SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Leland*, 2020 NSSC 57

Date: 20200214
Docket: Hfx No. 492580
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Frankie Robert Leland

Respondent

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	February 14, 2020, in Halifax, Nova Scotia
Oral Decision:	February 14, 2020
Written Decision:	February 14, 2020
Counsel:	Ronald Lacey, for the Appellant Frankie Robert Leland, Respondent, on his own behalf

By the Court:

INTRODUCTION

[1] On September 5, 2019 The Honourable Judge Ann Marie Simmonds sentenced the Respondent to a 30-day conditional sentence plus 12 months probation. In terms of ancillary orders, the Crown asked for a DNA order and the defence left it up to the Court to decide. The judge decided not to impose the DNA order.

[2] The sole ground of appeal in the Notice of Summary Conviction Appeal filed October, 3, 2019 is:

> 1. That the Honourable Provincial Court Judge erred in law in refusing to make an order under s. 487.051(3) of the *Criminal Code* in the absence of any evidence of the impact such an order would have on the respondent's privacy and security of the person, and by failing to give reasons for refusing to make the order requested by the Crown.

STANDARD OF REVIEW

[3] The standard of review with respect to a lower Court decision concerning a DNA order was very recently canvassed in *R. v. Desmond*, 2020 NSCA 1 at paras. 28 and 29:

> 28 The standard of review for an appellate court reviewing a lower court decision respecting a DNA order is laid out in *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.) and was followed by this Court in *R. v. Clancey*, 2003 NSCA 62 at para. 6:
>
>> 6 The standard of review in this case is as outlined by the Ontario Court of Appeal in *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.) at para 8 as follows:
>>
>>> The options available and the factors that the trial judge must weigh in determining whether to make a DNA order are more limited than in making a sentencing decision. However, as Weiler J.A. said in *Briggs*, the standard of review of orders under s. 487.051(1)(b) and s. 487.052 should be the standard applied to the review of such discretionary orders. Accordingly, 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 decision to either make or refuse to make a DNA data bank order if the decision was clearly unreasonable.

> 29 Thus, the standard of review for DNA orders is the same as is applied to other discretionary orders. This appeal turns on the judge's failure to consider relevant factors.

ISSUE: Did the sentencing judge err in law in refusing to make an order under s. 487.051(3) of the *Criminal Code* in the absence of any evidence of the impact such an order would have on the Respondent's privacy and security of the person, and by failing to give reasons for refusing to make the order?

[4] In *Desmond*, Justice Scanlan considered the identical issue as set out above and then provided a helpful analysis at paras. 31 – 51. In ultimately allowing the appeal and granting the DNA (and forfeiture) order, the Court of Appeal reproduced the trial judge's "very short reasons" referable to her decision to dismiss the DNA order application. In this case, the sentencing judge's reasons may be gleaned from the last three pages of the sentencing transcript:

> **THE COURT**: Mr. Newton, you didn't make any comment about Crown's recommendation that I consider a DNA Order. It's a secondary offence.
>
> **MR. NEWTON**: So I guess … as I said, as a secondary offence. I'll leave it up to Your Honour whether you think, in the … it's necessary in the nature of the offence.
>
> **THE COURT**: Mr. Lacey, did you want to say anything more about that?
>
> **MR. LACEY:** I … not really. Just to say that I believe it does fit within the intention of Parliament to have these orders granted, particularly with respect to secondary offences. It's not impingement on his personal … I forget the exact words … I haven't used them in a while but …
>
> **THE COURT**: That's what I'm looking for … is the exact words.
>
> **MR. LACEY**: … as noted … I can see that, yes. As noted in that section …
>
> **THE COURT**: They're not usually contested …
>
> **MR. LACEY**: Right.
>
> **THE COURT**: … and so I don't' often have a look.
>
> **MR. LACEY**: An given his … given his record, it's not a first offence. I think it's completely appropriate. And, given the nature of the offence, clearly would add to that as well.
>
> **THE COURT**: So the test is best interests of the administration of justice. I think that's it. Mr. Newton, can you help me with that? It's a touch … the offence is troublesome, certainly, but I … I am, at the same time … there's quite a

gap since the last time this gentleman was before the Court. I'm not persuaded it's necessary. I'm … the test is met in this case. Anything else, Counsel?

MR. LACEY: No, thank you. You have to go to Court Administration, Mr. Leland. My order will be prepared. You'll sign it and your house arrest will begin tonight at 8 o'clock. Okay?

MR. LELAND: Sounds good. Thank you.

THE COURT: Thank you. Good afternoon.

[5] At para. 32 of *Desmond*, Justice Scanlan confirmed, as follows:

> 32 That section requires a court to be satisfied it is in the best interests of the administration of justice to make a DNA order. In making that decision, the sentencing judge shall consider factors as set out in s.487.051 (3) including:
>
> - the person's criminal record
> - the nature of the offence;
> - the circumstances surrounding the commission of the offence; and
> - the impact an order would have on the person's privacy and security of the person
>
> It also requires that a sentencing judge give reasons for her decision.

