IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Fenton, 2005 NSSC 108

Date: 20050506
Docket: CR. S. AT 218110
Registry: Antigonish

Between:

Her Majesty the Queen

Appellant

v.

Keith Wayne Fenton

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: November 15, 2004, in Antigonish, Nova Scotia

Counsel: Allen G. Murray, counsel for the appellant
Lawrence I. O'Neil, Q.C., counsel for the respondent

By the Court:

[1] After trial before His Honour, Judge John D. Embree, a Judge of the Provincial Court for the Province of Nova Scotia, held on the 26th day of February, 2004, Mr. Keith Wayne Fenton (the "respondent") was acquitted of the charge that he, at or near Goshen, in the County of Guysborough, Province of Nova Scotia on or about the 29th day of March, 2003 while bound by a probation order made by the Supreme Court of Nova Scotia, on the 26th day of July, 2001, did fail without reasonable excuse to comply with such order, to wit not take or

consume alcohol or other intoxicating substances and must not have them in his possession contrary to section 733.1(1) of the *Criminal Code*.

[2] A Notice of Appeal was filed on behalf of the Crown (the "appellant") on March 24, 2004. The ground of appeal is:

> 1. That the Learned Trial Judge erred in not finding the respondent guilty of the offence of breach of probation and in finding that the probation order dated July 26th, 2001, was not a probation order as it had not been issued by the Supreme Court.

[3] The appellant seeks an order allowing the appeal and entering a conviction against the respondent and further requests that this Honourable Court impose sentence with respect to the offence.

[4] On October 27, 2004 a Notice of Cross-Appeal was filed on behalf of the respondent. The ground of appeal is:

> That the Learned Trial Judge erred in finding the Respondent in possession of alcohol as that term is used in the Probation "Order".

[5] If the respondent's cross-appeal proves successful it would result in a reinstatement or confirmation of the verdict of acquittal.

[6] Both the appeal and the cross-appeal were heard together.

SUMMARY OF THE RELEVANT FACTS:

[7] The following summary of the facts is reproduced from the factum of the appellant:

FACTS

The respondent was charged with the offence of breach of probation, contrary to section 733.1 of the Criminal Code. The allegation was that the Respondent had breached a condition of a Probation Order of the Supreme Court of Nova Scotia dated July 26, 2001. The particular condition which the respondent was alleged to have breached was one which prohibited him from consuming alcohol or other intoxicating things and from having them in his possession.

A trial was held on February 26, 2004 in the Provincial Court in Antigonish, Nova Scotia. The Crown called evidence from Corporal Terry Miller of the RCMP. The officer testified that on March 29, 2003 at approximately 2:40 p.m., he had been patrolling north-bound on the 316 Highway in Goshen, Guysborough County. At that time, he observed a truck which was being operated by a female driver and in which the respondent was a passenger. Upon observing the driver take a drink from what appeared to be a beer bottle, the officer initiated a stop of the vehicle.

The officer made observations of the vehicle and of the respondent. He noted a sound which he described as a glass striking and a wet floor mat near the feet of the respondent. The respondent ultimately reached down to his feet and picked up an open beer bottle and handed it to the officer. A second open, partially full beer bottle was found near where the respondent's feet had been positioned. The officer also made observations which suggested consumption of alcohol by the respondent.

The respondent gave evidence at his trial. The respondent denied having consumed alcohol on the day in question and gave other explanations for the officer's observations of him which had suggested consumption. However, he admitted to entering the vehicle voluntarily, despite the fact that the driver was drinking from a bottle of beer. He also testified that, upon being stopped by the officer, the driver had handed this bottle of beer to the respondent. The respondent stated that he placed the bottle on the floor and then kicked it under the seat with his foot so that it

would not be observed by the officer. He later passed this bottle to the officer.

The respondent acknowledged both on direct and cross examination that he believed he was subject to a probation order at the time. On cross examination, he agreed that the order was from July 26, 2001 and that it was for a period of three years. He also identified his Probation Officer. A certified copy of the alleged probation order, along with a Notice of Intention to Produce Certified Copy which had been served on the respondent, were entered into evidence at the trial.

