

Date: 20011211
Docket: Cr. S.AT. No. 2617

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: R. v. J.R. C., 2002 NSSC 1]

Between:

J. R. C.

Appellant

-and-

Her Majesty the Queen

Respondent

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Heard Before: The Honourable Justice D.L. MacLellan

Place Heard: Antigonish, Nova Scotia

Date Heard: December 11, 2001

Decision: December 11, 2001 **Written Release:** January 2, 2002

Counsel: Lawrence O'Neil, Esq., for the appellant
Ronald J. MacDonald, Esq., for the respondent

MACLELLAN, J.: (Orally)

[1] The appellant here, J. R. C., appeals his conviction by Judge John Embree, acting as a Judge of the Youth Court of Nova Scotia on the 5th day of July, 2001 on a charge of breach of probation under Section 26 of the *Young Offenders Act*.

[2] The appellant was charged before Judge Embree with the offence that between the 2nd day of August, 2000 and the 4th day of August, 2000 at or near Antigonish, in the County of Antigonish, Province of Nova Scotia, he did while bound by a probation order made by Judge John D. Embree, a Judge of the Youth Court of Nova Scotia on the 4th day of May, 2000 wilfully fail to comply with such order, to wit: keep the peace and be of good behaviour, contrary to Section 26 of the *Young Offenders Act*.

[3] The record before me indicates that following the making of the probation order on May 4th, 2000, the appellant was convicted of the offence of theft and subsequently charged with breach of probation. The issue before Judge Embree on July 5th, 2001 was whether Section 23 of the *Young Offenders Act* was complied with at the time the appellant was placed on probation.

[4] Section 23(3) of the *Young Offenders Act* provides as follows:

Section 23(3)

(3) Where the Youth Court makes a Probation Order under paragraph 20(1)(j), it shall:

- (a) cause the order to be read by or to the young person bound by the Probation Order;
- (b) explain or cause to be explained to the young person the purpose and effect of the order and ascertain that the young person understands it; and
- (c) cause a copy of the order to be given to the young person and to a parent of the young person, if the parent is in attendance at the proceedings against the young person.

[5] The trial before Judge Embree on July 5th, 2001, proceeded by way of agreed facts in that the actual probation order was introduced into evidence before Judge

Embree to prove that the appellant was in fact on probation. There appears to be no issue but that he had been convicted of a subsequent offence and therefore would be in violation of the requirement to keep the peace and be of good behaviour as mandated by the probation order.

[6] The argument before Judge Embree dealt with whether Section 23(3)(c) had been complied with. The central issue on that was in regard to the last paragraph on the probation order which provides for confirmation that the parent has received a copy of the order. In the probation order introduced before Judge Embree, this paragraph was not completed. It is important, therefore, to outline the options available on the probation order itself.

[7] The probation order provides space for the young person to acknowledge that he has received a copy of the order and that it has been explained to him. It further provides as follows following the acknowledgement of the young person. The wording is as follows:

_____ Parent or Guardian of Young Person Not Present

_____ Parent or Guardian of Young Person Present

Note: If a Parent of the Young Person is present, complete the following: I hereby acknowledge receipt of a copy of this document.

Witness:

Parent or Guardian of the Young Person

[8] I find that this paragraph anticipates that the Youth Court clerk would check either that the parent or guardian was not present or the parent or guardian was present and a copy of the order had been provided to that person. Defence counsel at trial before Judge Embree argued that since neither situation had been checked that the Crown had not proven that Section 23(3)(c) had been complied with.

[9] In his decision Judge Embree said:

In all the circumstances here, I'm satisfied that the provisions of Subsection 3 of Section 23 have been complied with, and that the documentation before me, on its

face, and given a logical interpretation, confirms that. In my view, Subsection 3 has been complied with, and in the absence of any evidence that would raise a reasonable doubt about that, combined with all of the other evidence that's before me by agreement here, I'm satisfied that the breach of Section 26 is made out, that all of the elements of that have been established beyond a reasonable doubt, and that the provisions of Section 23(3) are met, and I'm prepared to make, and do make, a finding of guilt on the Section 26 matter.

[10] Counsel for the appellant argues that the case of *R v. L.M.* (Ont. C.A.) [1994] O.J. No. 1956, holds that the Crown must prove compliance with Section 23(3)(c). Otherwise, the probation order is not valid as found by that Court.

[11] The Crown relies on the case of *R v. D.C.A.* [2000 A.J. 335] from the Alberta Court of Appeal which dealt with the same issue and found that it would depend on the particular facts as to whether strict compliance with that section was necessary or not.

[12] Crown counsel also argues that the principle of regularity would presume that Court staff had in fact given the appellant's parent or guardian a copy of the order if the parent was present, and therefore, the fact that the section was not indicated on the probation order should not affect its validity.

[13] Counsel for the appellant argues that the trial judge here imposed a duty or burden on the accused to prove that the section had not been complied with instead of a burden on the Crown to prove that it had been complied with.

[14] I agree with counsel for the appellant.

[15] In this case, the Crown proceeded by simply introducing a copy of the probation order. The Crown had the right to call evidence to clear up any misunderstanding caused by the wording in the probation order. I do not believe the principle of regularity would assume that the parent was not present in this case since the clerk did not check that line of the order. The Crown could easily have called evidence on that point and therefore avoided the issue raised by the form used by Court staff.

[16] I also note that Section 23(6) of the *Act* provides that a failure on the part of the offender to endorse the probation order does not affect the validity of the order. Such a provision is not present in relation to Section 23(3).

[17] If the Crown relies solely on the probation order as evidence of compliance with Section 23(3) it must be clear from that document that the section had been complied with. Otherwise, there is a reasonable doubt and it must be resolved in favour of the accused.

[18] I find that the trial judge was wrong to conclude that compliance with Section 23(3) was proven beyond a reasonable doubt by the wording of the probation order itself in this case.

[19] Here, also, where I am faced with two conflicting decisions from two different Courts of Appeal in Canada, I would indicate that in this case I prefer the reasoning of the Ontario Court of Appeal, and in light of the fact that the Crown did not prove here that Section 23(3)(c) had been complied with, the probation order is of no force and effect and therefore the charge of breach of probation should be quashed.

[20] I would allow the appeal and quash the conviction.

J.