IN THE PROVINCIAL COURT OF NOVA SCOTIA
Cite as: R. v. Shea, 2010 NSPC 70

Date: December 15, 2010
Docket: 2024045, 2024046
Registry: Halifax

Her Majesty the Queen

v.

Shawn Michael Shea

DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: December 14, 2010
Decision: December 15, 2010
Charges: sections 129(a) and 145(3) of the *Criminal Code*

Counsel: Christopher Morris - Crown Counsel
Brian Bailey - Defence Counsel

By the Court:

[1] On January 14, 2009, Mr. Shea had a confrontation with police in a parking lot of an apartment building in Clayton Park. He was on a recognizance at the time. The net result was that Mr. Shea was charged with two criminal offences: (1) the wilful obstruction of Detective Constable Garland Carmichael contrary to section 129(a) of the *Criminal Code*, and (2) breach of the condition of his Recognizance to keep the peace and be of good behaviour contrary to section 145(3) of the *Criminal Code*.

[2] The facts in this case can be set out quite simply. Halifax Regional Police had an interest in certain individuals, including Mr. Shea. It appears they believed Mr. Shea and other persons of interest were driving around the Clayton Park area in a red Dodge truck. They had the vehicle under surveillance although probably not continuously as it was observed at one point to have several individuals in it but later, when stopped, there was only the driver present.

[3] The truck was stopped because it was observed to roll through a stop sign. This was after a series of careless maneuvers that showed a disregard for traffic rules. Although there was evidence that the police had no advance plans to pull the vehicle over, the Crown did not discount the possibility that the *Motor Vehicle Act* infraction provided police with a convenient opportunity to stop it. It is when the traffic stop happened that Mr. Shea came to the attention of the police.

[4] The only evidence led at Mr. Shea's trial was by the Crown. It was evidence from police officers at the scene. Detective Constable Carmichael was the officer who had the most direct contact with Mr. Shea. He was present as part of a surveillance detail that had been following the red truck as it drove around the area. He was right

behind the police officer who effected the traffic stop of the truck.

[5] The truck was pulled over just past the driveway to a large apartment building with a parking lot. Within 2 - 5 minutes of the truck being stopped, D/Cst. Carmichael saw Mr. Shea advancing toward the officers through the parking lot, at a fast pace, cursing. Just behind him were two other persons the surveillance teams had been interested in: Jeremy LeBlanc and Troy Shanks. Mr. Shea was calling the police officers "fucking pigs" and asking: "Why are you stopping us?" D/Cst. Carmichael testified that Mr. Shea was using "a lot of foul language" so he told him that if he kept cursing he would find himself arrested for causing a disturbance. This loud warning did not seem to have any effect on Mr. Shea at all although within seconds another vehicle drove into the parking lot and Mr. Shea turned his attention to unleashing a swearing tirade at that driver. (Later, D/Cst. Carmichael learned that Sgt. Leger, responding as a member of the Halifax Regional Police Quick Response Unit, was the driver of that vehicle.)

[6] Sgt. Leger described Mr. Shea as cursing and yelling at the top of his lungs. According to D/Cst. Carmichael Mr. Shea had stopped cursing in his direction after being told to stop. However when Mr. Shea started swearing at his new target, D/Cst. Carmichael told him he was under arrest for causing a disturbance. At this point, Mr. Shea turned and walked away. There was a short, slippery pursuit that ended with Mr. Shea face down on the ground resisting D/Cst. Carmichael's efforts to handcuff him. With Sgt. Leger's intervention, handcuffing was successful and Mr. Shea was taken away and released on an appearance notice for the two charges that have been the subject of this trial.

[7] During these events, D/Cst. Carmichael did not observe anyone from the apartment building either in the lobby or looking out of their windows. He saw no one in the parking lot other than Mr. Shea, Mr. Shea's associates and himself. Sgt. Leger saw a few people either coming from or going to their cars.

