

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Nimchuk, 2002 NSSC 285

Date: 20021231

Docket: C.R. 169495

Registry: Halifax

Between:

Her Majesty the Queen

v.

James C. Nimchuk

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: December 31st, 2002, in Halifax, Nova Scotia

Written Decision: January 2nd, 2003

Counsel: Timothy McLaughlin, for the Crown
James C. Nimchuk, Self-represented

By the Court:

BACKGROUND

- [1] James Nimchuk was apprehended the 17th of December, 2002 and brought before me at which time I remanded him for hearing on an alleged breach of his conditional sentence, in particular, breach of the statutory condition, to keep the peace and be of good behaviour, by committing an armed robbery. The hearing on the breach of conditional sentence must be within 30 days and accordingly, I set the matter down before myself for Monday, the 30th of December 2002.
- [2] On the 20th of December, Mr. Nimchuk appeared before me seeking bail so as to be able to be free to spend some time with his young daughter for the Christmas holiday period and his request for bail was denied. Mr. Nimchuk acknowledged that separate and apart from the alleged breach of his conditional sentence, which he is set to be tried on the 30th of December, he had already committed a serious breach of his conditional sentence by committing a break and enter for which he was sentenced to imprisonment for four months and during the period of incarceration his conditional sentence was postponed.

[3] On the 30th of December 2002, I conducted a hearing on the s.742.6 breach and after hearing evidence and representations by the Crown and Mr. Nimchuk, who represented himself, I found the breach by James Nimchuk of his statutory term to keep the peace and be of good behaviour established by his robbery at an Irving Service Station, during which he brandished a machete type knife and was driven off by the clerk who produced an iron bar and chased Mr. Nimchuk out of the service station. This finding is not a finding of guilt of the offence of robbery, the charge for which he faces in Provincial Court under the *Criminal Code* where the Crown will be required to prove his guilt beyond a reasonable doubt. In a breach of conditional sentence, para. 742.6 of the *Criminal Code*, s.9 provides:

Breach of Condition

742.6 (9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may

- (a) take no action;

- (b) change the optional conditions;
- (c) suspend the conditional sentence order and direct

(i) that the offender serve in custody a portion of the unexpired sentence, and

(ii) that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or

(d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

[4] Mr. Nimchuk requested an adjournment of his sentence for the breach of conditional sentence until he appeared with his lawyer in Provincial Court in the a.m. the 31st of December 2002, and Mr. Nimchuk's request was granted and his sentencing on the breach took place starting 1:30 p.m., Tuesday, the 31st day of December 2002.

SENTENCING OPTIONS ON BREACH OF CONDITIONAL SENTENCE

[5] The sentencing options available to the court are set out in s. 742.6 (9) of the *Criminal Code*, above, and the Crown seeks an Order terminating the conditional sentence and directing that Mr. Nimchuk be committed to custody until the expiration of the balance of his conditional sentence.

SUPREME COURT OF CANADA DIRECTION

[6] In *R. v. Proulx* (2000), 140 C.C.C. (2d) 449, Lamer, C.J.C. states at p. 472-473, paras. 38 and 39:

[38] The punitive nature of the conditional sentence should also inform the treatment of breaches of conditions. As I have already discussed, the maximum penalty for breach of probation is potentially more severe than that for breach of a conditional sentence. In practice, however, breaches of conditional sentences may be punished more severely than breaches of probation. Without commenting on the constitutionality of these provisions, I note that breaches of conditional sentence need only be proved on a balance of probabilities, pursuant to s. 742.6(9), whereas breaches of probation must be proved beyond a reasonable doubt.

[39] More importantly, where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. This constant threat of incarceration will help ensure that the offender complies with the conditions imposed: see *R. v. Brady* (1998), 121 C.C.C. (3d) 504 (Alta. C.A.); J.V. Roberts, *Conditional Sentencing: Sword of Damocles or Pandora's Box?* (1997), 2 Can. Crim. L. Rev. 183. It also assists in distinguishing the conditional sentence from probation by making the consequences of a breach of condition more severe.

