Wild v Balchin [2009] NTSC 35

PARTIES:	WILD, MILO MANNY FELIX
	v
	BALCHIN, VIVIEN LYNETTE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM A YOUTH JUSTICE COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA11 of 2009
DELIVERED:	16 July 2009
HEARING DATES:	7 July 2009
JUDGMENT OF:	OLSSON AJ
APPEAL FROM:	DARWIN YOUTH JUSTICE COURT

CATCHWORDS:

Sentencing -- Youth -- Drug offences -- Offender placed on the bond to be of good behaviour for two years, but convictions recorded -- Participation in CREDIT NT program -- Rehabilitation issues -- Appeal against recording of convictions -- Whether error on the part of sentencing magistrate demonstrated.

REPRESENTATION:

Counsel:

Appellant:	J Franz
Defendant:	G McMaster

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Ols200903
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wild v Balchin [2009] NTSC 35
No. JA No. 11 of 2009

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against a sentence of the Youth Justice Court at Darwin

BETWEEN:

WILD, Milo Manny Felix
Appellant

AND:

BALCHIN, Vivien Lynette
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 16 July 2009)

Introduction

[1] On 3 February 2009 the appellant appeared before a stipendiary magistrate in the Darwin Youth Justice Court and pleaded guilty to four counts of unlawful possession of a dangerous drug (contrary to s 9 of the Misuse of Drugs Act), one count of having in his custody personal property reasonably suspected of having been stolen or otherwise unlawfully obtained (contrary to s61 of the Summary Offences Act) and one count of possessing a

prohibited weapon without exemption or approval (contrary to s 6 of the Weapons Control Act).

[2] After hearing submissions from counsel for the appellant and the prosecutor, the learned magistrate recorded convictions against the appellant in respect of each offence, but released him on a bond of $1,000 to be of good behaviour for two years.

[3] The appellant appeals against the recording of convictions against him in respect of counts one to four inclusive (the four drug-related offences) on the ground that it is said that the learned magistrate erred in failing to properly consider whether or not to record a conviction as to the counts in question.

Relevant background facts

[4] The appellant was 17 years of age at the time of the offending. He was employed as an apprentice electrician at the time when he appeared before the court and lived with his mother, with whom he had a good relationship. She, nevertheless, disapproved of his involvement with drugs.

[5] He had a prior record of offending, although this did not involve drug offences. It was said that, at the age of 12 years, he had committed an assault, at the age of 13 he had committed dishonesty offences and, at the same age, he had been charged with trespass. The learned magistrate was informed that the prior offending had essentially related to a period when

there were a number of difficulties arising from conflict with his stepfather in the home environment. The learned magistrate was told that the appellant had moved out of the home for a time and fell in with the wrong crowd. However, since 2004, he had put that situation behind him.

[6] It was conceded to the court that the appellant had smoked cannabis recreationally on weekends since he was 13 years of age and had been experimenting with other drugs such as amphetamines and lysergic acid in the 12 months prior to 6 January 2009.

[7] The prosecutor informed the learned magistrate that, at about 9:35 p.m. on Friday 16 May 2008, the defendant was with a group of friends consuming alcohol at the corner of Lambell Terrace and Mitchell Street in Larrakeyah. The group was subjected to a random drug screening by a drug detection dog.

[8] That dog gave a positive reaction to the appellant. A search of him revealed one deal bag of cannabis, having a total weight of 2.83 g, in his shorts pocket. A further search of the appellant revealed a clip seal bag of methamphetamine having a total weight of 1.1 g and five lysergic acid tabs of a total weight of 0.04 g concealed within his wallet. He was also in possession of a substantial quantity of cash, which was said by the appellant to have been money that he had saved through working at a pizza outlet.

[9] The appellant was considered to be under the influence of dangerous drugs and was conveyed to his home in Fannie Bay, where he was placed in the care of his mother.

[10] A consensual search of the appellant's bedroom revealed the presence of a further 1.27 g of cannabis plant material, 0.96 g of cannabis seed and a 12 ounce NK9 magnum olio resin capsicum spray canister marked Darwin 202, identified as belonging to the Northern Territory Police, Fire and Emergency Services. Such a spray is a prohibited weapon under the Weapons Control Act.

[11] It is not disputed that the offending in question had occurred in what was a public place, at a time when the appellant was with friends drinking alcohol. It was conceded that he was then under the influence of drugs. However, his behaviour had not attracted the attention of the police. They had merely conducted a random search.

[12] The learned magistrate was informed that the drugs detected were all for the personal use of the appellant. He gave evidence to rebut the statutory presumption of intent to supply in relation to possession of a trafficable quantity of lysergic acid. In the course of so doing he informed the court that he had been using a fair bit of drugs at the time and had been building up a resistance.

[13] The learned magistrate does not appear to have expressed any positive finding in relation to the presumption of intent to supply, but I infer that she must have accepted the essential thrust of the appellant's evidence.

