<u>IN THE PROVINCIAL COURT OF NOVA SCOTIA</u>
Citation: R. v. Withrow, 2008 NSPC 28

Date: June 5, 2008
Docket: 1534690 and 1879786
Registry: Shubenacadie

Her Majesty the Queen

v.

Gregory Ross Withrow

<u>DECISION</u>

Judge:	Jamie S. Campbell
Heard:	May 1, 2008
Oral decision:	June 5, 2008
Charges:	*Criminal Code*; section 267(b) and 145(2)(b)
Counsel:	Crown - Karen Quigley Defence - Robert Cragg

By the Court:

[1] Conditional sentences are a practical response to the potential social and financial costs of having people serve prison sentences. A penal system that already struggles to physically accommodate a growing number of inmates would be overcome if those serving conditional sentences were to be incarcerated instead. Perhaps more importantly, conditional sentences acknowledge that for some offenders, whose circumstances justify a custodial sentence, incarceration in an institution is either unnecessary or not appropriate.

[2] Yet, there are situations in which incarceration in an institution for a period of time is the only legal response and, for others, it is simply the right response.

[3] The issue here is whether Greg Withrow should serve a sentence in jail or in the community under the terms of a conditional sentence.

Facts

[4] On March 26th, 2005, Angus Withrow and Greg Withrow were at the home of Brian Oliver. The two Withrows, despite having the same surname, are not related. For reasons that were not made clear, Greg Withrow, who had been drinking, went to pull Brian Oliver off the couch. Angus Withrow tried to intervene. Greg Withrow then punched Angus Withrow, breaking his false teeth and knocking him to the floor. Rather than leaving the matter at that, Greg Withrow tried to drag Angus Withrow out of the house, continuing to punch him while he was down and unable to defend himself. It was not a fight. It was a beating.

[5] An ambulance was called and Angus Withrow was taken to the hospital. Angus Withrow had significant injuries to his face.

[6] Greg Withrow was found by the police hiding in the woods. Police tracking dogs were used to locate him.

[7] The assault was not a minor one. Angus Withrow was injured. He was both smaller and older than Greg Withrow. Greg Withrow did not simply throw a single punch. He was not provoked. The attack was sustained after Angus Withrow was unable to protect himself. Greg Withrow made matters worse when, rather than

accepting responsibility for his actions, he tried to evade the police by hiding in the woods.

[8] After a few court appearances, Greg Withrow entered a plea of guilty to the offence of assault causing bodily harm, contrary to s. 267(b) of the *Criminal Code*, on January 26th, 2006. A Pre-Sentence Report was ordered and the matter set for sentencing. The sentencing was to take place on April 13, 2006.

[9] At that time, Greg Withrow, who had a criminal record, was facing a serious charge.

[10] On the appointed day, Greg Withrow did not show up for court. In an act that showed a stunning lack of common sense, he fled to British Columbia. He had not forgotten about the court date. There was no misunderstanding about the process. He simply went to British Columbia, as far away as he could get and still remain within Canada. There he found work and set about establishing as normal a life as he could, under the circumstances.

[11] A warrant was issued. He was a fugitive, or in the slang of a few generations ago, he was on the lam.

[12] He remained in British Columbia for at least a year, then decided that he should return home to Nova Scotia. He had successfully avoided detection in British Columbia during that time. The reason for his decision to return to Nova Scotia is not clear. He did however turn himself in and appeared in court on January 2, 2008. He was then released on an undertaking.

[13] On March 6th, 2008 he appeared in court, charged under s. 145(2)(b) of the *Criminal Code* with failing to appear in court on April 13th, 2006.

[14] On May 1, 2008 he pled guilty to the s. 145(2)(b) offence.

Issue

[15] The Crown maintains that Greg Withrow should be incarcerated for a period of 18 to 24 months. Mr. Cragg, counsel for Mr. Withrow, argues that a conditional sentence of 6 months house arrest followed by 6 months of probation would be a

proper sentence. The Crown opposes the conditional sentence. The issue is whether a conditional sentence should be imposed.

Law

[16] The *Criminal Code* sets out the conditions that must be present before a judge may consider whether a conditional sentence is appropriate in each case.

