IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R.* v. *T. A.*, 2004 NSPC 18

Date: 20040305
Case No.(s): 1355446,1355448,
1355450,1355452
Registry: Halifax

Between:

R.

v.

T. A.

Publication Restriction: s.110(1) YCJA

Judge:	The Honourable Judge Marc C. Chisholm, JPC
Heard:	Decision rendered orally on March 5, 2004 in Halifax Nova Scotia
Counsel:	Gary Holt, Q.C., for the Crown Shawna Y. Hoyte, for the Defence

BY THE COURT

[1] This is an application by the Crown pursuant to s. 487.051(1)(b) for an authorization to take such samples of bodily substances of T. A. as are reasonably required for the purpose of forensic DNA analysis.

Background

[2] On November 14, 2003, T. A. pled guilty to twelve (12) charges contained in four informations. In relation to the first information, Mr. A. pled guilty to charges of possession over (s. 334(a)), break, enter and theft (s.348(1)(b)) and having his face masked (s.351(2)). The facts admitted by Mr. A. revealed that at approximately 3:00 a.m., he and two other males stole a truck from an apartment building parking lot in Dartmouth. They drove the truck to Porters Lake, where the truck was driven through the wall of Toulany's store, allowing them to gain access and steal cigarettes. The video camera for the store recorded the event and showed that the two males who entered the store had their faces masked.

[3] The three left the scene in the truck. Later that early morning, the police spotted the truck and a high speed chase ensued. The police discontinued the chase for safety reasons. Shortly thereafter, the truck was found abandoned on Mic Mac Drive in Dartmouth.

[4] Mr. A. and a second male were located walking not far away. They were questioned by police and gave a story of having just been dropped off by a girlfriend. They were let go. Four days later, July 14, 2003, the police noted the description of Mr. A. matched one of the two males seen on the videotape inside the Toulany's store on the morning of July 10, 2003.

[5] Mr. A. was arrested and charged. On July 18, 2003, Mr. A. was released on a responsible person undertaking. One of the conditions of which was a daily curfew of 7:00 p.m. to 7:00 a.m. He was to appear in Youth Justice Court on August 22, 2003.

[6] The second information included four offences to which Mr. A. pled guilty on November 14, 2003. The offences occurred on August 3, 2003, just 16 days after Mr. A. was released on a Responsible Person Undertaking. The August 3, 2003 charges to which Mr. A. pled guilty were: escaping lawful custody (s.145(1)); threat to cause serious bodily harm or death (to a peace officer) (s. 264.1(1)(a); assault of a peace officer (s. 270); and breach of the July 18, 2003 undertaking (curfew condition)(s. 145).

[7] The incident began at 12:30 a.m., August 3, 2003, when the police attempted to stop a motor vehicle occupied by Mr. A. and other males. The vehicle stopped and the occupants, including Mr. A., fled on foot. Mr. A. was apprehended by the police but then managed to escape and ran off again. He was re-arrested minutes later. Mr. A. was taken to the police

station where he kicked an officer in the leg and threatened to kill or do serious bodily harm to another officer.

[8] Mr. A. was charged and released to appear in court on a later date.

[9] The third information contained a charge of Mr. A. failing to attend court on August 22, 2003, as required by the responsible person undertaking he signed on July 18, 2003.

[10] The fourth information dealt with on November 14, 2003 included four charges to which Mr. A. pled guilty namely, robbery (s.344); possession of a weapon for a purpose dangerous to the public peace (s.88); being an occupant in a motor vehicle knowing it was taken without the consent of the owner (s.335(1)); and breach of undertaking (curfew condition).

[11] The admitted facts of these offences were that at approximately 4:25 p.m. on September 17, 2003, Mr. A. and a second male entered a jewelry store on Spring Garden Road, Halifax. They approached the counter where Rolex watches were displayed. Both men were wearing ball caps and sunglasses. Mr. A. was wearing white latex gloves. Mr. A. took out a revolver, pointed it at the owner and demanded all the watches. The owner was slow to respond. Mr. A. repeated his demand. The owner opened the display. The second male sprayed the owner with pepper spray and lifted the tray of Rolex watches. He dropped the tray. The owner tried to grab the gun from Mr. A.. They struggled. Mr. A. broke free. Mr. A. and his partner ran from the store.

