Werner v. H.M.T.Q., 2006 NWTSC 24 Date: 2006 05 10
Docket: S-001-CR2005000067

BETWEEN:

HARVEY RONALD WERNER

Appellant

-and-

HER MAJESTY THE QUEEN

Appeal of conviction on breach of probation charge.

Heard at Yellowknife NT on April 20, 2006

Reasons filed: May 10, 2006

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

Counsel for the Appellant: James D. Brydon
Counsel for the Crown: M. David Gates, Q.C.

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REASONS FOR JUDGMENT

[1] The appellant was charged with three Criminal Code offences, all arising out of the same set of circumstances: 1) assaulting a peace officer engagedin the executionof his duty (s.270(1)(a)C.C.); 2) causing a disturbance in a public place (s.175(1)(a)C.C.; and 3) failing to comply with an existing probation order (s.733.1(1)C.C.). Following a 3-day trial in Territorial Court, he was acquitted on Counts (1) and (2) and convicted on Count (3). He appeals his conviction on the breach of probation charge.

[2] The charges arose out of an altercation between the appellant and a deputy sheriff at the Hay River courthouse in November 2004. The appellant was in attendance at a criminal proceeding in which he had an interest (he was the complainant in an auto theft case). In the public foyer outside the courtroomproper, he became engaged in a heated conversation with a Crown prosecutor regarding her conduct of the case. This heated discussion was observed by the deputy sheriff who told the appellant to calm down and, when the appellant attempted to return to the courtroom proper, the deputy sheriff told him he could not re-enter the courtroom proper (where proceedings were in progress) until he calmed down. A verbal and physical altercation ensued between the appellantand the deputysheriff. Some RCMP officers were summoned and they subdued the appellant, arrested him and took him to the detachment.

[3] At the time of this event the appellant was under the terms of a probation order as a result of an unrelated conviction in September 2003. One of the terms of that probation order was that the appellant "keep the peace and be of good behaviour".

[4] For clarity I set forth the precise words of the three criminal charges which resulted:

> Count #1:
>
> on or about the 23rd day of November 2004 at or near the town of Hay River in the Northwest Territories did assault Steve Beck a peace officer engaged in the execution of his duty contrary to s.270(1)(a) of the *Criminal Code.*
>
> Count #2:
>
> on or about the 23rd day of November 2004 at or near the town of Hay River in the Northwest Territories, not being in a dwelling house did cause a disturbance in or near a public place to wit: the Hay River courthouse by shouting and swearing,contrary to s.175(1)(a)(i) *Criminal Code.*
>
> Count #3:
>
> on or about the 23rd day of November 2004 at or near the town of Hay River in the Northwest Territories did, while bound by a probation order made by the Territorial Court on September 3, 2003, fail without reasonable excuse to comply with such order, to wit: keep the peace and be of good behaviour, contrary to s.733.1(1) *Criminal Code.*

[5] The trial judge heard *viva voce* testimony from 11 witnesses,including 2 Crown prosecutors, a defence lawyer, the deputy sheriff, the appellant and some police officers, all of whom were present at the Hay River courthouse on the date of the altercation. In his oral decision the trial judge made extensive referenceto the material evidence of the key witnesses.

[6] In his reasons the trial judge makes some explicit findings of fact and certain conclusions . Among these are the following:

(a) He found the appellant's testimony to be not credible and he rejected it (p.423 of transcript).

(b) He found that the appellant had been angry, upset and agitated, and used rude and abusive language at the time in question. He found that the appellant was rude and abusive to the Crown prosecutor. He found that the appellant was verbally and physically confrontational and abusive towards the deputy sheriff (p.430-431).

(c) With respect to the key moment in time when the appellant and the deputy sheriff were alone together in the foyer, the trial judge stated that he had a "reasonable doubt as to what exactly transpired" (p.437).

[7] In reaching his conclusion on the verdicts, the trial judge stated:

> I apply the three-step test in *W.(D.)* as follows: Number 1, I have rejected the evidence of Mr. Werner. Number 2, I am not left in reasonable doubt by the evidence of Mr. Werner. Thirdly, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt of the guilt of Mr. Werner only with respect to the charge of breach of probation by failing to keep the peace and be of good behaviour.
>
> In conclusion, I find Mr. Werner guilty on the charge of breach of probation. He is acquitted on the charges of assaulting a peace officer and causing a disturbance.

