NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. George*, 2016 NSCA 88

Date: 20161209
Docket: CAC 449452
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Steven William George

Respondent

Judges:	Bryson, Oland and Scanlan, JJ.A.
Appeal Heard:	December 8, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson, J.A.; Oland and Scanlan, JJ.A. concurring
Counsel:	James A. Gumpert, Q.C., for the appellant Stephen Robertson, for the respondent

Reasons for judgment:

Sentencing Judge Erred

[1] In this unusual case, the parties agree that the Crown's appeal of sentence should be allowed. Steven William George pleaded guilty to impaired driving causing bodily harm. In an oral decision delivered February 25, 2016, Judge Del Atwood of the Nova Scotia Provincial Court gave Mr. George a suspended sentence with 24 months of probation, a driving prohibition and ancillary orders.

[2] Section 731(1) of the *Criminal Code* permits a suspended sentence where no minimum punishment is "prescribed by law". Impaired driving causing bodily harm carries a minimum sentence of a $1,000 fine, (s. 255(2) of the *Criminal Code*). The suspended sentence was legally unavailable to Mr. George and the judge was wrong to impose it, (*R. v. Berner*, 2013 BCCA 188, ¶¶ 1, 35, 36). Parenthetically, 2012 amendments to the *Code* also preclude a conditional sentence in the circumstances of this case, (*Berner*, ¶ 34).

[3] Approximately two weeks later, following transcription of his oral decision, the judge realized his mistake. He purported to correct it by adding a $1,000 fine to the sentence he had already imposed. He issued a written decision incorporating this change, (2016 NSPC 12). But the judge had already imposed what he described as a "final sentence". He was *functus officio*—he had lost jurisdiction to deal with Mr. George's sentence, (*R. v. Simpson*, [1998] N.S.J. No. 424 (N.S.C.A.), ¶¶ 17-19).

[4] Courts of appeal must consider the fitness of an appealed sentence (*Code*, s. 687(1)) and should generally defer to the sentencing judge, absent an error of law. Imposing a suspended sentence in this case was an error of law.

Fit and Proper Sentence

[5] The sentencing judge formed a favourable impression of Mr. George. He pleaded guilty at an early stage of the proceeding. He remained on the scene of the accident and was cooperative with police. He showed concern for his girlfriend whom he had injured. They have maintained a good relationship although they are no longer romantically involved. She has forgiven him for what occurred.

[6] Mr. George is young, only 22 at the time of the sentencing. He was living at home with his father and extended family and had been steadily employed for three years in the roofing business. His employer was supportive and complimentary of him. He had been convicted as a young person for theft, but he had no prior convictions related to drinking and driving.

[7] Most importantly, the judge was impressed by what he regarded as Mr. George's remorse and rehabilitative efforts. The sentencing judge observed:

> Mr. George self-reports the moderate use of alcohol to the author of the pre-sentence report and has informed the Court today in his s. 726 elocution before the Court that he has abstained from alcohol for the past two and a half months and is committed to remaining alcohol free and seeking appropriate counseling and intervention.
>
> In my view, those mitigating factors are of considerable weight. [. . .]

[8] In response to the Crown's request for jail time of three to four months, the judge remarked:

> Mr. Robertson has made a very compelling case in spite of a very reasonable recommendation made by the Prosecutor. There was nothing out of line at all with the recommendation made by the Prosecutor today. In fact, ordinarily it would be a sentence that you might have been able to count on receiving. However, Mr. Robertson's submissions as well as what I've read in the pre-sentence report and what I heard you tell me today, satisfy me that you are a good candidate for a rehabilitative sentence. [. . .]

[9] Mr. George's representations to the court plainly affected the sentence he received and influenced the judge against a period of incarceration. Unfortunately, the judge was misled by Mr. George, who had, in fact, been drinking the night before his sentencing appearance. He had also twice stolen alcohol from a liquor store the week before he was sentenced. None of this was known to the sentencing judge and is only before this Court by agreement between counsel.

[10] Obviously, the sentencing judge was misinformed about the state of Mr. George's rehabilitative efforts and the prospect of those efforts bearing immediate fruit.

[11] The Crown argues for some jail time, relying upon the need to denounce and deter dangerous behaviour such as Mr. George's. The Crown cites this Court in *R. v. MacLeod*, 2004 NSCA 31:

> [22] ***This and other courts have repeatedly said that denunciation and general deterrence are extremely weighty considerations in sentencing drunk driving and related offences***. [citations omitted] I accept the point that generally incarceration should be used with restraint where the justification is general deterrence. However, I also accept the view of the Ontario Court of Appeal in *Biancofiore*, shared by the Supreme Court of Canada in *Proulx*, that ***offences such as this are more likely to be influenced by a general deterrent effect***. As was said in *Biancofiore*, "… [T]he sentence for these crimes must bring home to other like-minded persons that drinking and driving offences will not be tolerated." (at para. 24) I would add that this is all the more important where, as here, the respondent's drunk driving caused serious physical injury to an innocent citizen and where, by fleeing the scene of the "accident", the offender has shown disregard for the victim's condition and disrespect for the law.
>
> [Emphasis added]

[12] Although *MacLeod* describes more serious circumstances than are present here, the sentiments quoted are apt. Before the sentencing judge in this case, the Crown was looking for a sentence of three to four months' jail time. Mr. George's blood alcohol readings were almost twice the legal breathalyser limit. His girlfriend was seriously injured in the ensuing crash. She suffered a dislocated hip and had seven stitches to close a facial wound.

