PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Hendsbee, 2009 NSPC 50

Date: 20090728
Docket:2043830
Registry: Halifax

Between:

Her Majesty the Queen

v.

Caleb Bruce Hendsbee

Judge: The Honourable Judge Alan T.Tufts

Heard: July 28, 2009 in Kentville, Nova Scotia

Written decision: October 15, 2009

Charge: Did steal from PETRO CANADA SERVICE STATION a quantity of money while armed with an offensive weapon, to wit: a knife, contrary to Section 344(b)i) of the Criminal Code.

Counsel: Robert Morrison, for the Crown
Stephen Mattson Q.C., for the defence

By the Court:(Orally)

INTRODUCTION

[1] Caleb Bruce Hendsbee pled guilty to an offence under **s. 344** of the **Criminal Code**. This offence appears to have been included in the definition of robbery under **s. 343(d)** of the **Criminal Code**.

ISSUES

[2] The issues in this proceeding are as follows:

1. What is the range of sentencing in Nova Scotia for robbery in the circumstances for this type of offence and offender and whether that range falls below a two year term of imprisonment?
2. Do the recent amendments (December 1st 2007) to the Criminal Code relative to the conditional sentence regime preclude consideration of conditional sentence order?
3. If not, is a conditional sentence an appropriate disposition? If so, what is the appropriate length and conditions. And if not, what is the appropriate sentence?

[3] This is a difficult sentencing. The words of Chief Justice Lamer in *R.v. M.(C.A.)* [1996]1 S.C.R. 500 at par. 91 are applicable in my opinion. He says at midway thru par. 91:

> [...]Perhaps most importantly, the sentencing judge would normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempt to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.

It is with these words in mind that I endeavour to craft an appropriate sentence which complies with the principles and purposes of sentencing and the directions our Appeal court has made in such cases.

FACTS

[4] This offence occurred May the 18th in 2009. At that time the offender was 19 years of age. He left the family home after a conflict with his father. He was sleeping in a warehouse in the Kingston/Greenwood area. At approximately 9:30 pm he went to a local gas station in the Greenwood area. It was not an isolated or remote location. He entered the store. When asked by the clerk if he could help, the offender said words to the effect "This is a robbery". The clerk replied "Are you serious?". At that point the offender who had his right arm straight by his side turned the palm of his hand toward the clerk. He had a knife with a blade approximately 3 ½ inches long tucked up his sleeve. The blade appeared in the palm of his hand which the clerk obviously saw. The clerk immediately backed off from the cash register after he opened it. The offender helped himself to approximately $400 in cash from the till. He apologized to the clerk. After he took the money, he explained he needed the money to buy food; that he was homeless and he then left. He did not conceal his identity or attempt to conceal his identity.

[5] Through his counsel he explained that he went to a local store, bought something to eat and went back to the warehouse where he had been sleeping overnight. He was arrested later that evening. The offender, it is conceded, never threatened the clerk with the knife or held it in his direction or made any gestures of any kind, it appears, with the knife. He simply had the knife in his sleeve and showed it as a means to demonstrate that he was intent upon getting the money from the store. The knife was one which the offender apparently carried regularly on him. It was not acquired specifically to commit the offence. It is clear he went to the store for the purpose of committing the offence and accordingly this was not a spontaneous act or incident. It is also clear that the clerk was very compliant once he saw the knife as it would appear he was trained to do. His comment "Are you serious?" seems to suggest that the offender was not otherwise aggressive or threatening.

OFFENDER'S CIRCUMSTANCES

[6] The offender was the subject of a pre-sentence report. It is before the court and forms part of the record. I need not review it in any detail here. He grew up in a very religious home. His father is a pastor at the Bible College in Kingston. He is the eldest of four children. His father was very strict. The offender had conflict with his father and left the home when he was age 15 to live in a Catholic group home. He also lived with family friends in the Kingston area. The offender does not have a good work record and has displayed some degree of irresponsible behaviour. He spent a

short time in the Canadian Armed Forces but left, honourably discharged, because he did not see himself as being part of the military life. He is also a very religious person. He has no criminal record.

