Werner v. H.M.T.Q., 2001 NWTSC 64

Date: 2001 08 17
Docket: S-1-CR-2001000019

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARVEY RONALD WERNER

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal from conviction and sentence on a charge of breach of probation. Conviction appeal dismissed; sentence appeal allowed.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER
Heard at Yellowknife, Northwest Territories
on May 24, 2001

Counsel for the Appellant: James D. Brydon

Counsel for the Respondent: Sadie Bond

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REASONS FOR JUDGMENT

[1] As was noted by Richard J. of this Court in *Werner v. H.M.T.Q.*, 2001 N.W.T.S.C. 20, there has been ill will for years between the Appellant and the municipal government and municipal officials of the town of Hay River. This is yet another of the many court proceedings arising from those circumstances.

[2] This summary conviction appeal was argued in an unusual manner. Mr. Brydon appeared as counsel for the Appellant, Mr. Werner, with respect to his appeal of conviction and sentence on the breach of probation charge which was heard on May 24, 2001 and on which I reserved judgment. However, the Appellant appeared on his own behalf with respect to his appeal of conviction and sentence on the mischief charge which arose out of the same circumstances. On August 16, 2001 I dismissed the latter appeal.

[3] These then are my reasons for judgment on the appeal arising from the breach of probation conviction.

Background

[4] On June 14, 2000, the Appellant was placed on probation by His Honour Judge Bruser of the Territorial Court after conviction on certain charges. One of the conditions of the probation was that "you are to post no signs in any vehicle of yours or elsewhere on public display, and on public property, in which you identify by name or otherwise any particular town employee or Mr. Scarborough."

[5] The Appellant appealed the conviction and sentence which had resulted in the probation order containing the condition just quoted. Prior, however, to the hearing of his appeal, he was charged, on August 23, 2000, with mischief and breach of the above-noted probation condition. These charges arose out of an encounter between the Appellant and the town of Hay River's by-law officer, Mr. Loupret and the breach of probation charge is the subject of these Reasons for Judgment.

[6] On January 11, 2001, the appeal of the June 14, 2000 convictions and sentences was heard in this Court by Richard J. and judgment was reserved. On January 12, 2001, the Appellant's trial on the mischief and breach of probation charges took place and he was convicted on both and sentenced to thirty days on each charge consecutive, for a total of sixty days. He had served 22 days when he was released on bail pending this appeal.

[7] On March 26, 2001, the decision of Richard J. on the appeal from the June 14, 2000 convictions and sentences was filed. In that judgment Richard J. dismissed the conviction appeals but allowed the sentence appeal only to the extent that he deleted from the probation order the condition about signs. In doing so, he referred to the constitutional right to freedom of expression and held that:

> The inclusion of the impugned condition was not fit or appropriate, and it was, with respect, an error in principle to include it in the June 14, 2000 probation order. The probation order having otherwise provided for precautionary measures, the man is entitled to be free to express his views.

[8] The appeal from the January 12, 2001 conviction for breach of probation essentially rests on two grounds:

> 1. that the conviction should be set aside because the condition found to have been breached was subsequently found not to be fit or appropriate;
>
> 2. that the trial judge erred in convicting the Appellant on the evidence before him and the conviction is unreasonable.

[9] The evidence before the trial judge relevant to the charge of breach of probation was that the Appellant had a sign displayed on top of his vehicle which said " CTV Act

- town by-laws shall be enforced by the by-law officer". Mr. Loupret was at the relevant time the only by-law officer in Hay River.

[10] Mr. Loupret testified that as he was leaving an automotive shop, the Appellant drove up, got out of his vehicle and started making remarks about paying attention to the sign on the vehicle. Mr. Loupret initially paid no attention to him but then, as per his testimony (page 10, lines 15 to 22):

> But he was insistent and he continued going on about his signs, that I was a piece of slime, that I'm going to be fired, that everybody's going to get it, and at that time when he mentioned that I glanced over to his vehicle to look and see what it was, and I couldn't really see it clearly so I walked over to it a little bit more, and it was a sign that was pertaining to me. ...

[11] At the conclusion of the Crown's evidence, an application was made by the Appellant's counsel for dismissal on the basis that the sign did not identify, by name or description, any by-law officer, but was merely a statement of fact, a statement of a provision of the *Cities, Towns and Villages Act,* as understood by the Appellant. The trial judge dismissed the application, referring to the prohibition in the probation condition against any sign that would "identify by name or otherwise any particular Town employee". He found that the words "the by-law officer" on the sign referred to the by-law officer, Mr. Loupret.

[12] The Appellant's testimony was that he had simply taken a phrase out of the *Cities, Towns and Villages Act,* R.S.N.W.T. 1988, c. C-8, and displayed it on his vehicle as part of his campaign to be elected as a town councillor on a platform of justice and fairness, meaning that every by-law officer has to obey the *Act.* The Appellant denied calling Mr. Loupret a slime but did admit that he told Mr. Loupret that (transcript page 65, lines 17 to 20), "... you'll have lots of time to rest once your (*sic*) fired".

