Werner v. H.M.T.Q., 2001 NWTSC 20

Date: 2001 03 26
Docket: CR 03898

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARVEY RONALD WERNER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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a) Appeal from conviction for breach of probation. Appeal denied.
b) Sentence appeal from imposition of a further probation order as being unreasonable and punitive in nature. Appeal granted in part.

Appeal heard: January 11, 2001

Reasons filed: March 26, 2001

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Appellant: James D. Brydon
Counsel for the Respondent: Loretta Colton

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REASONS FOR JUDGMENT

[1] The background to the within appeal is an *animus* which has existed for years between the appellant and the municipal government and the municipal officials of the Town of Hay River. There have been numerous proceedings, both civil and criminal, before the Courts. I take judicial notice of the fact that the appellant has been a thorn in the side of town officials for a number of years. Being a nuisance, however, does not mean that one is necessarily a criminal.

[2] For purposes of these reasons, I set forth the following chronology:

1. January 19-20, 1999 and February 8, 1999: The appellant attended at town hall and got himself involved in an altercation with town hall officials, and in doing so caused a public disturbance.

2. April 15, 1999: Following a trial, the appellant was convicted by His Honour Judge Bourassa of two counts of causing a disturbance, contrary to s.175(1)(a) C.C., arising out of the January 19-20, 1999 and February 8, 1999 incidents. In submissions to Judge Bourassa, the Crown stated its concern that the sentence

disposition ought to provide for a mechanism to keep the appellant and town hall officials "separate and apart". On April 15, 1999 Judge Bourassa sentenced the appellant to three days' imprisonment followed by 18 months' probation. The conditions of the probation order, in addition to statutory conditions, were:

> a) have no contact directly or indirectly with any staff member working at the Hay River Municipal Office, unless through counsel,
>
> b) not to be on the property at 73 Woodland Drive, Hay River [the street address of town hall] N.W.T., or in town hall except for public town council meetings, and
>
> c) report to probation officer once per month.
>
> (emphasis added)

3. May 14, 1999: The appellant filed an appeal of the conviction and the sentence imposed. On January 4, 2000 this Court dismissed that appeal.

4. February 24, 2000: The appellant parked his vehicle on the public street directly in front of town hall just before 5:00 p.m. Three large signs were displayed on his vehicle. These signs read as follows:

   - "By-law is a liar"
   - "Mr.-Mrs. was not truthful in a Court Law"
   - "Hay River Town Manager took a good idea and twisted it into railroad justice, as Judge Halifax put it, completely unreasonable."

   Charles Scarborough, town manager, saw the appellant and the signs from within town hall. He took a camera and went outside to take photos of the appellant, his vehicle and the signs. In the course of Mr. Scarborough doing so, a verbal confrontation ensued between the two, and the appellant spat on Mr. Scarborough's face.

5. June 14, 2000: Following a trial, the appellant was convicted by His Honour Judge Bruser, arising out of the February 24, 2000 incident, of the following offences:

   a) assaulting Charles Scarborough by spitting on him, contrary to s.266 C.C.

b) failing to comply with the April 15, 1999 probation order, in particular the condition that he have no contact directly or indirectly with any staff member working at the Hay River Municipal Office, contrary to s.733.1 C.C.

6. June 14, 2000: Judge Bruser sentenced the appellant to 14 days' imprisonment for the assault conviction and one day imprisonment for the breach of probation conviction. In addition Judge Bruser placed the appellant under a further probation order. Conditions of the new probation order, in addition to statutory conditions, were:

a) you are to have no contact or communication directly or indirectly with any employee of the Town of Hay River at any time at the Town of Hay River Municipal offices or on the Town of Hay River Municipal Office property. Exceptions:

(i) unless you are asked by a Town of Hay River Municipal Office employee to attend at the municipal office,

(ii) you may attend at the Town of Hay River Municipal Office for any public meting to be held there,

(iii) you may attend at the Town of Hay River Municipal Office for the purpose of running in any municipal election,

(iv) you may attend at the Town of Hay River Municipal Office for the purpose of paying any town bills that are then due and owing, or to discuss them, after which you are forthwith to leave and while there not to discuss anything other than the stated purpose.

(b) you are to have no contact or communication directly or indirectly with any of the Crown witnesses in this case, except within one of the previously mentioned exceptions,

(c) you are to have no contact or communication directly or indirectly for any purpose with Charlie Scarborough or with his spouse,

(d) if you find the need to attend at Kingland Ford Truck and Welding for any mechanical purpose you are to phone ahead to someone else, at least three hours in advance, advising them of your intended purpose and to remind them to alert Mr. Scarborough, this will give him the opportunity to leave if he prefers to do so. [Prior to the June 14, 2000 trial, Mr. Scarborough had left his employ as town manager and commenced new employment with Kingland Ford.]

