IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Cross, 2005NSPC23

Date: 20050622
Docket: 1199318
1199319
1199320
Registry: Halifax

Between:

Her Majesty the Queen

v.

James Everett Cross

Restriction on publication: S. 486(3) Ban on Publication of complainant's name

Judge: The Honourable Judge James H. Burrill

Heard: May 22, 2005, in Halifax, Nova Scotia

Written Decision: June 22,2005

Charge: 266(a)CC
271(1)(a) CC
279(2) CC

Counsel: Rick Woodburn, for the Crown
Roger Burrill, for the Defence

By the Court:

[1] S. 490.011 of the Criminal Code was proclaimed in force on December 15, 2004. It creates obligations for persons who have been convicted of designated offences, including sexual assault, to register under the Sex Offender Information Registration Act (S.O.I.R.A.). The legislation requires the court to make the order as soon as possible after sentencing.

[2] James Everett Cross, was found guilty of assault (S. 266(a) C.C.), sexual assault (S. 271 C.C.) and unlawful confinement (279(2) C.C.). The offences occurred on May 7, 2002, he was convicted on June 23, 2004 and after several adjournments the matter was before me for sentencing on January 6, 2005. Mr. Cross was sentenced to 42 months imprisonment. The Crown sought an order under the S.O.I.R.A., but the defence objected on the basis that it would violate s. 11(i) of the Canadian Charter of Rights and Freedoms.

[3] This issue was deferred and counsel have now had an opportunity to provide the court with written submissions and make further oral presentations relating to the applicability of the S.O.I.R.A. to this case.

[4] Section 11(i) of the Charter provides that:

> Any person charged with an offence has the right
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[5] Obviously the offences committed by Mr. Cross occurred prior to the proclamation of the S.O.I.R.A. The issue is whether the requirements of the legislation constitute a "punishment" within the meaning of s. 11(i).

[6] The defence argues that they do and that s. 11(i) exempts Mr. Cross from a registration order. The Crown argues that the requirements of a registration order made pursuant to the S.O.I.R.A. do not constitute a "punishment" and, therefore, do not violate section 11(i). The Crown asks the court to impose a registration order in Form 52.

Requirements of the Legislation

[7] Under the S.O.I.R.A. if a registration order is made Mr. Cross would be required, as a sex offender, to report in person to a registration center that serves the area in which his main residence is located. Initial reporting must occur within 15 days after his release from custody after serving the custodial portion of his sentence. He would not be able to leave Canada until he has reported. After the initial reporting he would have to report annually and within 15 days of changing his main residence, changing his name or returning to Canada. He would be required to provide his name, date of birth and gender, his address(es), his employment or volunteering address(es), his educational address(es), his telephone and pager numbers and his physical description (height, weight and distinguishing marks). He could be asked details of his convictions. He could be photographed and in some cases, fingerprinted. He would also be required to provide information of intended and actual absences from and returns to his residence in or out of Canada for periods exceeding 15 days. These last notifications may be by registered mail and he could not be required to report this information in person.

Failure to comply with the registration requirements could result in the case of a first offence to a fine of $10,000 and/or imprisonment for six months. In the

case of a second or subsequent offence to a fine of $10,000 and/or a term of imprisonment of two years.

[8] Under s. 490.013 of the Criminal Code the orders are in force for 10 or 20 years or for life, depending on the maximum punishment for the offence in question. In Mr. Cross' case, the order would be for 20 years as the maximum term of imprisonment for indictable sexual assault is ten years.

The Case Law

[9] The definition of punishment for the purposes of section 11(i) of the Charter was considered by Steele J.A. in **R. v. Lambert** (1994), 93 C.C.C. (3d) 88 (Nfld**.** C.A.) at p. 93:

> **"**As I construe s. 11(i) of the Charter "punishment" means or includes the formal sentence of the court (which is the punishment inflicted for the commission of the offence) but in addition, also means or includes any other "severe handling" or harsh or injurious treatment". The term "punishment" appearing in s. 11(i) of the Charter is not confined to the narrow legal definition that corresponds exclusively to the formal sentence of the court. Punishments may also encompass any coercive or punitive treatment likely to discourage or deter an accused (and sometimes others) from a repetition of criminal activity.

> The framers of the Canadian Charter of Rights and Freedoms knew or are presumed to have known that the Criminal Code authorizes a sentencing judge, in addition to imposing imprisonment or a fine, or both, to grant various orders or declarations that may qualify as a further punishment. Such orders may comprise an integral part of the punishment levied by the sentencing judge. Section 199(3) "forfeiture"; s. 100(1) or (2) :firearms prohibition"; s. 259(1) or (2) "driving prohibition"; s. 725 "restitution to victim", and s. 737(1) "probation orders", and the like, all are examples of orders made at the time of sentencing that have the potential to be additional punishment. Whether such orders are or are not part of the formal sentence or deemed to be a "punishment" within the anticipation of s. 11(i) of the Charter is another matter and one that will not be considered here. The only observation to be made is that many of the orders or declarations similar to those above are ancillary or secondary to the primary penalty of imprisonment or a fine.....
>
> Choice of the term "punishment" rather than sentence in s. 11(i) of the Charter is significant. The Charter was not written in diction intended exclusively for the eyes of the legal profession and the judiciary, and I suspect the word "punishment" was adopted as it is less formal, broadly understood and capable of a generous and far-reaching interpretation."

