IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R.*** v. ***T. G.,*** 2004 NSPC 19

Date: 20040305
Case No.(s): 1394750
Registry: Halifax

Between:

R.

v.

T. G.

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:	Timothy MacLaughlin, for the Crown Rickcola M. Slawter, 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. G. as are reasonably required for the purpose of forensic DNA analysis.

Background

[2] On November 14, 2003, T. G. pled guilty to charges contained in four Informations.

In relation to the first Information alleging offences on August 22, 2003 Mr. G. pled guilty to a charge of possession under (s.335) and a charge of failing to stop for police (s. 249.1(1)). The admitted circumstances were that at 9:30 p.m. on August 22, 2003, Mr. G. was driving a damaged vehicle. The police decided to check the vehicle and activated their red lights. Mr. G. continued driving, at low speed, twice going over a curb while making a turn. Eventually, he stopped the vehicle. Two passengers fled on foot. Mr. G. stayed in the vehicle and was arrested. The vehicle had been stolen four days earlier. Mr. G. was charged and released to appear in court on a later date.

[3] In a second Information alleging an offence dated August 27, 2003, Mr. G. pled guilty. The offence was breach of Undertaking (responsible person) by failing to comply with the 6:00 p.m. to 8:00 a.m. curfew condition. The accused's mother called the police at 6:09 p.m. August 27, 2003 and advised that her son was not home. The police went to the accused's residence. At 6:45 p.m. the accused arrived home and was arrested. He was charged and released.

[4] In a third Information, the accused was charged with an offence of breach of his Undertaking (responsible person) on September 17, 2003. The accused pled guilty on November 14, 2003. The admitted circumstances were: The accused was bound by a condition of his Undertaking to stay away from a specified area of the City of Halifax. At 9:27 a.m. on September 17, 2003, the accused was observed on Uniacke Street, within the prohibited area. When the accused saw the police, he fled on foot. He was chased but managed to escape. He ran back to his house. When the police attended at his home, he initially refused to come out. When he did, he was arrested. He was charged and released.

[5] Finally, in a fourth Information, the accused pled guilty to a charge of attempted robbery (s.344); possession over (s.335(1)) and breach of Undertaking (s.139 YCJA) on October 16, 2003.

[6] The admitted circumstances of the robbery were that on October 8, 2003 at 5:40 p.m., the

accused approached the victim in the area of 2435 Bruce Street, Halifax. Mr. G. accused the victim of looking at kids. He asked the victim if he had any money. The victim said he did at his apartment. Mr. G. demanded he take him to his apartment or he would blow his brains out. Mr. G. kept a hand in his pocket, causing the victim to believe he may have a gun. The victim and the accused walked toward the victim's apartment. En route, Mr. G. told the victim not to run or he'd blow his brains out.

[7] As the two got to the victim's apartment building, the superintendent was outside. The victim yelled to him for help. The accused fled and escaped. He was charged when arrested for other matters on October 16, 2003.

[8] The admitted facts in relation to the October 16, 2003, s.139 ***Youth Criminal Justice Act*** offences were:

At 6:30 a.m. on that date, the police received a call regarding a suspicious car at Cunard and Maynard Streets in Halifax. Upon checking the car, they located Mr. G. and a second person sleeping inside. A check of the vehicle revealed it was stolen. Mr. G. was in the driver's seat. He turned the key to the car over to the police.

[9] Mr. G. was sentenced on the above noted matters on November 14, 2003. The Crown request for a DNA Order was adjourned to permit counsel to submit written briefs on the application. Briefs have been received and reviewed. Oral submissions were made on February 27, 2003. The matter was adjourned to today, March 5, 2004 for decision.

The Applicable Law

[10] 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.

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

[12] 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.

[13] 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.).

[14] 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.

[15] 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:

1. Deter potential repeat offenders;

2. Promote the safety of the community;

3. Detect when a serial offender is at work;

4. Assist in the solving of "cold" crimes;

5. Streamline investigations; and

6. 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.

[16] 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.

[17] 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.

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

> *(a) the record of the offender*
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> 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.
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> 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 [See Note 44 below], 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.
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> 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.
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> 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.
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> *(b) the nature of the offence and the circumstances surrounding its commission:*
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> 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.
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> Note 45: R. v. K.P., [2001] J.Q. No. 439 (Quicklaw) at para. 34.
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> 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.
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> 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.

[19] 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.

[20] 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. For the reasons set out in ***R.*** v. ***T. A.***, I find that the Nova Scotia Court of Appeal decision in ***R.C.*** is authority for this court, in considering an application for a DNA Order in relation to a secondary designated offence to apply the provisions of ss. 487.051(1)(b) and 487.051(3) without modification by the purposes and principles in the ***Youth Criminal Justice Act*** when dealing with a young person. The court must consider any evidence regarding the impact of an order on the young person taking into account his

or her age and stage of development and I will do so.

Analysis

[21] I will consider the factors listed in s.487.051(3):

The Record of the Young Person

Mr. G. is sixteen years of age. He will turn 17 on April 26, 2004. He has fourteen (14) convictions. The accused has one conviction for attempted robbery (subject of present application), one conviction for robbery, two (2) possession over and under convictions, one fail to stop car, 7 breaches of probation on an Undertaking, one 4(1) CDSA conviction and one break and enter (sentenced October 30, 2003). The present attempted robbery is his third secondary designated DNA offence. Even with counselling the young person is receiving in custody, in my opinion, there is a significant risk of recidivism.

The Nature of the Offence and the Circumstances surrounding its Commission

The present offence of attempted robbery involves the threatened application of force to blow the victim's head off intimating that he had a gun for the purpose of stealing money from the victim. While there is no evidence that the accused actually had a gun, this is a very serious offence.

At the time, the young person was on a responsible person Undertaking with curfews and house arrest. He was bound by those release orders to keep the peace and be of good behaviour. He was pending on numerous other charges.

Subsequent to his sentencing on November 14th, on January 30th, 2004 he was sentenced to three (3) months custody and supervision for a break and enter (a secondary DNA offence).

Impact a DNA Order would have on the Young Person's Privacy and Security of the Person

I incorporate by reference, my response to the defence argument set out in my decision in ***R.*** *v.* ***T. A.***.

[22] I am evaluating the impact of an order on Mr. G. taking into account his age and stage of development. I have considered the courses he is taking while institutionalized. I find that there has been no proof of any specific impact to Mr. G. other than that which occurs in each case of a DNA Order: i.e. (1) momentary, minimal physical discomfort; (2) interference with the privacy right only to the extent to which the information may be used pursuant to the DNA legislation.

Conclusion

[23] After considering the factors set out in s.487.051(3), I am satisfied that it is the best interests of the administration of justice to grant a DNA Order in this case.

[24] Therefore, pursuant to section 487.051(1)(b), I authorize the taking of such samples of the bodily substances of T.G. as are reasonably required for the purposes of forensic DNA analysis.

Application granted.

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