

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Wentzell, 2011 NSSC 200

Date: 20110215

Docket: CRH 322479

Registry: Halifax

Between:

Her Majesty the Queen

v.

Kevin Wentzell

Judge: The Honourable Justice Felix A. Cacchione

Heard: January 20th, Feb 2nd, and 15th, 2011,
in Halifax, Nova Scotia

**Final Written
Submissions:** January 14th and 31st, 2011

Written Decision: May 25th, 2011

Counsel: Mark Heerema, for the Crown
Geoffrey C. Newton, for the Mr. Wentzell

By the Court:

[1] Before I give my reasons for the sentence to be imposed I should indicate that I have read the victim impact statement filed by Mr. Scott. The only part of the report which I will not take into consideration is the concluding paragraph. That is not appropriate and that part of it will not be considered by me in the sentence to be imposed.

[2] Kevin Wentzell appears before me as a 46 year old, what I would consider to be a first offender. At least this offence was first in time. He has a grade 12 education. He was previously married. He has one child who is 23 years of age.

[3] November 2nd of 2010 he entered a guilty plea to one count under s.380(1)(a) of the **Criminal Code**.

[4] A presentence report was prepared and it discloses the following information.

[5] Mr. Wentzell was one of three children who were adopted by a family that had seven children. It was alleged and confirmed by one of Mr. Wentzell's sisters that the adoptive mother was physically abusive towards the three adoptees. Mr. Wentzell, unfortunately, was also sexually abused as a youth by a relative. He left home at age 17 and has had virtually no contact with his siblings except for a sister who passed away in 2008. It would appear that the lack of contact with his siblings is because of Mr. Wentzell's sexual orientation.

[6] The report notes no history of alcohol or drug abuse, although it states that Mr. Wentzell has been under some form of psychiatric care for approximately 30 years.

[7] He has had little, if any, contact with his former spouse. He is presently retired and living with a common law partner. His retirement occurred in 2010.

[8] He has had various forms of training as a hair stylist and as a personal care worker. He also has a business technology program, to which I would assume is what gave him access to the employment which led to the charges before the Court. He did work for about 10 years as a personal care worker. During that period, or at

least for some of that period, he worked a second job which overlapped between the years of 1998 and 2004.

[9] Apparently he was on disability leave from 2006 to 2010. The report indicates that he is on a number of medications for heart problems, depression. He apparently takes anti-psychotic medication for his depression and suicidal ideation. He is presently under psychiatric care. I have Dr. Whitby's letter, and the report notes other physical ailments such as angina and acid reflux, etc.

[10] Mr. Wentzell apparently has ceased to use alcohol since 2006. Prior to that he was using it for self-medicating purposes.

[11] The report notes that he accepts responsibility for his actions. I find that comment troublesome in light of other comments that were made. Mr. Newton has offered an explanation for the comment in Dr. Whitby's recent letter, however, I have some difficulty accepting that as 100% truthful.

[12] The offence is one which was committed for two purposes it would seem. One being for personal gain, and the second one to support his daughter's extra curricular activities, and also support payments for her. Mr. Wentzell, as most offenders, I will not say all, is fearful of incarceration for two reasons. His physical ailments and also his sexual orientation.

[13] In March of 2008 he was given a two year less one day conditional sentence for an offence under s.433(a). That conditional sentence was breached, as I understand it, because he, contrary to the order, had in his possession a lighter. Mr. Newton indicated last day that Mr. Wentzell is a smoker and that was the basis for the violation. As a result of that violation he did serve six months in custody. I take it that following his release there were no further breaches of the conditional sentence order and he reported as was required. As I have stated, this offence predates the offence for which he was placed on a conditional sentence order.

[14] The Crown's position is that Mr. Wentzell should be sentenced to a term of custody for a period of between 12-15 months. It is also asking for a DNA order.

[15] I take it that the defence is not contesting the DNA order and that order will be granted as part of this sentence.

[16] The defence position is that this is a matter that can and should be dealt with by way of a conditional sentence order. The amount defrauded is approximately \$70,000.00, \$69, 245.51, to be exact. One of the troubling aspects is that this matter went on for almost two years. There were 21 separate transactions and the monies that were illegally obtained were deposited into three separate bank accounts. The Crown argues that this type of fraud, and this fraud in particular, shows a degree of sophistication and the amount as well as the nature of the fraud requires that general deterrence and denunciation be the primary objectives stressed in the sentencing of Mr. Wentzell.

[17] He committed this offence by creating fictitious travel claims, submitting them for repayment and in fact received repayment for these fraudulent claims. He was, as I understand the submissions, in a position where he essentially worked alone in processing these travel claims. So he would have been in control of that operation.

[18] What I find difficult in this case is that unlike some fraud cases that come before the Court where an accused person commits a fraud, sometimes on the spur of the moment, other times very calculated, but there is an end to it. This did not end because Mr. Wentzell decided that it would end. It ended when it was discovered because he had gone on disability leave.