SUMMARY OF DIALOGUE BETWEEN COURT AND MR. NIMCHUK

[7] Mr. Nimchuk was asked if he wished to present any evidence, make any representations, or speak as to matter of sentence and in summary, the following transpired.

[8] Mr. Nimchuk stated that he was willing to do the balance of his time and agreed with Mr. McLaughlin, the Crown prosecutor. Mr. Nimchuk went on to complain that when he was in prison for the earlier breach, he had applied

for help to address his problems of alcohol and drug addiction and nothing was done or made available to him. The court responded that it understood from visits to Springhill, Dorchester Penitentiary and Renous Penitentiary that generally speaking, problems of alcohol, drug addiction, learning disabilities, anger management, etc., were very difficult to address where the sentence term was relatively short and that in any event, the resources are simply not available to deal with the high percentage of inmates who have such difficulties and problems. The court inquired as to whether Mr. Nimchuk over periods that he has had his freedom whether or not he enrolled in AA?, enrolled in Narcotics Anonymous?, provided financial assistance for his young daughter? and such inquiries were met with silence but finally, the comment by Mr. Nimchuk that he was employed at times; then the court pointed out the obvious, that employed people make up a number of those who seek assistance with similar problems and that the real difficulty was that he took no measure of self-responsibility and suggested to him that he would not likely get anywhere until such time as he recognized the need to be responsible for his own actions and to personally address his problems. Mr. Nimchuk requested a transcript of all the proceedings dealing with the breach of conditional sentence and I advised him that I understood

the usual practice was to put the request in writing and in any event, since he has counsel on the criminal robbery charge, I suggested that he consult his counsel.

SENTENCE

[9] The Crown pointed out that Mr. Nimchuk, as of the date I initially remanded him, December the 17th, had only 28 days left of his conditional sentence and that s.742.6(12) of the *Criminal Code* provided:

742.6 (12) A conditional sentence referred to in subsection (10) starts running again on the making of an order to detain the offender in custody under subsection 515(6) and, unless section 742.7 applies, continues running while the offender is detained under the order.

[10] Mr. Nimchuk was arraigned in Provincial Court after his apprehension and remand in Supreme Court on the 17th of December and although he has not yet met the terms of bail set by the Provincial Court, I raised the question as to what credit he was entitled to for the time already incarcerated from the 17th of December to the 31st of December. I agree with the Crown that as s.742.6(12), above, answers that question and therefore, his 28 days commenced to run when I remanded him and the balance outstanding, at this point, of 14 days.

[11] I agreed with the Crown that the principle is vital; namely, that the presumption that one who breaches a conditional sentence should serve the entire balance of the conditional sentence is important to maintain the credibility necessary for conditional sentences. A conditional sentence is, by its very nature, an opportunity for the offender to avoid incarceration and all the consequences of incarceration by agreeing to abide strictly to a number of terms, including the statutory condition to keep the peace and be of good behaviour. Breaches can take many forms, including those that provide reasonable excuse, an obvious one where an individual has to be hospitalized in an emergency, and others on a scale would be minor; i.e., a late reporting in, compared to in this case, a commission first of a break and enter and now on the balance of probabilities, a robbery. I readily recognize that the *Criminal Code* does not direct paramountcy to any one option available to the court on breach of a conditional sentence. A conditional sentence is expressly conditional upon the offender living up to his undertaking to abide by the statutory conditions and any other conditions imposed, the totality of which presents the offender with an opportunity to avoid incarceration. The court must view every breach of a conditional sentence as being serious and depending on the totality of the circumstances,

the options contained in s.742.6(9) are available with the presumption being in favour of s.742.6(9)(d) to terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

[12] Please stand Mr. Nimchuk. In all the circumstances, you are sentenced to incarceration for the balance of your conditional sentence; namely 14 days.

J.