IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. W.D.*, 2024 NLCA 10
Date: March 25, 2024
Docket Number: 202001H0050

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BETWEEN:

W.D.	APPELLANT/RESPONDENT BY CROSS-APPEAL

AND:

HIS MAJESTY THE KING	RESPONDENT/APPELLANT BY CROSS-APPEAL

Coram: D.E. Fry C.J.N.L., L.R. Hoegg and D.M. Boone JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division 201601G6227 (2020 NLSC 96)
Appeal Heard:	February 16, 2024
Judgment Rendered:	March 25, 2024
Reasons for Judgment by:	L.R. Hoegg J.A.
Concurred in by:	D.E. Fry C.J.N.L. and D.M. Boone J.A.

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Authorities Cited:

CASES CITED: *R. v. Hillier*, 2016 NLCA 21; *R. v. Graham*, 2022 NLCA 44; *R. v. Lucas*, 2021 NLCA 14; *R. v. Carter*, 2019 NLCA 39; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089; *R. v. Barrett*, 2022 NLSC 43; *R. v. R.J.C.*, 2015 NLTD(G) 154; *R. v. Scrivens*, 2019 ABQB 700; *R. v. R.K.A.*, 2006 ABCA 82; *R. v. Bissonnette*, 2022 SCC 23.

STATUTES CONSIDERED: *Criminal Code*, RSC, 1985, c. C-46, sections 161, 753.1, 753(4), 675(1)(b) and 676(1)(d).

L.R. Hoegg J.A.:

INTRODUCTION

[1] The issue in this appeal is whether the Judge erred in failing to make a *Criminal Code*, RSC, 1985, c. C-46 section 161 Order of Prohibition when sentencing W.D. as a long-term offender in *R. v. W.D.*, 2020 NLSC 96 (the "Decision").

BACKGROUND

[2] W.D. was 18 years old when he pleaded guilty to sexual offences involving a 13-year-old girl and breaching his Probation Order imposed by The Provincial Court of Newfoundland and Labrador's Youth Court. Following his convictions, the Crown sought to have him designated a dangerous offender.

[3] W.D. had a history of engaging in sexually offensive behavior since he was approximately seven years old. Specifically, he seriously and repeatedly sexually assaulted his three younger sisters, beginning when they ranged in age from three to six years, and this behavior persisted through W.D.'s adolescence. He was also

convicted of sexual interference in Youth Court in 2016. The historical information was put before the Court by way of an Agreed Statement of Facts.

[4] While awaiting sentence, W.D. was assessed by two forensic psychiatrists, Dr. Gill and Dr. Bloom. Each psychiatrist filed an extensive report on their assessment of W.D. Both psychiatrists stated that he was at a medium-to-high risk to reoffend, although Dr. Gill stated that some clinical features suggested that the risk of W.D. reoffending was high. However, both psychiatrists opined that with "high intensity sex offender programming" while incarcerated, and community supervision upon his release from prison, there were prospects for controlling W.D.'s future risk to public safety (Decision, at paras. 21, 40). The psychiatrists also advised that W.D. expressed a "willingness and desire" to participate in treatment (Decision, at paras. 21, 41).

[5] As a consequence of the evidence, the Crown modified its position, and asked the Court to designate W.D. as a long-term, rather than a dangerous, offender. W.D. agreed with being designated a long-term offender, and the matter proceeded on that basis. W.D. was represented by counsel at the sentencing hearing.

[6] The Judge considered the parties' agreement that W.D. be designated a long-term offender and reviewed the evidence. The Judge found that a sentence in excess of two years was appropriate for W.D.'s predicate offences, and that there was a substantial risk that he would reoffend. The Judge also found that there was a reasonable possibility that the risk of W.D. reoffending could be controlled, saying that W.D.'s behaviour fell short of being intractable. The requirements of section 753.1 of the *Criminal Code* having been met, the Judge designated W.D. a long-term offender (Decision, at para. 23).