[19] I questioned counsel last day about Mr. Wentzell's psychiatric condition and whether or not that played a role in the commission of the offence. The report from Dr. Whitby and what I know of personality disorders from years of hearing about them in this position is that they are character based. This is not a situation where Mr. Wentzell did not know what he was doing. It is not a situation where he was either psychotic or under some form of delusion.

[20] I have reviewed the cases that have been submitted by both Crown and defence and as was stated last day, the range of sentences for these types of offences is very broad. The spectrum is anywhere from a suspended sentence in some cases to lengthy terms of imprisonment.

[21] The aggravating factors, as I see them, are primarily that this was a breach of trust. In fact Mr. Wentzell defrauded all of us as tax payers because that is where the money was coming from, from the general taxation revenues which are funnelled into the various government departments. As well, an aggravating factor

is that Mr. Wentzell did this, in part, for personal gain. Although he did, also, do it for the support of his daughter. It is the wrong way of going about supporting one's child, but that is part of the explanation. As well, the fact that this was an offence that spanned an almost two-year period of time, that it does appear as if it was very calculated and premeditated. And finally, the amount. Although \$70,000.00 is a great amount, in the scheme of things relative to such offences, it appears to be at the lower end of the range.

[22] There are mitigating factors in Mr. Wentzell's case. He has pled guilty. He indicates that he is prepared to make restitution. He had no prior criminal record at the time the offences were committed, although he did have some offences subsequent to that. And I take into account, as well, the comments of his physician, Dr. Whitby.

[23] Counsel and the Court is well aware of the principles of sentencing. Those set out as far back as 1973 in the **Grady** case indicating that the protection of the public is the primary concern of the sentencing process and this is achieved through both general and specific deterrence, but also through reformation and rehabilitation. The principles that were enunciated in **Grady** were subsequently codified in the **Criminal Code** under ss. 718 to 718.2. Section 718.2 (d) and (e) refer to an offender not being deprived of his or her liberty if less restrictive sanctions may be appropriate.

[24] In sentencing an accused the Court must not only consider the circumstances of the offence, but also the circumstances of the offender. If one were to simply consider the circumstances of the offence, sentencing would be a *pro forma* activity. In fact, as I stated I believe last day, you might as well have "Hal" the computer sitting up here dispensing sentences. Not all offenders are the same. Not all offences are the same, and it is for that reason that judges are given a discretion as to what is a fit and proper sentence. To do otherwise would be to simply, as was stated many times by our Court of Appeal, use a cookie cutter approach to an individual situation.

[25] Mr. Newton has asked that a conditional sentence be imposed in this case. He indicates that there is no minimum penalty for this offence, and that is one of the requirements of conditional sentence orders, that the safety of the community is not endangered by Mr. Wentzell serving his sentence in the community and that such a sentence is one which is two years, or two years or less.

[26] The Crown is looking for 12-15 months, and argues that a conditional sentence would not be consistent with the fundamental purpose of sentencing and the principles set out in s.718- 718.2.

[27] In the present case I think that the statutory objectives to be emphasized are a deterrence and a denunciation of such offences.

[28] I am not certain that the sentence should not have as a component a specific deterrence and I say that because of the calculated nature and the prolonged nature of this offence together with the comment that Mr. Wentzell has a personality disorder. Personality disorders and there is unfortunately no indication by Dr. Whitby as to whether or not this is an anti-social personality disorder, what type of personality disorder, but certainly the concept of a personality disorder is one that predisposes an individual towards criminality. And that is of concern.

[29] On the other side of the equation it would appear that Mr. Wentzell is in a stable relationship. He is retired so he is no longer having access to funds that are not his.

[30] As with all cases, sentencing is a difficult task. It is made more difficult in this instance because Mr. Wentzell is considered to be a first offender. The amount taken, although not overly large, was a considerable amount, and it was used primarily for personal gain, I find.

[31] There is, in my view, a need for some specific deterrence to Mr. Wentzell. I think that that specific deterrence can be achieved through a sentence as suggested by the Crown, but not for the length suggested by the Crown. This is one of those cases where, to cite our Court of Appeal again, a short, sharp term of incarceration is something that hopefully will do the trick. If you would stand please Mr. Wentzell.

[32] The sentence of this Court is that you be incarcerated at the Burnside Facility for a period of six months. Following your term of incarceration you will be placed on probation for a period of one year. The conditions are that you keep the peace and be of good behaviour; that you perform 50 hours of community service upon your release from the institution and during the course of your probationary term. There will be a condition as well that you abstain absolutely

from the consumption of alcohol or non-medically prescribed drugs, and finally that you make restitution to the Receiver General of Canada in the amount of \$69,245.51.

[33] Mr. Wentzell I take it that your counsel has discussed with you the DNA order that has been consented to.

Mr. Wentzell: There is a DNA on file, My Lord.

[34] All right. Well now there is going to be a second one.

Mr. Wentzell: Okay.

Cacchione, J.