NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. S.A.M.***, 2006 NSCA 139

Date: 20061219
Docket: CAC 266754
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

S.A.M.

Respondent

Restriction on publication: **pursuant to s. 110 of the Young Criminal Justice Act**

Judges:	Roscoe, Bateman and Hamilton, JJ.A.
Appeal Heard:	November 29, 2006, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Bateman, J.A.; Roscoe and Hamilton, JJ.A. concurring.
Counsel:	James Whiting and James Martin, for the appellant Chandrashakhar Gosine, for the respondent

Publishers of this case please take note that s. 110(1) and s. 111(1) of the **Youth Criminal Justice Act** apply and may require editing of this judgment or its heading before publication.

Section 110(1) provides:

Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Reasons for judgment:

[1] On May 2, 2006 S.A.M. having entered a guilty plea before the Youth Justice Court to possession of cannabis marihuana for the purpose of trafficking (s. 5(2) of the **Controlled Drugs and Substances Act**, S.C. 1996, c.19) was sentenced.

[2] The Crown recommended a period of probation but neglected to advise the judge of the mandatory weapons prohibition required pursuant to the combined effect of s. 109(1)(c) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 and s.51(1) of the **Youth Criminal Justice Act**, S.C. 2002, c. 1. The prohibition was not imposed by the judge.

[3] The Crown says in view of the mandatory nature of the legislation the judge's failure to order the prohibition is error of law and asks that this Court issue the prohibition order.

[4] The respondent says that the prohibition order is, in fact, discretionary and the judge's failure to grant it was not in error. Counsel cites **R. v. R.C.**, [2005] 3 S.C.R. 99 and draws a comparison to an order requiring a DNA sample from a young person. He suggests that the mandatory weapons prohibition violates the **Charter** protected privacy and security of a young person. Counsel does not elaborate on the manner in which such an order would infringe those rights. Nor was such a submission made to the sentencing judge. There is no evidentiary basis in the sentencing record supporting his assertion. The respondent does not challenge the constitutionality of the legislation.

[5] The statutory provisions at play here are as follows:

> **51. (1)** Despite section 42 (youth sentences), when a young person is found guilty of an offence referred to in any of paragraphs 109(1)(a) to (d) of the *Criminal Code*, the youth justice court shall, in addition to imposing a sentence under section 42 (youth sentences), make an order prohibiting the young person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance during the period specified in the order as determined in accordance with subsection (2).

> **109. (1)** Where a person is convicted, or discharged under section 730, of
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> . . .
>
> (c) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the *Controlled Drugs and Substances Act*, or
>
> . . .
>
> the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.
> (Emphasis added)

[6] There is no statutory exemption to the order. The DNA provisions of the **Criminal Code**, on the other hand, specifically contemplate circumstances where the order will not be made:

> **487.051(2)** 2) The court is not required to make an order under paragraph (1)(a) if it is satisfied that the person or young person has established that, were the order made, the impact on the person's or young person's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

[7] The respondent's submission is, in my view, obviously without merit.

[8] Whether the judge's failure to make the order was oversight or intentional, it is in error. The mandatory nature of the order is not conditional upon the Crown's request that it be imposed (**R. v Goguen** (2006), 208 C.C.C. (3d) 181; N.B.J. No. 165 (Q.L.)(C.A.)).

[9] If the weapons prohibition impairs SAM's ability to gain sustenance or employment, which is not suggested by the respondent, he may apply pursuant to s. 113 of the **Criminal Code** for relief from the prohibition.

[10] I would grant leave, allow the appeal, direct that a prohibition order issue under s. 109. (1)(c) of the **Criminal Code** and s. 51(1) of the **Youth Criminal Justice Act**.

Bateman, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.