Citation: *R. v. Taylor*, 2005 YKTC 15 Date: 20050218
Docket: 03-00172G
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Lilles

R e g i n a

v.

Henry Raymond Taylor

Appearances:
Michael Cozens Counsel for Crown
Malcolm Campbell Counsel for Defence

REASONS FOR JUDGMENT

[1] Mr. Taylor has been charged with a breach of a probation order contrary to s. 733.1(1) of the *Criminal Code* by failing to report to his probation officer between May 1, 2004 and June 28, 2004. He entered a not guilty plea. That probation order was imposed on March 22, 2004 as part of a conditional discharge resulting from Mr. Taylor pleading guilty to two breaches of an undertaking. The probation period was for six months and included a reporting term, an abstain from the consumption of alcohol term and several other terms requiring him to participate in community-based programming.

[2] This file was transferred to another probation officer, Colleen Geddes, on May 1, 2004. Mr. Taylor was instructed by his former probation officer to contact Ms. Geddes during the first week in May, to make an appointment and report to her. Ms. Geddes did not hear from Mr. Taylor until she received a telephone message on June 10, 2004 stating that he was back from working in the bush.

He left two telephone numbers. When she called back, she found one number to be disconnected and the other just rang without anyone answering it. She tried to track Mr. Taylor down, and left a message with the Band's Justice Committee, as Mr. Taylor was also to report to it on a regular basis. He did not contact her. On July 9, 2004, she laid the breach charge that is currently before the court.

[3] In addition to not reporting to her, Ms. Geddes testified that Mr. Taylor had also not contacted his support group, Kwanlin Dun Community Wellness or the Justice Committee, all as required by his probation order. A warrant was issued for Mr. Taylor's arrest. He came before Senior Justice of the Peace Cameron on September 24, 2004 for a show cause hearing. The submission of the Crown was as follows:

> If your Worship has a copy of the original Order, you will note that Your Worship made an Order the 22nd day of March 2004 for a period of six months. That Order, therefore, would expire on today's date but has not been fulfilled in its conditions or at least Mr. Taylor is experiencing difficulties in complying or fulfilling its terms.
> The Crown, therefore, makes application pursuant to s. 732.2 of the *Criminal Code* to extend the Order for a further period of six months from the 22nd day of September, I suppose, would be appropriate. That will give Mr. Taylor an opportunity to fulfill his obligations under the Order.

[4] To this submission, Mr. Taylor's counsel responded as follows:

> I have spoken to Mr. Taylor both about the probation and the undertakings and terms and conditions and he is agreeable to all of those.

[5] It is obvious that the purpose of this extension of the probation order, with the consent of Mr. Taylor, was to avoid a breach charge and to preserve his opportunity to deal with the earlier charge as a conditional discharge, thus avoiding a conviction.

[6] Mr. Taylor's probation order was extended for a six month period on the same conditions. With respect to the s. 733.1 breach charge he was released on an undertaking with conditions as recommended in the Bail Assessment Report.

[7] At trial, both of his probation officers were called as witnesses. On cross-examination, defence counsel questioned Ms. Geddes on a sentence in her Court Report that several phone messages were left by Taylor. Ms. Geddes was certain that there was only one message, the one on June 10, 2004, that was referred to previously. She acknowledged that she made a mistake in her Court Report and that only one call was recorded in her running notes.

[8] Mr. Taylor did not testify.

[9] Based on this entry in Ms. Geddes' Court Report, Mr. Taylor submits that I should have a reasonable doubt as to whether Mr. Taylor failed to report to his probation officer as required. I do not. I accept Ms. Geddes' explanation that the entry in her Court Report was made in error. She was both emphatic and certain on this point. Considering all of the evidence before me, I am not left with a reasonable doubt on this point.

[10] Mr. Taylor was given Ms. Geddes' business card by his first probation officer and told to contact Ms. Geddes during the week of May 1, 2004. He did not telephone her until June 10, 2004. Mr. Taylor provided no explanation or excuse for this delay. This fact alone would justify a conviction for the charge before the court.

[11] I find that the *actus reus* of the offence has been made out and that Mr. Taylor has not provided a reasonable excuse for not reporting to his probation officer.

[12] Normally, these findings would end the matter. Mr. Taylor, in addition, has argued that the extension of his probation order amounted to a “conviction” for failing to report to his probation officer, and that he should be able to avail himself of the defence of “autre fois convict”. Similarly, he submits that the extension of his probation constitutes “a finding of guilt and an imposition of punishment” such that he may avail himself of s. 11(b) of the *Canadian Charter of Rights and Freedoms*. Finally, he submits that prosecuting the charge after the probation order has been extended amounts to an abuse of process and a violation of s. 7 of the *Charter*.

[13] Section 11(h) of the *Charter* merely enshrines the principles underlying the common law special pleas of “autres fois acquit” and “autre fois convict” (see *R. v. D. (T.C.)* (1987), 38 C.C.C. (3d) 434 at p. 447-448).

[14] Sections 607-609 of the *Criminal Code* codify the common law defences of “autre fois acquit” and “autre fois convict”. A number of reported cases make the following points:

- the special plea of “autre fois acquit” is only available if there has been a complete adjudication at the first trial, which included sentencing (*R. v. Melanson*, [2001] O.J. No. 869 (Ont. C.A.); *R. v. D. (T.C.), supra*, at p. 443).
- the accused must prove that he was acquitted (or convicted) previously for the same offence before a court having proper jurisdiction (*R. v. Suleyman Sanver* (1973), 12 C.C.C. (2d) 105 (NBCA); *R. v. Turmel* (1996), 109 C.C.C. (3d) 162 (Ont. C.A.).