> 742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court
>
> > (a) imposes a sentence of imprisonment of less than two years, and
> >
> > (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,
>
> the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

[17] In this case, the offence to which Mr. Withrow has pled guilty is not one for which there is a prison term imposed as a minimum sentence.

[18] The procedure to be followed then requires that the judge first conclude that neither probationary measures nor a period of imprisonment for two years or more would be a suitable sentence.

[19] Probation would not be an appropriate sentence. The assault was a relatively serious one. It was sustained and unprovoked. Mr. Withrow has a criminal record for similar offences. Mr. Withrow's attempt to avoid responsibility for a sustained period of time is significant as well. Probation would not properly deal with the issues of denunciation and deterrence which are significant issues in dealing with crimes of violence and, in this case, especially so in light of Mr. Withrow's criminal record and his flight out of the jurisdiction.

[20] There has been no suggestion that in this case a sentence of two years or more would be appropriate. The Crown's recommended range of sentence was between 18 and 24 months. The assault in this case, while serious, was not of such a nature that it would call for a period of incarceration of greater than two years.

[21] Having concluded that a custodial sentence of less than two years is the appropriate sentence, the issue then is whether serving the sentence in the community would endanger the safety of the community.

[22] The issue of community safety is not merely a consideration, or even a primary consideration, but a condition precedent. If the court is not satisfied that serving the sentence in the community can be done without endangering the safety of the community, that form of sentence is not available. That of course also involves a consideration of the extent to which any risk can be managed through the terms of the conditional sentence.

[23] The term “safety of the community” refers to the specific threat posed by that person. It requires an assessment of the risk of the offender re-offending and the gravity of the harm if he does re-offend.

[24] An offender who presents a high risk to re-offend, or even a lower risk to re-offend with serious consequences, should not be permitted to serve a sentence in the community. That offender then, should be incarcerated.

[25] As noted by Mr. Cragg, many offences involving crimes of violence have resulted in the imposition of conditional sentences. That is the case where the court has been satisfied that the safety of the community has not been endangered and where serving the sentence in the community is consistent with the fundamental purposes and principles of sentencing.

[26] Mr. Cragg made specific reference to R .v. Rushton, 2005 NSSC 360, which he argued was "on all fours" with Mr. Withrow's situation. In that case, Mr. Rushton beat his victim with a baseball bat and told him that he was going to die. What was particularly significant however, was that Mr. Rushton had, during the period of his appeal, on two occasions failed to appear in court when directed. On the first occasion he had recorded the wrong date and on the second, he had again mixed up the date.

[27] While the case does support the now well established view that conditional sentences may be appropriate when violent crimes are involved, the case does not, with respect, provide guidance in dealing with assessing the risk presented by those offenders who flee. Mr. Rushton's circumstances did not involve his leaving the jurisdiction or even making an attempt to do so.

[28] Mr. Cragg also cited the recent case of R. v. Kagan, 2008 NSSC 26. In that decision, Justice McDougall sentenced Mr. Kagan to a conditional sentence for aggravated assault. The assault involved a stabbing. Justice McDougall considered the fact that Mr. Kagan was 19 at the time of the incident, had no criminal record and had in the seven years following the assault followed the terms of a recognizance, pursued a university education, and taken counseling to deal with the syndrome that may have contributed to his involvement in the assault.

[29] Once again, while the case supports the contention that conditional sentences can be appropriate to deal with violent crimes, Mr. Kagan's circumstances and Mr. Withrow's bear no more than a superficial similarity. The case also supports the view that the offender's behavior since the incident can be an important consideration. In Mr. Kagan's case, he sought counseling, attended university and followed the terms of his recognizance. Mr. Withrow fled to British Columbia.

[30] In addition to the case law to which I have just made reference, Mr. Cragg sent 13 cases by courier on June 3, 2008. I received the 91 pages of case law on June 4, 2008. The sentencing was set for today, June 5, 2008.

[31] Most of those cases were ones of which no mention whatsoever was made in the sentencing hearing.

[32] At the sentencing hearing, Mr. Cragg had indicated that he would be forwarding copies of the cases he had relied upon. He has now done that, and added more.

[33] I have had a opportunity to review those cases. They do not provide examples of circumstances that are sufficiently similar to the circumstances of Mr. Withrow, such that they can offer guidance that is in Mr. Withrow's interest in this sentencing.