[7] Notwithstanding the short comings noted, in my experience, the pre sentence report is not, in my opinion , a negative report and in some sense is a positive report. The offender attributed his motivation for the offence to "uttered desperation at being homeless and without any money for essentials". This was reported in the pre-sentence report. He apparently tried to get some social assistance but was unsuccessful. His father suggested that his son committed the offence to attract attention presumably from his father. The offender denies this. There is considerable conflict between the offender and his father. The conflict appears to be very complex and rooted, in part, in their respective religious beliefs and a father's expectations and the son's quest for independence. This is not an uncommon phenomena. My sense of it is that this is much more complex that is often seen in the family unit. It does appear though that the offender knows right from wrong, if you will. He is a well grounded individual notwithstanding the short comings noted in the pre sentence report. In my opinion, there is a real need for the offender to at least, reconcile himself to the differences he has with his father. This, in my opinion, would reduce, if not eliminate, any risk of this young man committing any further offences. His father was present in court for the sentence hearing and he is here today. Although he indicated he could not see the offender residing in his home, I did have the sense that he is supportive of his son.

[8] After the original sentence hearing I ordered an assessment of the proposed residence where the offender would reside if he was released into the community. It is with a couple - Mr and Mrs Jason Koutstaal, and their children. They are also a religious family and confirmed that the offender attends church regularly. It is very apparent they are a remarkably loving and caring family and have considerable affection for the offender and would provide a very supportive environment for him if he is permitted to reside with them.

RANGE OF SENTENCING FOR ROBBERY

[9] The Nova Scotia Court of Appeal has in the past said that "robbery with violence and armed robbery" required strong deterrent sentences. The Court of Appeal has referred to minimum " benchmarks sentences of three years and occasionally going as low as two years". See *R.*v.*I zzard* (1999), 175 N.S.R. (2d) 288; see also *R.*v. *Brophy* [1989]nN.S.J. No 136; *R.*v. *Longaphy* 2000 NSCA 136 and more recently *R.*v. *Benoit* 2007 NSCA 123 and *R.*v. *Johnson* 2007 NSCA 102. In those cases the Court of Appeal confirmed the same view.

[10] In *Benoit* the Court confirmed the appropriate range of available sentences of penitentiary term of two to three years for robbery which was committed by a person with a knife on a public bus at supper time. The offender in that case was 18 years of age with a substantial and serious criminal record. In that case a 2 ½ years sentence was imposed.

[11] In *Johnson* an 18 year old pled guilty to robbery, unlawful confinement and breach of probation. The offender was masked and threatened to "shank" the victim. He had a lengthy Youth record. Again the Appeal Court referred to the three years as a starting point and that anything less is rare and exceptional and in those circumstances would have to be present before a sentence of less than two years would be considered.

[12] In *R.v. Bratzer* 2001 NSCA 166 the Nova Scotia Court of Appeal recognized that there are cases that do warrant sentences below a penitentiary term. There the court referred with approval to the comments of Justice Rosenberg of the Ontario Court of Appeal in *R.v. J.W.* 99 O.A.C. 161 where Justice Rosenberg referred to the rationale and the underlying basis for the 1996 amendments to the Criminal Code which created the conditional sentence regime. In that case Justice Rosenberg referred to the "negative impact of imprisonment particularly upon youth or first time offenders". In *Bratzer* our Court of Appeal said at par. 47 " Reasonable alternatives to incarceration must be considered when the sole purpose of imprisonment would be general deterrence. This was in large part a reason for the development of Conditional Sentences".

[13] However the court in *Bratzer* referred to *R.v. Quesnel* and *Smith*(1984), 14 C.C.C. (3d) 254 where it was said that there is a place for leniency in the sentencing process but it must, however, be based upon information that underpins a reasonable

belief that such leniency will serve the goal of protection of the public through reformation and rehabilitation of the offender.