The Learned Trial Judge raised an issue regarding the validity of the order. The document, although dated, was not signed at the bottom of the second page on the line which provides for the signature of "Judge, Provincial Court Judge, Justice of the Peace, Clerk of the Court". The Learned Trial Judge determined that the document had not in fact been issued by the Court and was not, in law, and under the provisions of the Criminal Code, a probation order. Given this finding, the Learned Trial Judge found the respondent not guilty. He did, however, go on to find that there was evidence which proved beyond a reasonable doubt that the respondent did have possession of alcohol on the day in question.

ROLE OF A SUMMARY CONVICTION APPEAL COURT:

[8] I am satisfied that all procedural requirements of the *Criminal Code* have been met and that both the appeal and cross-appeal are properly before me. Before considering the merits of the appeal and cross-appeal it is important to establish the proper standard of review in matters such as this. An appeal may be taken on any ground that involves a question of law alone. An appellate court, however, has no jurisdiction to interfere with a trial judge's finding of fact

unless such a finding is patently unreasonable and unsupported by the evidence. [See **R.** v. **Croft**, [2003] N.S.J. No. 368; **R.** v. **Webb** (1980), 56 C.C.C. (2d) 26 (N.S.S.C., A.D.); **R.** v. **Gillis** (1981), 60 C.C.C. (2d) 169 (N.S.S.C., A.D.)]. The proper standard of review in summary conviction appeals is the same as that used by the Court of Appeal.

DISCUSSION:

Issue (#1): Did the Learned Trial Judge err in finding that the document purporting to be a Probation Order was not properly issued and therefore not valid?

[9] The Learned Trial Judge acquitted the respondent after deciding that the document entitled "Probation Order" had not been properly issued due to the absence of a signature of either a "Judge, Provincial Court Judge, Justice of the Peace, Clerk of the Court" in the place provided at the bottom of page two of the document. Although no one had signed the order, someone had inserted the date of 26th July, 2001 just above the blank signature line.

[10] Furthermore, the Supreme Court Justice who made the order had initialled near the top of the first page under the pre-printed word "APPROVED". Under the Justice's initials someone had inserted the appropriate date, that being "26/07/01" signifying the day, month and year. As well, an "ACKNOWLEDGEMENT" section located near the bottom of page three of

the document bore the signature of the respondent and was witnessed by "J. Elise LeVangie" on 26th July, 2001. The acknowledgement indicated that the respondent had:

> (i) received a copy of this Order;
>
> (ii) that he had had it read to him or had read it himself;
>
> (iii) that he had read or had read to him sections 732.2(3), 732.2(5), and 733.1 of the Criminal Code; and
>
> (iv) that he understood the meaning of this Order and sections 732.2(3), 732.2(5), and 733.1 of the Criminal Code.

[11] Section 731 of the *Criminal Code* describes the circumstances in which the Court can exercise its discretion to direct an offender to comply with conditions prescribed in a probation order.

[12] Sub-section 732.1(2) describes the compulsory conditions that must be included in a probation order. Sub-section 732.1(3) describes some of the optional conditions that the Court may also include in a probation order. The former are mandatory whereas the latter are discretionary.

[13] It is sub-sections (4) and (5) of section 732.1 that provide the real focus for this appeal. They read as follows:

> 732.1 (4) A probation order may be in Form 46, and the court that makes the probation order shall specify therein the period for which it is to remain in force.
>
> (5) A court that makes a probation order shall
>
> (a) cause to be given to the offender
> (i) a copy of the order,

(ii) an explanation of the substance of subsections 732.2(3) and (5) and section 733.1, and

(iii) an explanation of the procedure for applying under subsection 732.2(3) for a change to the optional conditions; and

(b) take reasonable measures to ensure that the offender understands the order and the explanations given to the offender under paragraph (a).

[14] Sub-section 732.1(4) states that a probation order may be in Form 46,however, it need not be adopted as is. It may be changed or modified which is the case with the form of order used in Nova Scotia. It contains all of the compulsory conditions prescribed by sub-section 732.1(2) as well as a number of optional conditions which, if the court rules, can also form part of the probation order . The particular form used and the optional conditions included are at the discretion of the Court. The form of order used in Nova Scotia was last revised in June, 1996.

