IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Deering*, 2019 NLCA 31
Date: May 17, 2019
Docket Number: 201801H0030

BETWEEN:

SCOTT ERIC DEERING — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Green, White and O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador, Grand Bank

Appeal Heard: May 13, 2019
Decision Rendered: May 13, 2019 (Orally)
Written Reasons Filed: May 17, 2019

Reasons for Oral Decision by: Green J.A.
Concurred in by: White and O'Brien JJ.A.

Counsel for the Appellant: Derek Hogan
Counsel for the Respondent: Dana Sullivan

Green J.A.:

[1] The issue in this appeal is whether the trial judge erred in imposing a condition in a three-year probation order that barred the appellant from being present on "any part of the Burin Peninsula south of the Piper's Hole River Bridge."

[2] Following the appeal hearing, the panel dismissed the appeal with reasons to be filed at a later date. What follows are those reasons.

[3] The probation order was imposed consequent on a sentence of 132 days (six months less time served) for one breach of recognizance and two breaches of probation. The recognizance and probation orders in question had prohibited the appellant from contacting his former girlfriend. The trial judge had found that the appellant had breached the orders by confronting his girlfriend on a road in Marystown and screaming at her that, amongst other things, she would never get her children back and that if he could not have her, no one else would either. The convictions and the sentence for them are not under appeal.

[4] The appellant claims that the decision of the judge effectively "banishes" him from the Burin Peninsula and that he erred in law in making such an order at all or alternatively, in all the circumstances, the geographic scope of the order was not necessary or appropriate, and hence not "reasonable" for "protecting society" (including the complainant) or for "facilitating the offender's successful reintegration into the community" within the meaning of section 732.1(3)(h) of the *Criminal Code.*

[5] The Burin Peninsula, like Italy, is shaped like a boot. Marystown, where the offences occurred, is at the bottom of the "leg" of the boot where the "foot" begins. Pipers Hole River Bridge is near the top of the "neck" of the boot. Approximately 115 kilometers of the main Burin Peninsula highway separates the bridge from Marystown. There are few settlements, and hence little population, between these two points. In and beyond Marystown, towards the "heel" and the "toe" of the boot, is where most of the population on the peninsula is located. It is appropriate for this Court to take judicial notice of these geographical facts because they are clearly uncontroversial and beyond reasonable dispute due to their notoriety and their potential for verification from sources of indisputable accuracy (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, per McLachlin C.J.C. at para. 48).

[6] In imposing the geographical restriction, the judge focused on:

- The appellant's "unenviable criminal record" of 82 convictions over 17 years
- Of those convictions, 36 involved breaches of probation, 21 breaches of probation, one breach of a peace bond, 2 under the *Family Violence Prevention Act* and one for criminal harassment
- The complainant's victim impact statement in which she stated, amongst other things, that the incidents caused "a lot of stress" and that "I don't want him around me or my kids. I don't trust him."
- The importance, in the judge's view, of the appellant not having any contact or communication with the complainant, her children and another individual

[7] The judge picked Piper's Hole River Bridge as the boundary for the "no-go" zone because it is easily recognizable, is well-known and all traffic travelling down the peninsula to Marystown must cross it. In imposing the restriction, the judge essentially acceded to the submissions of the prosecutor who suggested barring the appellant from the whole of the Burin Peninsula because:

> He has no reason to be on the Burin peninsula. … He's not living there, he has no place to live there, he's not working, he's not attending school. He comes here, I suspect, to be around [the complainant].
>
> (Transcript, p. 95)

[8] It is also to be noted that the appellant testified that he did not want to have any further dealings with the complainant (Transcript, p. 73). Thus, if one were to take his protestations at face value, being prohibited from interacting with her should be of little or no concern to the appellant.

