

CANADA / JUDGMENT

R. v. S.A.M.

2003 BCCA 561

COURT

British Columbia Court of Appeal

DECIDED

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2003BCCA0561 COURT OF APPEAL FOR BRITISH COLUMBIA (In the Matter of the Young Offenders Act) Citation: R. v. S.A.M.,

2003 BCCA 561 Date: 20031009

Docket: CA030644 Between: Regina Respondent

And S. A. M. Appellant

Before: The Honourable Mr. Justice Lambert The Honourable Madam Justice Huddart The Honourable Mr. Justice Mackenzie Oral Reasons for Judgment L. Worth Counsel for the Appellant F. Tischler Counsel for the (Crown) Respondent Place and Date: Vancouver, British Columbia October 9, 2003

- [1] HUDDART, J.A.: On 16 January 2003, the appellant, a 17-year old young offender, pled guilty to assault, two counts of credit card fraud, and one count of use or possession of a stolen credit card. [2] On 16 August 2002, he had exchanged words with a 12-year old neighbour riding his bicycle in a park. The appellant grabbed the younger boy's shirt, causing him to fall to the ground and suffer a serious head injury. Defence counsel explained the credit card offences were in aid of the appellant's drug addiction. The goods the appellant acquired by using the stolen credit cards were recovered. [3] On 5 February 2003 the trial judge sentenced the appellant to 21 days open custody to be served concurrently on all counts, plus time served of 21 days. The period of custody was to be followed by six months probation. He also ordered, without reasons, the collection, analysis, and retention, of the appellant's DNA. [4] The DNA order is the subject of this appeal. The appellant asks this court to set it aside and direct the destruction of the sample collected because it was neither necessary nor appropriate. [5] Section 487.051(1)(b) of the Criminal Code permits a trial judge who has convicted a young person of assault to authorize the taking of samples of bodily substances for the purpose of forensic DNA analysis "if the court is satisfied that it is in the best interests of the administration of justice to do so." When deciding whether to make such an order, s. 487.051(3) requires the trial judge to "consider the criminal record of the young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the young person's privacy and

security of the person." It also requires the trial judge to give reasons. [6] When Crown counsel applied for the DNA order, the trial judge asked defence counsel if he had any objection to the application. Counsel replied "a mild one." Anticipating a submission that the appellant was a young offender, who had turned his life around, who should not be required to give a DNA sample, Crown counsel made submissions based on *R. v. M.(I.R.)* 2002 BCSC 1746. [7] In *M.(I.R.)* Grist J. granted a DNA order on appeal that the Youth Court judge had denied because the young offender was turning his life around and because of the impact on the his privacy and security. The designated offence, as in this case, was common assault. The young offender's record resembled that of the appellant. [8] In reaching his conclusion, Grist J. noted that the legislation provided for the destruction of youth offenders' DNA samples and profiles after the same time periods stipulated for currency of youth records where there are no intervening convictions: five years after sentence completion in the case of indictable offences, and three years after sentence completion in the case of summary conviction offences. He did not see the recent changes in the young offender's life, or the extended privacy right afforded young offenders, as sufficient to found a reasonable basis for refusing the DNA order that would usually be in the interests of the administration of justice. [9] Following Crown counsel's submissions on sentence, defence counsel advised the sentencing judge that the appellant was "mildly opposed" to the DNA order because he felt his "privacy interests outweigh the need to take a DNA sample." [10] Crown counsel acknowledges the trial judge's error in failing to give reasons for making the DNA order. He asks this Court to determine afresh whether to impose the DNA order, and not to remit the matter to the authorizing judge with directions that he provide reasons for his order, nor to remit the matter to the Youth Court. Defence counsel agrees for practical reasons. [11] The Criminal Code provides for an appeal in s.487.054, but does not provide a remedy. This court has not addressed the issue of remedy directly. However, in *R. v. Ku*, (2002), 169 C.C.C.(3d) 535 (B.C.C.A.), where the constitutional validity of s. 487.052 was at issue, this Court did consider the matter afresh. In that case the trial judge erred by making a DNA order without providing defence counsel with the opportunity to make submissions. Because of that unfairness, this Court examined the order for correctness following full submissions. In doing so, this Court followed the approach the Courts of Appeal of Ontario, Alberta, and Manitoba had taken. [12] In *R. v. Hendry* (2001), 161 C.C.C.(3d) 275 the Ontario Court of Appeal considered five Crown appeals from decisions refusing DNA orders. At para. 12, Mr. Justice Rosenberg enunciated his view of the court's power on appeal: the Criminal Code is silent on the powers of the appellate court in dealing with an appeal from the decision concerning a DNA data bank order. Parliament could not have intended to provide a right of appeal, yet give the appellate court no power to correct the errors through an appropriate remedy. The appeal court must at least have the power to make the order that should have been made by the trial court. It may be that the appellate court also has the power to remit the matter back to the trial court. I would consider this a highly unusual order, involving as it would additional time and expense.