[8] I will pause here to note that there does not appear to be any dispute by Mr. Shea with respect to what happened between himself and the police. The issue in this trial is whether what Mr. Shea did was criminal. His defence is that it was not: through counsel he has submitted that he was not lawfully arrested and therefore cannot be found guilty of obstructing the police officer effecting the arrest. He further submits through counsel that his cursing did not amount to a failure "to keep the peace and be of good behaviour" as contemplated by the breach charge.

[9] At this point it is necessary to return to the obstruction charge and review its wording. Mr. Shea is charged that he wilfully obstructed D/Cst. Carmichael, engaged in the lawful arrest of Mr. Shea, contrary to section 129(a) of the *Criminal Code*. The Crown has submitted that Mr. Shea's obstructive conduct occurred, not only when he was actually being arrested, but also when he was diverting D/Cst. Carmichael's attention from the traffic stop by cursing at him. I cannot agree with this submission. The charge is clear: according to the wording in the Information, the wilful obstruction is alleged to have occurred while D/Cst. Carmichael was engaged in arresting Mr. Shea. That is the charge Mr. Shea has been required to answer: the words used to describe when the wilful obstruction occurred, while D/Cst. Carmichael was "engaged in the lawful arrest of Shawn Shea..." are not surplusage as the Crown has suggested.

[10] The charge as recited in the Information of obstructing D/Cst. Carmichael conforms to section 581(3) of the *Criminal Code* which requires that "A count shall contain sufficient detail of the circumstances of the alleged offence to give the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to..." Mr. Shea will have understood from the charge that he is accused of having wilfully obstructed D/Cst. Carmichael when D/Cst. Carmichael was engaged in lawfully arresting him. Had there been no arrest, a wilful obstruction charge could not have been made out by Mr. Shea merely cursing at D/Cst. Carmichael while D/Cst. Carmichael was attending to the traffic stop. Indeed, when this was all that Mr. Shea did, there was no suggestion by D/Cst. Carmichael that he was being obstructed. The wording of the charge is not surplusage, or "unnecessary." It is very necessary as it informs Mr. Shea what it is he is being accused of doing. Casting as wide a net as the Crown suggests should be done here cannot be sustained on the wording of the Information and would be unfair.

[11] This takes me to the issue of whether the arrest of Mr. Shea was lawful. He was arrested for causing a disturbance by swearing. On the facts, could he be lawfully arrested for that?

[12] A disturbance that attracts criminal sanction is caused when there is an externally manifested interference with the ordinary or customary use of the premises by the public. (*R. v. Lohnes, [1992] S.C.J. No. 6, paragraph 30*) No such evidence, either direct or by inference, was led in this case. In other cases where public swearing at police officers lacked this externally manifested interference, including a case with identical facts, that is, police officers being called "fucking pigs", the essential

requirements for causing a disturbance have not been made out. (*R. v. Williams, [2006] N.S.J. No. 363 (N.S.P.C.); R. v. Peters, [1982] B.C.J. No. 2213 (B.C.C.A.)*) The *Peters* case was referred to by the Supreme Court of Canada in *Lohnes* at paragraph 17.

[13] Mr. Shea was therefore merely foul-mouthed and obnoxious: he was not committing any offence. D/Cst. Carmichael had no basis for arresting him. In arresting Mr. Shea, D/Cst. Carmichael was not engaged in effecting a lawful arrest. D/Cst. Carmichael arrested Mr. Shea when he was committing no offence in law. Mr. Shea was entitled to put up a resistance to the unwarranted and unlawful interference with his liberty.

[15] The Crown has suggested in a written brief filed late yesterday afternoon that Mr. Shea was "arrestable" for an apprehended breach of the peace. There was no evidence led that D/Cst. Carmichael remotely apprehended an imminent breach of the peace. While he described Mr. Shea as "an unknown threat coming across the parking lot", he confirmed that within five seconds of hollering at Mr. Shea to stop swearing, Mr. Shea had turned his attention to Sgt. Leger, ending the interaction with D/Cst. Carmichael. Most importantly, D/Cst. Carmichael's evidence was clear: he arrested Mr. Shea because he believed Mr. Shea's swearing was a violation of the law prohibiting disturbances of the peace. He was wrong in law.

