PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Hennessey*, 2017 NSPC 29

Date: 2017-06-22
Docket: 8053673
Registry: Pictou

Between:

Her Majesty the Queen

v.

Brett Edward Hennessey

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	22 June 2017 in Pictou, Nova Scotia
Charge:	Sub-s. 245(5) of the Criminal Code of Canada
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Douglas M. Lloy QC, Nova Scotia Legal Aid for Brett Edward Hennessey

By the Court:

[1] Brett Edward Hennessey pleaded guilty to a single prosecution-option summary count of failing to provide a screening sample of his breath, contrary to sub-s. 254(5) of the *Criminal Code*. The prosecution served an increased-penalty notice upon Mr. Hennessey prior to plea, in accordance with s. 727 of the *Code*. The prosecution alleges that Mr. Hennessey has one prior applicable conviction, which would bring into play the mandatory-minimum 30-day sentencing provisions in sub-para. 255(1)(a)(ii) of the *Code*.

[2] However, Mr. Hennessey's prior finding of guilt was recorded when he was a young person and sentenced under the provisions of the *Youth Criminal Justice Act*.

[3] After hearing from counsel at the sentencing hearing, I raised the issue whether a prior finding of guilt under the *YCJA* would operate as a prior conviction as comprehended in sub-s. 255(4) of the *Code*, so as to make Mr. Hennessey liable for the increased penalty in sub-para. 255(1)(a)(ii). The parties have filed briefs with the court which allow me to settle that question for the purposes of this proceeding.

[4] The facts presented to the court by the prosecution pursuant to ss. 723 and 724 of the *Code*, and admitted as correct by defence counsel, informed the court that Mr. Hennessey was pulled over by police after being observed driving after dark without headlights. When police checked the RMV database, they discovered that Mr. Hennessey was a revoked driver; as they prepared to issue Mr. Hennessey a s. 287 Motor Vehicle Act SOT, they observed Mr. Hennessey exhibiting signs of alcohol impairment. One of the officers believed that Mr. Hennessey had alcohol in his body, and immediately made a screening demand under sub-s. 254(2) of the *Code*. Mr. Hennessey refused to provide a screening sample of his breath; he was charged with the sub-s. 254(5) offence for which he is to be sentenced.

[5] Sub-section 255(1) of the *Code* provides:

> 255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
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> (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
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> (i) for a first offence, to a fine of not less than $1,000,
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> (ii) for a second offence, to imprisonment for not less than 30 days, and
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> (iii) for each subsequent offence, to imprisonment for not less than 120 days;

[6] Sub-section 255(4) of the *Code* provides:

> (4) A person who is convicted of an offence committed under section 253 or subsection 254(5) is, for the purposes of this Act, deemed to be convicted for a

> second or subsequent offence, as the case may be, if they have previously been convicted of
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> (a) an offence committed under either of those provisions;
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> (b) an offence under subsection (2) or (3); or
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> (c) an offence under section 250, 251, 252, 253, 259 or 260 or subsection 258(4) of this Act as this Act read immediately before the coming into force of this subsection.

[7] On the application of defence counsel, the court ordered the preparation of a presentence report for Mr. Hennessey. The report which I received contains a list of Mr. Hennessey's previous findings of guilt, in accordance with para. 721(3)(b) of the *Code*. Included in that list is an entry which states that Mr. Hennessey was sentenced on 26 June 2012 for a para. 253(1)(b) offence; the sentencing court imposed a fine of $500, a one-year term of probation and an eighteen-month driving prohibition. As Mr. Hennessey was 17 years of age at the time, his sentence was governed by the provisions of the *Youth Criminal Justice Act*. There is no evidence before me that this charge was prosecuted indictably, so that it is presumptively a summary-conviction charge: *R. v. E.B.L.*, 2015 NSPC 76 at para. 7.

[8] The *YCJA* imposes time-limited restrictions on access to and admissibility of a young person's forensic record. The periods of access are set out s. 119(2)(g)-(j) of the *YCJA*:

> (g) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is a summary conviction offence, the period ending three years after the youth sentence imposed in respect of the offence has been completed;
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> (h) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is an indictable offence, the period ending five years after the youth sentence imposed in respect of the offence has been completed;
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> (i) subject to subsection (9), if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an offence punishable on summary conviction committed when he or she was a young person, the latest of
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> (i) the period calculated in accordance with paragraph (g) or (h), as the case may be, and
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> (ii) the period ending three years after the youth sentence imposed for that offence has been completed; and
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> (j) subject to subsection (9), if, during the period calculated in accordance with paragraph (g) or (h), the young person is found guilty of an indictable offence committed when he or she was a young person, the period ending five years after the sentence imposed for that indictable offence has been completed.

[9] The legal effect of a finding of guilt under the *YCJA* is described in sub-s. 82(4) of the *YCJA*:

> A finding of guilt under this *Act* is not a previous conviction for the purposes of any offence under any Act of Parliament for which a greater punishment is prescribed by reason of previous convictions, except for
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> (a) [Repealed]
>
> (b) the purpose of determining the adult sentence to be imposed.

[10] This would seem to be consonant with the principles which recognize the reduced moral blameworthiness of young persons in conflict with the law as described in paras. 3(1)(b) and (d) and sub-s. 3(2) of the *YCJA*.

