SUPREME COURT OF NOVA SCOTIA
Citation: R v. D'Eon., 2011 NSSC 330

Date: 20110829
Docket: Yar. No. 329125
Registry: Yarmouth

Between:

Jeffrey Antoine D'Eon

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	April 7, 2011, in Yarmouth, Nova Scotia
Counsel:	Philip J. Star, Q.C., for the Appellant Michelle Christenson, for the Respondent

By the Court:

[1] Mr D'Eon received a one-year suspended sentence and probation after pleading guilty to one charge of common assault, contrary to s. 265 of the *Criminal Code*, R.S.C. 1985, c. C-46. He appeals his sentence. The issue on this appeal is whether the Provincial Court Judge erred by applying a two-part test for conditional discharge.

The Provincial Court decision

[2] Mr. D'Eon attended a party at a private residence in January 2010. Near the end of the party, he became involved in a verbal dispute which led in turn to shoving and pushing. The complainant left the party alone. Mr. D'Eon and a third party followed him. As they proceeded down the laneway, there was a physical altercation. Mr. D'Eon held the complainant and the third party physically assaulted him. The complainant received cuts and bruises and require stitches. He was kept in hospital overnight and released the next day.

[3] Mr. D'Eon was originally charged with assault causing bodily harm. He pleaded guilty to common assault. On sentencing, the Crown sought a one-year

suspended sentence and probation. The defence sought a conditional discharge under section 730 of the *Criminal Code*. Prince, J.P.C. reviewed the facts, and said:

> The Defendant has no prior criminal record. The Defendant did spend the equivalent of eight days in custody awaiting his release. The Defendant appears not to have been involved in any other difficulties since the time of the commission of this offence.

[4] The Crown is suggesting, in the circumstances, that a period of one year probation is appropriate with a number of conditions to perhaps address issues that may or may not be apparent from the circumstances that have been outlined.

[5] It's also suggested that restitution is an appropriate consideration in the circumstances.

[6] The Defendant joins with respect to the recommendation made by the Crown but seeks from the Court a conditional discharge in relation to this individual. The Court has reminded itself with respect to the test that's applicable when considering whether or not a discharge is appropriate in a given situation.

[7] In my view, what has been recommended is appropriate in the circumstances. He will be placed on a period of one year probation, the passing of sentence will be suspended...

[8] The Sentencing Judge went on to impose conditions and a restitution order. He then returned to the defence request for a conditional discharge, and said:

> I have considered the request of defence counsel with respect to the issue of a conditional discharge and while I would be satisfied that it would be in the best interests of the Defendant in this circumstance; bearing in mind the nature of the offence and the extent of what had occurred, it's my view that it would not be in the public interest that one issue.

[9] As such, the Sentencing Judge accepted the Crown's submission.

The Notice of Appeal

[10] In his Notice of Appeal, the appellant alleges that the Trial Judge (1) "erred in law in imposing a sentence that was harsh and excessive under the circumstances"; (2) "erred in law in failing to take into account the Appellant's personal circumstances"; and (3) "erred in law in imposing an incorrect legal test with respect to the granting of a discharge pursuant to s. 730(1)."

Summary conviction appeals

[11] Paragraph 813(a)(ii) of the *Criminal Code* provides that the defendant may appeal a sentencing decision. Paragraph 812(1)(c) stipulates that for the purposes of sections 813 to 828, in Nova Scotia, the Appeal Court is the Supreme Court. The Court's powers on a sentencing appeal are set out at s. 687(1), which states:

> 687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
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> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
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> (b) dismiss the appeal.

[12] The Supreme Court of Canada addressed sentencing review in *R v. Shropshire*, [1995] 4 S.C.R. 227, where Iacobucci, J. adopted the statement from *R v. Pepin* (1990), 98 N.S.R. (2d) 238 (N.S.S.C.A.D.) that "in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the Sentencing Judge applied wrong

principles or [if] the sentence is clearly or manifestly excessive" (para. 47). He also adopted (at para. 48) a passage from *R v. Muise* (1994), 94 C.C.C. (3d) 119 (N.S.C.A.):

> Further, in *Muise* it was held at pp. 123-24 that:
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> > In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate....
> >
> > . . .

[13] The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the Trial Judge applied the correct principles and considered all relevant facts... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a Sentencing Judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.

[14] The standard of review on a sentencing appeal was described in *R v. Metzler*, 2008 NSCA 26, 2008 CarswellNS 151, at para. 24, where Bateman, J.A. said, for the Court:

> Sentences are afforded a deferential standard of review on appeal. This has been articulated in a number of ways. In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.), Lamer, C.J.C., for a unanimous Court, said:
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> > [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code* ...
> >
> > [91] ... The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly...