[12] That evening after 7:00 p.m., the police received a call of a male with a hand gun in a motor vehicle in the Mic Mac Mall parking lot. That male was Mr. A.. A check on the car revealed that it had been stolen from Antigonish. The entire ignition having been removed. Mr. A. was in the front passenger seat. As the police cars arrived at the parking lot, the vehicle tried to leave. It's path was blocked. The occupants fled on foot. They, including Mr. A., were apprehended. Mr. A. was wearing the same sweater and hat as he wore during the robbery. His white latex gloves were thrown away as he fled on foot.

[13] Mr. A. was kept in custody from September 17, 2003, until his sentencing on the above-noted charges on November 14, 2003. Prior to November 14, 2003, on October 30, 2003, Mr. A. was sentenced to 80 days custody for an assault on a peace officer, an attempt and an assault with a weapon.

[14] At the November 14, 2003 sentencing, the defence admitted that Mr. A. has 39 prior convictions. Of those convictions, two were for robbery, three assault of peace officer, two assaults, one assault with a weapon, two threats charges, and one charge of possession of a weapon for a purpose dangerous to the public peace.

[15] Mr. A. admitted to six prior breaches of an undertaking and 13 breaches of a disposition order.

[16] On November 14, 2003 counsel for the Crown and Mr. A. presented a joint recommendation for a total sentence of 18 months custody and supervision, consecutive to the sentence to which he was already subject.

[17] As counsel's joint recommendation had not addressed the matters of a s.110 prohibition or a s. 487.051 DNA Order, I invited further submissions on those issues.

[18] Mr. Holt, on behalf of the Crown, urged the court to grant both a firearms Prohibition Order and a DNA Order based upon the young person's conviction for robbery. Ms. Hoyte, on behalf of Mr. A. did not oppose a firearms Prohibition Order, but did oppose the granting of a DNA Order. Counsel requested an opportunity to make written and oral submissions on the issue of the DNA Order.

[19] I sentenced Mr. A. to a total period of 18 months custody and supervision consecutive to the sentence he was already serving and made an order under s. 110 of the ***Criminal Code***. The issue of a DNA Order was adjourned to February 27, 2004. Briefs were received from both counsel and reviewed by me prior to February 27, 2004. On February 27, 2004, counsel made oral arguments on the DNA issue. At the completion of the arguments, I adjourned until March 5, 2004 for decision.

The Applicable Law

[20] Section 487.051 of the ***Criminal Code*** states:

ORDER / Exception / Criteria.

487.051 (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or the *Youth Criminal Justice Act*, of a designated offence, the court

(a) shall, subject to subsection (2), in the case of a primary designated offence. Make an order in Form 5.03 authorizing the taking, from that person, for the purpose of forensic DNA analysis, of any number of samples, by means of the investigative procedures described in subsection 487.06(1); or

(b) may, in the case of a secondary designated offence, make an order in Form 5.04 authorizing the taking of such samples if the court is satisfied that it is in the best interests of the administration of justice to do so.

(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.

(3) In deciding whether to make an order under paragraph (1)*(b)*, the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision, 1998, c. 37, s. 17: 2002, c. 1, s. 176.

[21] Robbery is a secondary designated offence (s. 487.04).

[22] In relation to a secondary designated offence, the relevant portions of s. 487.051 are:

> 487.051(1)*(b)* may, in the case of a secondary designated offence, make an order in Form 5.04 authorizing the taking of such samples if the court is satisfied that it is in the best interests of the administration of justice to do so.
>
> and 487.051(3) In deciding whether to make an order under paragraph (1)*(b)*, the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision. 1998, c. 37, s. 17: 2002, c. 1, s. 176.

[23] The requirement that the court be satisfied that it is in the best interests of the administration of justice to grant a DNA Order does not place a burden of persuasion on either the Crown or defence. ***R***. v. ***Hendry*** (2001), 161 C.C.C. (3d) 275 (Ont.C.A.).

[24] The making of a decision whether or not to grant a DNA Order involves a balancing of the state's interest in obtaining a DNA profile against the security and privacy interests of the individual.

[25] In ***R.*** v. ***Briggs*** (2001), 157 C.C.C. (3d) 38, the Ontario Court of Appeal considered a number of the factors which have been argued in relation to the issue of "the best interests of the administration of justice" and considered their relevance. The Court's decision was summarized in its later decision ***R.*** v. ***Hendry*** (2001), 161 C.C.C. (3d) 275, at p. 292:

> (1) Whether or not there is evidence at the scene of the crime of which the offender was convicted that would likely yield a DNA profile of the perpetrator is not necessarily a relevant consideration.
>
> (2) The phrase "best interests of the administration of justice" does not import as a prerequisite to making the order that there be

reasonable and probable grounds to believe a further offence will be committed.

