

ONTARIO COURT OF JUSTICE

CITATION: *R. ex rel. Halton (Region) v. Garwal*, 2016 ONCJ 217

DATE: April 15, 2016

COURT FILE No - Certificate of Offence 5229554B

B E T W E E N :

Her Majesty the Queen ex re Region of Halton

— AND —

Lamar Garwal

Before Justice of the Peace P Macphail

Heard on March 18, 2016

Reasons for Judgment released on April 15, 2016

G Larson for the prosecution

L Carter for the defendant Lamar Garwal

JUSTICE OF THE PEACE MACPHAIL:

Background

On April 12, 2015 Lamar Garwal was charged with the offence of speeding, 120 km/h in a 100 km/h zone, contrary to s. 128 of the Highway Traffic Act. The Defendant requested a meeting with a prosecutor as permitted by s.5.1 of the Provincial Offences Act ('the Act'), also known as an early resolution meeting. That meeting occurred on September 22, 2015. The matter did not resolve on that day and proceeded to trial. The trial was scheduled for March 18, 2016 in Burlington Provincial Offences court. L. Carter, a Paralegal Licensee, appeared at trial on behalf of Mr. Garwal. Mr. Garwal did not attend.

The matter resolved before the trial occurred and the Defendant entered a guilty plea to the amended charge of Disobey Sign, contrary to s. 182(2) of the Highway Traffic Act. The parties jointly submitted that the set fine of \$85.00 was appropriate in the circumstances.

\$85.00 is the Set Fine ('set fine') established by the Chief Justice of the Ontario Court of Justice for the offence of Disobey Sign. The set fine has no direct applicability following an 'in-court' disposition of a Part 1 proceeding, either by way of guilty plea before trial, or following a conviction after trial. A fine approximating or equalling the set fine amount is not precluded but the suitability of a fine of such quantum must withstand the application of proper sentencing principles.

Set Fines

Section 1(1) of the Act defines 'set fine' to mean '*the amount of fine set by the Chief Justice of the Ontario Court of Justice for an offence for the purpose of proceedings under Part I and II*'. These fines represent the penalty that is considered appropriate for a first offender who is pleading guilty in an out of court resolution, with no other mitigating factors to consider and no aggravating factors.

Set fines are applicable after convictions resulting from a resolution reached following a meeting with a prosecutor pursuant to section 5.1 (9) of the Act (the '*early resolution plea*'), a guilty plea with representations pursuant to section 7(1) (often described as the '*walk in guilty plea*'), upon conviction after being found deemed not to dispute the charge pursuant to s.9 of the Act or failing to appear a s.5.1 meeting with the prosecutor or at trial pursuant to section 9.1 ('*fail to attend*' convictions). The Act is silent on the applicability of set fines following a trial.

In R.v. Dosik [2006] O.J. No. 2864, 2006 ONCJ 251 (Ont. C.J) para 29 Justice S. Armstrong of the Ontario Court of Justice held that set fines were statutorily reserved for cases that did not go to trial or for cases where there were mitigating factors

Section 61 of the Act is headed 'General Penalty' and reads as follows – '*Except where otherwise expressly provided by law, every person who is convicted of an offence is liable to a fine of not more than \$5,000*'.

Justice Armstrong found that the s.61 General Penalty provisions to apply when a defendant is convicted after a guilty plea on trial day or after a full trial (para 16). He went on to note that s.12 (1) of the Act further limited the size of fine as the proceeding had been commenced under Part I of the Act. He acknowledges that a fine coincidentally approximating the set fine could result '*after considering the relevant sentencing factors and principles*' (para 18).

In R.v. Appiah, [2012] O.J. No.5851 Mr. Justice Nakatsuru addressed suitability of imposing a set fine following a guilty plea on trial day to the offence of speeding contrary to s.128 of the Highway Traffic Act. He held that court had no ability to impose the set fine following a conviction. The statutory fine must be imposed. He referred to the decisions in R.v. Weber (2003), 64 O.R. (3d) 126 (Ont.C.J.) and R.v. Winlow (2009), 99 O.R. (3d) 337 (Ont. C.A.) in support. It should be noted that the statutory fine for speeding is a series of specific and fixed amounts based upon the rate of found to be in excess of the permitted speed.

In para. 7 he found as follows - *‘However, if the individual chooses to have a trial, as the respondent did, and he or she is found guilty at court, then the payable fine is different, It is the statutory penalty governed by subsection 128(14) of the Highway Traffic Act. The penalty is higher. No doubt deliberately so in order to encourage out of court settlements to avoid unnecessary use of judicial resources. The aforementioned provisions of the Provincial Offences Act no longer apply once the matter gets before a justice of the peace’.*

Justice Nakatsuru acknowledged that the court in R. v. Winlow did not specifically deal with set fines under the Provincial Act. He held in para. 9 that *‘... the distinction is irrelevant. The result is the same. A set fine which is an out of court payment is simply a figure that amounts to a reduced fine. The justice of the peace has no authority to reduce the penalty in this fashion....’*

There are a number of ways by which a defendant can take the benefit of a set fine. The first and most usual way is when she/he elects simply to acknowledge guilt and pay the set fine (plus the statutory costs and victim surcharge fee) – s.8(1), the *‘payment out of court’* option. If this option is elected the defendant loses the opportunity to defer payment of the fine but also avoids the risk of increased penalty that any aggravating factors may present.