[10] In **Lambert** the court concluded s. 741.2 of the Criminal Code, which restricts parole eligibility, does amount to punishment within the meaning of section 11(i).

[11] In **R. v. Murrins** (2002), 162 C.C.C. (3d) 412, the Nova Scotia Court of Appeal dealt with whether the ordering of a D.N.A. sample was a punishment. At paragraph 107 Bateman J.A. said:

> "I am not persuaded that the ordering of a D.N.A. sample is "punishment" within the meaning of s. 11(i) of the Charter. Its impact on the offender is not

> comparable to the control central to imprisonment, house arrest or even reporting. It does not constitute a deprivation or hardship such as that which accompanies a restitution order, a fine or even a firearms prohibition. In no direct way does the order put limits upon the future behaviour of the offender. I do not agree that it constitutes "severe handling" or "harsh treatment". Nor is it a direct consequence of the conviction. The court cannot order a D.N.A. sample on its own motion - there must be an application by the Crown. It is not within the range of tools from which the judge may craft the sentence."

[12] The case of **R. v. Have**, [2005] O.J. No.388 (Ont. C.J.) dealt with whether the impact of a S.O.I.R.A. registration order on a particular defendant's privacy and security of the person would be grossly disproportionate to the public interest. At paragraph 12 Duncan J. said:

> "The impact of an order on any offender, including the defendant, is substantial. Subjecting the individual to an obligation for ten years enforceable by the prosecution and imprisonment is, in itself, a significant infringement on liberty. The subject is required to provide information that he otherwise could keep private and to which the state would have no right of access. I agree with Hearn J. in Dyck that there is a substantial stigma attaching to an individual who is subject to registration, even if only in his mind. It may undermine treatment, rehabilitation and re-integration into the community."

I have also found it helpful to review **Smith et al. v. Doe et al.** (01-729)538 U.S. 84(2003) where the Supreme Court of the United States considered whether the Alaska Sex Offender Registration Act (which requires more onerous reporting and public dissemination of registration information) constituted a punishment and thereby violated the Ex Post Facto Clause of the U.S. Constitution. In a 6:3 split

decision the court held that the Alaska law was not punitive and not in violation of their Constitution.

I have considered the full judgement of the court carefully, but have found the dissenting judgement of Justice Stevens to be most persuasive. In delivering his dissent he comments:

> "It is also clear beyond preadventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offence, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a criminal conviction under these statutes provides both a sufficient and necessary condition for the sanction.

And further;

> ".....in my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment. It is therefore clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted."

[13] In determining whether the requirements of the S.O.I.R.A. constitute a "punishment" an examination of the intent of parliament in enacting the legislation

may be helpful. If parliament's intent in enacting the legislation was to impose additional punishment that would likely determine the issue. The purpose and principles of the S.O.I.R.A. are outlined in Section 2 of the Act:

> 2.(1) The purpose of this Act is to help police services investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders.
>
> (2) This Act shall be carried out in recognition of, and in accordance with, the following principles:
>
> (a) in the interest of protecting society through the effective investigation of crimes of a sexual nature, police services must have rapid access to certain information relating to sex offenders;
>
> (b) the collection and registration of accurate information on an ongoing basis is the most effective way of ensuring that such information is current and reliable; and
>
> (c) the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community as law-abiding citizens require that
>
> (i) the information be collected only to enable police services to investigate crimes that there are reasonable grounds to suspect are of a sexual nature, and
>
> (ii) access to the information, and use and disclosure of it, be restricted.

This declaration by parliament suggests that the intent was not to provide additional "punishment".

[14] Further evidence to support this proposition can be found in the testimony of the Hon. Anne MacLellan before the Standing Senate Committee on Legal and Constitutional Affairs on March 11, 2004 where she said, referring to the S.O.I.R.A. :

> "Strictly speaking, it is not part of the sentence at all. By design, it is an administrative consequence of the conviction and is proportional to the objectives of the legislation."

And further;

> "I emphasize that the retrospective provisions of the bill are not punishment. They are designed in a minimally intrusive manner and they are fully proportional to the purposes of the legislation."

The combination of the stated purpose and principles together with the testimony of the Minister make it clear to me that parliament's intent was not to punish Mr. Cross or any other person who would be subjected to such an order.