[34] In R. v. Arsenault [1981] P.E.I.J. No. 9, 21 C.R.(3d)268, the Prince Edward Island Court of Appeal dealt with an appeal from a sentence with respect to a 19 year old offender with no criminal record. The young man entered a liquor store, while drunk, and assaulted a 70 year old man who was a customer at the store. The court acknowledged that by not sentencing Mr. Arsenault to jail, the trial judge had emphasized the reformation and rehabilitation aspects of the matter. The court was also made aware that Mr. Arsenault had abided by the terms of his probation order over a period of 6 months.

[35] In this case, Mr. Withrow has also abided by the terms of his release conditions since January 2008. That is a factor for consideration. Otherwise, the case is a very different one.

[36] In R. v. Ayala [2006] O.J. No. 1208, Mr. Ayala pleaded guilty to a charge of assault causing bodily harm. He had been part of a larger group who had all been drinking. He was asked to leave the apartment. An altercation took place in the parking lot, where Mr. Ayala hit a man breaking his eye socket. Mr. Ayala had a youth court record that included crimes of violence. In sentencing him to a conditional sentence, the court took into account the fact that Mr. Ayala had made significant changes in his life. He had moved from the area to live with his mother. He involved himself in a program designed to address issues of violence. He had become an active participant in the program. He had historically not been sufficiently committed to following through on his good intentions. A letter from a counsellor indicated however that now Mr. Ayala was actively engaged in counselling with respect to alcohol, anger management and mental health issues.

[37] The court noted that Mr. Ayala was in a position to present himself as a person who had changed. Clearly the court considered the fact that Mr. Ayala has identified

and seriously committed to dealing with the issues that had contributed to his criminal record. While his good behaviour was of significance, the continuation of that good behaviour was not based only on a hope of its continuing but on Mr. Ayala's insight into his behaviour. In that significant respect, it differs from Mr. Withrow's case.

[38] In R. v. Hobbs, [1999] N.J. No. 194, the accused attacked the victim in a bar. He kicked him in the face, arms and back. The trial judge noted that while such an offence would normally result in a period of incarceration, he refrained from imposing that sentence so that the accused could keep his job. The case is similar to the extent that now Mr. Withrow also has a job. It also confirms that conditional sentences can be appropriate for offences involving violence.

[39] In. R. v. Moose [1995] S.J. No. 512, the court considered the negative impact of incarceration. The case involved a domestic assault. The accused had only one prior conviction. He was amenable to becoming involved in a domestic violence and alcohol abuse program. He was employed and was supporting his spouse and five children. Once again, while the case provides an example of circumstances in which a conditional sentence may be appropriate, its direct relevance to Mr. Withrow's case is difficult to discern.

[40] In R. v. Hartlen [1997] N.S.J. No. 347, 163 N.S.R.(2d) 54, Justice Kelly of the Nova Scotia Supreme Court sentenced a 23 year old single man to a conditional sentence of three months with respect to a sexual assault of a 13 year old girl. Justice Kelly was satisfied with conditions imposed, Mr. Hartlen would not be a danger to the community.

[41] In. R .v. Doyle [1979] O.J. No.137, the crown appealed the sentencing of a man who had attacked a woman on a dark street. The accused was a 27 year old with a record of convictions, though they had involved only two fines and one period of probation. He was described as suffering from chronic alcoholism and depression. The psychiatric report indicated that there was “concrete evidence that there has been a remarkable change in this man.” Mr. Doyle had undergone a lengthy period of hospitalization and treatment. The court noted that in this case, the system had succeeded and it could be said with some confidence that to interfere at this stage would be likely to undo “the work of many and to destroy the hope of society that this man will be a dependable citizen.” Mr. Doyle’s good behaviour was evidence of a remarkable change in him, brought about by addressing the issues that had contributed to his being before the court. Again, it differs in that important aspect from Mr. Withrow’s case.

[42] In R. v. Curtis [1996] S.J. No. 343, 144 Sask. R. 156, the Saskatchewan Court of Appeal dealt with an appeal of a two year suspended sentence for assault causing bodily harm. Mr. Curtis kicked the victim while he was incapacitated and unable to defend himself. He was 20 years old and had no criminal record. He worked full time and provided financial assistance to his father. The court, in a concise eight paragraph decision, stated that the trial judge’s decision was not appropriate and ordered electronically monitored house arrest. It is difficult, once again, to determine what direct relevance the case has to the legal argument in Mr. Withrow’s case.

