

Date: 20130221
Docket: 12/33
Citation: *R. v. Alexander*, 2013 NLCA 15

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

SHANE ARLINGTON ALEXANDER

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Rowe, White and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Clareville

Appeal Heard: February 14, 2013

Judgment Rendered: February 21, 2013

Reasons for Judgment by Hoegg J.A.

Concurred in by Rowe and White JJ.A.

Counsel for the Appellant: Self Represented

Counsel for the Respondent: Sheldon Steeves

REASONS FOR JUDGMENT

Hoegg J.A.:

[1] On May 2, 2012 Shane Alexander was convicted of three breaches of section 4(1) of the *Controlled Drugs and Substances Act* for possessing

various drugs, and one breach of section 91(2) of the *Criminal Code* for possessing a switchblade. As part of his sentence for the switchblade offence, Mr. Alexander was prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance (the “firearms prohibition”) for life pursuant to section 109(3) of the *Criminal Code*. Section 109(3) requires that a lifetime firearms prohibition order be made in any case but a first conviction. On a first conviction, a firearms prohibition order for a minimum of ten years is mandatory pursuant to section 109(2) of the *Criminal Code*.

[2] On June 27, 2007 Mr. Alexander was convicted of possessing a prohibited weapon under section 91(2) of the *Criminal Code*. This previous conviction was brought to the judge’s attention at Mr. Alexander’s sentencing. The record indicates that the judge imposed a lifetime firearms prohibition on Mr. Alexander in the belief that it was mandatory because it was Mr. Alexander’s second section 91(2) conviction.

[3] Mr. Alexander appeals the lifetime firearms prohibition, arguing that a lifetime ban is too severe. He says that although he has never owned a firearm, he would like to be able to hunt with his son or grandson in the future. He also says that he has mended his ways, and is moving on from his criminal past.

[4] The Crown acknowledges that the lifetime firearms prohibition was imposed because the sentencing judge believed it was mandatory, and concedes it was not mandatory because Mr. Alexander was not given notice that the Crown was seeking the greater punishment of a lifetime firearms prohibition due to his previous conviction.

[5] Section 727(1) of the *Criminal Code* stipulates that where an offender is convicted of an offence for which a greater punishment may be imposed by reason of a previous conviction, the offender must be given notice that the Crown is seeking that greater punishment because of the previous conviction. In such circumstances, a sentencing judge is obligated to impose the greater punishment. It is clear from the wording in section 727 that it applies to the provisions of section 109, as was decided by Dymond J. in *R. v. Seers*, 2010 NLTD 74, 296 Nfld. & P.E.I.R. 171. The applicability of section 727 to section 109 does not mean that a sentencing judge cannot impose a lifetime firearms prohibition for a first offence on a discretionary basis. It simply means it is not mandatory to do so. (See *R. v. Ellis* (2001), 143 O.A.C. 43.)

[6] In this case, the lifetime firearms prohibition was imposed on Mr. Alexander on the basis that it was believed to be mandatory. It was not mandatory because there was no section 727 notice. Although section 109(2) permits a lifetime prohibition for a first offence, a sentencing judge would have to consider the facts of the case and the offender's circumstances to do so. In automatically imposing the lifetime prohibition on Mr. Alexander in the absence of a section 727 notice and without consideration of the facts and circumstances of the case, the sentencing judge erred. Accordingly, the lifetime firearms prohibition must be set aside, and this Court must impose a firearms prohibition in accordance with the provisions of section 109(2).

[7] Section 109(2) mandates that Mr. Alexander be subject to a firearms prohibition for a minimum of ten years. While it is within this Court's discretion to impose a mandatory lifetime firearms prohibition, the Crown is not arguing that one be imposed on Mr. Alexander. However, the Crown is seeking a prohibition of a longer duration than the 10-year mandatory minimum. The Crown's position is based on the fact that Mr. Alexander has a criminal record for crimes involving violence, weapons and drugs, and also on the fact that he committed the switchblade offence while bound by another prohibition order. The Crown relies on the *Seers* case to support its position.

[8] I agree that something more than the 10-year mandatory minimum is required in Mr. Alexander's case, for the reasons stated by the Crown. However, I do not view Mr. Alexander's situation as calling for a lifetime prohibition. Mr. Alexander was found in possession of the drugs and switchblade while driving on a public highway, having been stopped by police who believed that he was using a radar detection device. While Mr. Alexander was pulled over, police detected the smell of marijuana and a search ensued. In *Seers* the trial judge imposed a 20-year firearms prohibition on an offender convicted of robbery with violence. In Mr. Alexander's case, something less than a 20-year firearms prohibition is appropriate. Accordingly a 15-year firearms prohibition pursuant to section 109(2) will be imposed.

[9] In the result, the appeal is allowed, the lifetime mandatory firearms prohibition order under s. 109(3) is varied and a 15-year firearms prohibition order under section 109(2)(a) is imposed instead. Mr. Alexander will also be subject to a mandatory lifetime order prohibiting him from possessing

any prohibited or restricted firearm and prohibited weapon, prohibited device and prohibited ammunition pursuant to section 109(2)(b).

L. R. Hoegg J.A.

I concur: _____

M. R. Rowe J.A.

I concur: _____

C. W. White J.A.