IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. MacArthur, 2009 NSPC 61

Date: 20091102
Docket: 2081835

Between:

Her Majesty The Queen

- v -

Francis Hugh MacArthur

DECISION ON SENTENCING

Judge: The Honourable Judge Robert A. Stroud

Heard: October 22, 2009

Written decision: November 2, 2009

Charge: 253(1)(b), 255(5)

Counsel: Danielle Bastarache, for the Crown

Joel Sellers, for the Defence

Mr. MacArthur entered a plea of guilty to a charge of impaired driving under Section 253(1)(b) of the Criminal Code on August 31, 2009. His breathalyzer reading at the time of his apprehension was 220 milligrams of alcohol in 100 milliliters of blood. He is seeking a curative discharge under Section 255(5) of the Code.

Section 255(5) of the Criminal Code reads as follows:

> "Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs."

As counsel have indicated in their briefs, the factors that a court must consider when granting a discharge under that section are as follows.

1. The circumstances of the offence and whether the accused was involved in an accident which caused death, bodily harm or significant property damage.

2. The bona fides of the offender.

3. The criminal record of the accused as it relates to alcohol-related driving offences.

4. Whether the accused was subject to a driving prohibition at the time of the offence; and

5. Whether the accused has received the benefit of a prior curative discharge and what, if anything, the accused has done to facilitate his rehabilitation under the prior discharge.

The following documents have been submitted in support of the application.

1. A letter from Dr. John Swain, Ph.D., a clinical psychologist, dated September 2, 2009 stating that Mr. MacArthur referred himself to him in 2001 with concerns about addictions and previous abuse issues and that he provided counseling services to him over an eighteen month period until February 2003.

2. A letter from Dr. Swain dated September 28, 2009 in which he indicates that Mr. MacArthur did quite well dealing with his issues until February, 2008 when he began to become depressed and experience increasing anxiety, memory difficulties, and poor emotional and behaviourable controls. Dr. Swain expressed the opinion that because Mr. MacArthur has since been able to express his issues more openly with friends and family it is now possible to deal with them in a manner that was not previously possible.

3. A letter dated October 13, 2009 from Dr. C. A. L. Felderhof, M. D. confirming that she has been Mr. MacArthurs physician since February 2000, and stating that she first became aware of his addiction problems in July, 2001. At that time she referred him to a recovery program in which he did well and was able to return to work. When his problems resurfaced in July, 2009 he again contacted AA, Addiction Services and Dr. Swain. According to Dr. Felderhof Mr. MacArthur
"has been able to again put alcohol to rest". Since then his blood has been checked regularly and the results show a "significant improvement in the condition of his liver.

4. A letter dated October 5, 2009 from Deb. Kyle MSW, RSW, a clinical therapist with Addiction Services, stating that she has met regularly with Mr. MacArthur since July 31, 2009 and believes that he is genuinely motivated to stay in recovery; and

5. letters from three prominent citizens in the community expressing their support for Mr. MacArthur and his reputation as a competent, hard working, and conscientious probation officer.

The Crown is opposed to the application primarily because of Mr. MacArthur's record which consists of a conviction for impaired driving in 1988 and curative discharges for impaired operation of a motor vehicle in 1990 and 2001. Its submission, among other things, includes:

1. There is no information or correlating information submitted on behalf of Mr. MacArthur that shows his motivation to obtain rehabilitation. In my view, this position is without merit. In addition to the material referred to above, an exhibit was tendered setting out a total of twenty appointments with Drs. Felderhof, Swain and Watts and Deb Kyle prior to the date of the sentencing hearing, with additional appointments scheduled thereafter and blood tests conducted in July, September, and October and further tests scheduled monthly until September, 2010.

2 The chances of success of a 3rd. curative sentence are not clearly enunciated to satisfy the Court on the balance of probabilities that the accused is well motivated and has a reasonable chance of overcoming his alcohol related problems. I have no difficulty finding that Mr. MacArthur has met that onus based upon the evidence submitted on his behalf.

