

SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. MacPherson*, 2020 NSSC 336

Date: 20201124

Docket: Halifax, No. 469520

Registry: Halifax

Between:

Her Majesty the Queen

v.

Drew MacPherson

DECISION

Judge: The Honourable Justice John P. Bodurtha
Heard: November 13, 2020, in Halifax, Nova Scotia
Oral Decision: November 24, 2020
Counsel: Eric Taylor, Crown Counsel
Drew MacPherson, Self-Represented
Defendant/Applicant herein

By the Court:

Overview

[1] This is an application brought by Drew MacPherson (“MacPherson”) pursuant to s. 732.2(3)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “Code”) to modify or delete his two-year term of probation.

[2] MacPherson is fearful of releasing his address to probation officers. Although this fear is unfounded, it is very real to him. He believes his mother will attempt to obtain his address and kill him. As a result, the thought of releasing his address causes him stress and anxiety. MacPherson believes this will result in poor mental health for him and cause him to reoffend. He does not want this to happen. Therefore, he will not provide his address to a probation officer, which will result in a breach of his probation and cause him to be returned to prison.

[3] MacPherson is currently housed in a federal institution in British Columbia with his Warrant of Committal expiry date on or around September 8, 2021. Upon release, his probation will start and run for another two years.

Facts

[4] MacPherson’s only concern with the probation order is clause 3 which requires him to provide his address and reads as follows:

3. notify the Court or the Probation Officer in advance of any changes of name or address, and promptly notify the Court or the Probation Officer of any changes of employment or occupation.

He does not feel safe providing his address.

[5] MacPherson testified that there has been a significant change in his demeanour, attitude and ability to function as a result of engaging with mental health professionals. He claims he has been properly diagnosed now and is doing much better, but his fear of releasing his address remains.

[6] MacPherson is afraid his mother will trick a probation officer into divulging his address, allowing her to track him down and kill him. He describes his mother

as clever and says that she will manipulate a probation officer to disclose the information.

[7] MacPherson understands the need for society to be protected but believes his situation will bring the exact opposite. He testified that he does not have the ability to control the trauma inside his brain when under stress. His fear of releasing his address may be completely irrational but MacPherson believes he is at a risk to reoffend should he be required to do so. He believes the best thing for him and for society is for the term of the probation order to be reduced to zero. This would allow him to rehabilitate in the community without fear and protect society.

Jeffrey Martin

[8] Jeffrey Martin (“Martin”), a Senior Probation Officer, age 43, testified at the hearing. He has been a probation officer for 15 years, with the last eight months as a Senior Probation Officer in the Dartmouth probation office at 277 Pleasant Street.

[9] He testified that clause 3 within MacPherson’s probation order is one of the standard mandatory conditions under the *Code*. It is one of the three conditions that appears on all probation orders. In his view, there is no way that the probation order can be complied with without knowing a probationer’s address. To the best of his knowledge, there have been no occasions where the Dartmouth office has leaked a probationer’s address.

[10] It is a duty of probation officers to maintain accurate addresses of probationers and to keep them confidential. They are not to disclose a probationer’s address unless it is for specific reasons, such as a request by law enforcement agencies. The information is safeguarded.

[11] In addressing MacPherson’s concerns about his address being inadvertently leaked to his mother, Martin responded that they have systems in place, such as:

1. Addresses are not provided unless the request comes from a legitimate source.
2. They can put a note or flag on the system to not disclose the probationer’s address.
3. They can try to ensure the file stays with one probation officer.

Analysis

Mandatory Statutory Conditions

[12] Section 732.1(2) addresses the mandatory statutory conditions with the language “shall prescribe” and reads as follows:

732.1(2) Compulsory conditions of probation order

The court shall prescribe, as conditions of a probation order, that the offender do all of the following:

- (a) keep the peace and be of good behaviour;
 - (a.1) [Repealed 2019, c. 25, s. 297(1).]
- (b) appear before the court when required to do so by the court; and
- (c) notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

These are the first three clauses in MacPherson’s probation order.

[13] Section 732.1(3) of the *Code* addresses the optional statutory conditions with the language “may prescribe” but the provision is not relevant to determine MacPherson’s application.

[14] MacPherson argues that the mandatory statutory conditions legislated by Parliament probably never contemplated someone “in his condition”. MacPherson provided no evidence or authority for this proposition.