[9] Although the judge did not refer to these considerations in his short orally-delivered sentencing decision, it is reasonably clear from the record that these must have been factors present in his mind and of influence to him in reaching his decision. The evidence disclosed that the appellant maintained an apartment in Tilton, a community not on the Burin Peninsula. He had no residence in Marystown or anywhere else on the peninsula and had been motivated to visit the area because he had met in prison and became friends with the husband of the complainant and decided to go and meet her. He did so and within a day, he had commenced a relationship with her (see, generally, Transcript, pp. 71-73).

Leave to Appeal

[10] This is an appeal against sentence only. As such it requires leave of the Court (*Criminal Code*, s. 675(1)(b)). The Crown did not oppose leave. It cannot be said that the appeal is "frivolous, in the sense of having no arguable basis or sufficient merit" (*R. v. Hillier*, 2016 NLCA 21, at para. 7). Accordingly, leave was granted at the hearing.

Standard of Appellate Review

[11] Judges have a wide discretion to craft an appropriate sentence within the sentencing guidelines in the *Criminal Code*. An appellate court may interfere with and set aside a sentence where there is an error in principle, a failure to consider a relevant factor, an overemphasis on appropriate factors, and such errors would have had an impact on the result, or where the sentence is otherwise demonstrably unfit (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 per Lamer C.J.C. at paras 90-91; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 per Wagner J. at para 44).

[12] Here, the submissions of the appellant as to whether in principle banishment should be available and, even if so, whether it was appropriately imposed within the strictures of s. 732.1(3)(h) of the *Criminal Code*, engage questions of whether the judge erred in law or legal principle. Deference should nevertheless be shown unless an error of law or principle, if it exists, would have had an impact on the resulting sentence or it is otherwise demonstrably unfit.

Analysis

[13] Appellant's counsel initially characterized the condition in question as a "banishment" order. In truth, it is hard to regard it as such since the appellant had no presence on the Burin Peninsula except to interact with the complainant. The notion of banishment has inherent within it the idea of requiring a person to *leave* or *remove* himself or herself from a particular place where he or she might have otherwise been. It assumes some sort of personal connection by virtue of residence, employment or educational activities, family heritage or cultural affiliation. For example, the banishment legislation in colonial Newfoundland spoke of "removal" of offenders from the colony by requiring them to "leave" the colony and to "remain away" from it (*Removal of Criminal Offenders from this Colony*, C.S.N. 1872, c. 44).

[14] In this case the appellant maintained no residence on the peninsula and did not work or go to school there, nor was there any evidence of a historical

family or cultural connection. In these circumstances, the condition establishing a "no-go" area is more in the nature of a general limitation or curb on mobility. Many aspects of sentencing, such as imprisonment or house arrest, also involve restrictions on mobility.

[15] Nevertheless, even if one accepts for the purposes of this appeal that what was imposed was a banishment, of sorts, I am satisfied that a judge has the authority to impose such a condition as part of a probation order in appropriate circumstances. In this case, the judge did not err in principle in considering such a condition.

[16] Although this Court has struck out conditions in probation orders banishing offenders from particular areas (*R. v. Lahey* (1977), 13 Nfld. & P.E.I.R. 167; *R. v. Lasaga* (1977), 13 Nfld. & P.E.I.R. 164; *R. v. Rees* (1977), 13 Nfld. & P.E.I.R. 170; *R. v. Taplin* (1977), 23 Nfld. & P.E.I.R. 178; *R. v. Whalen* (1977), 21 Nfld. & P.E.I.R. 390), as "not reasonable conditions for securing good conduct of the accused and preventing him from repeating the same offence or committing other offences" (per Morgan J.A. in *Lahey* at para. 5), I do not read this as a statement of the illegality, in all circumstances, of banishment conditions but only that they must be justified in each individual circumstance.