(e) 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,

(f) you are to report to a probation officer no later than three days following your release and thereafter when and as directed by that person. You will for the 18-month period of probation be under the supervision of the probation officer,

(g) you are to be an active participant in any psychological or psychiatric assessment as the probation officer may deem necessary and as the probation officer may direct from time to time,

(h) you are to participate actively in any counselling as the probation officer may direct from time to time,

(i) you are not to have at any place any direct or indirect contact or communication with any person known to you to be a town employee other than within the above-mentioned exceptions; a further exception is in the course of your running for elected office.

(emphasis added)

7. June 27, 2000: The appellant filed the within appeal against his June 14, 2000 conviction for breach of probation and against the sentence imposed, i.e., the new probation order.

[3] On the conviction appeal the appellant submits that the trial judge erred in law in finding that the appellant's conduct in merely parking in front of town hall with the subject signs displayed on his vehicle amounted to "contacting" of town employees

as prohibited by the April 15, 1999 probation order. The trial judge held that the word "contact" in the context of the intended purpose of the probation order had the meaning "getting into communication with someone".

[4] The appellant further submits that as it was his intention to communicate his dissatisfaction about the acts of certain town hall officials to the general citizenry of Hay River, any particular communication to town employees was merely accidental, or, as his counsel put it, adventitious.

[5] I find that the reasoning of the trial judge in interpreting the meaning of the word "contact" in the no-contact condition of the probation order discloses no error of law. The ordinary meaning of the word "contact" includes "communicate", as stated by the trial judge.

[6] And as to the appellant's communication to town employees being merely adventitious or accidental or happenstance, on the evidence, it was open to the trial judge as trier of fact to find otherwise, and he did. The trial judge noted that the appellant deliberately parked his vehicle in front of town hall. He noted that the town hall building had windows, and that town employees could see, and did see, the large signs on the appellant's vehicle by looking out the window; something they are entitled to do. The trial judge found that the appellant would clearly have known that this was a working day and that he had parked there during the town employees' working hours. The trial judge found that the appellant's conduct went so far as to be reckless. The trial judge stated, "if he had been parked somewhere where they could not reasonably have been expected to see the signs he would not be guilty." However, he found as a fact that at the time and place in question the appellant was having direct or indirect contact with town employees. This was a finding that was open to the trial judge on the evidence before him.

[7] For these reasons I see no merit in the appeal from conviction for the offence of failing to comply with the April 15, 1999 probation order. The trial judge carefully considered the evidence and the requisite elements of the subject offence and made his decision, stating "...accordingly I find him guilty, but barely so..." without error, in my view.

[8] I turn now to the appeal from sentence.

[9] On his sentence appeal the appellant essentially makes two submissions:

a) placing him under restrictive conditions of a probation order is punitive in nature, and as punishment is not a goal or objective of probation orders, the trial judge's sentence is demonstrably unfit;

b) condition (e) of the June 14, 2000 probation order, in particular (set out earlier in these reasons) is an undue interference with the appellant's constitutional right to freedom of expression.

[10] Upon reflection, while I cannot agree with the first, more general submission, I find that there is indeed merit in the second submission with respect to condition (e).

[11] In support of his first submission the appellant firstly points to the provisions of the Criminal Code which authorize a sentencing judge to require an offender to comply with conditions prescribed in a probation order after serving a term of imprisonment.

[12] In section 732.1 of the Criminal Code, Parliament provides firstly for certain mandatory conditions of any probation order (e.g., keep the peace and be of good behaviour and appear again before the Court as required); next, for certain specific optional conditions (e.g., abstain from consumption of alcohol, or perform a number of hours of community service work); and then finally, in paragraph 732.1(3)(h), allows the Court to craft additional appropriate conditions:

> 732.1(3) The Court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:
>
> . . .
>
> . . ., and
>
> (h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

[13] The appellant suggests that to restrict his movements and behaviour as contemplated by the conditions of the June 14, 2000 probation order is unduly

punitive, and is unlikely to aid in his reintegration into the life of the community. I disagree. The sentencing judge made exceptions to the proscribed contact or activities at town hall, exceptions that allow the appellant to attend there for reasons that other citizens attend there, e.g., attend public meetings, pay a water bill, etc. Indeed, at the appellant's specific request the sentencing judge included an exception in the conditions to allow the appellant to carry out his intention to run for municipal office.

[14] On the hearing of this appeal, it was suggested that the probation order precludes the appellant from other specific forms of access to his local government, e.g., "including the acquisition of materials such as by-laws from the town hall, the petitioning of the local government and lobbying elected officials". The answer to this is that it is open to the appellant at any time during the probation period to apply to the sentencing judge for relief from compliance with a probation condition for valid reason. Indeed the sentencing judge on June 14, 2000 specifically invited the appellant to do so:

> These conditions can be amended from time to time, and if things are not working exactly as they ought to be, then it can be brought back before the Court and adjusted. (p.206)

and further:

> ...and there may be some adjustments that might have to be done, and again I say finally before we end this today, any of these terms can be addressed in court by the Crown or by the defence at a later date, preferably before me, it does not have to be me, but it should be before me, I think, because I am familiar with the case, wherever I may be . . . it is not cast in stone today. (p.208)

[15] The sentencing judge had in mind, of course, the provisions of s.732.2(3):

> 732.2(3) A court that makes a probation order may at any time, on application by the offender, the probation officer or the prosecutor, require the offender to appear before it and, after hearing the offender and one or both of the probation officer and the prosecutor,
>
> (a) make any changes to the optional conditions that in the opinion of the court are rendered desirable by a change in the circumstances since those conditions were prescribed,
>
> (b) relieve the offender, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any optional condition, or

> (c) decrease the period for which the probation order is to remain in force, and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions, inform the offender of its action and give the offender a copy of the order so endorsed.