[11] But what a statute giveth, it might also taketh away.

[12] Significant in this case is the fact that Mr. Hennessey came into conflict with the law after he turned 18 years of age. He was sentenced on 11 May 2015 for an array of offences committed when an adult and ordered to serve a 90-day term of imprisonment, followed by a 9-month term of probation. Three months later, he was sentenced to a 9-month term of imprisonment followed by 12 months of probation for weapons charges.

[13] At the time of the commission of the offences for which Mr. Hennessey was sentenced in 2015, fewer than three years had elapsed since the expiration of his 26 June 2012 *YCJA* sentence, well within the access-to-record period prescribed in para. 119(2)(g) of the *YCJA.*

[14] The legal effect of these later adult convictions upon Mr. Hennessey's *YCJA* sentence is described in para. 119(9)(a) of the *YCJA*:

> If, during the period of access to a record under any of paragraphs (2)(g) to (j), the young person is convicted of an offence committed when he or she is an adult,
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> (a) section 82 (effect of absolute discharge or termination of youth sentence) does not apply to the young person in respect of the offence for which the record is kept under sections 114 to 116;

[15] Does this mean merely that an earlier finding of guilt under the *YCJA* might get rendered admissible in a later adult sentencing hearing? Or does para. 119(9)(a) go beyond that, and require a sentencing court to treat a finding of guilt

under the *YCJA* as a prior conviction for the purposes of engaging a mandatory-minimum-sentencing provision for a second or subsequent offence?

[16] In its brief, the prosecution referred the court to *R. v. Able* 2013 ONCA 385. The appellant in that case sought a reduction of a sentence of nine and one-half years' imprisonment for firearms-related offences, including possession of a restricted firearm with ammunition under para. 95(1)(a) of the *Code*. Two years earlier, the appellant had been found guilty of a number of offences—including, yes, possession of a restricted firearm with ammunition—under the *YCJA*. At the sentencing hearing for the offences under appeal, defence counsel conceded (and the prosecution and the judge agreed) that the appellant's finding of guilt as a youth on the earlier para. 95(1)(a) charge made the pending charge under para. 95(1)(a) a second or subsequent offence for the purposes of determining the applicable mandatory-minimum five-year penalty under sub-para. 95(2)(a)(ii). On appeal, Able resiled from that concession, and argued that because he had found guilty under the *YCJA* for his previous para. 95(1)(a) offence, the later para. 95(1)(a) conviction did not constitute a second or subsequent offence for the purpose of determining the applicable minimum penalty.

[17] In the opinion of Tulloch JA—writing for a unanimous three-member panel—the appellant's earlier finding of guilt as a youth became an earlier offence

within the meaning of sub-s. 84(5) of the *Code* in virtue of the interaction between para. 119(9)(a) and s. 82 of the *YCJA*. The appellant was well within the period of access applicable to his youth record defined in sub-s. 119(2) of the *YCJA*, and the elevated five-year mandatory minimum in sub-s. 95(2) of the *Code* for second or subsequent offences applied. The application of sub-s. 82(4) of the *YCJA* was restrained also by the operation of para. 119(9)(a), which directed that s. 82 was rendered of no force. This interpretation fulfilled Parliamentary purpose and helped achieve the objective of the *YCJA* of fostering responsibility and ensuring accountability through meaningful consequences and effective rehabilitation and reintegration. Able's appeal from sentence was dismissed.

[18] *Able* is not binding upon this court. The principle of *stare decisis* would require me to follow the judgments of courts to which appeals from this court might lie: *see, e.g., R. v. Oxford* 2010 NLCA 45 at para. 55; *R. v. E.B.L.* 2015 NSPC 76 at para. 6.

[19] A creditable case might be made that *Able* incorrectly conflates the issue of admissibility of a *YCJA* record with the issue of its penal effect in a mandatory-minimum sentencing regime.

[20] However, in my view, there are a number of reasons which satisfy me that I ought to follow *Able*. First, the panel in that case was dealing with precisely the issue before this court: whether a *YCJA* record might constitute a prior offence for the purposes of engaging an increased penalty under the *Code*. It is clear from the record that the Ontario Court of Appeal considered the issue exhaustively following fulsome argument by counsel. In doing so, the Court considered exactly the same statute that applies in this case. Furthermore, the opinion of the Court was unanimous. Additionally, *Able* was the opinion of an appellate court. Finally, *Able* appears to be the leading case on this point. It has been cited a number of times; in fact, it was cited with approval in *R. v. W.R.M.* 2013 NSSC 392, although in relation to an issue different to the one that is live in this case. These factors— which were discussed in detail in Bryan A. Garner, Carlos Bea, Rebecca White Berch et al, *The Law of Judicial Precedent* (St. Paul, MN: Thompson Reuters, 2016) at pp. 164-247— militate overwhelmingly in favour of my determination that I ought to follow the outcome in *Able*. Defence counsel conceded the point, in any event.

[21] Accordingly, I find that Mr. Hennessey's finding of guilt as a youth for a para. 253(1)(b) offence operates as a prior conviction so as to make Mr. Hennessey liable for the mandatory-minimum penalty in para. 255(1)(a)(ii) of the *Code* for the refusal charge for which he is to be sentenced.

JPC