

In the Court of Appeal of Alberta

Citation: R. v. Warren, 2008 ABCA 436

Date: 20081219
Docket: 0803-0198-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Duane Richard Warren

Applicant

**Reasons for Decision of
The Honourable Mr. Justice Ronald Berger**

Application for Leave to Appeal

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[1] The Applicant applies, pursuant to s. 839(1) of the *Criminal Code*, for leave to appeal a trial judge's disposition, confirmed on appeal to the Court of Queen's Bench, holding that the *Sexual Offender Information Registration Act*, S.C. 2004, c. 10 ("SOIRA") is a minimal imposition upon the liberty of the subject and, accordingly, is not sufficiently significant to warrant protection under s. 7 of the *Charter*.

[2] The thrust of the Applicant's submission for leave focuses upon the retroactive scope of the legislation. Sections 490.109 and 490.02(1) of the *Criminal Code* read as follows:

"490.019 A person who is served with a notice in Form 53 shall comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.022 unless a court makes an exemption order under subsection 490.023(2).

...

490.02(1) The Attorney General of a province or minister of justice of a territory may serve a person with a notice only if the person was convicted of, or found not criminally responsible on account of mental disorder for, an offence referred to in paragraph (a), (c), (d) or (e) of the definition 'designated offence' in subsection 490.011(1) and

(a) on the day on which the *Sex Offender Information Registration Act* comes into force, they are subject to a sentence for, or have not received an absolute discharge under Part XX.1 from, the offence; ..."

[3] The factual underpinnings which are not in dispute are that the Applicant pled guilty to four counts of sexual assault pursuant to s. 271 of the *Criminal Code* and was sentenced to a twelve month conditional sentence order to be followed by a probation term of twenty four months. The convictions were recorded on January 5, 2004 and February 10, 2004. In addition, he was ordered to provide a sample of DNA in accordance with s. 487.054 of the *Criminal Code*.

[4] On December 15, 2004, the SOIRA registration came into force. The Applicant was served with a Notice of Obligation to comply with SOIRA, to register in the Sex Offender Registry and report to the Registry for the balance of his life.

[5] At the heart of the submission for leave is that the Queen's Bench judge on appeal erroneously applied the principles of law set out in *Cunningham v. Canada*, [1993] 2 S.C.R. 143, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Redhead*, 2006 ABCA 84, (2006), 206 C.C.C. (3d) 315. More precisely, the complaint is that the courts below failed to

distinguish the factual underpinnings in the aforementioned leading cases from those in the case at bar, namely that the Applicant in the instant case is subject to retroactive operation of a criminal enactment.

[6] The Applicant relies in part upon the following excerpt in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 96:

“We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure ‘strikes the right balance’ between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7. The procedural implications of such a collapse are significant. Counsel for the appellant Caine, for example, urges that the appellants having identified a threat to the liberty or security of the person, the evidentiary onus should switch at once to the Crown *within* s. 7 ‘to provide evidence of the significant harm that it relies upon to justify the use of criminal sanctions’ (Caine's factum, at para. 24).”

[emphasis in original]

[7] The Applicant submits that the “collapse” delineated in the aforementioned excerpt is the error committed by the Queen’s Bench judge in this case.

[8] In response, the Crown submits that collateral or “civil consequences” flowing from a conviction such as a SOIRA order do not equate with punishment and, accordingly, do not engage s. 7 of the *Charter*. The Crown asserts that, in any event, the legislation provides relief on application by the subject of a SOIRA order and, indeed, the Applicant is at liberty to seek earlier termination of that order. The Crown also argues that the informational and reporting requirements of the SOIRA are not unlike those that most citizens must comply with to operate a motor vehicle or receive tax forms. The Crown points out that the impugned legislation is not to be likened to the DNA legislation of the *Criminal Code* which involves significant infringement of privacy and liberty rights by requiring the subject to provide tissue samples. In a nut shell, the Crown submits that there being no sufficient infringement of a *Charter* right, the errors attributed to the courts below are simply not engaged.

[9] I note that in *R. v. Redhead, supra*, at para. 12, this Court took note of the parallels between DNA orders and SOIRA orders:

“...[B]oth are consequences of a conviction; both exist to assist the police in investigating future crimes; and both infringe upon the privacy and liberty rights of the offender.”

[10] The precise question of law proffered by the Applicant is whether ss. 490.019 and 490.02(1) of the *Criminal Code*, given their impugned retroactive application, are contrary to s. 7 of the *Charter*. This Court has not yet pronounced upon that issue. I note that the question arises in another context on appeal (yet to be argued): *R. v. C.L.B.*, 2007 ABQB 521, (2007), 225 C.C.C. (3d) 237. Counsel are agreed that, should I grant leave to appeal, both appeals should be argued at the same time.

[11] I grant leave and so direct.

Application heard on December 16, 2008

Reasons filed at Edmonton, Alberta
this 19th day of December, 2008

Berger J.A.

Appearances:

D.C. Marriott
for the Respondent

G.M. Johnson
for the Applicant