[43] In R. v. Arpin [1998] P.E.I.J. No. 56, the Prince Edward Island Supreme Court dealt with an appeal from a sentence for an 18 year old who had pleaded guilty to assault causing bodily harm. While Mr. Arpin had a record as a youth, this was his first adult offence. He had grabbed a teacher by the arm and twisted it, breaking a bone in the teacher’s hand. The teacher had pulled a chair out from under Mr. Arpin and shoved him. The court found that this constituted provocation. The court noted that these circumstances were of significance to the trial judge and on that basis, did not feel that imprisonment was appropriate. There is no allegation of provocation in Mr. Withrow’s case.

[44] In R. v. Fazlic [2007] M.J. No. 148, 215 Man R. (2d) 26, the accused pleaded guilty to assault causing bodily harm. He had been ejected from a bar and punched a passerby in the face. The victim suffered a broken nose. Mr. Fazlic was 21 years old and had no criminal record. He was embarrassed for what he had done. He was found to have been genuinely remorseful and of good character. He was aware that he had a substance abuse problem and was scheduled to begin a program to deal with it. He was fined. The resemblance to Mr. Withrow's situation is not apparent.

[45] In. R. v. Evans [2003] O.J. No. 4506, the Ontario Court of Justice sentenced Mr. Evans with respect to charges of assault causing bodily harm, breach of recognizance and uttering a death threat. The assault involved Mr. Evans' spouse, Robin Reid. Mr. Evans was diagnose as having mood instability which could be made worse by Ms. Reid's drug use. The spouses wanted to stay together and care for their young child. Ms. Reid provided as latter to indicate that she needed Mr. Evans to look after herself and their son after a car accident. The court was satisfied that with Mr. Evans having served a total of 22 days on pre-sentence custody, that a further jail term was not appropriate and ordered a lengthy period of probation. While the court did take into account the need for Mr. Evans to provide care for his spouse and child, the circumstances of the case are far removed from Mr. Withrow's situation.

[46] In. R. v. R.B.C. [2005] N.S.J. No. 571, Justice Boudreau accepted a joint recommendation for a conditional sentence with three months of house arrest with respect to a sexual assault.

[47] In. R. v. Reddy [2007] B.C.J. No. 2797, an off duty police officer received a conditional discharge with 6 months probation after grabbing the complainant's jacket while effecting a citizen's arrest. This was described as a momentary lapse of judgment from a person with no criminal record and who had been an "above average" constable. While the case contains a very helpful summary of the law relating to discharges and the law involving sentencing of police officers, it cannot be said to be relevant in any real way to this case, either in terms of factual similarity or in terms of the law addressed.

[48] In R. v. Tait, [2005] B.C.J. No. 1574, the case again involved the granting of a suspended sentence for an assault causing bodily harm. Once again, the accused was a police officer. He was found to have not been acting in the course of his duties in arresting the complainant. He struck the complainant who was handcuffed at the time and broke his jaw. The court found that Mr. Tait had been provoked. It was a fleeting or heated reaction. Mr. Tait permitted his temper to override his rationality and

judgment. His position of authority was held to be an aggravating factor. Mr. Tait had also undergone rehabilitative measures since the offence. He had been placed on desk duty. He expressed remorse and what the court found to be “a genuine intention to address the aspect of rehabilitation”.

[49] The court ordered a suspended sentence with a period of probation. The case does provide an example of a non-custodial sentence for an assault causing bodily harm. It’s similarities to Mr. Withrow’s circumstances are far from substantial.

[50] In assessing the issue of endangerment to the public, a court must consider factors such as the offender’s criminal record and the nature of that record.

