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— Weapons Prohibition

Dallas Mack

Author's Note[1]

[1] Assistant Crown Attorney in Ottawa and creator of, and chief blogger at Mack's Criminal Law. The views and opinions expressed herein are those of the author and do not represent those of the Attorney General or the Crown Attorney's office. Please follow Dallas on Twitter at @mackcriminallaw.

1.0 — PREFACE

This issue reviews recent cases that have considered the imposition of weapons prohibition under sections 109 and 110.

2.0 — THE CASES REVIEWED IN THIS BULLETIN

(i) *R. v. Mills*, 2016 CarswellOnt 8003 (Ont. C.A.)

(ii) *R. v. Wauer*, 2014 CarswellAlta 1472 (Alta. C.A.)

(iii) *R. v. MacKenzie*, 2013 CarswellNS 717 (N.S. C.A.)

(iv) *R. v. Scott*, 2014 CarswellNfld 443 (N.L. Prov. Ct.); affirmed 2016 CarswellNfld 154 (N.L. C.A.)

Other cases mentioned in this issue:

(i) *R. v. Samery*, 2007 CarswellOnt 5957 (Ont. C.A.)

(ii) *R. v. Wiles*, 2005 CarswellNS 542 (S.C.C.)

(iii) *R. v. Simpson*, 1994 CarswellOnt 7347 (Ont. Gen. Div.)

(iv) *R. v. Hurl*, 2013 CarswellSask 387 (Sask. Q.B.)

(v) *R. v. Levesque*, 2010 CarswellPEI 72 (P.E.I. C.A.)

(vi) *R. v. Woloshyn*, 2002 CarswellSask 364 (Sask. Q.B.)

(vii) *R. v. Lui*, 2005 CarswellNat 684 (Can. Ct. Martial App. Ct.)

(viii) *R. v. L. (S.)*, 2013 CarswellOnt 4314 (Ont. C.J.)

(ix) *R. v. Mitchell*, 2008 CarswellNfld 58 (Nfld. T.D.)

(x) *R. v. White*, 2014 CarswellOnt 13185 (Ont. S.C.J.)

(xi) *R. v. Apolinario*, 2014 CarswellMan 584 (Man. Q.B.)

(xii) *R. v. Vincent*, 2014 CarswellOnt 3428 (Ont. S.C.J.)

(xiii) *R. v. B. (G.)*, 2005 CarswellNB 408 (N.B. C.A.)

2.1 — MILLS

Facts

Bruce Mills pleaded guilty to two counts of break and enter. The first incident related to his attendance at a three-storey duplex in Toronto. He first rang the doorbell of the duplex and then smashed a pane of glass and reached in to open the door. Once inside he approached the door of one of the units and knocked. He heard someone inside respond and he fled.

The second incident related to Mills' attendance at a duplex. He knocked on the outer door and then smashed a glass pane to allow access to the lock on the inside. He unlocked the door and then knocked on one of the inner doors - someone answered and he fled.

The third incident related to Mills' attendance at a home where he knocked on the front door. The homeowner observed him through a window, but there was no indication that he noticed the homeowner inside. Mills then went around to the backyard and the homeowner went to the basement to keep watch on Mills. The homeowner then heard banging on a window and called 911. When the police arrived they arrested Mills. He had a crowbar and exacto knife in his possession.

Mills ultimately pleaded guilty to possession of stolen property, attempted break and enter, and break and enter in relation to these incidents. He received a global sentence of 42 months. He also received a lifetime weapons prohibition under section 109(3) of the *Code*. He appealed.

Ruling

The sole issue on appeal was the imposition of the lifetime weapons prohibition. The Court of Appeal noted that the sentencing goal of a weapons prohibition is protection of the public [para 17]: see *R. v. Wiles*, 2005 CarswellNS 542 (S.C.C.) at para 9. The court noted that this focus impacts on the interpretation of "violence against a person was . . . threatened" — part of the statutory requirements of section 109. In the present case, the victims expressed through their victim impact statements that the offence impacted them negatively, they were fearful, and Mills admitted he was aware that his actions could have this impact. These two factors provided a sufficient basis for the sentencing judge to conclude that there was an "implied threat of violence" to justify the weapons prohibition.