[14] I recognize that our Court of Appeal has found that there is a starting point for sentence for robbery. The Court referred to it as three years or occasionally as low as two years. See *R*.v.*Izzard*, *supra*; *R*.v. *Johnson*, *supra*; *R*.v. *Longaphy*, *supra* Although in *R*.v. *Butler*, 270 N.S.R. (2d) 225 the court recognized that the "starting point is not a rigid position from which a sentencing Judge cannot depart"; see also *R.* v. *McDonnell*, [1997] 1 S.C.R. 948. Indeed in *Benoit* the Court found that a two to three year sentence, not three years and up, was an appropriate range and that a Conditional Sentence was appropriate in *Bratzer*. Leniency is appropriate where it is linked to rehabilitation which will serve to protect the public.

[15] Mr. Mattson has referred to me a number unreported decisions which I do not need to list here. Many are by way of joint recommendation. They are all Nova Scotia cases in either the Provincial Court or the Supreme Court. I have listed them to be included in a scheduled attached to this decision. - see appendix "A" attached.

[16] The Crown seeks a penitentiary term of two years. Defence asks that I consider a sentence of less than two years less any remand time. The defence is seeking a Conditional Sentence Order. In my opinion a sentence of less than two years is a proper disposition and is within the range of sentencing for this offense, for this offender in these circumstances.

[17] I will now explain my reasons for this conclusion. Here the defender did not use the knife to explicitly threaten the clerk although I recognized that an implicit threat was present. He was not aggressive. In fact, he apologized to the clerk. Until the clerk saw the knife he did not recognize the offender as being serious about his intentions. The offender was motivated by his desire to buy food which he did. These circumstances are far less serious than those described in *Benoi*t where an appropriate range was found to begin at two years. Furthermore, in *Benoit* the offender had a substantial serious criminal record. Here the offender has no criminal record. In my opinion it cannot be said that a sentence of 2 years less a day,for that matter, in this case is a departure "from the norm" to use Chief Justice Glube's words in *Izzard*. It is not necessarily, in my opinion, a lenient sentence for this offender in these circumstances.

[18] Finally, if such a sentence is outside the norm or below the range and considered lenient, I am satisfied that a lenient sentence is appropriate and a sentence in the range of two years less a day or below is appropriate . For the reasons I will explain below I believe that this offender can be rehabilitated in the community and more effectively by considering sentencing alternatives only available to offenders sentenced to terms below two years. I will explain this further below.

EFFECT OF DECEMBER 1, 2007 AMENDMENTS

[19] I will now deal with the recent amendments to the Criminal Code with respect to Conditional Sentence Orders. On December the 1st, 2007 Parliament amended the Criminal Code to further restrict the availability of conditional sentence order. Section 742 was amended to the effect that Conditional Sentence Orders were not available, for among other offenses, for serious personal injury offenses as defined in section 752 of the Criminal Code which are prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more. Section 752 defines serious personal injury offenses as follows:

> "serious personal injury offence" means
>
> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[20] This definition also serves as a threshold or gateway for applications for dangerous offender designations. Many cases interpreting this definition were decided in that context. It is clear that “offence” is in “serious personal injury” refers to the factual circumstances of the offence instead of the legal character or type of offence. Accordingly, it is necessary to examine the underlying facts of an offence to determine if it meets the definition. The cases all support this conclusion. The issue here is whether the offence committed by Mr. Hendsbee, in this case, involved “the use or attempted use of violence against another person or conduct endangering or

likely to endanger the life or safety of another person or inflicted or likely to inflict severe psychological damage on another person" to use the words of the Criminal Code.

[21] Two lines of authority have developed around the statutory interpretation and in particular how to properly characterize the use or attempted use of violence and the endangering conduct referred to in the Criminal Code section. The Alberta Court of Appeal in *R*.v. *Neve* 137 C.C.C. (3d) 97 (Alta. C.A.) suggested the violence and the dangerous conduct have to have a serious component such that the offense must be objectively serious. The court found that there must be a serious degree of violence or endangering conduct in the predicate offense.

[22] In *R*.v. *Goforth* [2005] S.J. No. 79 the Saskatchewan Court of Appeal rejected the so called "objective seriousness test" which *R.v.Neve* endorsed. In that case the court found that the words of the section do not invite a qualitative assessment of the degree of violence or endangerment in the predicate offense. It also found that in requiring the inclusion of "seriousness" or "very serious" was not consistent with the interpretation of the section made by the Supreme Court of Canada in *R.v.Currie* [1997] 2 S.C.R. 260, a case where the Supreme Court considered section 752 in the context of the dangerous offender designation. Other courts have agreed with the *Goforth* analysis and I refer particularly to *R*.v. *Naess* [2005] O.J. No 936 and *R*.v. *Reed,* [2009] BCPC 201.