[14] The appellant was admitted to the CREDIT NT program following the preferring of charges against him. The formal reports in relation to his participation in that program, as presented to the learned magistrate, have been placed before me.

[15] It was put to the learned magistrate and not disputed that the appellant had demonstrated a high level of commitment to the program and had done well by being fully compliant with all aspects of it, to the point that he had reportedly ceased all illicit drug use and had markedly reduced what had previously been a substantial weekly alcohol intake.

[16] This, it was said, had enabled him to tackle an apprenticeship as an electrician on a clearheaded, energetic and organised basis. Although he was still drinking alcohol, this had been reduced from 15 - 31 standard drinks on each Friday and Saturday to about 4 - 7 standard drinks on each of those days.

[17] It was put to the learned magistrate that there was no suggestion that the appellant had stolen the capsicum spray can, which was in fact empty. There was no information forthcoming as to how it had come into his possession, although it was conceded that the appellant knew that it was police issue and that he ought not to have it.

[18] In the course of her submissions to the learned magistrate counsel for the appellant made reference to the fact that the police have continued a fairly constant ongoing series of street searches of the appellant and have kept him under observation, without any positive adverse outcome.

[19] The learned magistrate was urged not to record convictions in respect of the four drug offences because of his successful completion of the CREDIT NT program and the circumstances generally. That proposition was opposed by the prosecutor.

[20] In the course of her disposition of the matters the learned magistrate had this to say:

> "…… In relation to the CREDIT Court program you are to be congratulated on your progress there. It's clear that you addressed your issues with drugs and that is a difficult thing to do. It's also clear to me the amount of drugs that you had in your possession, that you had a real problem and you are a prime example of a young person undertaking risky behaviour which could have led you to more serious health issues as well as more serious offending. So, I do take that into account and I congratulate you on your completion of that program.
>
> It is of concern, however, that these drugs were found in a public place and, I think, to encourage you to stay on the path that you've taken, although I do note that you have other charges yet to be dealt with, but on the path that you've taken in relation to your drug habit, I'm going to convict you on all of those charges, but I'm going to release you on a good behaviour bond of $1000.
>
> That good behaviour bond will be for two years. The reason I'm making it for longer than usual is because of the drug habit that you had, no doubt your counsellors will have told you whilst you are now not taking drugs, it is going to be a continuing challenge for you not to take drugs, and the good behaviour bond for two years is to encourage you again. Because, if you are found again with drugs, you can be brought back before this court and re-sentenced on these

matters. All right, so it's just a bit of encouragement to you not to re-offend in this way……"

The basis of the appeal

[21] Counsel for the appellant took as her commencement point a proposition that the rehabilitation of a young offender is a prime sentencing consideration.[1]

[22] The recording of convictions would, she said, constitute an impediment to the attainment of such a goal and was not warranted, particularly having regard to the fact that a good behaviour bond had been required, with an operational period as long as two years -- a period somewhat longer than would normally be imposed.

[23] It was submitted that, not only would the existence of convictions be relevant to any future sentencing but that, if the appellant again appeared before a court after his 18th birthday in respect of a drug offence, then the provisions of s 37(2) of the Misuse of Drugs Act would be applicable and would mandate an actual term of imprisonment, absent the existence of particular circumstances as contemplated by those provisions.

[24] I took Ms Franz of counsel for the appellant to argue that there was some inconsistency in the approach of the learned magistrate in suppressing publication of the appellant's name on the basis that any media publication could negatively affect his rehabilitation whilst, at the same time, recording

[1] *LA v Kennedy* (unreported, [2007] NTSC 56)

convictions that could have the effect of stigmatising him for life and impeding his future prospects.

[25] This was, she submitted, particularly so because potential employers tend to take a very adverse view of the involvement of persons in the drug scene and consider that the possibility of such an involvement impacting on the reliability of them as employees.

[26] Reference was also made to the success achieved by the appellant in completing the CREDIT NT program and the tone of the reports rendered in relation to his participation in it. Unlike many other candidates in that program the appellant was still a young person who did not exhibit a serious drug addiction.

[27] It was argued that, in her sentencing disposition, the learned magistrate had simply not given appropriate recognition of the successful completion of the program. In that regard, my attention was invited to a series of what were said to be relevant published decisions on that general topic[2].

[28] Ms Franz stressed that the non-recording of convictions would not have meant that the appellant would necessarily have been conviction free forever. If he had re-offended during the lengthy period of the bond, he could have been re-sentenced and that re-sentencing could have included the recording of convictions at that point.

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[2] *Bakos v The Queen* [2006] NTCCA 5, *Miller v Burgoyne* (2004) 150 A Crim R 7 and *Snell v Davis* [2008] NTSC 26

[29] In the course of her submissions, she made mention of a series of other matters that were either pending in relation to the appellant at the time at which he appeared before the learned magistrate or arose shortly thereafter. These concerned various offences said to have been committed by the appellant on 16 January and 14 February 2009 respectively.

