

Offence #13-2318

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

BARIS ELKIS

REASONS FOR SENTENCE

BEFORE THE HONOURABLE JUSTICE T. CULVER

On July 8, 2014, at HAMILTON, Ontario

APPEARANCES:

Ian Lagden-Provincial Prosecutor

Ivon Fournier- Counsel for the Defendant

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TUESDAY, JULY 8, 2014

MR. LAGDEN: Baris Alkis, please.

MR. FOURNIER: Good morning, Your Honour.

THE COURT: Good morning. Just give me a moment, please. Yes, this is a case where the Justice of the Peace jumped joint submissions, if I can use the vernacular.

MR. FOURNIER: For the record, it's Fournier, F as in Frank, O-U-R-N-I-E-R.

THE COURT: Good morning, Mr. Fournier.

MR. FOURNIER: Good morning, Your Honour.

MR. LAGDEN: If this court is agreeable, I would like to ask the sentence appeal be allowed and vary the sentence to the joint submission of \$2000.00.

MR. FOURNIER: All is my instruction, Your Honour.

THE COURT: Well, it's not quite that easy. In a case where a Justice of the Peace has jumped a joint submission I'll require a bit more than that in a way of submissions, from both of you.

MR. LAGDEN: I'm going to have to rely on Mr. Fournier to provide the reasons for the joint submission being arrived at. Mr. Andres, the previous provincial prosecutor....

THE COURT: I've read the transcript. Have you had an opportunity to do that?

MR. LAGDEN: I have not had- Mr. Fournier, in his duties, said he did provide us with a transcript. It's not attached to the package I was given Friday. So I have not read the transcript.

THE COURT: Mr. Fournier, given- I would normally say okay, but given the nature of the appeal, I'll have to make a finding. I'm going to hear argument from both of you. If you could provide your friend with a copy of the transcript so he can read it before we proceed, I'd appreciate it.

MR. FOURNIER: Absolutely.

THE COURT: And we'll hold the matter down.

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MR. FOURNIER: Just so you're aware, Your Honour, it was filed with the court and with...

THE COURT: I've read it.

MR. FOURNIER: ...my friend. Obviously it wasn't shared. It wasn't shared with my friend. So I will make a copy for him and forward it to him. Do you want to put this to another date and...

THE COURT: No, we'll hold the matter down and deal with it today. I don't think it should take long, but I would at least like you to have both read the transcript before you consent. Alright? Thank you.

STOOD DOWN

UPON RESUMING

THE COURT: Yes. It's your appeal.

MR. FOURNIER: Again, for the record, Fournier, first initial I. I'm representing Mr. Alkis.

THE COURT: Go ahead.

MR. FOURNIER: Sorry, there's a young lady coming back in.

THE COURT: Keep your voice up, please.

MR. FOURNIER: Okay.

THE COURT: Why is there no mic on the counsel...

MR. FOURNIER: There is one, it's just- I guess this is the mic? There's isn't any.

THE COURT: So, keep your voice up, please.

MR. FOURNIER: Fair enough. Your Honour, I want to tread a little lightly and...

THE COURT: Don't tread-no, no, no, no, no. This is not the place to tread lightly. Be blunt, be effective, be concise. But don't tell me you have to tread lightly.

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MR. FOURNIER: Fine. I've had the opportunity, as you have, to review the disclosure. Sorry, the transcript for the date in which there was a 59.2 application put forth before his Worship Baker. In my review of the judgement, it wanders significantly into areas that I'm not sure if you can bring them back to the defendant before the court that was being sentenced at that time. In a round-about way, I guess you can. You're taking a very scenic route and there's things that are said that should not have been. The test that I put before you in *Regina v. Thompson*, and I don't- I apologize, I don't....

THE COURT: You don't have to give me Thompson. I know what the test is.