[13] The Crown also relies upon *R. v. Buffett*, [1989] N.S.J. No. 324 (N.S.C.A.) which bears some similarity to this case. The Crown quotes in part from *Buffett*:

> The trial judge recognized, as has this Court on numerous occasions, that the ***perpetrators of drinking and driving offences are, in many instances, citizens of otherwise good character, respected in their communities, and not inclined to criminal activity***. It is against such background that MacKinnon, A.C.J.O., commented in *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.) at p. 150:
>
> > Members of the public when they exercise their lawful right to use the highways of this province should not live in the fear that they may meet with a driver whose faculties are impaired by alcohol. It is true that ***many of those convicted of these crimes have never been convicted of other crimes and have good work and family records***. It can be said on behalf of all such people that ***a light sentence would be in their best interests*** and be the most effective form of rehabilitation. However, it is obvious that ***such an approach has not gone any length towards solving the problem***.

> In my opinion, these are the very ones who could be deterred by the prospect of a substantial sentence for drinking and driving if caught. ***General deterrence in these cases should be the predominant concern***, and such deterrence is not realized by over-emphasizing that individual deterrence is seldom needed once tragedy has resulted from the driving. …
>
> [Emphasis added]

In *Buffett*, a young man of otherwise good character injured a lady in a head-on collision. He was given a six month sentence.

[14] In response, Mr. George brings to our attention a number of decisions where custodial sentences were not imposed, including a decision of this Court, *R. v. Martin*, [1996] N.S.J. No. 389 (N.S.C.A.) which bears some resemblance to this case. In *Martin*, the Court of Appeal was impressed with the trial judge's careful consideration of all relevant factors, including Mr. Martin's "total abstention from alcohol, voluntarily attendance at a detox program…" and "compelling evidence of Mr. Martin's motivation to stop drinking alcohol…" These were precisely the factors that influenced the sentencing judge in this case because he was misled by Mr. George's assurances. Other cases cited by Mr. George permitted suspended or conditional sentences not legally available here or involved offenders who were successfully rehabilitating, (i.e. *R. v. Banta*, 77 BCAC 28; *R. v. Roasting*, 1991 ABCA 52; *R. v. Rowan*, 190 O.A.C. 342).

[15] The Supreme Court has again recently emphasized deterrence and denunciation in *R. v. Lacasse*, 2015 SCC 64:

> [73] While it is true that ***the objectives of deterrence and denunciation*** apply in most cases, they ***are particularly relevant to offences that might be committed by ordinarily law-abiding people***. It is such people, more than chronic offenders, who will be sensitive to harsh sentences. ***Impaired driving offences are an obvious example of this type of offence***, as this Court noted in *Proulx*:
>
> > . . . dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties: see *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.), at p. 150; *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 (Ont. C.A.), at paras. 18‑24; *R. v. Blakeley* (1998), 40 O.R. (3d) 541 (C.A.), at pp. 542‑43. [para. 129]

> [74] As I mentioned in the introduction, courts from various parts of the country have adhered to the principle that the objectives of deterrence and denunciation must be emphasized in imposing sentences for this type of offence.
>
> [Emphasis added]

[16] In *Lacasse*, two young passengers had died in the accident caused by Mr. Lacasse's impaired driving. He was young, with no criminal record. The trial judge imposed a sentence of six years and six months. The Quebec Court of Appeal reduced this to four years. The Supreme Court restored the sentence at trial.

[17] The Crown adds that Mr. George's conduct since his sentencing emphasizes the inappropriateness of a non-custodial sentence. The Crown informs us that in August of 2016, Mr. George pleaded guilty to two breaches of probation for possessing, taking or consuming alcohol and causing a disturbance by being drunk in a public place, contrary to s. 175 of the *Criminal Code*. Mr. George acknowledges as much. The Court can consider this information for sentencing purposes under s. 687(1) of the *Code*.

[18] The sentencing judge's decision here favoured rehabilitation over denunciation and general deterrence. That preference was misplaced as Mr. George's misrepresentations to the judge, and his recent charges confirm.

[19] In all the circumstances, a period of incarceration would give appropriate recognition to denunciation and general deterrence, particularly in light of the sentencing judge's misunderstanding of Mr. George's rehabilitative efforts. I would: (a) impose a jail sentence of four months; (b) order probation for 12 months, following service of his sentence for imprisonment, on the same terms as the Probation Order issued by the Provincial Court, but without house arrest; (c) order a victim surcharge fine of $200.00, payable within six months of this decision; (d) confirm the order for taking of bodily substances for DNA analysis in accordance with ss. 487.051 and 487.052 of the *Criminal Code* – as the judge's original order has been executed, it need not be executed again; (e) confirm the judge's order prohibiting operation of a motor vehicle and interlock eligibility, in accordance with s. 259 of the *Criminal Code*.

[20] I would grant leave to appeal and allow the appeal accordingly.

Bryson, J.A.

Concurred in:

Oland, J.A.

Scanlan, J.A.