

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARVEY RONALD WERNER

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] Mr. Werner appeals from his conviction in the Territorial Court on a charge of breach of probation. The grounds of appeal as set out in the notice of appeal are:

1. The learned trial judge erred in law by not allowing the defendant to enter evidence on the defendants behalf. The ruling of the judge was evidence of heresay (*sic*) and was not admitted;
2. There was not enough evidence for a conviction;
3. The R.C.M.P. failed to investigate and produce documented evidence that would prove my innocence.

[2] The facts can be summarized as follows. On September 3, 2003, Mr. Werner was placed on probation after being convicted of mischief arising out of his conduct at the Town Hall in Hay River. The incident in question is but one in a longstanding dispute between Mr. Werner and the Town. One of the probation conditions was that Mr. Werner not enter or be on the municipal premises of the Town of Hay River Town Hall, unless authorized in advance by an employee of the Town. There were other

conditions as well that restricted the means by which Mr. Werner could communicate with the Town Hall.

[3] On October 3, 2003, Mr. Werner attended a meeting of the Hay River Town Council in the Town Hall. The senior administrative officer of the Town told Mr. Werner that he was not allowed to be there and called the police. The police arrived and asked Mr. Werner to leave. He refused. He was arrested and escorted out.

[4] The trial judge convicted Mr. Werner of breach of probation and sentenced him to two months' imprisonment, which he has long since served.

[5] Mr. Werner represented himself at trial and on this appeal. His defence at trial was essentially one of lack of intent. He relied on the following "facts" in that regard, some of which were not put forward in his testimony, but only in his closing submissions:

1. he was running for or planning to run for a seat on Town Council at the time and previous probation orders had always given him the right to participate in Town Council meetings;
2. the Town's by-law officer told him to go before Town Council on an issue that was of concern to him;
3. he wrote to Town Hall asking if he could go to the meeting and did not receive a reply saying that he could not go;
4. his lawyer said that the probation order was silent when it comes to Town Council meetings, which Mr. Werner took to mean that it did not apply;
5. when the sentencing judge put him on probation, he said that the probation order would be silent with respect to Town Council meetings.

[6] Mr. Werner also acknowledged in his evidence that he was not happy with the condition that he not attend at the Town Hall and that he had tried to get his lawyer to appeal his sentence and to get the condition suspended pending the appeal.

[7] In my view, there is no merit in the second and third grounds of appeal listed above. There was sufficient evidence at trial for the trial judge to convict and it was

the evidence at trial, not the police investigation, that was important. It was not clear from Mr. Werner's submissions what document he alleges the police failed to produce.

[8] With regard to the first ground of appeal, Mr. Werner argued that the trial judge did not let him testify about what his lawyer and the by-law officer told him. The trial judge did intervene during Mr. Werner's testimony about the conversation he had with his lawyer, telling him that what the lawyer said is hearsay and not allowed. The trial judge also intervened and said it was hearsay and not allowed, when Mr. Werner testified that the by-law officer told him to go to Town Council about an issue.

[9] In my respectful view the trial judge was not correct when he said that the evidence was inadmissible hearsay. The evidence of what the lawyer said may have been relevant to what Mr. Werner understood the probation condition to mean and therefore to his state of mind, his intent, at the time he attended the Town Council meeting. I note, however, that it is not clear from what Mr. Werner did testify before the trial judge's intervention whether he was claiming to have spoken to his lawyer before he went to the meeting or only afterwards, when he had been charged with breach of probation. In the latter event, the evidence would be inadmissible.

[10] The evidence of what the by-law officer said was relevant to the issue whether Mr. Werner had authorization from a town employee to attend at Town Hall and therefore fell within the exception in the probation condition.

[11] In telling Mr. Werner that he could not testify about what he had been told, the trial judge also told him that if he wanted to put that evidence before the court he would have to call the lawyer and the by-law officer as witnesses. Mr. Werner had the by-law officer under subpoena and did call him as witness. He did not have the lawyer present to testify, nor did he seek an adjournment to subpoena him.

[12] When the by-law officer testified, he denied telling Mr. Werner to go to Town Hall or go before Town Council.

[13] The trial judge made it clear that he found Mr. Werner not to be a credible witness; in fact he found that Mr. Werner was not rational. He found there was no air of reality to the suggestion that the by-law officer authorized or induced Mr. Werner's

attendance at Town Hall and that there was no evidence in support of Mr. Werner's contentions.

[14] Deference must be given to the trial judge's finding that Mr. Werner was not credible. Deference must also be given to his finding of fact that Mr. Werner clearly understood that he was prohibited from entering on the Town Hall premises but was determined to breach the probation order, "using justifications that he found here, there and everywhere".

[15] In my view, s. 686(1)(b)(iii) should be applied in this case. Notwithstanding the erroneous ruling that Mr. Werner's evidence about what his lawyer and the by-law officer said to him was inadmissible, no substantial wrong or miscarriage of justice occurred. The evidence was overwhelming that Mr. Werner knew that the probation order prohibited him from entering on the Town Hall premises without authorization from a Town employee. His own witness, the by-law officer, denied having given him authorization.

[16] I do not ignore the point raised by Mr. Werner about an unfortunate exchange that occurred when he was placed on the probation order in question. I make reference to this in *Werner v. H.M.T.Q.*, 2005 NWTSC 27, a decision filed concurrently with this one. When he was placed on probation, both Mr. Werner and the Crown counsel who appeared at that time submitted to the sentencing judge that there had been a ruling in this Court that to prohibit Mr. Werner from attending Town Council meetings amounts to a breach of his rights under the *Charter*. No one was able to produce a copy of the decision to the sentencing judge, nor was one produced on appeal. Crown counsel on appeal indicated that he was not able to locate the decision and I have not been able to confirm that there has been any such decision in this Court.

[17] The sentencing judge was concerned when told there was such a ruling but, after initially indicating that the probation order would permit Mr. Werner to attend Council meetings in the presence of his lawyer, decided that the order would be silent with respect to Council meetings and would simply prohibit him from being on the premises of the Town Hall without authorization from an employee. The sentencing judge may have had in mind that if this Court had in fact ruled as Mr. Werner and Crown counsel claimed, authorization to attend Council meetings would likely be granted by the Town.

[18] Mr. Werner argued that since the trial judge, on being told of the alleged ruling about his *Charter* rights, said the order would be silent with respect to Town Council meetings, that led him, Mr. Werner, to believe that the order did not prohibit him from attending such meetings. However, the condition as finally pronounced by the judge did clearly prohibit Mr. Werner from being on Town Hall premises and did not make an exception for Town Council meetings held there. In my view, the judge hearing the breach of probation trial was in the best position to determine whether Mr. Werner was truly confused by the remarks made by the judge who put him on probation or was simply using those remarks as justification after the fact for a wilful breach of probation. The trial judge found it to be the latter and in my view was entitled on the evidence to come to that conclusion.

[19] For the above reasons, the appeal is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 7th day of March, 2005

Heard At Yellowknife, NT the 13th day of January, 2005

Counsel for Her Majesty the Queen: Steven Hinkley
The Appellant, Mr. Werner, appeared on his own behalf.