Arguments on the grounds of appeal

[15] (1) Unduly harsh and excessive sentence and (2) failure to consider the appellant's personal circumstances. The appellant says the sentence was unduly harsh and excessive in the circumstances. He argues that the Trial Judge gave insufficient consideration to the facts that he had already spent eight days in jail after his arrest, and that he was coming to the assistance of a friend when the assault occurred. He is, he submits, a hard-working and mild-mannered person, with no prior criminal record, who "happened to be in the wrong place at the wrong time." The Crown points out that the original charge was assault causing bodily harm under s. 267(b). A plea to the lesser included charge of common assault under s. 266 was accepted on the day set for trial. The offence is nevertheless a serious one, and the Crown might have sought a custodial sentence.

[16] The appellant says the Trial Judge erred by failing to place sufficient weight on his personal circumstances. He is a 28-year-old man without a previous criminal record, he was incarcerated for the equivalent of eight days after the incident and he was released two days before his wedding. The Crown notes that the actual period of incarceration was four days (equivalent to eight days, given double credit for pre-trial custody). Moreover, the Trial Judge adverted to these facts in his decision.

[17] The record indicates that the appellant was not simply in the wrong place at the wrong time. While he may have initially come to the aid of his friend, rather than simply removing the victim from atop his friend, the appellant joined his friends in kicking and punching the victim on the ground. This only resolved due to the intervention of a third party motorist. The sentence was not outside the appropriate range in the circumstances. The Sentencing Judge noted the appellant's lack of a criminal record, the four days he had spent in custody before his release and his conduct after the incident. The appellant has not established that the Sentencing Judge failed to consider relevant personal circumstances.

[18] (3) Interpreting s. 730 of the *Criminal Code*. A more substantial ground of appeal is the appellant's submission that the Trial Judge applied an incorrect legal test under s. 730(1) of the *Criminal Code*. Subsection 730(1) provides:

> Conditional and absolute discharge
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> 730. (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[19] Of particular concern is the second branch of the analysis, the stipulation that a discharge is “not contrary to the public interest...” This aspect of the test has been held to involve aspects of deterrence. The Ontario Court of Appeal commented on the conditions in which a discharge is appropriate in *R v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53, 1973 CarswellOnt 26. Arnup, J.A. said, for the Court, at para. 17:

> ... The granting of some form of discharge must be "in the best interests of the accused". I take this to mean that deterrence of the offender himself is not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation order. Nor is his rehabilitation through correctional or treatment centres, except to the same extent. Normally he will be a person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions. It must not be "contrary to the public interest" to grant some form of discharge. One element thereby brought in will be the necessity or otherwise of a sentence which will be a deterrent to others who may be minded to commit a like offence — a standard part of the criteria for sentencing.

[20] The British Columbia Court of Appeal considered the issue in *R v. Fallofield* (1973), 13 C.C.C. (2d) 450, 1973 CarswellBC 184, where Farris, C.J.B.C., for the Court, made a number of observations, at para. 21:

> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

> (4) The second condition precedent is that the court must consider that a grant of discharge is not contrary to the public interest.
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> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
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> (6) In the context of the second condition, the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
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> (7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.
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> (8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[21] In *R v. Elsharawy* (1997), 119 C.C.C. (3d) 565, 1997 CanLII 14708, 1997 CarswellNfld 191 (Nfld. C.A.), Green, J.A. said, for the Court, at para. 3:

> For the Court to exercise its discretion to grant a discharge under s. 730 of the *Criminal Code*, the Court must consider that that type of disposition is: (i) in the best interests of the accused: and (ii) not contrary to the public interest. The first condition presupposes that the accused is a person of good character, usually without previous conviction or discharge, that he does not require personal deterrence or rehabilitation and that a criminal conviction may have significant adverse repercussions. The second condition involves a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law...

[22] As noted above, the Sentencing Judge initially stated that the Court had "reminded itself with respect to the test that's applicable when considering whether or not a discharge is appropriate in a given situation." He subsequently concluded that he was "satisfied that it would be in the best interests of the Defendant in this circumstance; bearing in mind the nature of the offence and the extent of what had occurred," but that "it would not be in the public interest that one issue." The appellant says the Sentencing Judge applied too demanding a test by requiring that a discharge must be "in the public interest." The appellant also cites several instances where conditional discharges were granted to first offenders on assault (and related) charges: see *R v. Stevens*, 2009 NSPC 46, [2009] N.S.J. No. 449 (Prov. Ct.), *R v. Munro*, [1994] N.S.J. No. 693 (S.C.), *R v. Boyle* (1990), 100 N.S.R. (2d) 39, [1990] N.S.J. No. 371 (S.C.T.D.) and *R v. Rhynold*, [1993] N.S.J. No. 192 (C.A.).