[15] That, however, does not end the inquiry. I must now consider the effect of the legislation and determine whether its effect is punitive. If the effect of

the law is punitive the S.O.I.R.A. may still be properly characterized as a "punishment" regardless of parliament's intent.

[16] An examination of the legislation makes it clear that parliament carefully designed this law to separate it from the formal sentencing for the index offence. Justice Minister MacLellan is correct when she testified that "strictly speaking" the imposition of a registration order is not part of the actual sentencing. The legislation directs the presiding judge to make the order "as soon as possible ***after*** sentencing".

[17] The legal separation of the registration order from sentencing is somewhat artificial and in my view it would hardly be apparent to an offender before the court. In fact, in this case, the registration order was requested by the Crown as part of its general submissions on sentencing. While imposition of the order may be legally separated from the formal sentencing it is, in reality very much one of the sanctions that may be imposed upon the offender to track and/or monitor their behaviour in the community.

The fact that the registration order is not part of the formal sentence is not despositive. I agree with the court in **Lambert** (supra.) that "punishment" is not

confined to the narrow legal definition that corresponds exclusively to the formal sentence of the court. Considering the authorities to which I have referred I conclude that "punishment" within the meaning of section 11(i) also means any deprivation or hardship that places a limit on the future behaviours of an offender and severely impairs restricts their liberty.

[18] While not necessarily adopting the definition set out above, but in considering the definition of "punishment set out in **Lambert** Belanger J. in **R. v. Rouschop** (2005), O.J. No. 1336 (Ont Ct. J) considered the very issue that is now before me and held that the registration obligations under the S.O.I.R.A. did not constitute a "punishment" within the meaning of section 11(i). At paragraph 30 he says:

> "In my opinion, an obligation restricted to the annual provision of information such as that required by the S.O.I.R.A., unencumbered by physical or geographical restrictions of any sort in a confidential process guaranteed by criminal sanction can hardly be described as "severe handling" or "harsh or injurious treatment". While it is no doubt true that knowledge by a sex offender that his locations is known to authorities may have a deterrent effect, that is an incidental consequence and is not determinative of the issue. Fingerprinting, photography or taking of blood samples might similarly be said to have a deterrent effect on individuals contemplating criminal activity. However, appellate courts which bind me have determined that they do not constitute punishment."

And at paragraph 35 says:

> "Strictly speaking the order does not limit future behaviour in the way that a parole order, probation order, weapons order, driving prohibition order, a prohibition order under CC s. 161 etc. can. It merely imposes an obligation to provide statistical information periodically albeit that obligation can be imposed for a very long time. The obligations imposed in my view cannot be fairly described as constituting a significant deprivation or a hardship."

With respect I disagree. I am satisfied that the defence has met the persuasive burden of demonstrating that the requirements of a registration order meet the definition of punishment that I have set out. Unlike the effect of a DNA order which requires, at most, the minor imposition of having one's finger pricked on a single occasion a registration order requires much more. A registration order has a direct and lasting impact on the offender. It requires that the offender submit to what Bateman J. in **Murrins** (supra.) described as the control central to reporting for a long period of time. The obligations imposed on the offender can not be diminished by simply characterizing the information as statistical. The requirements of a registration order are, in my opinion, a severe infringement of the individual's liberty which is undiminished by attempting to call it an

administrative consequence of conviction rather than a punishment. In the case at bar, Mr. Cross would be required to comply with the order for twenty (20) years. He would have to report in person, at least annually, to the Registration Center closest to his primary residence. I am advised that there are eight Registration Centers in Nova Scotia and depending on the location of his residence this could require the offender to undertake significant travel in order to meet his reporting obligations. While the order imposes no geographical restrictions nor it does prevent the offender from engaging in any particular activity, it does place restrictions on the activities that they can engage in without providing information to the state. The offender can not, for example, take a vacation for more than fifteen (15) days unless they provide what is essentially their itinerary to the authorities.

It is not one, but a combination of the requirements under the S.O.I.R.A that cause me to conclude that a registration order is indeed punitive in effect. That fact combined with the fact that the requirements are imposed on individuals who have been convicted of an index offence and no one else (unlike a s.810.1 order which can be imposed on anyone regardless of conviction) cause me to conclude that a registration order it is indeed a " punishment" within the meaning of 11(i) of the

Charter. To categorize it as something else is, in my opinion, an attempt to draw a distinction where none exists.

[19] While a registration order may be an appropriate and proportional response to the risk of recidivism posed by sexual offenders it is nevertheless a punishment. Since it is a punishment that was proclaimed after the commission of Mr. Cross' crime it would violate s.11(i) of the Charter to impose it in this case. The Crown has not argued that the retrospective application of the legislation is saved by section 1 of the Charter and there is nothing before me to allow me to conclude that the Charter's saving provision should apply.

Conclusion

[20] Accordingly, the Crown's application for a registration order is dismissed.