[23] However, this section was used only at that point as a gateway or threshold to an application for dangerous offender or long term offender status. See section 752.1(1) of the Criminal Code. Other considerations would have to be weighted to make a dangerous offender a long term offender designation. When section 742.1 was amended to provide that "serious personal injury offences" were excluded from the Conditional Sentence regime, a finding that an offence was such an offence had a direct effect of the sentence imposed. It is not simply a threshold or gateway to an application for another procedure which would subsequently determine an offender's sentence disposition. In this case the amendments directly affected the ultimate sentence which would be imposed.

[24] In *R.v. Nikolovski* [2005] O.J. No 494 (Ont. C.A.) the Ontario Court of Appeal determined that whether an offence committed by an offender met the seriousness personal injury offense designation is very much dependant on the facts of the case.

This is in keeping with the principle that sentencing is an individualized procedure applying those principles of sentencing which I will refer to below.

[25] In *R.v.Lebar*, [2009]O.J. No 895 (ONSCJ), the case that counsel spoke of, the Ontario Superior Court of Justice dealt with a case remarkably similar with the one before me today. There, the offender was 50 year of age but had no criminal record. He was down on his luck, if you will, having lost his job and his EI benefits had run out. He entered a liquor store, displayed a knife and said this is a robbery. He left with over $900; no one was injured. Like this case, the offender did nothing to conceal his identity. In a very thorough analysis Justice Warkentin in that case considered the same issue that I addressed above. I agree completely with her analysis and need not repeat it here. In that case the court found that the offender had not committed a serious personal injury offence. A Conditional Sentence was an available disposition and the court made that sentence.

[26] I agree that the offence need not be objectively serious. In that sense I agree with the *Goforth* analysis and the comments of Justice Hill in the Ontario case I referred to earlier - *R.v. Nikolovski*-. However, this does not alter the result of my conclusion.

[27]Furthermore, in my opinion, the section should not be interpreted liberally to broaden the exclusion of offenses for consideration of a Conditional Sentence Order. I agree with Mr Mattson in that regard. Such an interpretation would exclude all offenses, practically, under section 344. If Parliament wanted to exclude all offenders convicted of an offense under section 344 that otherwise would not have met the definition of serious personal injury offense it could have easily provided for that. It chose not to do that.

[28]In *R.v. C.D.*, [2005] 3 S.C.R. 668 a decision of the Supreme Court of Canada which considered the term violent offences under the *Youth Criminal Justice Act, S.C. 2002, c.1.* the Court, - I recognized that different principles apply there - found that violent offences required that harm result. Obviously, there was no demonstrated harm in this case and attempted violence, if you will, would have a similar meaning. This did not occurr in this case. Accordingly, applying a similar analysis as in the *Lebar* case I arrive at the same conclusion. Mr. Hendsbee's conduct did not involve the "use" or "attempted use" of violence. While clearly they may have been an implicit threat, this was not a use or attempted use of violence. Mr. Hendsbee did not direct the knife toward the clerk or brandished it as that term is often used. He did not

utter any threatening words or gestures. In fact he apologized. He simply showed the knife. He never tried to hide his identity.

[29]I recognize though that it would be possible to interpret the words to reach a result that it could constitute violence. However, for the reasons I express above I do not believe that this section should be so broadly interpreted.

[30] Finally, I do not believe his conduct endangered the clerk, his life or safety or the safety of others or was likely to do so. I recognize that there is always a potential for more serious consequences. However, it is not clear what the likely outcome may have been had other contingencies arose; for example, the clerk had resisted or others had come in to the store. Examining the entire context, in my view it could not be found that it was likely that anyone's safety or life or psychological well being was or would be endangered or damaged. To my opinion this case does not constitute a serious personal injury offense.

IS A CONDITIONAL SENTENCE APPROPRIATE?