3. Since Mr. MacArthur has benefited from 2 previous curative treatment sentences the risk of recidivism is still present. Therefore, a curative sentence would be contrary to the public interest. Paragraph 16 of **R. v. Gray**, [2004] A.J. No. 1119 (Alta. Prov. Ct.) is cited in support of this argument. However that paragraph merely stated that it would be unrealistic to interpret a curative sentence as a means to cure alcohol dependency.

4. To meet the need of deterrence, the courts must sentence those apprehended for such offences primarily with deterrence in mind. In my opinion this submission disregards the provisions of other principles set out in s. 718 of the **Code**. In particular s. 718.2(d) and (e) which state that an offender shall not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. Thus the section encourages judges to assist in the rehabilitation of offenders and not to be reticent in exercising their discretion to impose alternate sanctions to imprisonment such as the one found in s. 255(5); and

5. Mr. MacArthur has benefited from two curative sentences in the past and both met with no success. In my view that is not an accurate assessment of his history. It indicates that he was successful in addressing his addiction problem from 1990 until 2001, and from 2001 until 2009. According to the medical evidence of Dr. Swain Mr. MacArthur has finally begun to assess issues of abuse and sexuality that have been significant contributors to his depression and his addictions and that this has allowed him to begin to heal in a way which had not been previously possible.

In addition, the Crown has questioned Mr. MacArthur's credibility because of he apparently denied driving his vehicle on the night in question and also faked an asthma attack following his apprehension. That argument fails to recognize that his judgment was obviously substantially impaired with a reading of 220 and overlooks his reputation as a solid citizen in the community.

As suggested by the Crown, a curative discharge under Section 255(5) is a unique sentence. Thus, cases dealing with that section are, of necessity, fact specific. In support of its position the Crown has relied upon **R. v. Storr**, {1995] A. J. No. 764 (Alta. C.A., **R. v. Gray** (supra), **R. v. Beaulieu** (1980), 53 C.C.C. (2d) 342 (NWT Sup. Ct.), **R. v. Dupuis** (2003), Man. R. (2d) 221 (Man. Prov. Ct.), and **R. v. Ashberry**, [1989] O. J. No. 101. In my view, all of those cases can be readily distinguished from the case at Bar and, to a large extent, support Mr. MacArthur's request for a discharge.

Storr was an egregious case involved in a high speed chase reaching speeds of 100 to 130 miles per hour which resulted in him colliding with numerous vehicles stopped at a traffic light causing damages of $ 47,800. He was driving while his license was under 14 assorted forms of suspension which were still in effect, including driving prohibitions by court order. He had, on 14 previous occasions, been convicted of drinking and driving related offences. In addition to various other convictions for driving while disqualified, In 1989 he had been charged with impaired driving and on that charge he received the benefit of a curative discharge and in direct

violation of the terms of his probation order issued that day in support of the curative discharge, he drank and drove again. He was subsequently convicted of impaired operation and driving while disqualified. The court found that the accused's alcohol-related driving behaviour has not improved despite prior Court sanctions so there was an increased risk of the behaviour being repeated, which warranted a sentence emphasizing specific and general deterrence.

Gray had three prior drinking and driving convictions in the previous 17 years during which he battled with alcohol dependence and sought counseling and treatment services. His addictions counselor stated that he had a reasonable chance of managing his alcoholism but was not prepared to say that he had a reasonable chance of overcoming his alcoholism. The Court, referring to the public interest test in **Beaulieu** interpreted the word “overcoming” to mean surmounting the problem by managing it so as to substantially reduce the risk of recidivism and that in the context of alcohol dependence it would not be realistic to interpret the word to mean curing oneself of the problem entirely. As a result a curative discharge was granted which, in my view, is supportive of granting such a discharge in this case.

Beaulieu involved an accused with a lengthy record for drinking and driving offences. His request for a curative discharge was denied at trial but allowed on appeal. The appeal court indicated that it was satisfied on the balance of probabilities that the accused was in need of curative treatment, was well motivated, and had a reasonable chance of overcoming his alcoholism and related problems. Again, this case is more supportive of Mr. MacArthur’s submission than that of the Crown.

