3400.

[11] Mr. Wood is not placed in any position from which his original position cannot be restored. The Crown has agreed that his guilty plea can be withdrawn. In short he will suffer no prejudice. I agree with the Crown that while repudiation of a plea agreement should be rare and exceptional, plea arrangements should not be

considered by the Court like an interpretation of a contract between legal entities. The Crown argued this in its brief and I agree with its submissions in that regard. Plea agreements as I mentioned above are a valuable means to provide efficiency into the administration of justice however plea agreements do have an underlying rationale in public policy. Early pleas in exchange for sentence recommendations are based on the premise that the offender is remorseful, contrite and open to rehabilitative measures, particularly where a community-based disposition is recommended as in this case.

[12] Where circumstances arise which are unforseen by the Crown which undermine this rationale it is not in my opinion an abuse of process for the Crown to be released from its obligation under the plea arrangement, especially in circumstances where prejudice to the accused can be avoided, as in this case.

[13] Furthermore, in my opinion, it is not for the Court, once a threshold has been met, to second-guess what impact, if any, these changed circumstances may have on the ultimate sentence recommendation by the Crown or the sentence itself. The Court should not be interfering with the Crown's prosecutorial discretion unless an abuse of process can be established, which in my view is not the case here. In other words, the Court should not opine about what sentence should be recommended to determine if the Crown's conduct is an abuse of process.

[14] Accordingly, the Crown's intention to repudiate the plea agreement for the reasons stated does not amount to an abuse of process at common law or under the Charter. Accordingly no remedy is ordered. It is now open to Mr. Wood to apply to withdrawn his guilty plea as the Crown has agreed not to oppose his application.

[15] Finally I would like to add that defence counsel's argument that even if Mr. Wood is permitted to withdraw his plea that his counsel will be compromised in his defence in my opinion is without merit. His prior plea is not admissible and any comments made in the Pre-sentence Report are also inadmissible against him. The suggestion by his counsel made during submissions that trial strategy may be compromised, the details of which were discussed during submissions, is in my opinion without merit.

[16] The application is dismissed and as I indicated earlier Mr. Wood is open to make his application to withdraw his plea or the matter can proceed to sentence.

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ALAN T. TUFTS, J.P.C.