IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Gorman*, 2009 NSPC 55

Date: 20090617
Docket: 1808794/1876003
Registry: New Glasgow

Between:

Her Majesty the Queen

- v -

Blair Francis Gorman

SENTENCING DECISION

Judge: The Honourable Judge Robert A. Stroud

Heard: February 23, 2009

Written decision: June 17, 2009

Charges: 334(b)(i), 334(b)(ii) CCC

Counsel: John MacDonald, for the Crown
David Bright, for the Defence

The accused, Blair Francis Gorman was charged with the following offences: that between the 1st. day of May, 2007 and the 31st. day of July, 2007, at or near Pictou, Nova Scotia, did steal gasoline, the property of the Government

of Canada, of a value not exceeding five thousand dollars, contrary to section 334(b)(i) of the Criminal Code; and also

that on or about the 17th. day of February 2008, at or near New Glasgow, in the County of Pictou, Nova Scotia, did unlawfully steal merchandise, the property of Wal-Mart Canada Inc. of a value not exceeding five thousand dollars, contrary to Section 334(b)(ii) of the Criminal Code of Canada.

The Crown proceeded by way of indictment on the first charge and by summary conviction on the second. After initially pleading not guilty to both charges, Mr. Gorman entered guilty pleas through counsel on December 10, 2008 (#1), and February 23, 2009 (# 2).

A sentencing hearing was held on February 23, 2009 during which Mr. Gorman's solicitor argued that he be granted a conditional discharge under section 730(1) of the Criminal Code of Canada. The Crown is opposed to such a disposition. Both counsel have cited numerous authorities in support of their arguments.

Section 730(1) provides that:

> "Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it or be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on

> the conditions prescribed in a probation order made under subsection 731(2). "

Both counsel referred to **R. v. Fallofield**, [1973] B.C.J. No. 55913, C.C.C. (2d) 450, in which the British Columbia Court of Appeal when granting a condition discharge to a member of the Canadian Forces without a prior criminal record stated at paragraph 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."

Clearly, Mr. Gorman meets the statutory prerequisites before a conditional discharge may be considered. There is also no doubt that a discharge would be in his best interests. Therefore, the only issue is whether such a discharge would be contrary to the public interest. The first offence was committed while Mr. Gorman was a member of the Royal Canadian Mounted Police and involved the use of an ARI RCMP credit card to purchase gasoline for personal use when he put gasoline in a marked police car. The number of occasions he did so is unknown but there is no question that it was a regular occurrence during the period covered by the indictment.

The second offence involved the theft of a number of items from Walmart Canada Inc. in New Glasgow during which his wife and their young child was present. It also occurred while Mr. Gorman was awaiting a Preliminary Inquiry for the first offence.

Decisions involving applications for discharges referred to by the Crown

include***: R. v. Cusack***, (1978), 26 N.S.R. (2d) 379 (N.S.S.C.AD.); **R. v. Dosanjh**, [2006] B.C.J. No. 3375 (B.C.P.C.); **R. v. Tait**, [2005] B.C.J. No. 1574 (B.C.P.C.); **Miles v. R.**, [1975] 5 W.W.R. 126 (Alta. S.C.A.D.); **R. v. Langlois**, [2004] B.C.J. No. 1372 (B.C.P.C.), and R**. v. Canada (Royal Canadian Mounted Police)**, (1981), 62 C.C.C. (2d) 45 (B.C.C.A.).

R. v. Cusak involved an R.C.M.P officer who removed $425.00 from the wallet of an eighty-three year old man he took to his police car while checking for his driver's license. It is authority for the principle that sentences in offences committed by police officers should be more severe than those of ordinary offenders "because of the position of public trust which they held at the time of the offence and their knowledge of the consequences of its perpetration." It makes it clear that this principle operates whether or not the officer is on duty at the time of the offence. The cases referred to therein speak of the betrayal of the trust imposed on police officers by the public.

In **R. v. Dosanjh** the accused, a thirteen-year member of the Victoria Police Department with an exemplary reputation was refused a discharge following his conviction for willfully attempting to obstruct, pervert, or defeat the course of justice when he counseled his cousin to make false statements to law enforcement officials about the origin of funds seized from his residence.

In **R. v. Tait** a discharge was refused following a conviction for assault causing bodily harm. The offender was found not to have been acting in the lawful execution of his duty in arresting the complainant without grounds and by striking him after being spat upon. The complainant was handcuffed at the time and suffered a fractured jaw. Surgery was required, the complainant spent nine days in hospital and had his jaws wired shut for an additional six weeks. Permanent nerve damage was also sustained.

