

Citation: *R. v. Martin*, 2004 YKTC 100

Date: 20050128
Docket: T.C. 01-00227
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Faulkner

R e g i n a

v.

Donald Alexander Martin

Appearances:
Michael Cozens
Gord Coffin

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

[1] On March 1, 2002, Donald Alexander Martin was before me for disposition on a charge contrary to s. 253(b) of the *Criminal Code*. At that time, Mr. Martin was granted a curative discharge pursuant to s. 255(5) of the *Code*. The discharge was conditional on the completion of a probationary period of two years. Mr. Martin was also prohibited from driving for a period of two years.

[2] On May 7, 2003, Mr. Martin was convicted of offences contrary to s. 253(a) and 259(4) of the *Code*. He received custodial sentences totaling 135 days and was prohibited from driving for a period of three years. At that time, the Crown elected not to take any action to revoke the discharge granted by the court in 2002.

[3] On January 9, 2004, Mr. Martin was charged with breaching the probation order imposed on him on March 1, 2002. The breach occurred on December 27,

2003 when Mr. Martin was found to have consumed alcohol in contravention of an abstention clause in the probation order. Mr. Martin subsequently entered a guilty plea to the breach charge on September 22, 2004.

[4] In light of the breach, the Crown decided to begin proceedings under s. 730(4) of the *Code* to have the court revoke the conditional discharge and to impose any sentence that could have been imposed had the conditional discharge not been granted. The application was filed on February 25, 2004. Mr. Martin appeared in court that day and was informed of the application. He sought and received an adjournment to consult counsel.

[5] On March 1, 2004, the probation order expired.

[6] The Crown's revocation application finally came before me for hearing on November 22, 2004.

[7] As I have indicated, the Crown's application to revoke Mr. Martin's discharge is brought under s. 730(4) of the *Code*. That section provides as follows:

Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under section 733.1, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.

[8] The section is clear in indicating that the court may act to revoke a discharge where an offender is bound by the probation order made at the time the discharge was granted. The section goes on to provide that the court may revoke the discharge, “at any time when it may take action under [section 732.2(5)]”. Section 732.2(5) provides as follows:

Where an offender who is bound by a probation order is convicted of an offence, including an offence under section 733.1, and

- (a) the time within which an appeal may be taken against that conviction has expired and the offender has not taken an appeal,
- (b) the offender has taken an appeal against that conviction and the appeal has been dismissed, or
- (c) the offender has given written notice to the court that convicted the offender that the offender elects not to appeal the conviction or has abandoned the appeal, as the case may be,

in addition to any punishment that may be imposed for that offence, the court that made the probation order may, on application by the prosecutor, require the offender to appear before it and, after hearing the prosecutor and the offender,

- (d) where the probation order was made under paragraph 731(1)(a), revoke the order and impose any sentence that could have been imposed if the passing sentence had not been suspended, or
- (e) make such changes to the optional conditions as the court deems desirable, or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable,

and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions or extends the period for which the order is to remain in force, inform the offender of its action and give the offender a copy of the order so endorsed [emphasis added].

[9] Thus, the court may only take action under s. 732.2(5) “where an offender who is bound by a probation order is convicted of an offence”.

[10] In *Re Regina and Paquette* (1980), 53 C.C.C. (2d) 281 (Alta. Q.B.), Belzil, J. held that the *Code* provision then in effect, which did not differ materially from the present section 732.2(5), meant that:

Once the probation order had expired there was no probation order in existence which could be revoked or amended, and no sentence could be imposed after the period of suspension of sentence had expired.

[11] In *Paquette*, the application to revoke the probation order was not commenced until after the probation order had expired. However, in the case at bar, the application was made before the order expired.

[12] In this regard, the decision of the New Brunswick Supreme Court, Appeal Division in *Regina v. Noble, Ex Parte Ogles*, [1966] 3 C.C.C. 66 is of interest, although the provisions of the *Code* then in force were by no means identical to s. 732.2(5). In *Noble*, the application to revoke was made before the expiry of the suspended sentence order, but no adjudication of the breach allegation was made until long after the order had expired. The court held that there was no jurisdiction to revoke the order and sentence the offender.

[13] In *Re Montanaro and the Queen* (1980), 55 C.C.C. (2d) 143, the Quebec Court of Appeal also dealt with a case in which the application to revoke a probation order was made before the expiry of the order. In *Montanaro*, the probation order was to be in effect for a period of two years. The Crown's application to revoke the order and sentence the offender was made but three days before the order expired. However, the court also proceeded on the same day to hear the application and to revoke the probation order. The sentencing hearing was adjourned and, meanwhile, the probation order expired. The Court of Appeal held that, since the probation order had been revoked while it was still in effect, the sentencing judge had jurisdiction to proceed with sentencing even though more than two years had passed.

[14] In the case at bar, the application to revoke the conditional discharge and probation order was made before the expiry of the order. The respondent asked for, and received, an adjournment to make full answer and defence. He was clearly entitled to the adjournment given the provisions of s. 650(3) of the *Code* and sections 7 and 11 of the *Charter*. See also *R. v. Tuckey* (1977), 34 C.C.C. (2d) 572 (Ont. C.A.), and *R. v. Borland*, [1970] 2 C.C.C. 172, (N.W.T.T.C.).

[15] In the result, the court did not adjudicate on the application to revoke the conditional discharge before the order expired. In such circumstances, I have come to the conclusion that the court has no jurisdiction to proceed with the application.

[16] I am quite alive to the Crown's concern that an accused faced with a possible revocation of his discharge and/or suspended sentence, may frustrate the process by tactics aimed at postponing the hearing of the application until after the order has expired. The problem is that the plain wording of section 732.2(5) limits proceedings to a time when the respondent is still bound by the probation order. There are other possible ways for an enterprising offender to throw a spanner into the works, including the provision that no revocation can be made while an appeal of the original conviction is outstanding, but the remedy for these difficulties is in the hands of Parliament.

[17] It is interesting to note that the court in *Re Montanaro* invited Parliament to clarify the matter of probation revocations. That was in 1980.

[18] In the result, although the application to revoke Mr. Martin's discharge and probation order was brought while the order was still in full force and effect, the court has no jurisdiction to proceed further with the application as the order has now expired.

[19] The Crown is not left entirely without a means of dealing with the respondent. Mr. Martin was charged with a breach of the probation order and subsequently entered a guilty plea to that charge. The breach charge clearly survives the expiry of the underlying probation order and Mr. Martin may be sentenced for that offence.

Faulkner T.C.J.