**PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** *R. v. Benson*, 2017 NSPC 37

**Date:** 2017-07-24
**Docket:** 8091400
**Registry:** Pictou

**Between:**

Her Majesty the Queen

v.

George William Benson

***DECISION RE APPLICATION TO STRIKE OUT CONVICITON***

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| **Judge:** | The Honourable Judge Del W. Atwood |
| **Heard:** | 24 July 2017 in Pictou, Nova Scotia |
| **Charge:** | Sub-section 287(2) of the Motor Vehicle Act |
| **Counsel:** | Douglas Lloy QC for George William Benson<br>Bronwyn Duffy for the Town of Westville |

**By the Court:**

[1] Today's is a short-notice application brought by defence counsel seeking an order striking out a conviction arising from a summary-offence ticket.

[2] It will occur by times that minor transgressions of state regulation will snowball into something really big. When this happens, those affected may seek the intervention of courts to remedy consequences that are grossly disproportionate to the original misstep. A court may grant a remedy only within the bounds of the law.

[3] In the case of George William Benson, it seems that what started as a couple of unremarkable speeding infractions now run the risk of derailing a promising career in the military. Affidavits submitted by defence counsel inform the court—albeit incompletely—how it is that this unfortunate situation arose.

[4] On 29 January 2016, Mr. Benson was fined and had his license suspended for seven days for a speeding violation contrary to para. 106A(c) of the Motor Vehicle Act (MVA).

[5] On 29 April 2016, Mr. Benson was fined again and suspended for seven days again, once more for speeding, contrary to para. 106A(b) of the MVA.

[6] As a result of the accumulation of demerit points arising from those offences, the Registrar of Motor Vehicles required Mr. Benson to take driver-improvement programming, as provided for in sub-s. 280(5) of the MVA, and submit proof of satisfactory completion by a specific date, failing which Mr. Benson would lose his licence. The registrar's office sent Mr. Benson a letter to that effect.

[7] However, it appears that Mr. Benson did not receive the letter and kept motoring on. As Mr. Benson remained unaware that it was imperative he enrol in a course, he never took one—and failed in turn to submit proof of completion to the registrar's office by the due date. As a result, the registrar suspended Mr. Benson's license as provided for in sub-s. 280(4) of the MVA.

[8] For reasons that are not clear at all, Mr. Benson was somehow off the grid all this time, and none of this came to his attention—until, that is, he was pulled over by police on 7 January 2017. The officer who conducted the stop ran Mr. Benson's master number on the RMV system and discovered the license suspension that had been imposed as a result of failing to complete driving improvement; he issued Mr. Benson with a ticket under sub-s. 287(2) of the MVA for driving while suspended. The officer made an entry in the ticket setting out an out-of-court settlement fine amount, and recorded a summons-return deadline of 7

April 2017, by which time Mr. Benson had to either pay the prescribed fine or file a notice of intent to appear in court. I will have more to say about this later.

[9] Mr. Benson was surprised by the news that his license had been suspended. He contacted the Registry of Motor Vehicles. The registry agreed to give Mr. Benson another chance to complete driver-improvement training, and allowed him until 13 April 2017 to get it done; this was extended later at Mr. Benson's request to 12 June 2017. Mr. Benson was able eventually to complete an approved course.

[10] At around the time Mr. Benson was charged with driving while suspended, he was in the process of enlisting in the Canadian military. To complete his induction, Mr. Benson had to give his recruiter proof that he was licensed to drive and that any fines or penalties owed to the government had been settled.

[11] It seems Mr. Benson decided to let his mother look after a good part of this.

[12] Mr. Benson's mother went to the administrative office of the Pictou Justice Centre on 5 April 2017 to check on the status of Mr. Benson's fines. It was at that time that she learned that Mr. Benson's ticket for driving while suspended remained "in the system", so to speak, with the 7 April payment deadline looming. She paid the ticket at the administrative-office counter in order to clear Mr. Benson's fine obligations; she claims in her affidavit to have been told by a

member of the administrative staff at the Justice Centre that this would not affect her son's license.

[13] Things didn't quite turn out that way. The payment of the fine for the drive-while-suspended ticket was recorded by court staff in accordance with sub-s. 8(13D) of the SPA. Once that fine payment came to the attention of the Registry of Motor Vehicles, the registry—treating the fine payment as a plea of guilty to the drive-while-suspended charge in accordance with sub-s. 8(13D)—revoked Mr. Benson's licence indefinitely in accordance with the mandatory-penalty provisions of para. 278(1)(f) of the MVA.

[14] This revocation has thrown a big monkey wrench into the gears of military enlistment, and Mr. Benson has had his eligibility deferred until he might get his license back and his charges cleared up.

[15] Mr. Benson applies to the court to have his finding of guilt for driving while suspended struck out. He hopes that this will reinstate his military eligibility.

[16] I inquired of defence counsel what authority this court might have to grant the relief that is being sought. Defence counsel referred the court to the general authority exercised by the Provincial Court to strike out convictions for SOT matters.

[17] In my view, no such general authority exists. This court is a statutory court, and, except with respect to the inherent jurisdiction of the court to control process—which is not in play in this proceeding—its jurisdiction to grant a judicial remedy must be situated in statute: see, *e.g.*, *R. v. Farler*, 2005 NSCA 105 at para. 21.