[31] The sentencing options in this case, in my view, include the consideration of a conditional sentence order. The other prerequisites are well known for consideration of a conditional sentence order. They are included in section 742.1 of the Criminal Code and have been considered by the Supreme Court of Canada in *R. v. Proulx* [2000] 1 S.C.R. 61 and the other judgments of the Supreme Court of Canada at the same time. The Nova Scotia Court of Appeal has considered them on numerous occasions as well and I need not to repeat again. The applicable principles which are required are well known to counsel and I have expanded on them in the past.

[32] As I determined above the range of sentencing includes a term of less than two years imprisonment. I will explain in more details below why this is appropriate. Clearly a suspended sentence and probation is not appropriate. In my opinion the offender is not a risk for the safety to the community. This was an isolated offense, in my opinion, and out of character which was committed by a desperate young man who, at least, he says wanted to buy food and who had considerable conflict with his father. There is no criminal record and no history of violence or assaultive behaviour.

[33]Finally, let me consider whether conditional sentence is consistent with the fundamental purposes and principles of sentencing. I will at the same time explain

why if it is a sentence below two year or a Conditional Sentence is considered to be lenient for this type of offence, it is an appropriate disposition.

[34] The purpose of sentencing is to protect the public and maintain respect for the law. This is achieved by the imposition of “just” sanctions which have various objectives. It should be noted that sanctions should be “just” connoting a measure of proportionality and restraint.

[35]Choosing the appropriate objectives and applying the “just” sanctions is done using the principles of sentencing: proportionality, parity and restraint. They are codified now in the Criminal Code sections 718 et seq. The fundamental principle is proportionality. Section 718.1 provides that a sentence must be proportionate to the gravity of the offense and the degree of responsibility of the offender.

[36] It is clear that there are serious aspects to this offense and that robbery of store clerks is always a very concerning matter in small communities particularly. However, this offense did not occur very late at night or at a remote or isolated area. The offender was not masked or his identity hidden nor were there any other threats uttered or acts of violence used or attempted. There was no injuries - no physical or psychological harm. His conduct was in desperation for the situation that he found himself in. The gravity of this offence, a robbery, was at the lower end of the scale for these types of offenses, in my opinion. The offender was the only one responsible, however for his action and accordingly carries a commensurate degree of responsibility.

[37]I agree that deterrence and denunciation are always paramount in these types of offenses and are necessary objectives to achieve. However there was not evidence or any indication that these types offenses are prevalent in this area a comment which is often included in sentencing decisions of these types of offenses.

[38]Deterrence and denunciation however are not the only objectives. This offender, in my opinion, could and would benefit from treatment and counselling to identify and address what is clearly a troubling conflict in his family and which lead him to be on the street in a situation he found himself in today. In my judgment this offender does not live an antisocial or criminal lifestyle. I say this having regard to the many,

many individuals I have sentenced in the last ten to twelve years on the bench. In my view there is real potential that this young man can turn his life around if he has been given an opportunity to do that. That, in my view, is best achieved by a community based sentence where there can be some effort at least for this young man to reconcile his differences with his family and gain a measure of self-respect and dignity. A Conditional Sentence Order can achieve this while at the same time delivering the objectives of denunciation and deterrence. If a conditional sentence order is considered a lenient disposition, although I am not entirely convinced of this, it is one, in my opinion, which is linked to real opportunity for rehabilitation while being proportionate to the gravity of the this particular offense. Sending this young man to a penitentiary given the circumstances of this offense would, in my opinion, not be consistent with the purposes, principles and objectives of sentencing.

DISPOSITION

[39] I am satisfied that a term of imprisonment served in the community of two years less one day together with credit for remand time is a fit and proper disposition and it is a sentence that I would make in this particular proceedings. As I mentioned elsewhere, on other occasions, Conditional Sentence are not so called lenient sentences although they are less burdensome than jail or penitentiary. Accordingly, taking into account 72 days of remand time and the usual two for one credit which is approximately 144 days and I have rounded that , if you will, to approximately three months; deducting that from the two years less one day - the sentence will be a sentence of 21 months imprisonment to be served in the community on a conditional sentence order.

[40] [The court continues to set out the terms and conditions of the conditional Sentence Order]

A. Tufts, J.P.C.