[8] Having found that the Crown had failed to prove the causing disturbancecharge and the assault peace officer charge, the trial judge did not explain on what basis he found that the Crown had proven that the appellant had failed to keep the peace and be of good behaviour.

[9] The trial transcript of the Crown prosecutor's closing address to the trial judge does not disclose any specific submission with respect to seeking a conviction on Count #3. It is a reasonable inference that the Crown was in all likelihood founding its request for a conviction on Count #3 on a conviction for one or both of the substantive charges in Counts #1 and #2. However, in fairness, that is not a necessary inference.

Crown's closing address, defence's closing address, and the trial judge's reasons are simply silent as to the basis on which the Court was being asked to convict the accused person of failure to keep the peace and be of good behaviour contrary to his existing probation order.

[10] I note that the Crown counsel in his closing submissions to the trial judge did make specific submissions with respect to seeking a conviction on Count #2, causinga disturbance in a public place by shouting and swearing (p.402). He submitted that in the instant case there had been an ongoing disturbance - beginning with the appellant's loud voice and insulting language and swearing at the Crown prosecutor in the foyer and continuing with the appellant's defiance of and physical contact with the deputy sheriff. It was also submitted that the Court proceedings had been disrupted and that also constituted a disturbance. And yet, the trial judge's decision was that the Crown had not proven beyond a reasonable doubt that the accused(the appellant)had causeda disturbance in a public place by shouting and swearing. How, then, to explain that on the same evidence it was proven beyond reasonable doubt that the accused had failed to keep the peace and be of good behaviour?

[11] With respect, given the verdicts on Count #1 and Count #2, the verdicton Count #3 begs an explanation. I reiterate that the only findings of fact that it can be said were found "against" the accused were those referred to above at p.430-431 of the trial transcript.

[12] The Crown did not appeal the accused's acquittals on the substantive charges.

[13] There may have been, in the view of the trial judge, a rational explanation for a conviction on the breach of probation charge, notwithstanding the acquittals on the substantive charges. However, no such rationale appears in the decision of the trial judge.

[14] The trial judge's reasons for convictingthe appellanton Count #3 are inadequate in the sense that they do not make it possible to understand by what judicial reasoning the trial judge arrived at his conclusion on that count.

[15] The basis for that verdict is not obvious on the face of the record. The Supreme Court of Canada has stated that the failure of the trial judge to give reasons which

demonstrate the basis for a verdict is an error of law. See *R. v. Sheppard* 2002 SCC 26; *R. v. Braich* 2002 SCC 27; and *R. v. Gagnon* 2006 SCC 17.

[16] In my respectful view, in the present case the accused person is entitled to know why he has been found not guilty of the substantive charges, yet guilty of a failure to keep the peace and be of good behaviour, on the same evidence. Procedural fairness requires it.

[17] The reasons given for the conviction on Count #3 are inadequate and further, they do not allow an appeal court to review that decision for any reversible error.

[18] In the normal course where reasons for a trial verdictare inadequateand also not amenable to appellate review, the remedy would be to require a new trial. However, the unique circumstances here are such that the trial judge has carefully assessed the Crown's evidence in support of the substantive charges and concluded, with reasons, that the Crown did not prove those criminal charges beyond a reasonable doubt. The Crown has not appealed that assessment, those reasons, that conclusion. In my respectful view once again, and without engaging in any formal analysis of the double jeopardy rule which was not argued on this appeal, it would be patently unfair in these circumstances to subject this appellant to a fresh trial (on those same factual allegations) on a charge of failing to keep the peace and be of good behaviour contrary to a condition in his existing probation order.

[19] For these reasons, I allow the appeal, and quash the conviction on Count #3 in the Information sworn December 11, 2004.

[20] J.E. Richard,
J.S.C.

Dated at Yellowknife, NT
this 10th day of May, 2006.

Counsel for the Appellant: James D. Brydon
Counsel for the Crown: M. David Gates, Q.C.