2006 ABQB 701
Alberta Court of Queen's Bench

R. v. McMahon

2006 CarswellAlta 1230, 2006 ABQB 701, [2007] A.W.L.D. 920, 406 A.R. 397, 71 W.C.B. (2d) 10

Her Majesty the Queen (Respondent) and Lloyd Alexander McMahon (Appellant)

E.F. Macklin J.

Heard: September 20, 2006
Judgment: September 22, 2006
Docket: Edmonton 040319600S2

Counsel: Gregory Marchant for Crown
C. Odishaw for Accused

Subject: Natural Resources; Public
Related Abridgment Classifications
Natural resources
I Fish and wildlife
I.5 Offences
I.5.o Sentencing
I.5.o.i Fines
Headnote
Natural resources --- Fish and wildlife — Offences — Sentencing — Fines
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***E.F. Macklin J.*:**

I. Introduction

1 The Appellant was convicted of unlawfully using bait for the purpose of hunting big game, contrary to s. 40(1) of the *Wildlife Act* and sentenced to a fine of $12,500.00. He appeals the sentence on the basis that it was excessive and demonstrably unfit.

II. Facts

2 The Appellant is the owner, director and operating mind of Great White Holdings Ltd., an outfitting company providing guided hunts to resident and non-resident hunters throughout hunting areas in Alberta.

3 On or about November 24, 2003, an American hunter was found sitting in a hunting shack approximately one hundred yards from a small feeding granary with a pile of approximately 6 to 7 five gallon buckets or about thirty to thirty five gallons of cereal grains lying in front of it.

4 Two Fish and Wildlife Officers arrested the hunter and took him to the gate of the property where they waited for a guide to pick him up.

5 When they arrived at the gate, they found that the gate had been opened and there were new vehicle tracks entering the property, leading them to believe that a vehicle had entered it while they were inside.

6 While at the gate, the Appellant approached them in a truck and stopped approximately thirty yards short of the officers' vehicles.

7 When the officers approached the Appellant's vehicle, they noted two other hunters in it. The Appellant asked one of the officers whether the person they had in custody was the American hunter and the officer confirmed that it was.

8 The officers took the hunter to the Vegreville RCMP detachment for processing and the Appellant followed closely behind.

9 When the officers returned to the property the next day to execute a search warrant, they found a new set of vehicle tracks leading to the granary. The granary itself had also been moved so that it covered the cereal grain.

10 A 2003 Guide Report listed the Appellant as one of the guides on the license produced by the American hunter. The report was issued by Great White Holdings Ltd., the company in which the Appellant holds 100% of the voting shares.

11 The Appellant is the registered owner of the quarter section of land where the incident occurred.

12 The relationship between the Appellant and the American hunter was a commercial one. In convicting the Appellant, the trial Judge found that the circumstantial evidence met the test to show that the Appellant was an "active party to the enterprise" that put the American hunter in the hunting shack.

13 The Appellant had no prior criminal record or record under the *Wildlife Act*. The trial Judge made the following statements when imposing sentence:

> I have no reason to believe that Mr. McMahon has not been guiding for 20 years and has never been convicted, at least before, of any offence like this.
>
> Nonetheless, and I repeat that these sorts of offences can occur over a wide geographical area. The resources the province has to enforce them are limited. There is a great temptation for guides and outfitters to engage in this kind of activity and their needs, in my view, to be a significant deterrent to that activity.
>
> I am advised here and the Crown concedes, that at least the money which was paid to [the Appellant] by [the American hunter] was about $4,000.00 Canadian.

> I am satisfied here that that of course should go for sure. There should be absolutely no reimbursement for any expenses or certainly any profit that may have been made.
>
> I am also satisfied that these sentences need to be generally deterrent. I am satisfied here that the fine suggested by the Crown is an appropriate one, it should be very high.
>
> There will be a fine in the sum of $12,500 to which is added automatically a victim fine surcharge of $1,875, so it is $14,375, in default of payment six months imprisonment . . .

III. Issue

1. Was the sentence imposed by the trial Judge clearly unreasonable or demonstrably unfit?

IV. Reasons

14 In considering a sentencing appeal, the standard of review for Appellate Court is fitness. A variation in the sentence should only be made if the Court is convinced that it is not fit. It must be clearly unreasonable (*R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.)). In *R. v. M. (C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.), the Supreme Court of Canada added that "absent an error in principle, failure to consider a relevant factor, or an over-emphasis of the appropriate factors, a Court of Appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit." (at para. 90).