[15] If a sentencing judge decides to impose a conditional sentence or to include conditions as part of a sentence in circumstances that meet the requirements of s. 731, a probation order must then be drawn up. Provided the probation order contains the compulsory conditions along with the optional conditions ordered by the sentencing judge and provided the order is properly issued by the Court and the mandatory requirements of sub-section 732.1(5) are satisfied then the probation order on its face is valid.

[16] The situation which resulted in an acquittal of the respondent in this case was the lack of a signature of either a “Judge, Provincial Court Judge, Justice of the Peace or Clerk of the Court” on the bottom of page two of N.S. Form 34/46 (the approved form in use in our Province). In all other respects the probation order met the requirements of a valid and enforceable court order. No one challenged its contents nor did anyone suggest that it did not properly reflect the conditions imposed by the sentencing judge. The sentencing judge indicated his approval by initialling in the place provided near the top of the first page. Counsel for the respondent suggested that these initials might only signify approval of the form itself and not the contents. I believe I can take judicial notice of the practise followed by the judges of this Court. The sentencing judge reviews the

order after it has been drafted in final form. Provided he/she is satisfied that it accurately reflects the sentence imposed then, and only then, is it initialled. Once this has been done, a member of the court staff is delegated the responsibility of carrying out the mandatory requirements of sub-section 732.1(5) which requires the probation order to be read to or by the offender and its contents explained to him/her (in particular sections 732.2(3), 732.2(5), and 733.1 of the *Criminal Code*). The offender in this case signed the probation order acknowledging that these steps had been followed and that he understood the meaning of the order. In addition, even though the validity of the probation order had not been raised by the defence during the trial the respondent admitted both on direct examination and on cross-examination that he remembered being placed on probation. He even went so far as to name his Probation Officer. The transcript of the trial reveals the following:

> MR. O'NEIL [Direct Examination] State you name and address, please?
>
> A. Keith Wayne Fenton.
>
> Q. Mr. Fenton –
>
> A. R.R. 1, Goshen.
>
> Q. R.R.?
>
> A. 1 Goshen.
>
> Q. Goshen? Okay.
>
> A. Guysborough County.
>
> Q. And the probation order here that's dated July 2000, you – you remember being put on probation?
>
> A. Yeah.
>
> Q. You don't dispute that.

A. No.

.....

MR. MURRAY [Cross-Examination] ....

Q. And you – I take it from questions Mr. O'Neil asked you, you don't take issue that you were on probation at the time of this –

A. Yes.

Q. – you agree that you were on probation?

A. Yeah.

Q. Okay. And that was an order dated July 26, 2001.

A. Yeah. That's right.

Q. Okay, and it was for three years.

A. Yeah, I got Bill.

Q. Sorry?

A. I got Bill, the probation officer, in town.

[17] It is clear from these series of questions and answers that the respondent knew that he was on probation and he knew or ought to have known the consequences of a breach of that order.

[18] In my mind the failure of the appropriate court official to sign the bottom of the second page of the probation order does not invalidate the order. This function is a delegable one. The important thing is that the probation order and its contents had been approved by the sentencing judge and either read over to or by the Respondent, then explained to him such that he apparently understood its contents as is evidenced both by his signature in the acknowledgement section on page three and by his own testimony.

[19] In **R.** v. **Sterner** (1982), 64 C.C.C. (2d) 160 (S.C.C.) (affirming 60 C.C.C. (2d) 68 (Sask. C.A.)) the sentencing judge had advised the appellant of the conditions of his probation but did not personally explain sub-section 664(4) and 666 (re the consequences of a breach of the order). The deputy clerk of the court read him the order, gave him a copy and explained the sections. The appellant signed the order. Section 663(4) required "the court" to inform the accused of the consequences of a breach. The appellant argued that section 663(4)(c) was not complied with. The Court of Appeal said, following **R.** v. **Leboeuf** (1978), 45 C.C.C. (2d) 152 (Que. S.C.), that it "may be preferable to have the presiding judge inform the accused, it is not strictly necessary that he do so." The important factor was that "the accused understood the conditions of the order and the consequences of a breach." In addition to the clerk's evidence, the evidence of the accused himself permitted the conclusion that he knew of the consequences of a breach. Further, the relevant definition of "court" was an institutional one that could encompass court officials. On appeal to the Supreme Court of Canada, the Court referred to the provisions in question as "administrative provisions which are delegable, once the probation order is made by the presiding judge." It was not necessary for the judge himself to inform the accused, who, on the facts, knew of the consequences of a breach.