[15] In the case at bar there has been no adjudication, sentencing or acquittal for the same offence. Indeed, it was in order to avoid such an adjudication and conviction that Mr. Taylor consented to the extension of his first order. Sections 607-610 of the *Code* consistently use the words “adjudication”, “acquitted” and “convicted” as prerequisites to the availability of these special pleas. Section

11(h) requires an acquittal or a finding of guilt along with punishment before this section of the *Charter* can be invoked. The extension of Mr. Taylor's probation order on consent did not involve an adjudication.

[16] I find no merit in the defendant's submissions as they relate to the defence of "autre fois convict" and s. 11(h) of the *Charter*.

[17] The defendant also submits that s. 7 of the *Charter* has application to his case.

> s. 7
> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[18] Section 7 of the *Charter* may be broader than s. 11(h) of the *Charter* and the special pleas of "autre fois convict" and "autre fois acquit". This point was made in *R. v. D. (T.C.), supra*. After noting that s. 11(h) of the *Charter* and the special pleas referred to above are only available where the first trial has proceeded to verdict, the court stated (at p. 448):

> In my view, however, s. 7 of the Charter constitutionalizing the requirement of "fundamental justice" might, in some circumstances, bar a second trial where the first trial has been improperly terminated. By way of example only, I consider that if, upon a breakdown of the Crown's case, a judge were to declare a mistrial in order to give the prosecution an opportunity to strengthen its case against the accused by endeavoring to find additional witnesses thereby depriving the accused of an acquittal where the Crown's initial preparation had been negligent, a second trial in those circumstances would contravene the principles of fundamental justice.

[19] This example is consistent with the jurisprudence of s. 7 of the *Charter,* namely that it can be invoked only in the clearest and most flagrant and shocking cases: see *R. v. Power,* [1994] 1 S.C.R. 601. Section 7 provides a general power

to control process to avoid unfairness. It is not every unfairness that can trigger s. 7. It must be oppressive and vexatious: see *R. v. Keyowski*, [1988] 1 S.C.R. 657. The affront to fair play and decency must be disproportionate to the societal interest in the effective prosecution of criminal cases.

[20] In my opinion, s. 7 of the *Charter* is not available to the accused on the facts of this case. Let me review those facts again.

a. On March 22, 2004, Mr. Taylor was sentenced to a conditional discharge and six months probation.
b. Mr. Taylor failed to comply with that probation order, in that he failed to report to his probation officer. His probation officer testified that Mr. Taylor had not complied with a number of other conditions in the order.
c. Mr. Taylor was charged with a breach of that probation order on July 9, 2004. As his whereabouts were unknown to the probation officer, a warrant for his arrest was issued.
d. Mr. Taylor was not located until sometime in September 2004 when he was arrested and brought before a Justice of the Peace for a show cause hearing. He was represented by counsel.
e. Rather than revoke his conditional discharge, the Crown was prepared to give Mr. Taylor another chance to comply with the conditions of his conditional discharge. Mr. Taylor apparently wanted to do so as well, and agreed to an extension of six months.
f. I was advised that he allegedly failed to comply with the extended probation order and another charge for breach was sworn on November 30, 2004. That charge is not before me. The Crown has not decided whether it will proceed with that charge. There is a question whether the extension of the probation order by consent was lawful.
g. The defendant, in para. 1 of his argument, states that the extension of his probation order was unlawful. That point was never argued

> and it was not an issue that this court was asked to decide. I have proceeded on the basis that the extension of the probation order by consent was a lawful exercise of the court's jurisdiction.

[21] These are not circumstances that are so flagrant and shocking as to constitute an abuse of process nor do the circumstances trigger s. 7 of the *Charter*. Mr. Taylor was represented by counsel. He consented to the extension of the probation order. The extension was for his benefit. If the principles of "estoppel" applied to criminal cases, he would be estopped from even raising this defence.

[22] There is another substantial reason why Mr. Taylor's arguments cannot succeed. In effect, he submits that the consent extension of his probation order was equivalent to a conviction and sentencing for a breach of his original order. But, s. 732.2(5)(e) of the *Code* provides that when a person is convicted of breach of probation, in addition to any punishment that may be imposed for that offence, the court may extend the period for which the order is to remain in force, up to a year. By analogy to the *Code* provisions, having consented to the extension of the order, he cannot complain if the Crown also prosecutes the breach. In other words, Mr. Taylor cannot, on the one hand, complain that the extension of the probation order on consent amounted to an adjudication conviction and sentencing, and at the same time object to the Crown proceeding with the prosecution of the breach. Had there been an adjudication and conviction on the breach, Mr. Taylor could have been punished for the breach and also had his probation order extended. At the time of the extension, the Crown did not stay the breach charge. Mr. Taylor was aware that that charge was still alive but consented to the extension anyway. There is nothing unfair about the result, as it is something that is specifically contemplated by the *Code*. There has been no breach of fundamental justice. Mr. Taylor's application pursuant to s. 7 of the *Charter* fails.

[23] I find Mr. Taylor guilty of the offence charged.

Lilles C.J.T.C.