[15] His only concern with his probation order is the statutory requirement to comply with any change of address and he asks the Court to ignore the mandatory requirement. However, he provided no authority for this Court to dispense with the mandatory statutory condition.

Jurisdiction to Vary a Probation Order

[16] A preliminary issue before the Court was whether a probation order can be varied before it comes into force. Section 732.2(3) of the *Code* reads:

732.2(3) Changes to probation order

A court that makes a probation order may **at any time**, on application by the offender, the probation officer or the prosecutor, require the offender to appear

before it and, after hearing the offender and one or both of the probation officer and the prosecutor,

(a) make any changes to the optional conditions that in the opinion of the court are rendered desirable by a change in the circumstances since those conditions were prescribed,

(b) relieve the offender, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any optional condition, or

(c) decrease the period for which the probation order is to remain in force,

and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions, inform the offender of its action and give the offender a copy of the order so endorsed.

[emphasis added]

[17] MacPherson’s probation order was made by Justice Cacchione of this Court on February 20, 2018, and was upheld by the Court of Appeal in *R. v. McPherson*, 2020 NSCA 23. Therefore, this Court has jurisdiction to vary the order under s. 732.2(3).

[18] It is the Crown’s position that the Court has jurisdiction to review the probation order and decrease the period even before it comes into force. The wording of s. 732.2(3) suggests the order can be varied “at any time” after it is ordered.

[19] Section 732.2(1)(b) states when a probation order comes into force:

732.2(1) Coming into force of order

A probation order comes into force

(a) on the date on which the order is made;

(b) where the offender is sentenced to imprisonment under paragraph 731(1)(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; or

(c) where the offender is under a conditional sentence order, at the expiration of the conditional sentence order.

[20] Section 732.2(1) clearly defines when the conditions begin to run. It could be argued that, since MacPherson’s probation order does not come into force until

September, 2021, he cannot apply to vary the probation order until then. I am not convinced by this argument and agree with the Crown that the words may “at any time”, in section 732.2(3), would not make sense if the section was interpreted to restrict applications to vary to a time after the probation order comes into force. Therefore, I find that MacPherson can bring his application to vary the probation order prior to the commencement of the order.

[21] MacPherson seeks a variation of the probation order under s. 732.2(3) of the *Code* to “decrease the period for which the probation order is to remain in force” to zero so that he will be free from any of its terms once his custodial sentence is completed.

[22] The test with respect to an application to decrease the period of a probation order is not addressed within the *Code*, but subsection 732.2(3)(a) can provide guidance. That provision requires a change in circumstances, since the order was imposed before a change can be made to the optional conditions.

[23] For instance, when a Court is called upon to consider an application to vary a probation order, it is attempting to determine whether the original order remains appropriate in the current circumstances of the offender. By analogy, the Crown argues that, before a Court decides to vary a probation order by decreasing its duration, the Court must first hear an application and be satisfied it is appropriate to do so after considering any changes to the offender’s situation.

Change of Circumstances

[24] MacPherson’s circumstances have not changed since his probation order was imposed. There is no basis to find that the current probation order is not appropriate under the circumstances. MacPherson is concerned that, if he remains bound by the terms of his probation order, upon his release he will be required to advise his probation officer of his residential address. Ultimately, he believes his address will be obtained by his mother who poses a threat to his personal safety.

[25] This fear is not new. It existed at the time the probation order was imposed. The trial judge was aware of MacPherson’s mental health and the alleged threat his mother posed, yet still imposed the order. The Court of Appeal acknowledged the trial judge’s awareness of this in *R. v. McPherson, supra*, at para. 35:

35 In imposing sentence, the trial judge had the benefit of a pre-sentence report and Mr. McPherson's [*sic*] submissions. He noted:

The presentence report, first prepared in January of 2015, and an update prepared in July of the same year, indicate that he has had no contact with his parents for several years, nor has he had any contact with his sibling. At trial Mr. [Mc]Pherson testified that his mother was part of a global conspiracy of child abusers and was out to have him assassinated. He repeated those assertions this morning.

He described his upbringing in the January 2015 report as being tortuously abusive. He alleged that he was a victim of neglect during his youth, and that he was locked in a room as a form of discipline. At age 10 he began self harming by cutting himself.