[51] The Alberta Court of Appeal in R. v. Brady 1998 A.J. No. 39 noted that some kinds of criminal behaviour will be of more concern in this regard than others:

> On the other hand, the criminal record and probation officers may yield negative indications. The record sometimes shows that the offender has not obeyed previous orders or undertakings to the court. That can take many forms; some of them are previous convictions for
>
> (a) escaping lawful custody or being unlawfully at large
>
> (b) failure to attend court
>
> (c) breach of recognizance

(d) driving while prohibited

(e) possessing firearms or explosives while prohibited

(f) breach of probation

(g) offences committed while on bail or probation (That requires knowing the date of the previous offence, which presentence reports often give, not the date of previous conviction, which is usually all that a CPIC record gives.)

(h) contempt of court or breach of court orders.

123 Other previous convictions may amount to substantially the same thing. For example, personation, or obstruction of a peace officer, when false identification was used to conceal the fact that the offender was driving while prohibited, or was breaking some other court order.

124 A judge cannot apply that in a mindless or mechanical way. Forgetting a court date once ten years ago does not automatically bar an offender from any future conditional sentence. Nor does turning up for his trial guarantee an offender a conditional sentence. The sentencing judge must of course look at all aspects of these previous disobediences of courts. That includes frequency, age, maturity, recency, seriousness of disobedience and surrounding circumstances. All matter.

125 But failures to obey previous court orders or undertakings to the court (or the like) will ordinarily cast serious doubt on future obedience. After all, a conditional sentence is an ongoing court order.

[52] The Court in R. v. Brady quoted the South Australian Court of Appeal in summarizing the concern about ordering a conditional sentence when there is doubt about whether the offender will comply with its terms.

> Offenders should not be allowed to mock the authority of Criminal Courts or their attempts, in the interests of the community, to combine justice with mercy. R. v. Walker (1981) 27 S.A.S.R. 315, 319 (C.A.)

[53] The Alberta Court of Appeal in R. v. Brady supra., cited a number of reasons why ordering a conditional sentence in those circumstances is inappropriate and a danger to the community. First, it is a waste of both time and money. Second, the person being out of jail would endanger the public. Third, the sentence would suggest to the offender and those around him, that the law and the courts are, to use Chief Justice Fraser's term, a "paper tiger".

> " A conditional sentence which will likely not be obeyed is a slap on the wrist with pious platitudes". (R. v. Brady supra. para. 131)

[54] A court must consider the likelihood that the offender will fail to abide by the terms of a conditional sentence, the potential consequences of such a failure and the conditions that might be put in place to secure compliance. If the offender will be inclined to test the limits of available supervision, that is a consideration. If he will, in doing so, be at real risk of committing an offence, that must raise the level of concern. The level of concern will be commensurate with the degree of seriousness of the offence.

[55] Only after being satisfied that a conditional sentence would not endanger the safety of the community, a judge must consider whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2. This should be done recognizing that conditional sentences can provide significant denunciation and deterrence, even in the face of aggravating circumstances. There are however, circumstances that require a custodial sentence to reflect the seriousness of the conduct involved.

Risk Assessment

[56] Greg Withrow is 34 years old. His friends and relatives describe him as a quiet, good natured man. He was described as fun, loving and good around children. He is now largely responsible for the care of his ailing mother in her home. He is employed at a concrete company and is considered to be a good, reliable and hard worker.

[57] Mr. Withrow does have a criminal record.

[58] It was argued on behalf of Mr. Withrow, that many of the offences are at least somewhat dated, if one considers them from the sentencing date. That is complicated however by the circumstances of this case.

[59] There is a pattern of behavior over a period of time.

[60] He was charged with mischief on October 13, 1991 and sentenced to a period of probation. Then, in March 1994, he was charged with assault. He was fined $100.00 on November 15, 1994.

[61] Two years and 8 months later, on July 1, 1997 he was charged with assault again.

[62] Just over four months after the July 1997 assault charge, on November 15, 1997 he was charged with assault with a weapon, a section 253(b) breathalyzer offence and a section 86(1) offence. In July 1998, he was sentenced with respect to the July 1997 assault and the November 1997 charges. He served a period of two months on a conditional sentence with a further two years probation.

[63] Less than a year after that sentencing, he was charged with possession of marijuana. He was sentenced on June 9, 1999 to a fine of $350.00.

[64] Just more than one year after that sentencing, on July 30, 2000 he was charged with breach of probation and failing or refusing to provide a breath sample under section 254(5).