[20] John L. Gibson, in his *Canadian Criminal Code Offences*, interprets **Sterner**, *supra*, in the context of the renumbered *Criminal Code* provisions and states that section 732.1(5) is a set of "administrative provisions which are delegatable, once the probation order is made by the presiding judge." The following is reproduced from this article by Gibson:

> **7. --Copy and Explanation Given to Accused**
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> Under s. 737(4) [now s. 732.1(5)], the court must cause the order to be read by or to the accused, and a copy given to the accused. R. v. Pettigrew, [1981] B.C.D. Crim. Conv. 5170-2 (Co. Ct.).
>
> Section 737(4)(a), (b) and (c) [now s. 732.1(5)] are all administrative provisions which are delegatable, once the probation order is made by the presiding judge. Sterner v. Vander Kracht, [1982] 1 S.C.R. 173, 64 C.C.C. (2d) 160, (sub nom. *R. v. Sterner*) 14 Sask. R. 79, 40 N.R. 423; affirming 60 C.C.C. (2d) 68, 9 Sask. R. 264. In this case the consequences of the breach of probation order were explained by the

deputy clerk. It was not necessary that he be made aware by the judge personally. See also *R. v. McNamara* (9182), 66 C.C.C. (2d) 24, 36 O.R. (2d) 308 (C.A.).

Further, the sentencing court need not "inform" the accused of s. 737(4)(c) [now s. 732.1(5)] *viva voce*; it may do so in writing or by other means of communication. R. v. Leguilloux (1979), 11 C.R. (3d) 289, 51 C.C.C. (2d) 99 (B.C. C.A.); *Sterner v. Vander Kracht, supra*.

Section 731.1(5) reads that the court need only "*cause to be given* to offender...".

The Crown must prove compliance with s. 737(4) [now s. 732.1(5)]. Piche v. R., [1976] 5 W.W.R. 459, 31 C.C.C. (2d) 150 (Sask. Q.C.).

8. – Validity of Order – s. 737(4) "Presumption of Regularity"

The British Columbia Court of Appeal has held that a Provincial Court Judge is entitled to infer that the sentencing judge had informed the accused in accordance with s. 737(4)(c) [now s. 732.1(5)], in the absence of any evidence to the contrary. This is an application of the presumption of regularity. *R. v. Leguilloux, supra.*

[21] The order of probation is that which was stated orally by the sentencing judge and subsequently rendered to print. Provided the mandatory requirements of the *Criminal Code* have been satisfied and there is no evidence to the contrary to suggest that these mandatory requirements have not been met then the typed or written probation order is enforceable.

[22] The failure to sign page two is an administrative error that, in my opinion, does not affect the enforceability of the Probation Order. As was stated in **Sterner**, *supra*, the important thing is that "the accused understood the conditions of the order and the consequences of a breach."

[23] I, therefore, must respectfully disagree with the Learned Trial Judge's decision to acquit the accused on this ground. To do so was an error of law which is reversible on appeal.

Issue (#2): The respondent's cross-appeal raises the following issue: "Did the Learned Trial Judge err in finding the Respondent in possession of alcohol as that term is used in the Probation "Order"?"