[23] The appellant argues that there is a difference between a finding that the Court must be satisfied that a discharge is "in the public interest" as opposed to "not being against the public interest." According to the appellant, the Sentencing Judge emphasized the circumstances of the assault, rather than "the necessity or otherwise of a sentence which will be a deterrent to others who may be minded to commit a like offence" (as per *Sanchez-Pino*) in concluding that a conditional discharge would not be "in the public interest." The appellant says the Sentencing

Judge "did not elucidate the necessity of entering a criminal conviction in order to deter others from committing a similar offence." According to the appellant, the prospect of post-arrest incarceration and the effect of the incident on his reputation in a village like Pubnico would be sufficient general deterrence for any person of good character. As such, entering a conviction was not necessary to deter "others who may be minded to commit a like offence."

[24] The Crown says, correctly, that the Sentencing Judge had the discretion not to grant a discharge, citing the use of the word "may" in s. 730(1). The Crown agrees that a discharge would be in the best interests of the accused. As to the requirement that a discharge not be contrary to the public interest, the Crown acknowledges the cases cited by the appellant, but says "there are also many cases in which a discharge was not utilized," without referring to any such decisions. In written submissions, the Crown says only that the Sentencing Judge was "concerned about the facts" and that his comments "viewed in [their] proper context, that it would not be in the public interest and not contrary to the public interest are essentially one and the same thing." Further, the Crown says, the Sentencing Judge "has a considerable amount of experience in dealing with criminal matters given the length of the time he has been on the bench."

[25] If the Sentencing Judge did apply a test requiring that a conditional discharge be “in the public interest” rather than being “not contrary to the public interest,” this would be the wrong test. There is a substantive difference between the two phrases; the correct “not contrary” test simply means that a conditional discharge would not be deleterious. It is not required to be have actual positive effect on the public interest.

[26] The authorities provided by counsel do not specifically deal with the distinction between “in the public interest” and “not contrary to the public interest”. I refer, however, to *R v. M. (A.M.)*, 2010 ABQB 514, where the Sentencing Judge erroneously stated that s. 730 required that a discharge be “in the public interest.” The Summary Conviction Appeal Court held that this was an error of law. A further error arose from the Sentencing Judge taking the position that a conditional discharge was essentially excluded for an offence of domestic violence. Having concluded that the Sentencing Judge erred in the application of s. 730, the Summary Conviction Appeal Court said, at paras. 17-18:

> The Trial Judge having erred in law in his consideration of s. 730, this Court on a summary conviction appeal shall "consider the fitness of the sentence appealed against", and may "vary the sentence within the limits prescribed by law for the offence of which the accused was convicted" (*Criminal Code*, ss. 687, 813, 822(1)). I conclude that a discharge clearly would be in the best interests of the Appellant. In view of her lack of any previous criminal record, it is not necessary to enter a conviction against her in order to deter her from future offences or to rehabilitate her (*Fallofield*). I also conclude that a discharge would not be

> contrary to the public interest. Even though the offence may be characterized as involving some level of domestic violence, it is not at all like the offences considered in [*R. v. Brown* (1992), 73 C.C.C. (3d) 242, 13 C.R. (4th) 346 (Alta. C.A.)], which all involved repeated instances of serious assaults. The circumstances of this offence are that it involved a low level of violence, essentially a "tug-of-war" as characterized by the Trial Judge. It was an isolated event of very short duration. The conduct occurred as a spontaneous reaction to a situation. In these circumstances, the public interest in the deterrence of others does not have such weight as to preclude the use of a discharge.

[27] The Trial Judge indicated that while he had considered a conditional discharge, in his view an absolute discharge would not have been appropriate. That may have been the case at the time, but the Appellant has now completed 9 months probation, with the conditions of probation including reporting to a probation officer and attending assessment, counseling or treatment as directed by the probation officer. At this time, therefore, there is no need for conditions.

[28] Similarly, in this case, it appears that the Sentencing Judge erred in law by misstating the requirements of s. 730. I am not convinced, however, that this error resulted in an unfit sentence. As noted above in respect to the appeal on the fitness of the sentence, the sentence was not outside the appropriate sentencing range in the circumstances. The Sentencing Judge noted the appellant’s lack of a criminal record, the time spent in custody before his release and his conduct after the incident. Further, I am not satisfied that the misstatement of the test alone establishes that the Trial Judge actually applied the wrong test; in the context of an oral decision with limited preparation time, it cannot be said with certainty that the

Trial Judge did more than inadvertently misstate the test. Certainly I am not convinced that the “not contrary to the public interest” test would have led to a different result.

[29] In these circumstances, I find that the Sentencing Judge committed an error of law, but it was harmless. The appeal is therefore dismissed.

J.