(3) The state interest in obtaining a DNA profile from an offender is not simply law enforcement but making it possible to detect further crimes committed by this offender. Rather, the provisions have much broader purposes including the following:

(a) Deter potential repeat offenders;

(b) Promote the safety of the community;

(c) Detect when a serial offender is at work;

(d) Assist in the solving of "cold" crimes;

(e) Streamline investigations; and

(f) Most importantly, assist the innocent by early exclusion for investigative suspicion or in exonerating those who have been wrongfully convicted.

(4) Provisions in the ***Criminal Code*** and the ***DNA Identification Act*** restricting the use that can be made of the DNA profile and protecting against improper use of the information offer significant protection of the offender's privacy.

(5) The procedures for seizures of bodily substances authorized by the provisions are of short duration and involve no, or minimal, discomfort. There is a minimal intrusion with no unacceptable affront to human dignity.

(6) A person convicted of a crime has a lesser expectation of privacy.

(7) The trial judge is entitled to look at the offender's entire record, not just the crimes that may be designated offences.

[26] In ***R.*** v. ***Hendry***, supra at p. 24-5, the Ontario Court of Appeal stated:

24 ... If the offender has no prior record and the circumstances of the secondary designated offence are relatively minor, the court may be justified in not making the order. However, particularly if the offender has a record that includes offences described as primary

> designated offences, I would think it exceptional that the order not be made. In general, the more serious the record the less likely the court could exercise its discretion against making the order. ***[page 290]***
>
> 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.

[27] The leading DNA issues in Nova Scotia are ***Jordan*** and ***R.C.***. In ***Jordan***, at p. 27-28, the court stated:

> 27 It is apparent that the intent of the DNA provisions is to strike a balance between, on one hand, the individual's rights to privacy and security of the person and, on the other, the requirements of effective law enforcement. In general, the legislation seeks to strike this balance by defining the outer limits of when it may be appropriate to make an authorizing order and leaving it to judicial discretion, within those outer limits, to decide how the balance should be struck in individual cases.
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> 28 The exception to this general approach is found in the section most relevant to this appeal, s. 487.051(a). As noted, that section provides that, with respect to a primary designated offence, the making of the order is not discretionary, but mandatory unless the offender establishes that its impact would be grossly disproportionate. Here, the judge's role is to determine whether the balance which the provisions attempt to strike is markedly lacking in the particular case such that the impact on the offender'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.

[28] In relation to the factors in 487.051(3), the court stated:

> *(a) the record of the offender*
>
> 64 The offender's record may be relevant as one indicator of the likelihood that the offender will reoffend. An important purpose of the DNA bank is to

assist in the identification of persons who have committed crimes. The more likely it is that an individual will commit other crimes, the more likely it is that the person's sample will help identify that person as the perpetrator of another crime.

65 However, in considering the record for this purpose, two points must be kept in mind. First, as Weiler, J.A. pointed out in Briggs, the identification of offenders is not the only purpose of the DNA bank. It does not necessarily follow, therefore, that an offender who is considered unlikely to reoffend falls outside the intended purpose of the provisions. Second, it is implicit in the legislative scheme relating to convicted persons that individualized reasonable grounds to believe the person will reoffend are not required and, therefore, was not part of the balance which Parliament has attempted to strike.

66 The offender's criminal record may also be relevant in the sense that a serious record for violent or sexual offences may indicate a degree of dangerousness to society which makes the interference with the offender's privacy and security of the person more readily justifiable than it would be, for example, in the case of an offender with a record of non-violent offences.

67 The record may also be relevant to the extent that it tends to indicate whether the offender has been convicted of offences with respect to which DNA identification is generally a useful investigative tool. Will say more about this aspect in a moment.

(b) the nature of the offence and the circumstances surrounding its commission:

68 It is apparent from a reading of the list of primary designated offences that the focus of Parliament's attention was the violent or sexual offender. However, as was pointed out by Braun, J.P.C. in R. v. K.P. [See Note 45 below], a wide variety of facts and conduct may give rise to conviction for a particular offence. It follows that if the offence, in the particular circumstances, is not typical of the general nature of the listed offences or is such that the risk of recidivism appears to be low, these will be relevant considerations in determining whether the case is outside the balance which Parliament struck between the objectives of the DNA provisions and the offender's privacy and security of the person.