The following quotation from par. 52 of **Dupuis** is also cited in support of the Crown's position:

> "In that context and in the context of the increasing severity of the minimum and mandatory penalties found in the Criminal Code provisions, it can be said that those who defiantly choose to commit the dangerous act of drinking and driving, possesses as a result of their action, a high degree of moral culpability."

However, that case can be readily distinguished because the accused was a first offender who, aside from discussing his alcohol problem with a doctor had not taken any serious steps to address it.

The facts in **Ashberry** are once again readily distinguishable from the present case. In it the accused had an extensive criminal record including six separate prohibition orders and was on a three-day temporary absence pass from prison where he was serving a term of two years and 12 months concurrent for dangerous driving while impaired. In spite of that he was granted a discharge under Section 255(5). That discharge was upheld on appeal.

On the other hand, defence counsel has referred to **R. v. Brown**, [2003] A.J. No. 1448 (Alta. Prov. Ct.) and **R. v. Wallner** (1988), C.C.C. (3d) 358 (Alta. C.A.) which are more analogous to Mr. MacArthur's situation.

In **Brown** the accused was before the court following a guilty plea for her fourth offence during the previous 11 years and had received two prior curative discharges. In spite of that she was granted a third discharge based upon the application of the facts to the factors enunciated in **Storr** (supra).

In **Wallner** Mr. Justice Stevenson, speaking for the majority in support of upholding the trial court's decision to grant a curative discharge stated:

> "I am of the view that public protection may well be best served by effective measures to reduce the risk of repetition. That protection may, in a proper case, be secured by rehabilitation. The fact that public protection is also served by retribution, denunciation or deterrence does not enable us to say that any particular objective of the sentencing function predominates in these cases, given the legislative scheme."

Applying the factors stated in Storr (supra) to the case at Bar, the following conclusions may be drawn:

1. The circumstances of the offence are not serious in that there was no motor vehicle accident involved.

2. Medical and other evidence presented indicates that Mr. MacArthur recognizes that he is in need of curative treatment in relation to his consumption of alcohol and the need to continue his counseling and treatment for both his depression and alcoholism.

3. The offence before the Court is his fourth drinking and driving offence in the past 21 years. This is further proof of his alcohol dependence problem and, as submitted by Crown counsel, he is a danger to the community. This factor weighs against the accused's application having regard to the principles of denunciation, deterrence and protection of the public.

4. The accused is this case was not subject to a driving prohibition at the time of the offence before the Court; and

5. The accused has had two prior curative discharges. There is a gap of twelve and eight years between those discharges. During that period of time the accused successfully completed his prior periods of probation without breach.

In the final analysis of the evidence presented herein and the authorities cited and discussed above, I am satisfied on the balance of probabilities that Mr. MacArthur is in need of curative treatment in relation to his consumption of alcohol and that it would not be contrary to the public interest to grant a discharge under Section 255(5) of the Criminal Code.

Mr. MacArthur will be placed on probation for a period of 18 months with the following conditions:

1. To keep the peace and be of good behaviour;

2. To appear before the Court when required to do so by the Court;

3. To notify the Court or the probation officer in advance of any change of name, address, telephone number, employment or occupation;

4. To report to the probation service the purposes of entering into the order, and remain under the supervision of your Probation Officer and report in person at such times, at such places, and in such manner as directed;

5. Refrain from the purchase, possession, use, or consumption of alcohol or any substance forbidden by the Controlled Drugs and Substances Act save as may be prescribed by a doctor or dentist;

6. Attend for assessment, counseling and treatment as directed by your Probation Officer, including psychiatric/psychological, alcohol and or drug abuse;

7. Attend for such tests, treatment, counseling, and other services as may be recommended from time to time by Addiction Services, your family physician and your clinical psychologist; and

8. Provide your Probation Officer with proof of attendance and completion of any such assessment, counseling and treatment directed.

And there will also be a two year driving prohibition as recommended by the Crown, and the usual Victim Surcharge, which in this case would be $50.00, and there's an automatic three month time to pay that.

DATED at New Glasgow, Nova Scotia, this 2nd. day of November, 2009.

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ROBERT A. STROUD
A Judge of the Provincial
Court of Nova Scotia Court of Nova Scotia