[16] Any legitimate requests that the appellant has, e.g., further specific exceptions to the prohibition against attending at town hall, should be addressed by the appellant under s.732.2(3), at least initially, rather than by an appeal in this Court. It bears mentioning that both sentencing judges on April 15, 1999 and on June 14, 2000 were quite fair to the appellant in accommodating specific requests and exceptions.

[17] With respect, I disagree with the appellant's characterization of the probation order as being primarily a form of punishment. As with the April 19, 1999 probation order, I am satisfied that the June 14, 2000 probation order has as its objectives the maintenance of a peaceful and safe community and the rehabilitation of this offender as a law-abiding member of that community. On this point I am in agreement with the words of Bayda, C.J. in *R. v. Taylor* (1997), 122 C.C.C. (3d) 376 (Sask.C.A.) at p.394:

> Depending upon the specific conditions of the order there may well be a punitive aspect to a probation order but punishment is not the dominant or an inherent purpose. It is perhaps not even a secondary purpose but is more in the nature of a consequence of an offender's compliance with one or more of the specific conditions with which he or she may find hard to comply. But even in that sense, the punitive aspect acts primarily as a specific deterrent and has the corollary rehabilitative effect.

[18] All of that said, I do have a concern regarding the broad prohibition in condition (e) of the June 14, 2000 probation order:

> "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."

[19] On the face of it, that condition appears to be too broad. All individuals, including this appellant, have certain basic freedoms. One is the freedom to express one's views. It is guaranteed in the *Charter of Rights and Freedoms*:

> 2. Everyone has the following fundamental freedoms:
>
> a) freedom of conscience and religion,
>
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication,
>
> c) freedom of peaceful assembly, and
>
> d) freedom of association.
>
> (emphasis added)

[20] Although freedom of expression is protected by the Charter, there are descending degrees of protection depending on the nature of the expression. For example, expressions amounting to defamatory libel, hate propaganda or criminal harassment can be sanctioned by Criminal Code prosecution. These examples, however, are not relevant here. There is no need to prohibit this kind of expression in a probation order; it is already prohibited by the law.

[21] Every probation order is an intrusion into the individual's personal freedom. Conditions of the probation order, however, must be reasonable, pursuant to s.732.1 C.C. It is not reasonable to withdraw the individual's constitutional right to freedom of expression without justification, in my respectful view.

[22] In the instant case the appellant's conviction for breaching the April 15, 1999 probation order resulted not simply because of the signs displayed on his vehicle but, rather, because of the location where he was using the signs to communicate with town employees.

[23] It appears from the record that each of the trial judge and the Crown prosecutor at one point was of the view that a broad ban on placing signs on his vehicle would

engage a constitutional right or freedom. During counsel's submissions on conviction/acquittal, the trial judge stated:

> I do not have a problem, Mr. Brydon, with his putting signs on the car windows to express his opinions, the Charter of Rights would apparently protect him in that regard, and I do not see anything before me to indicate that he is prohibited from doing that. (p.137)

(emphasis added)

[24] And, later, during the course of giving reasons in support of a conviction:

> . . .one argument that is raised is that the accused was displaying the signs in question where he was while exercising his constitutional right of freedom of expression. The accused has such a constitutional right, and this Court is not in any way attempting to take that away from him. (p.160)

(emphasis added)

[25] The Crown prosecutor, in sentencing submissions and in seeking the inclusion of certain specific conditions in a probation order, stated:

> . . . I'm not sure if the Court would be willing to do this or if it is permissible, but the Crown is suggesting to the Court that Mr. Werner be prohibited from displaying any signs on his vehicle that mentions any employee of the town hall either by name or function. . . . (p.182)

(emphasis added)

[26] In my respectful view, the other numerous and specific conditions in the June 14, 2000 probation order were adequate measures in striving for a peaceful and safe community and the rehabilitation of the appellant and it was not necessary or reasonable to, in addition, diminish the appellant's constitutional freedom of expression. As the Supreme Court of Canada has stated:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression.
>
> *Edmonton Journal* v. *A.G. of Alberta* [1989] 2 S.C.R. 1326 at p.1336

[27] 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.

[28] For these reasons:

a) the appeal from conviction for breach of probation is dismissed,
b) the appeal from sentence is allowed to the extent that condition (e) described above (enumerated as condition I in the actual probation order) is deleted.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT
this 26th day of March 2001

Counsel for the Appellant: James D. Brydon
Counsel for the Respondent: Loretta Colton

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