[24] Despite the fact that the Learned Trial Judge decided that the Probation Order was invalid he went on to decide that although he had a reasonable doubt that the accused (the respondent) had been consuming alcohol he nonetheless found that he had had possession of it. In his decision he said the following:

> With regard to the issue of possession, and that is certainly one of the terms of the order that is before me. As I have said, I do not consider it to be a valid order, but that document does contain as a condition to "not take or consume alcohol or other intoxicating substances and must not have them in your possession." So if this was a valid probation order, that would have been a term of the probation that Mr. Fenton was to comply with. Possession is defined in the Criminal Code and Mr. Murray referred to it.
>
> > Section 4(3):
> >
> > > For the purposes of this Act, a person has anything in possession when he has it in his personal possession or knowingly has it in the actual possession or custody of another person, or has it in any place whether or not that place belongs to or is occupied by him for the use or benefit of himself or another person. And,
> >
> > (b) Where one of two or more persons with the knowledge and consent of the rest has anything in his custody or possession that shall be deemed to be in the custody and possession of each and all of them.
>
> I can see in circumstances which appear to have occurred here where the operator of this motor vehicle possessed a beer, the police come along from behind; and the operator, in an attempt to secrete the item or get it out of her possession, passes it to Mr. Fenton, that a momentary taking in those circumstances without any knowledge that that was going to happen in advance might be something which should not be criminally punishable in the circumstances here. It could almost be, depending on

the circumstances, a reflex action to take something when it is handed to you; particularly, when the person who is handing it to you happens to be operating a motor vehicle at the time that you are in.

The circumstances here, in my view, go beyond that. I recognize that one the vehicle was stopped and Mr. Fenton and his associate were seated there and the driver was asked to get out and Mr. Fenton passed a beer bottle to the officer, that may or may not, in and of itself, be possession.

But looking at all of the circumstances together here, including Mr. Fenton's own testimony that he held it for a few moments, put it on the carpet, meaning the bottle he was passed, laid it on the floor he said and then kicked it under the seat. He said, "I didn't want to see her get caught with it," was part of his evidence in court today, that he is in possession of that in a couple of different ways. I think he is a party to Ms. Rynold's possession. He is also individually making a decision to assist her in attempting to secrete that and get it out of sight. He is controlling it for that purpose; it goes beyond a momentary reflect action on his part. He makes a conscious decision about how he is going to deal with it.

There are two bottles that were underneath the seat; one of which was passed by Mr. Fenton to the officer – that one had a little bit of liquid init, and there is still a little bit of liquid in it as it exists here. Mr. Fenton says that he did not know anything about two bottles; he only knew something about one. If that is the case, the very obvious inference is the one passed to him was the one that was half-full or more.

So in all the circumstances, I would conclude that Mr. Fenton was in possession, albeit briefly, of alcohol. Obviously, if it ever got to that point, those types of circumstances might not constitute the most serious breach of that section, and if the Court was caused to consider the matter in terms of sentencing, there would be some mitigating factors involved there; but I do not get to that stage.

> However, I wanted to make it clear how I interpreted all of the evidence and make the necessary rulings on all of the evidence. If this was a valid order, I would consider that the Crown had its case in terms of possession of alcohol on the facts as I find them; but for the reasons I have already stated, I do not consider that I have got a valid probation order before me, dn on that basis Mr. Fenton is found not guilty.

[25] I agree with the Trial Judge's conclusion that there was a reasonable doubt that the respondent had consumed alcohol but I do not agree that the respondent could have been found to be in possession of the alcohol or other intoxicating substance by virtue of being a party to an offence. The respondent was not charged as a party to an offence allegedly committed by the driver of the vehicle. There was, however, ample evidence to warrant the trial judge's finding that the respondent himself was in "actual" possession of alcohol or other intoxicating substance. I, therefore, dismiss the cross-appeal.

[26] By virtue of my decision to allow the appeal against acquittal I hereby set aside the verdict of the Learned Trial Judge and enter a verdict of guilty on the charge that he, while bound by a probation order, did fail, without reasonable excuse, to comply with the terms of said order contrary to section 733.1(1) of the *Criminal Code*.

[27] The matter should be sent back to the Trial Judge of first instance for sentencing as provided for in section 686, sub-section (4), paragraph (b), sub-paragraph (ii) of the *Criminal Code*. I agree with that portion of his decision in which he indicated that there are a number of mitigating circumstances that could have an effect on sentencing. It would be best left to him after hearing submissions from counsel to decide on the appropriate sentence after giving proper consideration to all the mitigating and aggravating circumstances that might exist.

J.