[17] In later cases in this and other jurisdictions, such conditions have been recognized as legitimate if (i) imposed for the right purposes and (ii) crafted carefully and with restraint (*R. v. Reeves* 2004 NLCA 79, 244 Nfld. & P.E.I.R. 186, per Rowe J.A. at paras. 7-8; *R. v. Skinner*, 2002 NFCA 44; *R. v. Peyton* (1996), 140 Nfld. & P.E.I.R. 243 per Schwartz J. at paras. 11 -17; *R. v. Malboef* (1982), 68 C.C.C. (2d) 544 (Sask C.A.); *R. v. Rowe* (2006), 216 O.A.C. 264, 212 C.C.C. (3d) 254, per Sharpe J.A. at paras. 4-7; *R. v. White*, 2015 BCSC 2383 per Young J. at paras 22-33; *R. v. Saila* (1983), [1984] N.W.T.R. 176, 54 A.R. 60 per de Weerdt J. at paras.18 – 29; *R. v. Graham*, 2009 BCSC 1588 per Humphries J. at paras 40 – 46)).

[18] Such conditions must be used only for the right purpose because "reasonable" conditions in a probation order must have a "nexus between the offender, the protection of the community and his reintegration into the community" (*R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, per Charron J. at para. 13). In *Reeves*, Rowe J.A. expressed the point in terms of there being a nexus between the banishment and the offence (paras. 8 – 9). That, of course, is another way of saying that there must be a nexus between the offender and the protection of the community, as per *Shoker*, since it is the commission of the

offence that raises the spectre of the need for protection by separating the offender from those who might be affected if it were committed again. Thus a banishment condition cannot be used simply to punish the offender in the abstract. Where, however, it is used to protect the victim from further interaction with the offender or to facilitate the offender's rehabilitation, it can be justified if appropriate in scope, given the area and locality involved.

[19] The larger the scope of the banishment area, the more difficult it will be to justify by reference to its nexus between the offender, the victim, the community and the offender's reintegration into that community (*Rowe*, per Sharpe J.A. at para 7). I would also add that the precise boundaries of the area where banishment is to be effective will to some extent be influenced by the geography of the area and the practicalities of achieving its intended purpose.

[20] Often, banishment or prohibition orders have been limited in area to the community in which the victim is located (e.g. *Skinner, Peyton, Rowe, Saila*) but in others the area has extended more widely (e.g. *Graham* – to stay out of part of Vancouver Island south of Malahat, which would include Victoria, where the offences occurred; *White* – to stay out of approximately one-third of Vancouver island, north of the Woss cut-off; *R. v. Banks*, [1991] B.C.J. No. 424 (BCCA) – to stay out of the Province of British Columbia). Where restrictions extending beyond a specific community have not been upheld, it is usually because no nexus could be demonstrated between the offence and the banishment area or between the offender and the protection of the community or reintegration of the offender into that community (e.g. *Rowe*, para. 8). Further, the concern to draw the boundaries of the banishment area more tightly usually arises more acutely where the offender can demonstrate that a larger restriction would cause considerable hardship to him.

[21] Conditions must be crafted with care and with restraint because of their potential for serious limitation and effect on the liberty of the subject. (I note in passing that the potential issue of whether a banishment order might unduly interfere with mobility rights under s. 6 of the *Canadian Charter of Rights and Freedoms* was not raised in this case and does not appear to have been definitively addressed in any other appellate decisions). Thus, it is appropriate for a court to consider the offender's ties to the area of banishment and the degree of consequent hardship to the offender if he were to be required to live and work outside the area for an extended period of time (*R. v. Etifier*, 2009 BCCA 292, per Groberman J.A. at para. 15). Further, the cases have recognized the general inappropriateness of using such orders effectively to "download" a

social problem onto other communities outside the banishment area (*R. v. Malboeuf* per Bayda C.J.S. at para 8; *Saila*, per de Weerdt J. at para 29).

[22] In this case, the appellant's criminal history demonstrates an unwillingness or inability to abide by court orders in general and no-contact orders in particular. There is no reason to believe that another no-contact order, without more, would have any greater chance of being effective. The use of a no-go area in this case is justifiable as a potentially more effective alternative – indeed, the only realistic alternative – means of minimizing and hopefully eliminating contact between the appellant and the complainant. As such, it has potential of contributing to the protection of the community, something that has not been achieved by imposition of simple no-contact orders in the past. Furthermore, the separation of the appellant from the complainant in this way should have the incidental effect of reducing the potential for future breaches of the no-contact provision and may incidentally contribute to the appellant's rehabilitation and reintegration into the community when the probation order expires. It will involve a "cooling off" period that may enable him to reflect on the futility of trying to maintain a one-sided relationship with someone who does not want to continue it.