In **Miles v. R** the Appeal Division of the Alberta Supreme Court overturned an absolute discharge granted to a police officer for assaulting a prisoner following his threat to kill the officer's wife in spite of that fact that the trial judge found that the prisoner's threat amounted to extreme provocation. The Court stated that it was not in the public interest that an absolute discharge should have been granted because the police had a duty to protect persons taken into custody from violence from any source, especially from the police themselves.

In **R. v. Langlois** the accused was a member of the RCMP and was on duty when the offence occurred. He, the complainant and the complainant's father had been discussing traffic violation notices that Langlois was serving on the complainant. As the officer was walking away, Langlois said something about the complainant's ability to pay the fines when the latter responded with an obscenity.

Langlois grabbed the complainant, held him in a headlock and started choking him. The complainant's father intervened to cause Langlois to release his son. Langlois was sentenced to 21 days incarceration, to be served in the community by way of a conditional sentence. The court held that had Langlois not been a police officer, a suspended sentence with probation would have been appropriate. The position of public trust that Langlois held as a police officer and the public interest in denouncing his conduct were aggravating factors that called for a more severe sentence.

In **R. v. Canada (Royal Canadian Mounted Police)** a police officer kicked a prisoner in the face, fracturing his cheekbone. At the time the prisoner was on the ground and there was no threat to the officer or others. The trial judge refused to grant the officer a conditional discharge and imposed a period of three months incarceration. That sentence was upheld on appeal.

Defence counsel referred to the following cases inter alia in support of its position: **R. v. Fallofield** supra; **R. v. McSween**, [2002] N. S. J. No. 465 (N.S.S.C.); **Regina v. Sanchez-Pino**, [1973] 2 O.R. 314 (Ont.C.A.); **R. v. LeBlanc**, [2003] N. B. J. No. 398 (N.B.C.A.); **R. v. Kelly**, [2004] O. J. No. 811 (Ont.C.J.); **R. v. Gibson** (2003), BCPC 462 (B.C.P.C.); **R. v. Spencer** (2003), CanLII 19697 (Q.C.C.Q.); **R. Wallator**, [1994] 22 W.C.B (2d) 617 (Alta.P.C.);

and **R. v. Aucoin** (2006), QCCQ 7093 (Court of Quebec, Criminal and Penal Division).

In **R. v. Fallofield** the British Columbia Court of Appeal held that deterrence to others in that case would not be diminished by the failure to register a conviction, and that the requirement for deterrence did not preclude the judicious use of the discharge provisions, adopting the now entrenched public interest test.

In **R. v. McSween** Mr. Justice LeBlanc approved statements by Mr. Justice Arnup of the Ontario Court of Appeal in **R. v. Sears** (1978), 39 C. C. C. (2d) 199 in Par. 29 that the prevalence of shop-lifting in a particular community "can never be more than one of the factors which is to be taken into account" and that "**the paramount question of course always being: what should this offender receive for this offence, committed in the circumstances under which it was committed** (Emphasis added). In par. 32 Mr. Justice Leblanc also referred to **R. v. Daley** (1997), 162 N.S.R. (2d) 222 (N.S.S.C.) in which Mr. Justice Moir confirmed that appellate courts have recognized that discharges are available in the right circumstances for serious criminal misconduct and are not restricted to trivial cases or to strict liability offences where there was no real criminal intent and made specific reference to **R. v. Fallofield** and **R. v. Sanchez-Pino**.

Regina v. Sanchez-Pino also contains a statement in par. 21 by Mr. Justice

Arnup that he was not saying that shoplifting can never be an offence in respect of which s. 662.1 (now s. 730(1) can apply.

R. v. LeBlanc involved a 48 year old police officer with 23 years service who stole personal property, including $ 83.00 from a single mother of modest means while responding to a fire in her residence. A condition discharge granted by the trial judge was set aside and a three month jail term imposed.

In **R. v. Kelly** a police officer with 14 years experience pled guilty to two counts of possession of cocaine. While a member of the drug squad, Kelly consumed cocaine with a police agent while they were betting on horses. He was given a suspended sentence and two years' probation, including 200 hours of community service at an addiction rehabilitation clinic. General deterrence was a key factor of the sentencing decision, as a result of the media attention received by this case. The Court said that specific deterrence had already been achieved through Kelly's public vilification.

R. v. Gibson involved an officer who assaulted an offender causing a disturbance in a holding cell which resulted in an injury. The officer voluntarily resigned from street duty and enrolled in anger management therapy and was given a conditional discharge.

In **R. v. Spencer** a 23 year old police officer while off duty and heavily

intoxicated invited a 15 year old victim to a fight during which he punched and bit the victim. The Court held that since he had no prior record and the offence was committed while he was off duty granted the officer a conditional discharge.