[65] Sixteen days later, on August 15, 2000 he was charged with dangerous operation of a motor vehicle. On February 8, 2001 he was sentenced with respect to the July and August 2000 charges. With regard to the failure/refusal charge and the dangerous operation charges, he was sentenced to 15 days in jail, served intermittently. He was fined $300.00 for the breach of probation.

[66] Just about 3 years later, on June 29, 2003 he was charged with public intoxication and fined $100.00.

[67] Five months later, in November 2003 he was facing Motor Vehicle Act charges for driving without insurance and driving while suspended. He was fined a total of $1250.00.

[68] It was only about one year and four months after that when Greg Withrow assaulted Angus Withrow, on March 26, 2005.

[69] About a year later, he failed to attend for the sentencing on that matter.

[70] Mr. Withrow's record, to say the very least, is troubling. It does not in itself foreclose consideration of a conditional sentence. It does however, suggest that Mr. Withrow is, for whatever reason, a person who feels unconstrained by rules. He is not a youthful first time offender or a person of whom it could be said, acted out of character.

[71] The nature of the offences involved are also significant. He has breached the terms of a probation order. He has driven while his licence was suspended or revoked. He has failed to attend court for a sentencing. Beyond that, he remained at large for some considerable time. These are all matters in which court imposed rules were intended to constrain Mr. Withrow's behaviour. In each case, he did not respect those constraints. These are just the kinds of offences to which the Alberta Court of Appeal made reference in R .v. Brady, supra.

[72] On April 16, 2006 Mr. Withrow did not attend court. Sometimes people forget. Sometimes they are confused as to the date. Sometimes, they are overtaken by anxiety or act on impulse and a warrant is issued. Often, people suffering from drug and mental health issues face a real challenge to keep the matter of court dates and processes straight.

[73] Mr. Withrow's actions were of a different nature. He made a plan and fled to British Columbia with his family. He lived there for some time. Each day after April 16th, 2006 Greg Withrow knew or should have known that he was acting, not only in contravention of the law, but in brazen defiance of it.

[74] What compelled Mr. Withrow to return to Nova Scotia is unknown. It may have been a desire to resolve these matters. It may have been the stress of living in another Canadian jurisdiction knowing that a warrant for his arrest would have been issued. It may have been the difficulties of remaining outside Nova Scotia away from his family. In any event, Mr. Withrow did eventually decide to return to Nova Scotia and deal with the matter.

[75] Mr. Withrow says that now he is a changed man. He is involved in a stable relationship with Robyn Green. He lives in Truro with her. He has a steady job and has turned his life around. Those who wrote letters in support of him commented on his gentle nature, his love of children and the essential help he provides for his sick mother. Since January 2, 2008 Mr. Withrow has been subject to conditions, which he has followed.

[76] There is no explanation offered for this change. Mr. Withrow reported that he was under the influence of alcohol when the assault on Angus Withrow took place. Otherwise, he offered little insight into his behaviour. He simply said that his actions in assaulting Angus Withrow were “stupid” and that running from his court obligations was also “stupid”. One might be tempted to add, “spectacularly so”.

[77] Stupid may well be a harsh word. But, people do stupid things. That is a fact of life.

[78] In some people it manifests itself in doing things that are illegal or dangerous. Greg Withrow may do no more stupid things than anyone else. When he does though, it has involved violence, breaching court orders and fleeing the jurisdiction.

[79] He has offered no more explanation for them than “stupidity”. There is no condition or circumstance that would explain the behaviour and that has somehow been dealt with either through counseling or an insight on the part of Mr. Withrow. If there were an alcohol or drug problem, Mr. Withrow did not acknowledge it. Given that Mr. Withrow has had a number of convictions arising from drinking alcohol and the assault of Angus Withrow also involved alcohol, it would not be unreasonable to suggest that alcohol has caused problems for him. He has not undergone any serious course of treatment, in any event.

[80] If there were other psychological issues involved, those have neither been identified nor treated.

[81] Mr. Withrow supports the contention that he has changed by referencing his current circumstances. He was not apprehended in British Columbia but came back to Nova Scotia of his own accord. While in British Columbia he was not charged with any offences. He now has a stable relationship and a steady job. He has followed the terms of his release since January 2, 2008.