Mr. [Mc]Pherson is a highly intelligent individual. He graduated from the University of Waterloo with distinction. He obtained a bachelor's degree in mathematics with a double major in computer science and electrical engineering, and he has also advised, and I believe his evidence, that he is a member of Mensa, which is a high IQ society.

...

As indicated, in 2011 he was involved in a motor vehicle accident which led to criminal negligence causing death charges and his present incarceration.

In 2013 he was assessed by Dr. Neilson, a psychiatrist at the East Coast Forensic Hospital. The assessment showed him as having a personality disorder, as well as a psychotic illness, together with antisocial and narcissistic personality traits. Mr. [Mc]Pherson does not agree with these findings but reported that he has developed serious psychiatric issues since his incarceration.

Dr. Neilson's testing confirmed Mr. [Mc]Pherson's high intelligence. His score on the IQ test was in the range of 135. Although he presented as a bright and articulate individual, Dr. Neilson found him to be paranoid. That paranoia is evident from his submissions today.

He was also assessed by Dr. Theriault, who found that he appeared to suffer from Asperger's/autism spectrum disorder, having features of narcissistic paranoia and schizotypal personality traits.

...

The presentence report states what is obvious: Mr. [Mc]Pherson is in need of significant mental health treatment.

...

This is a difficult and unfortunate situation. Mr. [Mc]Pherson is definitely in need of some major psychiatric intervention. ...

[26] The Nova Scotia Court of Appeal was aware of MacPherson's mental health issues and the Court confirmed the trial judge's decision in *R. v. McPherson*, *supra*, at para. 34:

34 Although Mr. McPherson will, following expiry of his warrants (in September 2021) be subject to probation for a further period of 24 months, we do not find that results in a manifestly unfit or excessive sentence. We reach that conclusion primarily due to the nature of Mr. McPherson's historically documented mental health issues. We are of the view the conditions of the probation order imposed have the potential to improve his ability to access treatment and to reduce his risk of re-offending.

[27] I see no material change in circumstances from when the probation order was imposed. The alleged threat his mother poses to his safety is not a new concern. This situation does not meet the criteria to vary because this alleged threat to his safety was present at the trial and before the Court of Appeal, who upheld the trial judge's decision.

[28] MacPherson says the change from when the order was imposed is that he has been supervised for the last three years. That is true, but MacPherson has been under the control of a federal institution for that period. This is a completely different scenario from MacPherson being released into the community where there would be much less supervision of him.

[29] Even if MacPherson were to establish that his personal circumstances have changed since the probation order was imposed, it would only be appropriate to cancel his probation order if those circumstances were such that a probation order would no longer have any rehabilitative value or provide the overall protection of the public by reducing his risk of re-offending. In my view, MacPherson's fear of the risk posed to him, should his mother obtain his address upon his release, cannot trump the security of the community if MacPherson was able to reduce his conditions of probation to zero. MacPherson is entitled to rehabilitation with supervision to ensure he is receiving the services he needs which will protect the public.

[30] I find there is no change in circumstances before the Court that would enable me to delete the probation order. There is nothing before me other than an unfounded fear of MacPherson's mother obtaining his address and causing him harm.

Conclusion

[31] I am not persuaded that the mandatory statutory conditions to report under the *Code* can be dispensed with. If I am incorrect in finding that the mandatory statutory conditions cannot be dispensed with, I find that MacPherson has not demonstrated a change in circumstances since the probation order was imposed that would permit the Court to decrease the period for which the probation order is to remain in force. As a result, MacPherson's application is dismissed.

[32] I would be remiss if I did not say a few things regarding MacPherson's mental health. MacPherson's fears are unfounded and speak to a state of paranoia. The idea of disclosing his address brings him great stress. Whether it is a valid concern or not, it has a real effect on his mental well-being. Unfortunately, for MacPherson these concerns appear to be an aspect of his mental illness and, hopefully, they can be addressed before his Warrant of Committal expires.

[33] Of grave concern to this Court is that, although MacPherson has demonstrated an improvement in his mental health, his unsubstantiated fear of providing his address to a probation officer indicates he is still suffering from a mental illness. Such an illness, if left untreated, will place him in conflict with the terms of his probation order. I direct that this decision be sent to his current mental health provider, Marie-France Lapierre, with the hope that this fear of providing his address can be adequately treated before his release into the community.

Bodurtha, J.