- [13] Less than a month later and without the benefit of the reasoning in *Hendry*, supra, the Nova Scotia Court of Appeal found good reason to remit the matter to the trial court for a new hearing on the merits: *R. v. Murrins* (2002), 162 C.C.C. (3d) 412. Madam Justice Bateman explained at para. 110: In the absence of statutorily mandated reasons, I cannot conclude that there has been no substantial wrong or miscarriage of justice. To apply s. 686(1)(b)(iii), here, would completely remove the effect of the legislative requirement for reasons in s. 487.052(2) of the Code.
- [14] She continued, at para. 111, to explain that not only had the trial judge not provided reasons, but his rationale was not discernible from his comments made during the hearing. Thus, the appeal court was unable to say what criteria the judge considered in arriving at his decision to make a DNA order, nor that he considered, at a minimum, the mandatory statutory criteria. [15] A few months later the Alberta Court of Appeal was called upon to consider the denial of an application for a DNA order in *R. v. North* (2002), 165 C.C.C.(3d) 393. The trial judge had not given reasons for declining the Crown's application. The court considered the failure to give reasons to be an error that required a remedy. At para. 37, after a brief reference to *Murrins*, supra, the court explained why it was granting a different remedy: In this case, we conclude that the appropriate remedy is for this court to consider the matter afresh, and render an appropriate decision. The issues were argued before the court and the relevant facts are not disputed. Thus, this court is in as good a position as the sentencing judge to decide the issue.
- [16] Last fall, the Manitoba Court of Appeal considered the same question. The sentencing judge did not provide reasons for refusing to make an order under s. 487.051(1)(b). The Court adopted the Alberta and Ontario approach. Thus, it considered afresh whether a DNA order should be made. In so doing it followed the reasoning of Weiler J.A. in *R. v. Briggs* (2001), 157 C.C.C.(3d) 38 (Ont.C.A.) and adopted the admonition of Rosenberg J.A. in *Hendry*, supra, that, in the case of an adult offender, it would usually be in the best interests of the administration of justice for the judge to make the DNA order for a secondary designated offence. It made the order because there was nothing in the case that took the accused outside of the "ordinary case." [17] Late last year the Ontario Court of Appeal affirmed its approach in *R. v. Young* [2002] O.J. No. 4359. The trial judge had erred in refusing to make the order on the sole basis that the offence had been committed before the Criminal Code provisions came into force. The Crown asked the court to consider the requisite factors and make an order. The respondent submitted the matter should be remitted to the trial judge because he did not have the opportunity to present relevant evidence. The court was not persuaded the evidentiary record was incomplete. The defence had notice of the Crown's intention to make the DNA application and had not sought to have any evidence led on it. The court commented that it was incumbent on a respondent to establish a basis for remitting the matter to the trial judge by way of fresh evidence. The admissibility of that evidence would be governed by the principles in *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont.C.A.), leave to appeal refused, [1996] S.C.C.A. No. 347. The Court then made the order because the evidence in support of it was "overwhelming." [18] I agree generally with the

approach of the Ontario Court of Appeal to a remedy on appeal. If the record is complete and such that an appellate court is in as good a position as the sentencing judge to make a determination, I can see no reason why it should not consider the matter afresh and decide whether a DNA order should be made. Because counsel agree that is so in this case, I would accede to their request that we consider whether a DNA order should be made in this case. [19] In *Ku*, supra, at para. 45, this court agreed with the approach taken by Rosenberg, J.A. in *Hendry*, supra, at para. 18: The legislation offers significant protections against misuse of the DNA profile information, thus minimizing an improper intrusion into the offender's privacy. Having been convicted of a designated offence, the offender already has a reduced expectation of privacy. In the ordinary case of an adult offender the procedures for taking the sample have no, or at worst, a minimal impact on the security of the person. Thus, in the case of an ordinary adult offender there are important state interests served by the DNA data bank and few reasons based on privacy and security of the person for refusing to make the order.

- [20] Defence counsel sought to distinguish *Hendry* and *Ku* on the basis that the appellant is a young offender who is remorseful for the injury he caused unintentionally and dealing successfully with the drug addiction at the root of his property offences. In her view, a DNA order is neither necessary nor appropriate for a young offender. She submitted the proper approach would be that of the civil libertarians, to begin with the premise that young offender is entitled to be free of state intervention into his privacy and security of the person. She would have this court deny a DNA order because no intention to injure was established. [21] I am not persuaded to that view. The circumstances of this offence were not trivial, even if the appellant did not appreciate the consequences that befell his victim. Assault causing bodily harm is a primary designated offence for which a DNA order is mandatory, yet intention is not required. While the appellant avoided a conviction for that offence by the Crown's acceptance of his plea of guilty to a lesser and included offence of common assault, it is common ground that the circumstances of the offence are to be considered in assessing whether a DNA order should be made. This appellant caused serious bodily harm, however unthinkingly, to a younger boy the record establishes he had bullied on previous occasions. [22] The appellant's youth record includes previous convictions for breaking and entering in June 2001, for assault and possession of a weapon in November 2001, and for three breaches of probation in March 2002, as well as the current offences. While he expressed remorse for the assault and a determination to control his drug addiction, he was convicted of carrying a concealed weapon as an adult on 20 January 2003, while on bail awaiting sentence on the current offences. He is now facing a charge of assault of a female person in May 2003 and a charge of failing to appear with regard to that charge on 27 May 2003. A warrant for his arrest is currently outstanding. [23] The nature of the assault and this criminal record require, in my view, a DNA order. In the circumstances of this case there is little to place in the balance, other than the community's concern reflected in the special provision for a young offender with regard to primary designated offences, that a young offender be treated more leniently in appropriate cases than an adult offender.

I see nothing in the record in the case of this 17-year old offender to merit any leniency. [24] Consequently I would affirm the order made by the sentencing judge. [25] LAMBERT, J.A.: I agree. [26] MACKENZIE, J.A.: I agree. [27] LAMBERT, J.A.: The order of the sentencing judge is affirmed.

"The Honourable Madam Justice Huddart"

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