[13] After hearing the Appellant's evidence, the trial judge stated that wherever his evidence conflicted with that of Mr. Loupret, he accepted the evidence of Mr. Loupret. He specifically referred in this regard to accepting Mr. Loupret's evidence that the Appellant called him a slime, pointed out the sign and asked him to look at it. He found that the Appellant did identify Mr. Loupret, a town employee, in the sign, contrary to the probation order, and convicted him of breach of same.

The Conviction Appeal

[14] At trial, the Appellant argued unsuccessfully that the probation condition prohibiting him from posting signs was an unwarranted infringement of his freedom of expression. In argument on the appeal before me, counsel for the Appellant relied of course on the fact that the probation condition was ultimately found by Richard J. to have been not fit or appropriate.

[15] The Appellant's argument is that a territorial court judge has only the jurisdiction given to him by statute and must exercise that jurisdiction subject to the *Canadian Charter of Rights and Freedoms*; any order made in breach of the *Charter* is, he argues, *ultra vires* and *void ab initio*. He relies in this regard on *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, [1989] S.C.J. No. 45. However, that case dealt only with the making of an order by an adjudicator and not with the consequences of a breach of such order.

[16] In my view, the Appellant's submissions in this regard are fully answered by a line of cases, which I will refer to below, which uphold the rule that a court order must be obeyed unless and until it is set aside, varied or suspended in proceedings taken for that purpose. This is the rule against collateral attack on court orders. In this case, of course, the Appellant did not merely seek to challenge the probation condition imposed by Judge Bruser at his trial on the charge of breaching that condition. He also appealed the probation order. However, he breached the probation condition prior to receiving a decision on the appeal and that is where he went wrong. The crucial question is whether the probation condition was in effect at the time that he breached it, not whether it was found at some later date to have been invalid. The probation condition was in effect on August 23, 2000, when the Appellant breached it. Therefore, he does not succeed in his argument that the conviction for breach of probation should be set aside on that ground.

[17] The Appellant's counsel argued that the rule against collateral attack should not apply because this case involves the Appellant's constitutional right to freedom of expression. He drew an analogy to a person charged with breaching a statute who defends himself by successfully challenging the constitutionality of the statute. He also argued that although the impugned probation condition may have been technically valid until it was set aside on appeal, it would be unjust to maintain a conviction for its breach where the conduct consists in exercising the constitutional right of freedom of expression. In this, he adopted one of the arguments considered by McLachlin J.

(as she then was) in her dissent in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129.

[18] In my view, however, it is clear that Justice McLachlin rejected the argument that a conviction should not be grounded on breach of an order later found to be constitutionally unsound and did not adopt the American jurisprudence which has accepted that argument in certain circumstances. Her dissenting reasons were later adopted by the Court in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, [1998] S.C.J. No. 31. In that case, Bastarache J. said the following about the appellants' challenge to a finding of contempt of a court-ordered injunction (at paragraph 51 of [1998] S.C.J. No. 31):

> On this issue, the appellants argue that they were not in contempt on two separate grounds. Their first ground of attack has to do with the validity of the order. As I have found above that the Federal Court has jurisdiction to issue the order, at its highest, the appellants can only suggest that that jurisdiction was exercised wrongly. Such an order is neither void nor nugatory, and violation of its terms constitutes contempt of court. The words of McLachlin J. in Taylor, supra, at pp. 974-75, are both definitive and eloquent on this point:
>
> In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the Charter violation until set aside. This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizen's safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.
>
> ... For the purposes of the contempt proceedings, [the order] must be considered to be valid until set aside by legal process. Thus, the ultimate invalidity of the order is no defence to the contempt citation.

[19] In *R. v. Domm* (1996), 111 C.C.C. (3d) 449 (Ont. C.A.), [application for leave to appeal to the Supreme Court of Canada dismissed May 8, 1997: [1997] S.C.C.A. No. 78], Doherty J.A., speaking for the Court, voiced the opinion that an allegation that an individual's constitutional rights have been violated by a court order cannot justify the abandonment of the rule against collateral attack (at p. 460). He added that where constitutional rights are implicated, the Court should be particularly concerned about

the availability of an effective remedy apart from collateral attack when considering whether an exception should be made to the rule against collateral attack.

[20] Here, the Appellant claims that the probation condition unjustifiably restricted his freedom of speech, especially considering that he was campaigning, or preparing to campaign, for a seat on town council. He did, however, have a couple of options. The first, which he took, was to appeal Judge Bruser's order. The second, if he did not wish simply to await the outcome of the appeal, was to apply to the summary conviction appeal court for an order under s. 683(5)(e) of the *Criminal Code* that the probation condition be suspended until the appeal was determined. He did not pursue that option. In my view, the availability of these remedies means that an exception to the rule against collateral attack is not appropriate.

[21] In his judgment in *Domm*, Doherty J.A. also dealt with the difference between the case where a person accused of breaching a statute defends himself by challenging the constitutionality of the statute and the case where, as here, a person accused of breaching a court order defends himself by challenging the constitutionality of that order. He referred to a number of reasons why court orders should be treated in a different manner than statutes. I agree with those reasons and would highlight for purposes of this case the policy- based reason he describes (at p. 465):

> ... Courts exist to settle disputes and determine rights. They do so by making orders. If those orders can be disobeyed and then challenged when proceedings are taken in respect of the breach, the authority of the court is reduced to little more than a mirage.

