COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Eriksen***,
2005 YKCA 5

Date: 20050912
Docket: YU00532

Between:

Regina

Respondent

And

John Abraham Eriksen

Appellant

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

Oral Reasons for Judgment

G.R. Coffin — Counsel for the Appellant

D.A. McWhinnie — Counsel for the Respondent

Place and Date: Vancouver, British Columbia
12 September 2005

[1] **FINCH C.J.Y.T.:** The appellant applies for leave to appeal sentence and, if leave is granted, appeals against the condition included in the probation order prohibiting him from possession, consumption and purchase of alcohol.

[2] The appellant pleaded guilty to one count of possessing a firearm while prohibited and one count of improper storage of a firearm. The trial judge sentenced the appellant to seven months custody on the first count and three and a half months custody on the second count, concurrent. He held the custodial aspect of the sentence was satisfied by the three and one half months the appellant had spent in custody pending sentence.

[3] The condition of the probation order to which the appellant objects is that, "you to abstain absolutely from the possession, consumption or purchase of alcohol, non-prescription drugs or other intoxicating substances, as outlined in the ***Controlled Drugs and Substances Act*** [S.C. 1996, c. 19], and submit to a breathalyzer, urinalysis, bodily fluids tests or blood tests upon demand by a peace officer or probation officer who has reason to believe that you have failed to comply with this condition". Counsel for the appellant contends that it was an error to include this condition in the probation order where the possession, consumption and purchase of alcohol is unrelated in any way to either of the offences for which Mr. Eriksen was sentenced and where there was no evidence as to any history of alcohol dependence or abuse by him.

[4] It would appear that submissions were made to the learned sentencing judge concerning the appellant's difficulties with alcohol. The judge said:

> [8] He moved to Ross River to try and put his criminal past behind him and build a new life (I will refer to his criminal record shortly). He intended to restore contact with some family members in Ross River. I am advised that he was able to remain sober from the time that he moved there and he also obtained employment with a construction company in Ross River.

[5] The judge also said he was imposing the impugned condition "to assist you in your efforts to remain sober…". We do not have a transcript of the submissions made to the judge but there is nothing before us and no submission is made to suggest that counsel at trial objected to whatever the judge was told concerning the appellant's problems with alcohol or that formal proof of those matters was required.

[6] The learned sentencing judge recorded the appellant's lengthy criminal history, some 37 convictions including 15 related to breaches of court orders. He also noted that at the time of the subject offences, in addition to the lifetime firearm prohibition, the appellant was also under a nine month probation order and on a recognizance.

[7] Counsel for the appellant contends that the conditions of a probation order should be relevant to the circumstances of the offence or of the offender. I agree. I have not been persuaded, however, that there was no basis on the submissions before the sentencing judge for a condition of this sort now impugned. The comments in the reasons and the appellant's history in general would lead one to believe that the sentencing judge was provided with information on this subject that is not in the record before us. I am therefore of the opinion that the judge did not err in imposing a condition concerning alcohol.

[8] However, the requirement in the condition that the appellant submit to tests on demand was held by the majority of this Court in ***R. v. Shoker*** (2004), 192 C.C.C. (3d) 176, 2004 BCCA 643, leave to appeal to the Supreme Court of Canada granted [2005] S.C.C.A. No. 81, to be inconsistent with the s. 8 ***Charter*** guarantee against unreasonable search and seizure.

[9] I would therefore grant leave to appeal and would allow the appeal only to the extent of deleting the words in the condition following "***Controlled Drugs and Substances Act***".

[10] **NEWBURY J.A.:** I agree.

[11] **KIRKPATRICK J.A.:** I agree.

[12] **FINCH C.J.Y.T.:** Leave to appeal is granted and the appeal allowed to the extent indicated.

"The Honourable Chief Justice Finch"