Note 45: R. v. K.P., [2001] J.Q. No. 439 (Quicklaw) at para. 34.

69 A further consideration may be the relevance of DNA identification in the particular circumstances of the offence or, as mentioned earlier, whether the offender's criminal record indicates that DNA was or could have been a

useful investigative tool.

> 70 However, in taking these matters into account, two other aspects of the legislative scheme must be considered. First, and as noted earlier, the identification of offenders is not the only objective of the DNA provisions. The fact that DNA identification was not, or is not, likely to be useful with respect to the offender, may tend to show that obtaining the samples will not further the legislation's other purposes. Related to this is the point that the availability of DNA samples at crime scenes continues to expand as technology advances. As Weiler, J.A. points out in Briggs [See Note 46 below], early DNA cases generally involved samples from blood or semen found at the scene or on the victim. Now, however, microscopic deposits of biological substances can provide a DNA sample and, of course, there are ways in which a perpetrator may leave samples of DNA which are unrelated to the acts involved in committing the crime. In other words, as technology advances, the sort of crimes in which DNA evidence may be obtained and helpful will expand.
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> Note 46: Supra note 3
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> 71 Second, the legislation specifically does not require individualized suspicion in the case of offenders as opposed to suspects. In other words, the fact that there is little or no reason to think that the offender will reoffend and that, therefore, the sample will not serve a purpose in identifying the perpetrator of some future crime was not, in Parliament's view, a critical aspect of the balance in the case of taking samples from offenders.

[29] In ***R.C.***, the Court of Appeal dealt with a 13 year old offender with no prior record on a primary DNA offence. On the issue of how the DNA provisions are to be interpreted in dealing with young persons, the Court stated, at p. 17:

> [17] I would agree with the court in ***R.*** v. ***K.B.*** that any evidence about the potential impact of an order on the young offender must be evaluated taking into account his or her age and stage of development. I am not persuaded, however, that the principles and purposes of the **Youth Criminal Justice Act**, S.C. 2002, c. 1 (**"YCJA"**), inform or otherwise modify the application of s. 487.051(1)(a) and (2) as between an adult and a young offender.
>
> [19] I agree with the view of the Alberta Court of Appeal expressed in R. v. S. (O.S.), (2002), 168 C.C.C. (3d) 360 where the court concluded that, as between adult and young offenders, there should be no distinction in the tests for ordering samples (at ¶ 14). As to the privacy and security interests of the young offender the Court in **S.**

(O.S.), *per curium*, wrote:

> [28] The respondent did not show that the taking of a DNA sample would have any unusual impact on his privacy or security of the person. But the sentencing judge considered relevant the general privacy concerns raised with respect to young offenders. The non-disclosure provisions of the *YOA* reflect a desire to prevent the stigmatization or labeling of young offenders and thereby increase prospects for rehabilitation: *N.(F.) (Re), supra*, at paras. 14-17. However, the *DNA Identification Act* contains safeguards to prevent improper use of a sample or information derived from it. Further, information in the convicted offenders index with respect to young offenders is removed in accordance with the time periods in s. 45 of the *YOA: DNA Identification Act, supra*, s. 91. Given these safeguards, taking a DNA sample from a young offender does not increase the prospect of labeling or stigmatization. Accordingly, the privacy interests of a young offender are not impinged to a greater degree than those of an adult.

[30] The Alberta Court of Appeal decision in ***R.*** v. ***S. (O.S.)*** cited, with approval by the Nova Scotia Court of Appeal, involved two secondary designated offences.

[31] On the present application, the defence submits that the decision of the Nova Scotia Court of Appeal in ***R.C.*** does not apply to cases involving secondary designated DNA.

[32] In support of this argument, defence noted:

(1) That the Court in ***R.C.*** was dealing with a primary designated offence and specifically referred to s. 487.051(1)(a) in para. [17]; and
(2) That while the Court of Appeal in ***R.C.*** referred with approval to the Alberta Court of Appeal decision in ***R.*** v. ***S. (O.S.)*** (which involved two secondary designated DNA offences), that case involved convictions under the ***Young Offenders Act*** which does not contain the same privacy protections set out in the ***Youth Criminal Justice Act***.