[7] Two Corrections Services Canada (CSC) officials, the Area Director and the Acting Program Manager for persons subject to a Long Term Supervision Order (LTSO), testified at the hearing. They provided the Court with information respecting the programming available for offenders subject to LTSOs, the process for assessing such offenders, how conditions are imposed on them after their release, and how their compliance with the imposed conditions is monitored.

[8] After giving W.D. credit on a 1 to 1 basis for his time spent in remand and pre-sentence custody (from May 3, 2016 to July 7, 2020), the Judge sentenced W.D. to two years plus one day for the predicate sexual offences, plus one month for the breach of probation, and ordered him subject to long-term supervision for the

maximum period of 10 years (*Criminal Code*, at s. 753(4)). The Judge did not grant W.D. enhanced credit for pre-sentence custody, saying that the time remaining of W.D.'s incarceration was relevant to him being able to receive sex offender programming while in custody. Upon his release from prison, W.D.'s 10-year LTSO would begin to run. The conditions of the LTSO were to be set out by CSC upon its post-incarceration assessment of W.D.

[9] At W.D.'s sentencing hearing, the Crown also requested that the Judge impose a 20-year prohibition order under section 161 of the *Criminal Code*, which would prohibit W.D. from some or all of the listed restrictions in section 161 for 20 years from the date of his release from prison. This would mean that for the first 10 years following W.D.'s release from prison, W.D. would be subject to the restrictions set out in a section 161 order as well as the conditions set by CSC pursuant to the LTSO, after which he would be subject to a section 161 prohibition order for a further 10 years.

[10] The Judge declined to impose the requested 20-year section 161 order. He said:

> [59] For ten of these years W.D. will also be subject to a LTSO, based on CSC's assessment of the need to protect the public and reintegrate W.D. into society. The LTSO may, or may not, contain those conditions now sought by the Crown as part of a section 161 Order. The conditions of the LTSO will, however, be based on CSC's assessment following the completion of W.D.'s determinate sentence and the completion of any programming while incarcerated. Under that circumstance, I am satisfied that the "safety net" provided by the LTSO is a sufficient guarantee of the protection of the public, such that the section 161 Order sought by the Crown is not necessary. Nor do I accept that extending such an Order for an additional ten years beyond the expiry of the LTSO is warranted. W.D. was incarcerated at the age of 18. Following completion of his determinate sentence and the LTSO he will be 34 years old. Should W.D. comply with the conditions of his LTSO, I am satisfied that protection of the public will be maintained without the necessity of a further extension of conditions for ten years under section 161.

[11] W.D. initially appealed the Judge's sentence, and the Crown cross-appealed the Judge's failure to issue the requested 20-year section 161 order. W.D. subsequently withdrew his sentence appeal, but the Crown elected to continue with its cross-appeal.

[12] W.D. has served his prison sentence, and is no longer incarcerated. He remains subject to the LTSO for the time remaining of the 10 years from the date of his release, at which time he will be 34 years old.

LEAVE TO APPEAL

[13] Sentencing appeals require the leave of the Court (*Criminal Code*, at s. 675(1)(b) and 676(1)(d)). The test for granting such leave was set out by this Court in *R. v. Hillier*, 2016 NLCA 21, and has governed the issue since (see *R. v. Graham*, 2022 NLCA 44, at para. 10; *R. v. Lucas*, 2021 NLCA 14, at para. 6; and *R. v. Carter*, 2019 NLCA 39, at para. 17). The test to be applied is whether the appeal is "frivolous in the sense of having no arguable basis or sufficient merit" (*Hillier*, at para. 7).

[14] The Supreme Court of Canada has made it abundantly clear that sentences for offences involving the sexual abuse of children are serious matters (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424). Given that the Crown's appeal focuses squarely on this issue, it cannot be said that the appeal is frivolous, or that it lacks arguable merit.

[15] Accordingly, I would grant leave to the Crown to appeal sentence.

