



THE UPDATE

Issue #20 November 11, 2005

BAIL PENDING APPEAL - CHILD PORNOGRAPHY - 1 YEAR JAIL- BAIL DENIED

R. v. De Brentani - Sept. 19, 2005 ABCA 301 per Costigan, J.A.:

Application for bail pending sentence appeal. 23 year old accused with no record received one year jail sentence for distribution of child pornography.

Held: Bail denied.

“Weak” appeal. Sentencing judge referred extensively to a PSR and FACS assessment in arriving at sentence. No error apparent in sentencing judge’s denial of conditional sentence request. Sentencing judge did not simply presume that a conditional sentence was inappropriate, rather a finding was made that the gravity of the offence could not be adequately addressed with a non-jail sentence.

P. Royal - Defence Counsel

●

CHARTER - 9 - ARREST - DUTY TO GIVE REASON FOR ARREST - S. 29(2) CC - TEST

R. v. Lee - Sept. 19, 2005 ABPC 140 per Van de Veen, P.C.J.:

Accused charged with several weapons offences. High risk motor vehicle stop, after police received information that people leaving the scene of a disturbance had a gun. Issue regarding lawfulness of arrest, and alleged ss. 8 and 9 Charter breaches.

Held: No breach.

Police justified in engaging in a gun point take down. Reasonable grounds to believe that weapons may be found inside the vehicle. Lawful arrest occurred upon police telling the occupants “you are under arrest”. Section 29(2) CC duty to give notice as to the reason for arrest arises only where it is feasible or practicable to do so: *George* [1936] 67 C.C.C. 33 (S.C.C.).

N. Kelly - Defence Counsel

●

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY - STRADDLE CASES - TEST TO BE APPLIED

R. v. MacDonald - Sept. 28, 2005 ABCA 306 per O’Leary, Paperny, O’Brien, J.A.:

Evidence to the contrary straddle case. Expert evidence established a blood-alcohol range in part above and in part below 80 mg%. *Pryor* (1994), 93 C.C.C. (3d) 108 (Alta. C.A.) held that this type of evidence was capable of constituting evidence to the contrary. Crown application for Court of Appeal to reconsider *Pryor*.

Held: Application granted.

Court of Appeal to consider whether *Pryor* has in effect been overruled by *St. Pierre* (1995), 96 C.C.C. (3d) 395, and the amendment to s. 258(1)(d.1) CC, or if not overruled, whether it was wrongly decided in view of subsequent decisions such as *Heideman* (2002), 168 C.C.C. (3d) 542 (Ont. C.A.).

T. Sturgeon - Defence Counsel

●

SEX OFFENDER REGISTRY - APPLICATION FOR EXEMPTION - 490.012 CC - TEST TO APPLY

R. v. J.D.M. - Sept. 21, 2005 ABPC 264 per Malin, P.C.J.:

34 year old accused pled guilty to sexual assault. Assault took place within a group home. Both accused and victim extremely low functioning. Accused's record included convictions for assault and mischief. Application by accused for exemption from an order requiring him to comply with the Sex Offender Information Registration Act.

Held: Application denied.

Factors considered included: the purpose of the legislation, the impact on the accused, the accused's record and the nature of the offence. Section 490.012(4) CC requires the accused to show that entry into the Registry would have a "grossly disproportionate" effect upon his privacy or liberty. "Grossly disproportionate" means "vary markedly ... so far removed from the usual situations": *Jordan* (2002), 162 C.C.C. (3d) 385 (N.S. C.A.). Accused unable to satisfy the "grossly disproportionate" standard. Authorities reviewed.

K. MacDonald - Defence Counsel

-

UTTERING THREATS - MENS REA - ACCUSED SAID HE WOULD "KILL" HIS WIFE - CONVICTION ENTERED

R. v. Bozic - Sept. 26, 2005 ABPC 262 per Allen, P.C.J.:

Trial on charge of uttering threats. Accused being removed from his wife's home by police upon being served an emergency protection order. While on the sidewalk outside of the home, and in the presence of the police, accused stated: "I'm going to kill that bitch". Mens rea issue.

Held: Conviction entered.

Crown must prove beyond a reasonable doubt the subjective intent of the accused. An inference regarding intent may be drawn from the words spoken. "Not all threats are meant to be captured by the section. Its purpose is to prevent against fear and intimidation. The Crown must prove that the accused meant the threat to be taken seriously or he or she meant to intimidate by uttering it." Authorities reviewed.

M. Stone - Defence Counsel

-

YOUTHS - SENTENCE - 39 YCJA - TEST TO BE APPLIED RE: CUSTODIAL SENTENCES

R. v. C.D.J. - Sept. 19, 2005 ABCA 293 per O'Leary, J.A, Veit, Ross, J. - Trial Judge: Easton, P.C.J.:

Defence appeal from 6 month deferred custody sentence plus probation, imposed after accused pled guilty to trafficking in cocaine.

Held: Appeal allowed.

Deferred custody portion of sentence set aside. Section 39(1) YCJA sets out the limited circumstances in which a custodial sentence may be imposed. 39(1)(d) requires the presence of "exceptional circumstances". Unlike in *T.(A.)* 2004 ABPC 91, no evidence in present case that accused played a major role in a "dial-a-doper" scheme. No exceptional circumstances. 39(1)(c) requires a Court to be satisfied that accused's record mandates a custodial sentence. 39(1)(c) to be interpreted to mean: "a recognizable regularity, consistency or similarity to the offences in order to demonstrate a pattern of findings of guilt. It if were sufficient to show merely that the young person had a prior history of findings of guilt, there would have been no need to include the word 'pattern' in s. 39(1)(c)". Requirements of 39(1)(a) - (d) not met; custodial sentence not available.

R. Stroppel - Defence Counsel

-

Anderson Dawson Knisely Stevens & Shaigec
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4
Tel: (780)424-9058 Fax: (780) 425-0172
All 2005 updates can be found at: www.adkscrimlaw.com