R. v. Wallator involved a 38 year old accused and a 15 year veteran of the city police force who plead guilty to a charge of assaulting his former spouse. The incident occurred three months after the separation of the accused and the complainant at the latter's home when the accused went there to pick up the children. He entered anger management programming and was granted a conditional discharge.

In **R. v. Auclair** the accused, a 34 year old Native Special Constable pled guilty to the summary conviction offence of assault causing bodily harm. The victim was his former girlfriend. During the assault, both Auclair and the victim were intoxicated. Auclair had an unblemished past record but had a problem with alcohol. After the events, he followed two domestic violence therapies that had some positive impact on him and the victim stated that she did not fear Auclair. He was granted a conditional discharge with 24 months' probation was imposed even though the Court found that the violence was far from trivial.

Other cases refer to by the Court include: **R. v. Arsenault**, [2000] O.J. No. 2179 (Ont. C.J.); **R. v. Cronmiller**, [2004] B.C.J. No. 7 (B.C.P.C); **R. v. D.E.D.**

[2007] A.J. No. 1531 (Alta.Q.B.); ***R. v. Griffin*** (1975), 23 C.C.C. (2d) 11 (PEICA); ***R. v. Hanneson*** (1989), 49 C.C.C. (3d) 467 (Ont.C.C.A.); **R. v. Hunt**, [1978] B.C. J. No. 92 (B.C.C.A.); **R. v. Jackson**, (2000), B.C.J. 101 (B.C.S.C.); ***R. v. Kidd***, [1998] O.J. No. 1739, (Ont.C.J.); **R. v. Peters**, [2008] B.C.J. No. 2674 (B.C.C.A.); **R. v. Rodrigues**, [2008] O.J. No. 2125 (Ont.S.C.); and **R. v. Walker**, [182] B. C. J. No. 1046 (B.C.C.A.).

Generally speaking, cases dealing with requests by police officers for discharges are all over the map. However, the following principles can be gleaned from the decisions referred to above, namely:

1. Cases dealing with a prisoner assault have been treated as an abuse of power resulted in a range of sentences from conditional discharges to jail time. Generally, officers who received jail sentences (conditional or otherwise), were involved in the use of excessive force that resulted in injuries disproportionate to the degree of force used and were found to have a high level breach of trust based upon the officers' seniority and involvement in the incident. Those who received discharges had the lowest level of moral blameworthiness some of which involved provocation.

2. Offences against the administration of justice merit a denunciatory sentence because they strike at our system of a lawful society and require a clear

message that it will not be tolerated.

3. As a general proposition, cases dealing with offences by officers outside the context of their policing duties hold that where the police officer is the sole offender or plays a central role in the offence, his position in the community may mean that a discharge is contrary to the public interest, even where the offence is not one against the administration of justice.

4 Cases involving breaches of trust involving the conversion of funds entrusted to police officers during the course of their duties or the theft of money or property from members of the public with whom they come in contact during the performance of those duties will only in the most exceptional circumstances justify a discharge.

DECISION

I accept the defence submission that Mr. Gorman has an exceptional Pre-sentence Report and acknowledge that he resigned from a very significant job with the Royal Canadian Mounted Police. I also accept that he has significant medical problems and was under financial stress at the time of the second offence. Although the first offence involved a breach of trust it was on the low end of the scale. The same may be said of the second charge involving the theft from Walmart. If only one or the other of the offences was before the Court I would be inclined to grant the request for

a conditional discharge. However, considering that they are both before me and that the theft from Walmart occurred while Mr. Gorman was awaiting a Preliminary Inquiry for the first offence, the theft involved numerous articles, one of which was hidden on the person of his young child, and the rest in her diaper bag, I believe the granting of a conditional discharge in such circumstances would place the administration of justice in disrepute and, therefore, be contrary to the public interest. All things considered I think an appropriate disposition in this case is a suspended sentence with a period of 18 month's probation. I will discuss the terms of that probation order with counsel.

During the course of closing arguments Mr. Gorman's solicitor informed the court that his client's driving privileges were suspended under s. 278(1)(c) of the Motor Vehicle Act as a result of his conviction on the first charge. I am satisfied upon reading the late Honourable Michael Baker's comments from Hansard when introducing Bill No. 250 in the Nova Scotia Legislature in 2005, that the goal of s. 278(1)(c) was to punish those involved in "gas and dash" crimes. Since that was not involved in this case I order that the revocation of Mr. Gorman's license be set aside

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Robert A. Stroud
A Judge of the Provincial Court of Nova Scotia