ANALYSIS

[16] Section 161 of the *Criminal Code* states:

> 161(1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 730, of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from
>
> > (a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;
> >
> > (a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order;

> (b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;
>
> (c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or
>
> (d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

[17] Accordingly, section 161(1) requires a judge to consider imposing a section 161 prohibition order when sentencing an offender for sexual assault (*Criminal Code*, at s. 161(1.1)), and after considering the issue, to decide whether such an order should be imposed. The decision to impose or not to impose a section 161 order is discretionary. However, just because a judge has discretion to make a certain order does not mean that whatever order he makes is not appealable. A judge's discretion must be exercised judicially, meaning that it must be exercised in accordance with principle and be legally defensible.

[18] In this case, the Judge considered imposing a section 161 order on W.D. and then exercised his discretion not to do so. Accordingly, the question becomes whether the Judge exercised his discretion judicially. In other words, did he properly consider the law and the evidence when declining to impose the requested order?

[19] The Crown alleges that the Judge erred in declining to impose the requested section 161 prohibition order by:

> 1. Failing to consider W.D.'s risk to the public when deciding not to impose a section 161 order;
>
> 2. Engaging in speculation that at the expiry of the LTSO the protection of the public would be maintained without the section 161 order; and
>
> 3. Imposing a demonstrably unfit and unreasonable sentence.

[20] For the reasons that follow, I do not agree with the Crown's position.

W.D.'s Risk to the Public

[21] The Judge considered the evidence. His decision references the evidence that W.D. had been engaging in sexually inappropriate if not criminal behavior that posed serious risk to young girls for a long time (in this regard, I note that some of W.D.'s assaults of his sisters took place before he was of an age to attract criminal responsibility). The Judge also referenced the psychiatric reports which documented, in detail, the nature and extent of W.D.'s criminal behaviours, and the psychiatrists' opinions of the risk W.D.'s behaviour posed to the public. The Judge found that there was a substantial risk that W.D. would reoffend. One of the criteria to be met in order to designate W.D. a long-term offender is that there must be a substantial risk that the offender will reoffend. As noted above, the Judge so found, after considering the evidence. Accordingly, in my view, it cannot be said that the Judge failed to consider the risk W.D. posed to the public.

Speculation

[22] The Judge considered the detailed reports of the two forensic psychiatrists. Both psychiatrists acknowledged the seriousness, and duration, of W.D.'s criminal behaviour. Both psychiatrists opined that W.D.'s risk to the public may be able to be controlled upon him receiving treatment while incarcerated and while subject to long-term supervision post-release. I note that Dr. Gill specifically stated that W.D. should be put on conditions and monitored for 10 years after his release from prison. The Judge noted that both psychiatrists said that W.D. was agreeable to receiving treatment, and that he was co-operative during the assessments.

[23] The Judge also considered evidence from two CSC officers respecting CSC's responsibility for persons subject to LTSOs. The officers informed the Court that the purpose of an LTSO is to manage the risk of an offender's criminal behavior after they finish an incarcerating sentence. The officers explained the protocols they engage in, how restrictive conditions are imposed on such offenders, and how they are monitored.

[24] The Judge stated that "the safety net" provided by the LTSO is a sufficient guarantee of the protection of the public" (Decision, at para. 59). While guarantees are virtually non-existent in sentencing or controlling human behaviour, it is clear that the Judge concluded that the 10-year LTSO would accomplish what was necessary to control the risk W.D. would pose to the public upon his release. This is a reasonable decision.

[25] In my view, the Judge properly considered the evidence informing the prospective imposition of a section 161 order; and he did not consider any irrelevant factors. His decision not to impose a 20-year section 161 prohibition order was supported by admissible opinion evidence from the two forensic psychiatrists and the testimony of two CSC officials. In these circumstances, his decision cannot be said to be speculative.

Is the Sentence Demonstrably Unfit

[26] The Crown also argued that the sentence the Judge imposed on W.D. is demonstrably unfit.

[27] The Judge canvassed the sentencing case law and sentenced W.D. to "just in excess of six years" (Decision, at para. 53). This part of the sentence is in accordance with established law and the Crown does not object to it.