[22] The point Doherty J.A. makes is that to allow people to breach court orders which are in force and have not been set aside would mean there is no real force to court orders and no resolution to the disputes they are meant to resolve.

[23] Finally, the line of cases I referred to at the beginning of these reasons includes *R. v. Reed* (1994), 91 C.C.C. (3d) 481 (B.C.C.A.) [application for leave to appeal to the Supreme Court of Canada dismissed March 2, 1995: [1994] S.C.C.A. No. 404]. In that case, the British Columbia Court of Appeal noted that although the probation order at issue did not violate the *Charter*, even if it had done so, the appellant would have been required to obey it until he succeeded in having it varied or set aside.

[24] For the above reasons, I find there is no merit in this branch of the Appellant's argument. In my view, however, the fact that the probation condition was ultimately set aside is something which can be taken into account on the issue of sentence, which I will address further on.

[25] I turn now to the Appellant's argument that his conviction was not reasonable because the sign did not specifically refer to a town employee. He argues that the sign simply stated the law set out in the *Cities, Towns and Villages Act*, R.S.N.W.T. 1988, c. C-8 and that it did not "target" Mr. Loupret, which is what the probation condition was aimed at preventing. He argues that he was improperly convicted because the conviction was based solely on Mr. Loupret's interpretation of the sign.

[26] The sign did not simply say what s. 172(2) of the *Cities, Towns and Villages Act* says, which is that, "A by-law officer shall enforce those by-laws of the municipal corporation that he or she is appointed to enforce under section 171". The sign said in part that **town** by-laws shall be enforced by **the** by-law officer. When one considers the wording of the sign along with the fact that it was displayed by the Appellant on his vehicle in the town of Hay River, it is clear that the sign identifies "by name or otherwise any particular town employee". It identifies **the** by-law officer of the town of Hay River - Mr. Loupret.

[27] Furthermore, although the Appellant's testimony was rejected by the trial judge where it conflicted with the testimony of Mr. Loupret, on the balance of the Appellant's testimony, the trial judge was entitled to find that the Appellant knew that Mr. Loupret was the sole by-law officer in Hay River and that he was of the view that Mr. Loupret was not doing his job very well. That, combined with the testimony of Mr. Loupret that the Appellant drew his attention to the sign, at the same time making derogatory comments about Mr. Loupret and saying that he would be fired, in my view all constituted ample evidence upon which the trial judge could find that the sign identified Mr. Loupret and was in breach of the probation condition. None of this is dependent on Mr. Loupret's interpretation of the sign. Rather, the Appellant's actions as described by Mr. Loupret simply confirm the sign's stated meaning.

[28] For the above reasons, the appeal from conviction on the charge of breach of probation is dismissed.

The Sentence Appeal

[29] The trial judge sentenced the Appellant to 30 days in jail on the mischief offence and 30 days consecutive on the breach of probation. He has served 22 days, having been released on bail pending appeal in February of this year, so effectively he has served the sentence for mischief. Thus, counsels' submissions were directed at the 30 day sentence for the breach.

[30] Counsel for the Appellant (who was also counsel at trial) referred to the trial judge's characterization of the Appellant as "worse than incorrigible ... a nuisance and a pest", and submitted that 30 days in jail for being a pest is excessive. It might be noted that the trial judge's characterization followed counsel's own submission that the Appellant is eccentric and someone who marches to his own drummer. In any event, these descriptions simply go to the Appellant's suitability for probation or any other form of court-ordered supervision. He was being sentenced, not for being a pest, but for breach of a court order, a probation condition that was imposed because of the ongoing dispute the Appellant had with the town of Hay River and its employees and his inappropriate and unlawful interactions with those employees. The criminal record presented to the trial judge contained four recent convictions, two for causing a disturbance, one for breach of probation and one for assault, all of which involved town employees.

[31] Considering the deference to be shown to the trial judge on the matter of sentence, I would not interfere with the sentence imposed, except for the fact that the probation condition has since been set aside on appeal.

[32] In *Taylor*, McLachlin J. referred to the following extract from R.J. Sharpe, *Injunctions and Specific Performance* (1983), at p. 259:

> It is well established that a contempt application is not answered by the assertion that the injunction was erroneously granted or even that it was void. The proper course is to move against the injunction or to appeal and the court will not permit the original order to be attacked collaterally in contempt proceedings. Again, however, *courts have considered the wisdom or validity of the initial decree in determining the appropriate sanction.* (Emphasis added.)

[33] In all the circumstances, and considering that Richard J. did set aside the probation condition, I allow the sentence appeal and reduce the thirty day sentence for breach of probation to time served and make it concurrent to the sentence on the mischief charge. Accordingly, the Appellant has served all of his sentence.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 17th day of August, 2001

Counsel for the Appellant: James D. Brydon
Counsel for the Respondent: Sadie Bond

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