[30] The relevant charges spanned various alleged offences, including several counts of possession of a drug analogue of a dangerous drug. It is said that certain of those matters have already been disposed of on plea, but that others have yet to be finally dealt with.

[31] Unsurprisingly, none of the charges in question were referred to before the learned magistrate. However, Ms Franz indicated that the purpose of adverting to them at this point was to demonstrate how, if the impugned convictions had not been recorded, the subsequent offending could have given rise to breaching offences that could, in fact, precipitate re-sentencing.

[32] She further contended that the presumption established by s 27(3) of the Misuse of Drugs Act did not apply to the appellant by reason of the operation of s 81(6) of the Youth Justice Act, a submission that was not challenged by counsel for the respondent.

[33] It was argued that the circumstances simply did not, on the face of them, warrant the recording of convictions and that this demonstrated error on the part of the learned magistrate.

[34] The essence of Ms Franz' submissions was that the error in the sentencing process was that the recording of the relevant convictions was inherently inconsistent with and counter-productive to the rehabilitation goal that the learned magistrate had set out to achieve.

The respondent's submissions

[35] Ms McMaster, of counsel for the respondent, submitted that, on the face of the situation, there was nothing in the impugned sentencing dispositions to give rise to an immediate reaction of apparent inherent error in the sentencing process. The recording of convictions in this case, she said, was well within the range of proper sentencing options available to the learned magistrate and did not offend the totality principle.

[36] As to the contention that the impugned convictions were counter-productive to the rehabilitation of the appellant as a young offender, Ms McMaster made the point that he had not appeared before the learned magistrate as a first offender. In 2004 he had been found guilty of quite serious offences such as assault or threaten with a firearm or a weapon and also entering a building at night and stealing -- as to which, despite that seriousness, he had been given the benefit of no entry of convictions.

[37] Moreover, she contended, there was some inconsistency in the present submissions on behalf of the appellant, in that there was no apparent and logical conceptual difference in the recording of convictions in relation to

the drug offences, on the one hand, and the recording of the non-impugned convictions for other offences, on the other.

[38] She further argued that successful completion of the CREDIT NT program by no means automatically entitled an offender to absolution from the recording of convictions. It was but one consideration to be taken into account.

[39] In those circumstances, it was submitted that the appellant had fallen far short of demonstrating any proper basis for interfering with the sentencing strategy that was adopted by the learned magistrate.

The principles to be applied

[40] The basis upon which this Court ought to proceed in relation to a manner such as this is well-established.

[41] It is trite to say that this Court will only interfere with the exercise of a sentencing discretion on the basis adverted to by the High Court in the well-known authority of *House v The King* (1936) 55 CLR 499 at 509. It is not enough that the appellate Court considers that, had it been in the position of the sentencing judicial officer, it would have taken a different course.

[42] The appellant bears the clear onus of demonstrating that some error has occurred in the exercise of the sentencing discretion. As the members of the High Court said in *House*:

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate Court may exercise its own discretion in substitution for his if it has the materials for doing so."

[43] It was further pointed out in *House* that it may not appear how a primary judicial officer has reached the result embodied in the impugned order, but, if, upon the facts, it is unreasonable or plainly unjust, the appellate Court may infer that in some way there has been a failure properly to exercise the sentencing discretion. In such a case it must be demonstrated by an appellant that the relevant sentence is clearly and obviously and not just arguably inappropriate or excessive.[3]

Conclusion

[44] In this case, although Ms Franz has said all that may properly be put on behalf of the appellant, I remain unconvinced that any error on the part of the learned sentencing magistrate has been demonstrated.

[45] I agree with Ms McMaster that, given the relevant circumstances, the disposition arrived at by the learned magistrate was well within the range of potential proper sentencing outcomes that could have been arrived at. This is particularly so in the light of the antecedent record of the appellant. He was by no means a first offender and due regard needed to be had to *all*

[3] *Liddy v R* [2005] NTCCA 4 at [12].

relevant principles and factors referred to in ss81 and 4 of the Youth Justice Act, in a balanced fashion.

[46] Whilst rehabilitation *is* a key consideration, it by no means follows that, on that basis alone, no record of convictions ought to be made. There is no necessary inconsistency, particularly in the case of a non-first offender, in suppressing publication of an offender's name, but nevertheless recording convictions. The former directly impacts on the issue of rehabilitation, the latter does not necessarily have that effect.

[47] Further, I am also constrained to accept Ms McMaster's contention that there is difficulty in perceiving any logic in the assertion that it was appropriate to record convictions for two of the offences, but inappropriate to do so in relation to the drug-related offences. Certainly, I do not regard the existence of s 37(2) of the Misuse of Drugs Act as being any logical basis for distinction. If, as an adult offender, the appellant elects to commit further relevant drug related offences given his antecedent history of offending, then he must bear the statutory consequences of doing so.

[48] Absent demonstrated error on the part of the learned sentencing magistrate, this appeal cannot succeed. Accordingly, there must be an order that it be dismissed.