[28] The Crown's contention that W.D.'s sentence is demonstrably unfit is based solely on the Judge's decision not to impose a 20-year section 161 prohibition order. Even though a sentencing judge has made no error affecting the sentence imposed, whether a sentence is demonstrably unfit can remain an issue (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11, 41, 51, 67).

[29] Both parties filed case law in support of their respective positions. All of the case law informs consideration of whether section 161 orders should be imposed, what conditions should be imposed, and the duration of such orders. The cases are all very fact dependent, and the decisions are, of course, all discretionary. Accordingly, it is difficult to draw firm principles from them. I do, however, note that in *R. v. Barrett*, 2022 NLSC 43, *R. v. R.J.C.*, 2015 NLTD(G) 154, and *R. v. Scrivens*, 2019 ABQB 700, the lengthy section 161 orders were imposed on offenders who were significantly older than W.D. and whose behaviour had generally proved intractable.

[30] In *R. v. R.K.A.*, 2006 ABCA 82, a lifetime section 161 order imposed on a younger man was upheld on appeal. However, the Court stated that there had been no pre-sentence report and no information respecting prospects, or desire, for treatment, and also that the offender had violated his bail conditions. The Court noted that, in any event, section 161(3) of the *Criminal Code* provided for variation of a section 161 order if the offender was subsequently treated and the situation changed.

[31] In this case, the Judge's decision not to impose a section 161 order was two-fold. He determined that it would not be necessary to impose a section 161 order for the first 10 years after W.D.'s release from custody because the LTSO would be in place to assess, restrict, and monitor W.D.'s risk to the public. The Judge reasoned that, practically speaking, the section 161 order would duplicate the prohibitions that the LTSO could impose. I note that in the particular circumstances of this case, the LTSO may arguably be a better tool to manage W.D.'s risk to the community during this time, given that it provides for assessment and monitoring of a subject whereas a section 161 order does not. Regardless, the Judge's decision was reasonable.

[32] The Judge based his decision not to impose a further 10-year period of restrictions on W.D.'s age. As the Judge stated, W.D. was a young man when originally incarcerated respecting the predicate offences, and would be 34 years old when his LTSO expires. The Judge did not see that it was necessary to add a further 10 years to the 16 years of restrictions that had already been imposed.

[33] I agree with the Judge's reasoning. Sixteen years (incarceration plus LTSO restrictions) is a long time for a person to be under such serious restrictions of their liberty. Ordering a total of 26 years of incarceration plus restrictions would, in the circumstances, be excessive. While it is not possible to predict with certainty whether W.D. will reoffend after his LTSO expires, he must be given a chance to demonstrate that he will not. In my view, it cannot be said that over 6 years incarceration combined with 10 years of restrictions is a demonstrably unfit sentence.

[34] This case is really about the role that rehabilitation plays in sentencing. If we as a society are to have any faith in the ability of offenders, especially relatively young offenders, to rehabilitate themselves, to benefit from treatment, or to learn from their mistakes, we must be prepared to give reformation and rehabilitation a chance. In this regard, the Supreme Court of Canada's comment at paragraph 85 of *R. v. Bissonnette*, 2022 SCC 23, pertains: "To ensure respect for human dignity, Parliament must leave a door open for rehabilitation, even in cases where this objective is of minimal importance". In my view, that reasoning applies to this case. The reformation and rehabilitation door must remain open to W.D. Moreover, imposing a 20-year prohibition order, at this point in W.D.'s life, is not necessary, and it could run the risk of thwarting his motivation and ability to reform and rehabilitate.

[35] In my view, the Judge made no error in exercising his discretion not to impose the requested 20-year section 161 prohibition order. Further, his incarcerating sentence of over six years coupled with the maximum (10-year) LTSO, cannot be said to be demonstrably unfit.

DISPOSITION

[36] In the result, I would dismiss the appeal.

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L.R. Hoegg J.A.

I concur: _____
D.E. Fry C.J.N.L.

I concur: _____
D.M. Boone J.A.