[6] As the above transcript of the oral decision reveals, the judge here did not consider any of the s. 487.051(3) factors other than to comment that the offence was troublesome and that there was quite a gap (passage of time) since the offender had last been before the Court. Returning to *Desmond*, Justice Scanlan's critique at para. 38 of the sentencing judge's decision is equally applicable here:

> 38 The sentencing judge noted that this was a secondary offence, and as the passage quoted above illustrates, she referred only to 'the intrusion on personal privacy and integrity'. There is nothing in the decision to indicate she conducted the assessment considering the offender's record, the nature of the offence and the circumstances surrounding the offence. Although she did reference *R. v. Sullivan*, 2015 NSPC 40 and the reference therein to the intrusion on the offender's privacy and integrity, the oral decision does not suggest that was weighed as against the other factors she was required to consider. If an offender's privacy and personal integrity were the only factors considered in these applications, I see no path to there ever being justification for granting a DNA order. Clearly that was not the intent of Parliament.

[7] The Respondent had a criminal record described by the Crown as follows:

> **<u>MR. LACEY</u>**: The record, Your Honour, should have attached to it the Presentence Report. You'll see convictions for failing to attend, refuse breathalyzer, and mischief back in 2014.
>
> I do note that Mr. Leland does have a SOT conviction on October 19, 2018, for 87 … under 87(1) of the *Liquor Control Act* as well.
>
> The Presentence Report talks about his relationship. He is working. He has almost $13,000 in outstanding fines. Looks like alcohol is a problem, as reflected by the report and certainly played a part in this offence, I think one could say. It's been a problem in the past. There's the … the conviction for refused breathalyzer in 2014 which is … gives some evidence of that.

[8] The sentencing judge did not provide reasons as to how she considered his criminal record in relation to the sentence.

[9] The crime itself involved spitting in the face of a police officer. In my view the circumstances of the offence were serious; there are clearly health risks associated with being spat upon.

[10] In all of the circumstances, I am of the view that had the sentencing judge carried out the required analysis she would have concluded that the impact of a DNA order referable to the Respondent's privacy and security of person would not outweigh the circumstances of this offence. I again refer to *Desmond* and Justice Scanlan's reliance on *R. v. Rodgers*, 2006 SCC 15 at para. 32:

> …
>
> > In this case, the state's interest is not simply one of law enforcement *vis-à-vis* an individual - it has a much broader purpose. The DNA data bank will: (1) deter potential repeat offenders; (2) promote the safety of the community; (3) detect when a serial offender is at work; (4) assist in solving cold crimes; (5) streamline investigations; and most importantly, (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).

[11] The above passage was excerpted by the Supreme Court of Canada from Justice Weiler's decision in *R. v. Briggs* (2001), 157 C.C.C. (3d) 38 (Ont. C.A.) . With respect to the balancing interest, in *R. v. Hendry* (2001), 57 O.R. (3d) 475 (Ont. C.A.), Rosenberg, J.A. had the following to say at para. 18:

> [18] I would summarize the effect of these holdings as follows. In balancing the offender's right to privacy and security of the person against the state interests in obtaining the offender's DNA profile, the court must consider the following. The legislation offers significant protections against misuse of the DNA profile

> information, thus minimizing an improper intrusion into the offender's privacy. Having been convicted of a designated offence, the offender already has a reduced expectation of privacy. In the ordinary case of an adult offender the procedures for taking the sample have no, or at worst, a minimal impact on the security of the person. Thus, in the case of an ordinary adult offender there are important state interests served by the DNA data bank and few reasons based on privacy and security of the person for refusing to make the order.

[12] As noted above, an adult offender having been convicted of a designated offence has a reduced privacy expectation. Further, as referenced by the Ontario Court of Appeal, when considering an adult offender, procedures for taking a DNA sample have no, or at worst, a minimal impact on the security of the person. There are important state interests served by the DNA databank and little rationale based on privacy and security of the person for refusing to make the order. Indeed, in *Hendry*, at para. 25 Justice Rosenberg had this to say:

> [25] On balance, I would expect that in the vast majority of cases it would be in the best interests of the administration of justice to make the order under s. 487.051(1)(b) and s. 487.052, as the case may be. This follows simply from the nature of the privacy and security of the person interests involved, the important purposes served by the legislation and, in general, the usefulness of DNA evidence in exonerating the innocent and solving crimes in a myriad of situations.

[13] Further, I am mindful of Justice Scanlan's comments at para. 51 of *Desmond* and find them applicable to the Respondent's situation:

> 51 I am not satisfied the impact of a DNA order as it relates to Mr. Desmond's privacy and security of person would outweigh the circumstances of this offence. I again refer to *Rodgers* and the benefits for the administration of justice in having this offender's DNA in a data bank. I am satisfied a DNA sample should be provided. Mr. Desmond shall be required to provide a sample of his DNA as per an order in Form 5.04.

[14] When I carry out the required analysis I conclude that all of the circumstances (bearing in mind the four factors set out in s. 487.051(2)) require that a DNA sample should be ordered. I am satisfied that there are benefits of having this Respondent's DNA in a data bank. In the result, the appeal must be allowed such that a DNA sample should be given. The ancillary DNA order sought by the Crown is hereby granted. The Respondent shall be required to provide a sample of his DNA as per an order in Form 5.04.

Chipman, J.