[18] Sub-ss. 8(18)-(19) describe the authority of this court to strike out ticket convictions:

> (18) Where a person who has been convicted as a result of a failure to
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> (a) act as required by subsection (13A) and more than sixty days have elapsed; or
>
> (b) appear at the time and place of the trial or the appearance for the purpose of pleading guilty to the offence and making a submission as to penalty, after having given a notice of intention to appear,
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> the person may appear before the court and the justice or the judge, as the case may be, upon payment of the prescribed application fee and being satisfied that
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> (c) the person demonstrates a prima facie defence to the offence charged in the ticket;
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> (d) the person has a reasonable excuse for failing to appear; and
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> (e) the person acted without unreasonable delay,
>
> shall strike out the conviction, give the person a certificate of that fact in the prescribed form and give the person appearing and the prosecutor a notice of trial or the appearance for the purpose of pleading guilty to the offence and making a submission as to penalty.
>
> (19) Upon the motion of a duly authorized prosecutor, a justice of the peace or a judge of the provincial court shall strike out a conviction entered pursuant to subsection (15).

[19] Neither provision is applicable in this case. Mr. Benson was not convicted as a result of his failure to pay his fine, dispute his charge, or appear at his hearing, as comprehended in sub-ss. 8(13A) and (18) of the SPA; nor was he convicted in default, as comprehended in sub-ss. (15) and (19) of the SPA. Rather, he stood convicted because his mother paid his fine, which, in turn, constituted a plea of guilty as laid out in sub-s. 8(13D) of the SPA.

[20] There exists statutory authority for the court to remit a penalty: Remission of Penalties Act, R.S.N.S. 1989, c. 397, s. 2; there exists authority for the court to extend the time for payment of a fine: *Criminal Code*, s. 734.3, SPA s. 7.

[21] But there exists no authority in the SPA or any other statute for the court to strike out a conviction entered in these circumstances, and this application must be and is dismissed.

[22] I mentioned to defence counsel during the hearing the unreported decision of *R. v. Decker* (23 November 2003) Case 1343640 (N.S.S.C.T.D.) per MacLellan J. Mr. Decker's driver's licence had been suspended for a medical reason by the Registrar of Motor Vehicles pursuant to s. 278C of the MVA. Mr. Decker took steps right away under s. 278D of the MVA to have his suspension reviewed. But he also kept on driving. Soon enough, Mr. Decker got stopped and ticketed for

driving while suspended. Prior to his summons-return date, Mr. Decker received word from the Registrar that his review had succeeded and his driving privileges were to be restored. Mr. Decker believed mistakenly that this would make away with his driving-while-suspended ticket and he failed to take any steps to deal with it. His failure to act resulted in an automatic conviction, which led, as in Mr. Benson's case, to a mandatory, indefinite para. 278(1)(f) MVA revocation.

[23] Mr. Decker appealed his case to the Supreme Court. I wish to disclose fully that I was the Crown attorney on that summary-conviction appeal.

[24] Mr. Decker had no defence to his charge, and he was unlikely to succeed on appeal. He had driven while suspended. His mistake about the status of his driving privileges was a mistake of law, which would not have afforded a mistake or due-diligence defence: *R. v. MacDougall*, [1982] 2 S.C.R. 605. Yet, there were compelling equities in Mr. Decker's favour: his initial loss of driving privileges was due to a medical condition and not any sort of wrongful conduct; he had gone about having his suspension reviewed the right way; the review was resolved in his favour; he needed his licence to help an infirm parent.

[25] On Mr. Decker's summary-conviction appeal from conviction and sentence, the prosecution proposed that the court amend the original charging document as

provided for in para, 683(1)(g) and sub-s. 822(1) of the *Criminal Code* to an offence of driving without a valid driver's license under s. 64 of the MVA, an offence that did not attract the inconvenience of a mandatory license revocation. With Mr. Decker's consent, the presiding judge agreed to the amendment, imposed the appropriate penalty as provided for in para. 687(1)(a) of the *Code* to one specified for a s. 64 MVA offence and Mr. Decker did not argue his appeal further.

[26] Defence counsel argued very ably the equities in favour of Mr. Benson.

[27] In my view, there is another good reason to have Mr. Benson's case reviewed judicially by a court with jurisdiction to do it.

[28] As I mentioned earlier, the officer who issued this ticket made an entry allowing for an out-of-court settlement. Section 5 of the Summary Offence Ticket Regulations, N.S. Reg. 281/2011, states:

> 5 (1) An offence charged in a summary offence ticket or a parking-infraction ticket is one for which the penalty may be paid out of court if any of the following applies:
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> (a) there is an amount listed in the out of court settlement column opposite the description of the offence in the applicable schedule;
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> (b) there is a category letter listed in the out of court settlement column opposite the description of the offence in the applicable Schedule.

> (2) If "Nil" appears in the out of court settlement column opposite the description of the offence in the applicable schedule, *the offence cannot be paid out of court.* [Emphasis added]

[29] Schedule 4 of the Regulations states at line item 399 the following:

> Driving motor vehicle while license or privilege of obtaining license (specify) cancelled, revoked or suspended (specify)—287(2)—Out of court settlement: NIL

[30] Accordingly, the ticketing officer should not have entered a settlement amount on the ticket, and administrative staff should not have processed the out-of-court payment.

[31] It is a schmozzle, to be sure—likely a repairable one. But it is not for this court to repair it.

[32] I feel it necessary to make one final observation. This application was advanced substantially on the strength of an affidavit of Mr. Benson's own counsel. Counsel swore to the truth of information that must have come from Mr. Benson; it is not clear to me why the court did not receive an affidavit from Mr. Benson. The content of the affidavit would go beyond what might be characterized as purely formal. Routine affidavits of counsel on uncontroverted matters are one thing; indeed, professional regulation allows for this: Code of Professional Conduct, para. 5.2. However, it is becoming uncomfortably common in this region for the court to receive affidavits of counsel in an array of contested

matters, affirming facts that are controversial and far from routine. I appreciate in this case the urgency that confronted defence counsel, and urgency will sometimes dictate departure from strict compliance with rules and codes. But counsel affiants can promenade themselves into minefields—something best avoided.

JPC