15 The Appellant was paid $4,000.00 by the American hunter. He says that the trial Judge over-emphasized the deterrence factor in imposing a fine of $12,500.00, an amount over three times what the Appellant was paid. He refers to the decision of the Alberta Court of Appeal in *Harrison v. Canada*, [2001] A.J. No. 675 (Alta. C.A.) where the Alberta Court of Appeal reduced a fine from $5,000.00 to $3,000.00 for the offence of violating the *Customs Act* by exporting grain. In reducing the fine to $3,000.00, being the amount that negated the profit earned by the accused for the export of grain, the Court stated:

> As to the trial judge's concern for deterrence, a $5,000.00 fine far exceeds what would be reasonable to negate any additional profit the Farmers would have made by exporting their grain to the U.S.

16 In other words, argues the Appellant, the Court of Appeal found that the objective of individual deterrence was met by assessing a fine that simply negated the profit made by the accused rather then tripling it.

17 The Appellant also argues that the disparity between the sentence handed down by the trial Judge and sentences for similar offences is simply too great to allow the sentence to stand. As there are no cases reported on sentences for baiting convictions (or, at least none brought to the attention of the Court), it is only possible to compare the sentence in this case with sentences imposed for other convictions under the *Wildlife Act*. It should be noted when doing so, that there are some guidelines for sentences set out in s. 92 of the *Wildlife Act*. That section creates a distinction between **trafficking** offences (that is, **trafficking** in game) and other offences under the Act (which would include baiting). In the former, an offender is liable to a fine of up to $100,000.00 and two years imprisonment while in the latter, an offender is subject to a maximum sentence of a fine of $50,000.00 or imprisonment for up to one year, or both.

18 In *R. v. Moosemay*, [2005] A.J. No. 1699 (Alta. Prov. Ct.), the accused were convicted of a number of offences under the *Wildlife Act*. Their sentences ranged from $200.00 for unlawfully hunting big game out of season up to $2,500.00 for **trafficking** in big game. In *R. v. Soto*, [1996] A.J. No. 826 (Alta. Prov. Ct.), the fines imposed were between $2,000.00 and $2,500.00 for **trafficking** in wildlife. In *R. v. Smallboy*, [2003] A.J. No. 1620 (Alta. Prov. Ct.), a sentence of $6,000.00 was imposed for **trafficking** in a Rocky Mountain sheep. In *R. v. Guay*, [2003] A.J. No. 870 (Alta. Prov. Ct.), the accused was sentenced to a fine of $1,000.00 for hunting out of season.

19 The fact that the Appellant had no criminal record, in my view, is a significant mitigating factor. However, contrary to the submissions of the Appellant, I do not consider the fact that he was only a party to the offence as a mitigating factor. Quite simply, he was the outfitter and guide. He was charging a fee for his services and was, presumably, earning a profit from his services.

20 I do consider, however, the range of sentences imposed in cases involving the unlawful hunting of big game and **trafficking** in big game to be instructive and persuasive. This is particularly so in light of the more serious sanctions imposed by the *Wildlife Act* on individuals convicted of **trafficking** offences.

21 I am also cognisant of, and in agreement with, the sentencing judge's emphasis on the deterrence factor. However, I feel that the objective of individual deterrence can be achieved by the imposition of a lesser fine.

22 While the Appellant argues that a fine equal to the profit earned by the Appellant would be adequate, I do not subscribe to that view. Little would be gained in achieving a deterrence objective by simply taking away the profit earned by the Appellant from one of his customers. In other words, the punishment imposed would be a soft cost as opposed to a real financial deterrent.

23 In my view, based on the sentencing objectives to consider, particularly that of individual deterrence, and in light of the sentences and fines handed down in other cases resulting from offences out of the *Wildlife Act*, a fair and fit sentence to impose upon the Appellant in this case would be a fine of $8,000.00. Such a fine would result in a return of the profit earned (a soft cost) plus an additional $4,000.00 actual cost to the Appellant.

V. Conclusion

24 The fine imposed by the trial Judge of $12,500.00 against the Appellant was excessive and demonstrably unfit. The objective of deterrence is adequately met by imposing a fine of $8,000.00, or double the profit earned by the Appellant.

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