

21/08; [2008] VSC 102

SUPREME COURT OF VICTORIA

WITHERS v GIROTTO & ORS

Kaye J

19 March 2008

SENTENCING – COMMUNITY-BASED ORDER MADE WITH CERTAIN CONDITIONS – CONDITION TO UNDERGO FORENSIC CARE AND PSYCHIATRIC ASSESSMENT – TO ABSTAIN FROM ILLEGAL DRUGS AND UNDERGO DRUG TESTS – FURTHER CONDITION THAT IF ANY ILLEGAL DRUG DETECTED IN OFFENDER TO "RESULT IN IMMEDIATE BREACH ACTION" – WHETHER SUCH CONDITIONS ARE *ULTRA VIRES* THE SENTENCING ACT 1991 – CBO MADE FOR AN OFFENCE NOT PUNISHABLE BY A FINE OF MORE THAN FIVE PENALTY UNITS – WHETHER MAGISTRATE IN ERROR: SENTENCING ACT 1991, SS36(1), 38, 47(1).

1. S38(1) of the *Sentencing Act* 1991 ('Act') specifically reserves for the determination of the Regional Manager as to when appropriate testing and assessment should take place and by whom they are to be undertaken. In relation to testing for drugs, the Act reserves to the Regional Manager the discretion and administrative decision as to when and with what frequency that testing is to occur. Also, a court does not have power to dictate to those responsible for prosecuting breaches of community-based orders if and when they should proceed to do so.

2. Where a court attached conditions to a community-based order which were contrary to the provisions of the Act, the conditions were invalid and liable to be deleted from the order.

3. S36(1) of the Act provides that an offence which is not punishable by a fine of not more than five penalty units cannot be the subject of a community-based order. Accordingly, a magistrate was in error in making a community-based order in respect of a charge under the *Road Safety (Vehicles) Regulations* 1999 which did not render the offender liable to a fine of more than five penalty units.

KAYE J:

1. In this matter the appellant came before the Heidelberg Magistrates' Court on 26 November 2007 in respect of ten charges brought against her. Those charges were comprised in four separate police briefs in respect of which there were four informants. The appellant was convicted on all ten charges and was sentenced by the Magistrate to a community based order with particular conditions attached to it. The appellant has brought this appeal in respect of some of the conditions which were so imposed. It is common ground between the appellant and the respondent that the conditions complained of are invalid, and that accordingly an order should be made by this Court amending the orders made by the Magistrates' Court by deleting the offending conditions from the community based order.

2. Having heard short submissions from Mr P Matthews, who appears on behalf of the appellant, and from Mr A Castle, the solicitor for the respondent in each matter, I am persuaded that the conditions so imposed were *ultra vires* the *Sentencing Act* 1991 and should not have been imposed in the community based order. I shall turn briefly to the conditions which are the subject of the appeal.

3. The community based order contained five of the program conditions which are referred to in s38 of the Act, and specified that the appellant perform unpaid community work of 100 hours over 12 months. In addition, the order contained further conditions under the title, "Other conditions and alternative concurrent/cumulative directions". It is those conditions which are the subject of this appeal.

4. The first additional condition was expressed thus: "Undergo forensic care psychiatric assessment to be required by core to occur within six weeks of this date". In my view, that condition was beyond the power of the Court. Section 38(1)(d) of the *Sentencing Act* 1991 provides for program conditions of a community based order to include, where appropriate, a condition

that the offender undergo assessment and treatment for alcohol or drug addiction or submit to medical, psychological or psychiatric assessment and treatment “as directed by the Regional Manager”.

5. That section has specifically reserved for the discretion and administrative direction of the Regional Manager, the determination both of when the appropriate testing and assessment are to take place, and by whom they are to be undertaken. The express provision for those two matters within s38(1)(d) excludes the power of the Court to direct when, and by whom, the psychiatric assessment is to occur. Thus, the condition, containing each of those two matters, was invalid and *ultra vires* the Act. It should be deleted from the community based order.

6. The second additional condition, which is the subject of this appeal, is expressed thus: “Abstain from all illegal drugs and undergo drug tests to be required by core at least once per month and any illegal drug test detected as from 26/12/2007 is to result in immediate breach action”.

7. There are two complaints made by the appellant in respect of that condition. In my view both complaints are valid. First, in my opinion the magistrate did not have power to specify the frequency with which testing for illegal drugs was to take place. The program condition under s38(1)(e) specifically provides that the offender is to submit to testing for alcohol or drug use “as directed by the Regional Manager”. That provision expressly reserves to the Regional Manager the discretion and administrative decision as to when, and with what frequency, that testing is to occur. By doing so, it excludes the power of the Court to direct when, and with what frequency, the testing is to occur. For that reason, in my view the additional condition is invalid, because it did specify that tests were to take place at least once per month.

8. The second criticism by the appellant, and supported by the respondent, of that second condition relates to the last part of it, namely, that any illegal drug test detected is “to result in immediate breach action”. That provision clearly impinges on the discretion of the prosecuting authority, under s47(1), to determine whether any breach of the community based order ought to be the subject of proceedings against the appellant. In my view, the Court does not have power to dictate to those responsible for prosecuting breaches of community based orders if and when they should proceed to do so. That is a matter which is properly reserved for the discretion of the prosecuting authority. For those reasons, I consider that the last part of the second condition, to which I have referred, is *ultra vires* and thus invalid. Accordingly, I will make orders in each of the matters deleting the two conditions to which I have just referred.

9. In addition, the eighth charge against the appellant was brought under Regulation 703(7) of the *Road Safety (Vehicles) Regulations 1999*, for removing a defective label from a motor vehicle. It is common ground, and I accept, that such an offence may not be the subject of a community based order, because conviction for it does not render the offender liable to a fine of more than five penalty units, which is a prerequisite for the imposition of a community based order as specified by s36(1)(a) of the *Sentencing Act*. Accordingly, the Court did not have power to impose a community based order in respect of Charge 8. Insofar as it did so, the order of the Court will be set aside, and that charge will be remitted to the Heidelberg Court for rehearing.

10. Finally, I should observe that the last condition contained in the community based order is expressed as follows, “If Cognitive Skills Program is successfully completed, 51 hours is to be deducted from work hours under this order.” At one stage it was considered whether that condition should be the subject of this appeal, but it is not the subject of the appeal which has come before me today and was not the subject of any argument before me. I therefore specifically decline to express any view as to whether a community based order could contain such a condition. That question may arise in later proceedings, and therefore it is inappropriate that I express any view on it at this stage.

11. For the reasons I have just stated, I shall therefore make orders to the effect discussed with counsel and in the form of the draft orders which have been provided to me.

APPEARANCES: For the appellant Withers: Mr PJ Matthews, counsel. Victoria Legal Aid. For the respondents: Mr A Castle, counsel. Office of Public Prosecutions.