[23] A no-go order can thus be regarded as a reasonable condition that would contribute to protection of the community and the reintegration of the offender into the community. The appropriate nexus between the offender and these goals therefore exists, as required by s. 732.1(3)(h) of the *Code* and as explained in *Shoker*. It can equally be said there is a nexus between the offence and the contemplated banishment, as alluded to in *Reeves*. From the record and the way the judge approached the matter, it is evident that he thought the same way. It was therefore not inappropriate to employ the tool of imposing a no-go area on the appellant as a condition of his probation.

[24] The use of banishment in these circumstances was therefore engaged. The judge did not err in imposing a no-go area on the appellant as a condition of his probation.

[25] Given the geography of the area, and how all traffic destined for Marystown must funnel across the Piper's Hole River bridge, and given the fact that once on the Burin Peninsula, there is a good likelihood of interaction among residents of Marystown with residents in one or more of the other smaller communities on the foot of the peninsula as people go about their daily tasks and visit back and forth, it is not realistic to limit the no-go area to the municipal boundaries of only Marystown, as the appellant suggested. Indeed, there would

have to be an exception made even for this more limited area because the highway that brings traffic to the other communities on the foot passes through Marystown. Barring the appellant from Marystown alone is therefore not likely an effective way of keeping the appellant away from the complainant. The reality is that municipal boundaries are often artificial and arbitrary. The towns and settlements existing on the foot of the Burin Peninsula can, in some respects, be regarded as one community. Extended families are often spread among more than one municipality or settlement. If the complainant were to be insulated from interaction with the appellant only technically within the municipal boundaries of Marystown, with the potential of the appellant hovering just outside, the victim would effectively be a prisoner in her own community unless she was prepared to face the appellant if she needed to travel to a neighbouring settlement.

[26] While there is always a reluctance to draw the boundary too widely, it is not unreasonable in the circumstances to set the boundary where the judge set it. This is especially so where there are minimal connections between the appellant and the peninsula. There will be little hardship to him in terms of his other life activities if he were to be prevented from being present in the area. The appellant suggested there would be hardship if he sought work in the area or decided to attend college in Burin. At the moment (and at the time of the sentencing hearing) these ideas are purely speculative. If such matters do ever become a reality, they could be considered on a subsequent application to vary the terms of the probation order on grounds of changed circumstances (*Criminal Code*, s. 732.2(3)).

[27] Finally it should be noted that this is not in reality a case of downloading a problem in one area onto another, as in this case the appellant already has connections with areas outside the no-go area. His potential presence in those areas is a given in any event.

[28] Accordingly, I conclude there is no basis for interfering with the sentencing judge's decision. In these circumstances, the judge is in the best position to determine what is necessary and reasonable in terms of area.

Summary and Conclusion

[29] The sentencing judge did not err in principle in considering and imposing a condition preventing the appellant from being present in or near the area where the offence was committed and the complainant was located.

[30] More specifically, the sentencing judge did not err in imposing in the probation order a condition that the appellant not be present on the Burin Peninsula south of the Piper's Hole River Bridge. His decision to do so was not unreasonable because the area chosen demonstrated a nexus between the offence, the offender, the protection of the community, including the victim of the appellant's offences, and the appellant's potential reintegration into the community. The sentence was not unfit in all the circumstances. The judge's decision is therefore to be accorded deference and this Court should not interfere.

[31] Accordingly, I would grant leave to appeal but would dismiss the appeal.

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J.D. Green J.A.

I Concur: _____

C.W. White J.A.

I Concur: _____

F.J. O'Brien J.A.