IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Field 2013 NSPC 92

Date: 20131104
Docket: 2528690
Registry: Amherst

Between: Her Majesty the Queen

v.

William Edward Field

Judge: The Honourable Judge Paul B. Scovil

Heard: August 26, 2013 in Amherst, Nova Scotia

Written decision: November 4, 2013

Charge: That he, on or about the 2nd day of November, 2012, at or near Amherst, Nova Scotia, did possess a substance included in Schedule II, to wit marihuana, for the purpose of trafficking contrary to Section 5(2) of the Controlled Drugs and Substances Act.

Counsel: Jill Hartlen, for the Crown
Andrew Melvin, for the Defence

By the Court:

[1] Mr. Field appeared before this Court on February 25, 2013 for sentencing. He had previously entered a guilty plea to a charge under Section 5(2) of the *Controlled Drugs and Substances Act*. During the course of sentencing, neither the Crown nor Mr. Field raised the matter of Section 109 of the *Criminal Code of Canada*. Section 109 of the *Code* makes it mandatory that a Court impose a weapons prohibition order that would prohibit the accused from possessing a weapon for a set period of time. The mandatory weapons prohibition was not considered by this Court as well. The issuing of the mandatory order under Section 109 was inadvertently neglected by all the parties to the sentencing. The Crown now applies for the imposition of the order while Mr. Field argues to me that I am *functus officio* and lack jurisdiction to make the order. For the reasons that follow, I have decided that a Judge in this circumstance can correct such an oversight by making the appropriate mandatory order.

[2] The Crown argues that this was not a discretionary order and was simply overlooked at sentencing and as a consequence, it falls within a slip or administrative error on behalf of the Court in drawing up the sentence. The Crown cites Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848 (S.C.C.), R. v. Miraliakbari [2001] N.J. No. 59 and R. v. D.M., [2013] ONSC 141. Mr. Field on the other hand argues that this Court is *functus officio* and puts forward R. v. Bevin, [2001] NSPC 27.

[3] The relevant portions of Section 109 of the *Code* are as follows:

> 109. (1) Where a person is convicted, or discharged under section 730, of ...
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> (*c*) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the *Controlled Drugs and Substances Act*,
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> the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow,

> prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.
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> (2) An order made under subsection (1) shall, in the case of a first conviction for or discharge from the offence to which the order relates, prohibit the person from possessing
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> (*a*) any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance during the period that
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> > (i) begins on the day on which the order is made, and
> >
> > (ii) ends not earlier than ten years after the person's release from imprisonment after conviction for the offence or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence.

It is therefore clear that the imposition of a ten year weapons prohibition would have been mandatory at sentencing. See R. v. M.(S.A.) [2006] NSCA 139. It should be noted that in M.(S.A.) the question as to whether the trial Judge could have remedied the failure to order a Section 109 prohibition was not before the Court, rather the Court of Appeal simply decided that it was an error not to grant one.

[4] The question of *functus officio* was considered by the Supreme Court of Canada in Chandler v. Alberta Association of Architects (*Supra*). There Justice Sopinka stated at paragraph 19:

> 19. The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

> 1. where there had been a slip in drawing it up, and,
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> 2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp*., [1934] S.C.R. 186.
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> In *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At p. 589 Martland J. stated:
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>> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
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>> In *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had recognized the application of the restriction stated in the *St. Nazaire Company* case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.
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> He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

Further Justice Sopinka stated at paragraphs 21 to 23:

> 21. To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal

judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

22. Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas, supra*.

23. Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)

[5] Even in the dissenting opinion in Chandler (*Supra*), Justice L'Heureux-Dubé stated at paragraph 40:

The doctrine of *functus officio* states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No.* 292 (1964), 44 D.L.R. (2d) 463 (B.C.S.C.)). "To allow adjudicator to again deal with the matter

> of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine"

[6] The Supreme Court of Canada visited again the question of addressing errors post verdict in R. v. Burke [2002] 2 S.C.R. 857 where the trial Court recorded a verdict of "not guilty" and was shortly thereafter advised that the true verdict of the jury was "guilty". There the Supreme Court reviewed the Rule in Head in determining when in jury matters the Court had reached a point of no return in altering a recorded verdict. In Burke, Justice Major rejected a bright-line approach that no alterations could be considered after a jury has rendered a verdict. At paragraphs 47 and 48 of Burke, Justice Major stated:

> 47. I do not think that result can be right. Where the error is rapidly discovered after discharge but prior to the jury having separated or dispersed, many of the policy concerns supporting the rule in *Head* are not engaged. If the error is discovered immediately after discharge, then it would seem that the passage of time has been so slight that the finality of the verdict is not a pressing concern. An immediate discovery of the error would mean that the accused and the court could not have been under the illusion of the incorrectly recorded verdict for very long. An error made only in conveying or recording the verdict can be corrected without exposing the deliberations of the jury to undue scrutiny and subjecting them to the risk of post-trial harassment. If the jury has not dispersed beyond the jury box, then there is no realistic possibility that outside influences have tainted the jury. Thus, there is no danger to the administration of justice.
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> 48. To the contrary, the administration of justice would be brought into disrepute by barring the court from correcting a recorded verdict where there is no perceptible injustice to the accused and no reasonable apprehension of bias. See V. Maric, Annotation to *R. v. Burke* (2001), 41 C.R. (5th) 135, at pp. 136-37, where it was observed:
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>> Such rigidity jeopardizes the integrity of the jury system since it forces the court to tell the jurors that despite the

> fact that they have dutifully carried out the oath that they had sworn to uphold by listening to days of evidence and then rendering a unanimous and otherwise valid verdict, their decision must be ignored.... [T]he interests of the state and the general public would not be served...

In those circumstances, not only would the policy issues used to justify the standard in *Head* not come into play, but the application of the rule in *Head* to this specific situation would run contrary to one of its own underlying policy concerns, namely the administration of justice.

[7] The question before this Court was considered in a similar context in R. Miraliakbari (*Supra*) by Judge Hyslop of the Newfoundland Provincial Court. There Miraliakbari had been convicted of counts of assault causing bodily harm. The counts carried with them mandatory provisions of DNA samples under Section 487.051 of the *Code*. The Crown request and subsequent failure to make such an order at the time of the offence was omitted by an oversight on all parties. In ruling that in such situations the sentencing Court is not *functus officio*, Judge Hyslop questioned whether parties should "be put to the onerous task of appeal in order to remedy a situation which was simply overlooked and over which the trial judge, having reached a verdict, had no discretionary power".

[8] Mr. Field argues that this matter is governed by R. v. Bevin (*Supra*). There Associate Chief Judge Gibson of this Court considered the Court's failure to make an order in relation to a secondary designated DNA offence under Section 487.051(1)(b). Under the legislative scheme set out in 487.051, secondary offences are not mandatory but may be made if the Court, having considered the statutory criteria, determines that it is in the best interests of justice to do so. Judge Gibson held that as there were judicial considerations involved in the granting of the DNA order which had to be considered at the time of sentencing and therefore discretionary, it was not open for the Court to come back after sentencing to rectify the matter. In short, Judge Gibson held that he was *functus* in the matter. I note that in *obiter,* Judge Gibson indicated that the mandatory provisions of 487.051 were not before him, but if they were he might still find himself to be *functus*. Judge Gibson's decision that he was *functus* in relation to the application before him was upheld on appeal in R. v Bevin [2002] N.S.J. No. 183 (NSCA).

With all due respect having considered all the relevant factors and caselaw, I am not inclined to follow Judge Gibson's comments in Bevin regarding mandatory orders.

[9] In matters where a trial Court has no discretion and is required to enter ancillary orders such as primary DNA cases, sex offender registry matters and other orders similar to that before this Court, there exists no reconsideration of the verdict or decision by the Court. There is no prejudice to an accused for a Court to revisit a sentence to impose an order which an Appeal Court would be bound to do in any event. Compelling the Crown to appeal the matter would be seen by the public as a wholly wasted expenditure of resources bringing the administration of justice into disrepute. These types of errors are clearly administrative in nature and can be remedied most easily by bringing the matter back to the attention of the trial Judge for the imposition of the mandatory order. They fall within the ambit of those matters described in Chandler (*Supra*) and others as a slip or administrative error.

[10] Consequently having considered the matter, I am prepared to sign the Section 109 order for a ten year period as requested by the Crown.

J.P.C.