[16] I am therefore acquitting Mr. Shea of the charge of wilfully obstructing D/Cst. Carmichael's efforts to arrest him.

[17] I must now determine if Mr. Shea's swearing at the police officers amounted, by itself, to a breach of his recognizance. Because of the acquittal I have entered on count number 1, this is not a case where a conviction on the breach of recognizance charge is made out by a conviction on the substantive count of obstructing D/Cst. Carmichael. Mr. Shea can only be convicted on the breach of a recognizance charge where swearing at the officers is, as a matter of law, a failure to keep the peace and be of good behaviour.

[18] I find that it is not. In my view, to extend the reach of the criminal law to swearing in public such that it could be found to sustain a conviction for breaching a recognizance is contrary to the notion of reasonable bail, not rationally connected to the *Criminal Code* provisions governing pre-trial release, offends the fundamental justice protections in section 7 of the *Charter*, and represents an undue restriction on a person's liberty. Also, no breach of the peace occurred here, as I have discussed, and so Mr. Shea cannot be found to have failed, by swearing, to keep the peace.

[19] There is, furthermore, judicial support for a restrictive meaning for the language "be of good behaviour". In a decision of the Ontario Divisional Court, *R. v. Grey, [1993] O.J. No. 251*, Judge Lane held that:

> ...the condition "to be of good behaviour" should be limited in its application to conduct which is alleged to breach some criminal, federal, provincial or municipal law, and should not extend to conduct which, while lawful, violates some community standard of behaviour expected of all peaceable citizens," i.e. "to be of good behaviour" cannot be given

> its ordinary meaning, but must be limited to an alleged violation of some substantive law.

[20] I agree with this view. As a consequence I am satisfied that Mr. Shea's swearing at the police officers, calling them "fucking pigs", was offensive but it did not amount to criminal conduct and was not a failure to keep the peace and be of good behaviour as required by the conditions of his recognizance.

[21] Before I leave this issue, I want to acknowledge with thanks, the Crown's written submissions. These submissions favoured the approach of the Newfoundland Supreme Court in *R. v. Stone, (1985) 22 C.C.C. (3d) 249*. I note that Judge Lane, whom I just quoted, disagreed with the decision in *Stone*. She had the following to say about it:

> In my view, the term "be of good behaviour" should be read more narrowly than Stone indicates, to avoid an overreaching effect which contravenes fundamental principles of natural justice and potential Charter rights of the accused. It is a fundamental principle of statutory construction that if the general language of a statute can be read narrowly to avoid an ultra vires effect, that should be done.

[22] Judge Lane went on to refer to the "reading down" of legislation to ensure conformity with the *Charter* and also noted that the vagueness doctrine required a narrow reading of the term "be of good behaviour." She said, and I agree:

> ...the only societal consensus on what activity should be proscribed by law is that which in fact has been expressly prohibited by some law...It Is totally inappropriate for enforcement authorities to assume that criminal liability extends to acts that fall short of that standard. Were it necessary to do so, I would find...the interpretation of the condition, "to be of good behaviour"...inconsistent with the accused's right to fundamental justice under s. 7 of the Charter....

[24] In the most recent case to consider Judge Lane's position, *R. v. D.R. [1999] N.J. No. 228*, the Newfoundland Court of Appeal held at paragraph 13 that the failure to be of good behaviour was limited to non-compliance with,

> ...legal obligations in federal, provincial, or municipal statutes and regulatory provisions, as well as obligations in court orders specifically applicable to the accused, and does not extend to otherwise lawful conduct even though that conduct can be said to fall below some community standard expected of all peaceful citizens.

[25] I will conclude by saying that offensive conduct like Mr. Shea's - swearing aggressively while approaching police officers engaged in their duties - could in certain circumstances tip into behaviour prohibited by the criminal law, but on the facts of this case it did not. Accordingly I am also acquitting Mr. Shea of the charge under section 145(3) of the *Criminal Code*.