Set fines are specifically permitted (but not required) following guilty pleas and convictions in accordance with the *‘early resolution’* provisions of s.5.1 of the Act. The defendant elects to avail her/himself of the opportunity to have an out of court meeting with a provincial prosecutor as specifically permitted by s.5.1 of the POA and a resolution satisfactory to both parties is reached. The prosecutor has generous latitude, consistent with the underlying elements and facts, in the range of resolutions to be offered; including amendments to the charge to reflect either a substituted charge or a change in a particular to be proven in the original charge such as the rate of speed or overage in weight alleged.

The defendant can then appear before a justice (s.5.1 (9) (a)) and enter a guilty plea. Following conviction the court is specifically permitted to *‘impose the set fine or other such fine as is permitted by law in respect to the offence for which the plea is entered’* (s 5.1(9) (b)). The court is not bound to impose the set fine.

The POA specifically requires the imposition of the set fine following a so called '*deemed not to dispute*' conviction (s.9) or '*fail to attend*' conviction (s.9.1). The court has no discretion to impose any other fine amount.

The s.5.1 process contemplates a limited expenditure of public resources, certainly a lesser expenditure than required in honouring a party's right to trial. No witnesses are required. The public is spared the cost of attendance by police and other public witnesses. Private or civilian witnesses are not forced to interrupt their weekday life and bear the cost of lost time or income, costs that are only partially and modestly reimbursed by the public.

Ms. Carter raised a serious practical deficiency in the current procedure of conducting s.5.1 meetings. In most instances disclosure is not provided to defendants or their agents at these meetings. In Halton a Disclosure Request Form is provided when there is no resolution and the matter is to proceed to trial but that disclosure is not provided until after a trial date has been set and notice of trial provided to the defendant. Retained agents are unable to fulfil their professional obligations to defendants if they are not able to review disclosure.

I accept this concern as valid on its face. While there may be instances where an informed decision can be reached without receiving and reviewing disclosure, those instances are uncommon. Despite that, it does not follow that this deficiency requires the court to import the authority to permit the imposition set fines on trial day. There does not appear to be any statutory authority to do so.

There are a number of practical ways in which the s.5.1 meeting process can be remedied. They include the following:

- The Prosecutor could provide disclosure to defendants concurrent with delivery of the written notice of the s.5.1 meeting.
- The written request for s.5.1 meeting form could be amended to allow the defendant to request the receipt of disclosure for delivery either in advance of, or at the s.5.1 meeting.
- The s.5.1 meeting could be adjourned to a later date and continued on that date when disclosure is requested but not available at the commencement of the meeting.

The implementation of any of those options would be consistent with the legislative intent of the s.5.1 provisions and ensure the effective operation of the s.5.1 statutory mechanism. It would protect for the defendant the benefit of the lower set fine regimen in return for the saving of public resources. There does not appear to be any statutory prohibition in adopting any of those measures.

The administration of the POA courts was transferred to the Halton municipalities via a December 2000 agreement styled '*Memorandum of Understanding*' between Her Majesty the Queen in Right of Ontario as represented by the Attorney General and the City of Burlington and Towns of Oakville, Halton Hills and Milton.

Schedule 1 to that agreement is headed '*Standards for Prosecutions by Municipalities*'. S.2.3.6. of the Schedule provides that the municipalities are responsible for '*ensuring provision of full and timely disclosure to defendants upon request*'.

The Halton municipalities have developed a number of pro-active steps and procedures to make defendants aware of the right to receive and review disclosure prior to trial and to assist in requesting this disclosure. I am confident that the municipalities can find practical and efficient ways of ensuring the availability of disclosure at the earlier or 'upstream' stage of s.5.1 meetings.

Penalty

The Provincial Offences Act does not codify sentencing principles. The Court is guided by case law and, on occasion, the Criminal Code of Canada when seeking guidance on sentencing principles. The importation of the Criminal Code s.718, s.718.1 and s.718.2 sentencing principles is rarely required following conviction in Part I proceedings and I need not resort to those principles today in order to determine the appropriate penalty for Mr. Garwal.

In the most Part 1 conviction sentencing it would be rare to consider principles other than general and specific deterrence. Specific deterrence usually becomes a factor to consider in a Part I proceeding only when the defendant has a record of convictions for the same or similar offence.

R. v. Cotton Felts Ltd. [1982] O.J. No. 178 was a decision of the former Supreme Court of Ontario – Court of Appeal and is a foundational case in establishing the goals and principles of sentencing in regulatory offences. The court confirmed that general deterrence is the paramount factor to be considered in arriving at an appropriate sentence in public welfare legislation. This general deterrence is to generally be achieved by the imposition of fines.