[33] To accept this argument would lead to a conclusion that the principles in the ***Youth Criminal Justice Act*** would be applicable when a court is dealing with a secondary designated offence under the ***Youth Criminal Justice Act***, but not for a secondary offence under the ***Young Offenders Act*** or a primary designated offence under either the ***Young Offenders Act*** or the ***Youth Criminal Justice Act***.

[34] I do not accept the defence position. There is nothing in the Court of Appeal decision in ***R.C.*** which leads me to conclude that the principles and purposes set out in the ***Youth Criminal Justice Act*** are to be applied to an application for a DNA order under either s.487.051(1)(a) or (b). Therefore, in relation to the present application, I find that the principles and purposes of the ***Youth Criminal Justice Act*** do not inform or otherwise modify s.487.051(1)(b). I will, as stated in ***R.C.*** consider the age and stage of development of the young person when assessing the impact of granting an order.

Analysis

[35] I will turn first to the considerations in section 487.051(3).

The record of the young person

Including the present offences, the accused has fifty-one (51) convictions. Of those 51 offences, eighteen (18) involve the actual or threatened use of violence. One prior offence is for a primary designated offence (assault with a weapon). Including the matters dealt with by the court on November 14, 2003, the accused has been convicted of thirteen (13) secondary designated offences. The young person has railed to comply with court orders of release or disposition, twenty-one (21) times.

[36] Even if I consider the accused's positive efforts since incarceration, I find there is a significant risk of recidivism.

The nature of the offence and the circumstances surrounding its commission

[37] The robbery, in relation to which the Crown seeks a DNA Order was a very serious offence. The robbery entailed the wielding of a handgun by the accused and the actual use of pepper spray on the victim by his accomplice. The robbery occurred in a jewelry store in a mall in the downtown core of Halifax at 4:25 p.m.. The accused and his accomplice wore hats and sunglasses. The offence was pre-planned. The accused and his accomplice attempted to remove a tray of Rolex watches.

[38] At the time of his involvement in the offence, the young person was on an Undertaking. He was at large pending trial on at least eight (8) other charges, two of those being secondary designated offences (s. 348(1)(b) and s. 270) and there was a warrant for his arrest for his failure to attend court on August 22, 2003.

[39] Following commission of the robbery, the accused remained outside his residence beyond his 7:00 p.m. curfew and committed two additional offences (s. 335(1) and s. 88).

Impact such an Order would have on the young person's Privacy and security of

the person Interests

[40] Counsel for Mr. A. argued that when dealing with a young person, the ***Criminal Code*** provisions relating to the granting of a DNA Order must be read in light of the guiding principles of the ***Youth Criminal Justice Act***.

[41] Counsel for Mr. A. argued that the privacy and security interests of a young person are greater than those of an adult offender.

[42] As previously stated, in my view, this issue was settled by the Nova Scotia Court of Appeal in ***R.*** v. ***R.C.***, 2004 NSCA 30. I interpret the Court's decision as a finding against the position advanced on behalf of Mr. A..

[43] I am evaluating the impact of an order on Mr. A., taking into account his age and stage of development. I have considered the courses he is taking in the institution.

[44] Counsel for Mr. A. argued that re-integration of Mr. A. into the community would be "difficult, if not impossible" with the mark of a permanent DNA sample upon him. There was no evidence called to support this argument. Given the restrictions on the use of the DNA information, I see no merit in the argument of the defence regarding the difficulty or impossibility of his re-integration into the community if a DNA Order is made.

[45] The defence argued that as a disadvantaged African Canadian youth, the DNA Order would have a greater impact on him. No evidence was called on this point. I have no specific evidence on how Mr. A.'s disadvantaged background is relevant to the issue of the impact of an order on him.

[46] Mr. A. is now eighteen (18) years of age. I am not satisfied on the evidence before me that the granting of a DNA Order would have any significant impact on him given his age and stage of development.

Conclusion

[47] Having considered the young person's record, the nature of the offence and the circumstances surrounding its commission and the impact such an Order would have on the young person's privacy and security of the person interests and balancing the interests of the young person with the state's interest in obtaining a DNA sample, I have concluded that the state's interest in obtaining a DNA sample from T. A. far outweighs Mr. A.'s privacy and security of the person concerns.

[48] I therefore grant the Crown request. Pursuant to section 487.051(1)(b), I authorize the taking of such bodily substances of T. A. as are reasonably required for the purpose of

forensic DNA analysis.

Application Granted.

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