[82] That picture of Greg Withrow must be assessed, having regard to his past, to determine whether indeed he would endanger the community.

[83] The reasons for his return to Nova Scotia were not made clear. Were those reasons to no longer apply, or were the pressures of house arrest to become more onerous than the known stresses of living as a fugitive, Mr. Withrow would find himself again at a decision point in his life. There is nothing to indicate that his decision making capacity has improved or that he is less inclined to make decisions that are improvident.

[84] Greg Withrow is essentially asking the court to trust him. He is saying that this time he will follow the court order. This time he would make different decisions. This time he would not be stupid.

[85] Sometimes, courts have to trust that people have changed. That trust must be based on something more tangible than hope and more real than promises. It must stand up under rational scrutiny. There must be something upon which to base it. Essentially, Mr. Withrow asks that he be trusted based on the hope and promise that his good behaviour will continue.

[86] His behaviour while in British Columbia can hardly be greatly credited to him, given that for that entire period he was subject to a warrant for his arrest in Nova Scotia. Rather than showing a pattern of good behaviour, his apparently stable life during that time must be weighed against the fact that for a sustained period he acted in blatant disregard of the authority of the court. (see R. v. Partridge 2005 NSCA 159)

[87] His unexplained compliant behaviour over the relatively brief period from January 2008, does not outweigh his record of defiance and his past effort over a period of more than a number of months to avoid responsibility for his actions.

[88] There is a real risk that Mr. Withrow has not changed and would fail to comply with the terms of a conditional sentence order. I am not satisfied therefore that he would not endanger the community if he were to serve his sentence in the community. Were he to re-offend, that could once again involve fleeing from the jurisdiction. That in itself would be a serious matter that would endanger the safety of the community. The safety of the community does not only involve the threat of physical violence, though in Mr. Withrow's case, that too, must be considered to be present. The safety of the community may involve the risk of property crimes, but in this case, also

involves the risk that the offender will not only fail to comply with the conditional sentence order but will seek to avoid his obligations entirely.

[89] I am not satisfied that there are any terms of a conditional sentence that would be sufficient to secure his compliance. Reporting requirements and house arrest, even on strict conditions, cannot bind a person who is intent on breaching them, especially if that breach involves not only incidental breaches but a flight from the jurisdiction. If he were intent on leaving the jurisdiction once again, which he has shown himself willing and able to do, he would now have the skill and knowledge to evade capture for a considerable period of time.

[90] Mr. Withrow should be sentenced to a period of incarceration.

[91] I am not satisfied here that a period of incarceration approaching 18 months is appropriate having consideration of the nature of the offence, Mr. Withrow’s record and his current circumstances. While there are aggravating factors present here, which I have already outlined, the assault itself was not life threatening or physically disfiguring in any permanent way. Mr. Withrow’s criminal record, while disturbing, does not show a pattern of intensely violent behavior. He has, to his credit, remained

compliant with his recognizance, since January 2008. He has been subject to restrictions on his liberty over those months.

[92] Mr. Withrow, you are sentenced for the offence of assault causing bodily harm, to a period of incarceration of 6 months. For the offence of failing to appear in court, you are sentenced to a period of incarceration of 2 months, to be served consecutive to the 6 month sentence. That period of incarceration will be followed by a period of probation, with respect to both offences, for one year, with the following terms:

Keep the peace and be of good behaviour.

Appear before the Court when required to do so by the Court.

Notify the court, probation officer or supervisor, in advance of any change of name, address, employment or occupation.

Report to a probation officer at Shubenacadie within 2 days of the date of expiration of your sentence of imprisonment, and when required, as directed by your probation officer or supervisor.

Remain within the Province of Nova Scotia unless you receive written permission from your probation officer.

Not to take or consume alcohol or other intoxicating substances.

Not to take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a medical prescription.

Not to own, possess or carry a weapon, ammunition or explosive substance.

Attend for assessment, counseling or a program directed by your probation officer.

Participate in and co-operate with any assessment, counseling or program directed by your probation officer.

[93] Mr. Withrow is to pay restitution in the amount of $870.00 in favour of Angus Withrow to cover the cost of his broken teeth and the cost of the ambulance service. The amount is to be paid within 24 months through the clerk of the court.

Jamie S. Campbell

Judge of the Provincial Court