MR. FOURNIER: And the other one is Tyskull (ph)- if I said that wrong- I don't think the proper analysis for this matter was brought forward. Personal issues relating to the bench, with all due respect, I don't think should be part of sentencing an individual and to even try to compare the position of the trier of fact at the time with the defendant- they're miles apart. And I don't understand why it was done. At the end of the day I don't believe the tests were the appropriate tests, the measure were the appropriate measures to be used in sentencing a gentleman under 59.2. I do keep in mind the 59.2, that it states that although the provisions create the penalty for an offence, describes a minimum fine where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interest of justice, the court may impose a fine that is less than the minimum or even suspend sentence. I put in the word "even" sorry. I think information that was relayed...

THE COURT: I'm sorry, is your client here?

MR. FOURNIER: No.

THE COURT: Okay.

MR. FOURNIER: I think- and that's my doing, not his. I think the information relayed to His Worship was sufficient. His Worship also refers to extreme financial difficulties and I don't recall where that's written in the Provincial Offences Act. It sounds like he brought the test up even higher than what the Provincial Offences Act requires, and I think- I believe the test wasn't the appropriate test- in acknowledged that- he did- in an early plea, he did show cause or- I believe he met the test in *Regina v. Thompson*. And I say the work wrong- it is pronounced Tyskull (ph)? I believe it's Tyskull (ph). And show that his fine was unduly oppressive. Also, in the public interest- I don't think the public would fare against the defendant knowing that his financial circumstances, his age, trying to go to school- I don't think the

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public would be upset with the fine that was submitted as a joint submission. I just don't see that. I think I'll stop there.

THE COURT: Thank you. Yes?

MR. LAGDEN: Mr. Fournier has encapsulated most of my thoughts accurately. A 59.2 application is a specific application dealing with the defendants in front of the Justice of the Peace at that time and I think that many of the comments that were made in the analogies that were drawn were inappropriate because they did not deal specifically with the defendant. They tried to draw inference from what the public at large may feel. That's not a 59.2 application. I think it was also a case of where the defendant has hired an agent and that agent has met with the provincial prosecutor and they have discussed the matter and come to a position that was a joint position on sentence. I think subject to there being something that would bring the administration of justice into disrepute then the trier of fact should not look beyond that unless there is some specific reason that they wish to put on record for not doing so. I absolutely accept that the trier of fact, Justice of the Peace in this matter, has the ultimate responsibility to impose a fine that they see fit, but they should have addressed the 59.2 matter in a totally different manner rather than the manner in which it was addressed.

THE COURT: Thank you.

MR. LAGDEN: Thank you.

THE COURT: Well, I think put together, both of you are correct. It's quite clear even from the plea inquiry that the court's not required to follow a joint submission. However, the law is quite clear: the court should give deference to a joint submission unless it can find that the joint submission would bring the administration of justice into disrepute and be contrary to the public interest or if in some way, shape, or form the joint submission was illegal. In this case, it's quite clear to me that the Justice of the Peace did not enter- sorry, did not apply the test at all or conduct such an inquiry accordingly, under the circumstance, I am satisfied that decision of the Justice of the Peace should be vacated and the joint submission, if that's the request, the joint submission should be substituted before the decision of the Justice of the Peace. Do I understand that's what you're asking the Court of Appeal to do?

MR. FOURNIER: Yes.

MR. LAGDEN: Certainly, from my perspective...

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THE COURT: And that was, if I recall, a \$2000.00 fine?

MR. FOURNIER: Yes.

MR. LAGDEN: Correct.

THE COURT: All right. Then the appeal is allowed. The sentence appeal is allowed. A fine of \$2000.00 is substituted. Surcharge does apply. Are you in a position to advise the length of time required to pay the fine and surcharge?

MR. FOURNIER: 12 months, please.

THE COURT: Any comment?

MR. LAGDEN: None at all.

THE COURT: 12 months to pay the fine and surcharge. Thank you.

MR. FOURNIER: Thank you, Your Honour.

....PROCEEDINGS CONCLUDED.