S.12 of the Act further limits the s.61 general penalty provisions where a proceeding was commenced by a certificate of offence pursuant to Part I of the Act. It reads as follows:

'Where the penalty prescribed for an offence includes a fine of more than \$1,000 or imprisonment and a proceeding is commenced under this Part, the provision for fine or imprisonment does not apply and in lieu thereof the offence is punishable by a fine of not more than the maximum fine prescribed for the offence or \$1,000, whichever is the lesser.'

Joint Submissions

The parties have jointly submitted that the set fine of \$85.00 is the appropriate penalty in the circumstances of Mr. Garwal's conviction.

While joint submissions are not binding on a sentencing justice, the case law in both criminal and regulatory proceedings is consistent in finding that courts are to give considerable deference to joint submissions.

The Act specifically contemplates occasions where a joint submission will not be accepted. S.45 of the Act mandates that before the court can accept a guilty plea the justice must satisfy him/her self that a defendant understand that *'the court is not bound by any agreement made between the defendant and the prosecutor'* – s.45 (3) (d).

A joint submission may only be rejected if its imposition would be contrary to the public interest or bring the administration of justice into disrepute. The court must advise the parties of the court's intention to possibly reject the joint submission and give them the opportunity to make further submissions. Further submissions often clarify and give support to the sufficiency of the penalty requested. It is prudent to ask for clarification or further information before raising the possibility that the joint submission may be rejected.

If the joint submission is rejected the court must provide reasons why the penalty submitted would be contrary to the public interest or would bring the administration of justice into disrepute. The court must then fully consider the circumstances of the offence and the offender before imposing sentence – R.v. Tsicos [2006]O.J. No. 4041 (Ont. C.A.).

Why would the imposition of the set fine upon conviction after the defendant elected the right to have a trial be contrary to the public interest or bring the administration of justice into disrepute? The range of possible penalty is already quite narrow in a Part I proceeding. It would be easy to conclude that it would not be practically possible to meet this test given the relatively modest potential difference in punishment between that resulting from a jointly submitted set fine and a fine that is the result of proper consideration of sentencing principles.

There are at least two reasons why the set fine would have this negative effect.

The first reason is one of jurisdiction. Ontario Court of Justice is a statutory court. The powers of the court are limited to what the governing legislation and attendant case law authorises. The Act only speaks to the imposition of a set fine in specific circumstances as reviewed earlier in this decision. As noted, the Act is silent as to the applicability of set fines following a request for trial. Case law has filled that si-

lence. The court in both R.v. Dosik and R.v. Appiah (supra) have found that the set fines are statutorily reserved for case that do not go to trial or where there were mitigating factors. The court has no power to impose a set fine following a plea or conviction after trial on trial day. To do so would be an error in law and would bring into disrepute, at a minimum, the sentencing practices following conviction in a Part I proceeding.

The second reason is the need to respect the legislative intent that these proceedings take place with economy and efficiency. The set fine is meant to be a reduced fine that shares with the defendant some of the costs to the public that were avoided due to the plea. Those costs can only be avoided if the plea and conviction occur before trial day. On trial day there are no savings to share. The time and expense of assembling the court and the trial witnesses has been incurred and cannot be refunded. A defendant always has the right to have a trial. Society has a responsibility to ensure that the necessary resources are available for such trials on a timely basis. This comes at a cost to both the general public and those private citizens who have no option but to participate as witnesses. The public has the right, in return, to see these resources used efficiently and economically. A defendant should not have the benefit of both the public cost required to ensure a right to trial as well as a reduced fine after conviction on trial day. To permit otherwise would breach our public agreement with each other and is contrary to the public interest.

For the reasons set out above, I must reject the joint submission to impose the set fine of \$85.00.

Decision on penalty

S. 214 (1) of the Highway Traffic Act further limits the general penalty provision of s.61 of the Act is headed '*General Penalty*' and reads as follows - '*Every person who contravenes this Act or any regulation is guilty of an offence and on conviction, were a penalty for the contravention is not otherwise provided herein, is liable to a fine of not less than \$60 and not more than \$500.*'

Section 182 neither contains nor references a specific penalty provision. I am satisfied that the s.214(1) Highway Traffic Act general penalty range of fine sets out and limits the permitted range of penalty for a contravention of s. 182(2).

There was no evidence that Mr. Garwal has a record of this offence or similar offences. No aggravating circumstances were proven or acknowledged. Specific deterrence need not be considered.

The permitted range of penalty is from \$60 to \$500. In circumstances where there is no record alleged nor any other aggravating circumstances it seems reasonable that the penalty should be found within the lower range of that permitted. Here the set fine becomes a helpful measure for we know that this is the reduced amount. A fine

of \$100 is approximately 20% higher than the set fine yet still falls within the first quartile or 25% (maximum \$125) of that permitted range. A \$100 fine appears to be sufficiently punitive to ensure general deterrence without being unduly harsh in the circumstances of this offence and offender.

A fine of \$100 plus court costs and victim surcharge is imposed.

Released: April 15, 2016

Signed: "Justice of the Peace P Macphail"