Comment

Mills is a helpful decision that illustrates a principled approach to sentencing. The imposition of the weapons prohibition should not be driven by a technical and narrow interpretation of "violence threatened" but rather should focus on the purpose of the provision and the nature of the offence. *R. v. Simpson*, 1994 CarswellOnt 7347 (Ont. Gen. Div.) (a case cited by the court) is a helpful example to illustrate the point. In that case the offence was conspiracy to commit robbery. No actual victim was threatened or realized. There was no robbery, violence or actual attempted violence. Nonetheless, the court held that violence is inherent in robbery and thus there was an implied threat. This approach is also consistent with *R. v. Samery*, 2007 CarswellOnt 5957 (Ont. C.A.) an earlier decision of the Court of Appeal where despite a lack of actual threats or violence the court accepted the inherent and implied threats involved in the conduct of the accused involving contact with his wife in breach of recognizance conditions.

2.2 — WAUER

Facts

Ralf Wauer was arrested under suspicion for theft of lumber from a construction site. He was confronted by a civilian about the incident. Upon arrest the police located brass knuckles, bear spray and a homemade machete on his person.

Wauer pleaded guilty to possession of a prohibited weapon (the brass knuckles) and possessing weapons (machete and spray) for a dangerous purpose. As part of his sentence he received a 10-year weapons prohibition under section 110.

Wauer appealed.

Ruling

On appeal Wauer argued that the imposition of the section 110 weapons prohibition was improper. The Court of Appeal highlighted three points in considering the appropriateness of the order.

First, it noted that the order is part of the sentence and concluded that it "is not only protective or preventative it also has a punitive aspect". In support of this conclusion the court cited *Wiles* and *R. v. Hurl*, 2013 CarswellSask 387 (Sask. Q.B.).

Second, it held that since the order is "punitive" the principle of proportionality applies to both the imposition of the order and the determination of its length [paras 14-21]: see also *R. v. Levesque*, 2010 CarswellPEI 72 (P.E.I. C.A.) at para 32; *R. v. Woloshyn*, 2002 CarswellSask 364 (Sask. Q.B.) at para 33; *R. v. Lui*, 2005 CarswellNat 684 (Can. Ct. Martial App. Ct.).

Third, the court noted that there must "be some evidence of a safety concern or reason to believe that safety is a concern" [para 22]. The court noted, however, that this is sometimes satisfied by the nature of the offence, regardless of the precise circumstances: see for example *R. v. L. (S.)*, 2013 CarswellOnt 4314 (Ont. C.J.) at para 21; *R. v. Mitchell*, 2008 CarswellNfld 58 (Nfld. T.D.).

With these principles in hand the court held that the imposition of the weapons prohibition was appropriate:

> We have examined the record and agree with the sentencing judge's conclusion that a weapons prohibition was desirable based on the nature and circumstances of the offences. Those circumstances included removal of construction materials by a person in possession of prohibited weapons capable of inflicting harm, and the confrontation which took place while the offender had possession of those weapons. [Para 35].

The court varied the duration of the order, however, and imposed the prohibition for three years. The court held that imposing the maximum duration was "disproportionate having regard to the offender and the circumstances. But more to the point, we do not believe a 10-year prohibition is desirable in the interests of safety. There is no evidence of a safety concern continuing for an indefinite time" [para 36].

The court rejected the request to limit the weapons prohibited, however.

Comment

Wauer highlights some of the key issues related to the imposition of a weapons prohibition. Three points raised in the decision warrant comment.

First, the "punitive" aspect of the order and the interplay of proportionality. The court in *Wauer* discusses the "punitive" aspect of weapons prohibitions and the application of proportionality. This discussion, however, must be viewed with some caution for the following reasons. One, while the provision has been recognized as having a "punitive" impact, it does not follow that it was intended to be part of the "punishment" such as to be a significant consideration in determining the overall fitness of the sentence imposed. In *Wiles* (at para 3) the court recognized that this provision constituted punishment, however, that was in the context of a section 12 constitutional challenge. It does not follow that the provision was intended to form an integral part of the "punishment" imposed on an offender. Indeed, the court in *Wiles* recognized that prevention was the primary purpose of the provision and merely acknowledged that the provision *may* have a punitive effect on *some* offenders.

Second, the enumerated purpose of section 110. The court recognized that section 110 identifies that the order may be

imposed where “it is desirable, in the interest of *the safety of the person or of any other person*, to make an order prohibiting the person from possessing any [weapon]”. Given this statutory language, while the provision may have a punitive impact, it is clear that it is not intended to be an integral part of the punishment — rather it is intended to be preventative albeit, in some cases, imposing an ancillary punitive impact.

Third, the overall scheme of the legislation. Section 110 cannot be read in isolation. It is part of a broader scheme that includes section 109 where the weapons prohibition is mandatory (although the duration allows some variation). Given its mandatory nature for identified offences, the interplay of proportionality must be understood as minimal.

2.3 — MACKENZIE

Facts

Daniel MacKenzie was convicted of unlawfully entering a dwelling house with intent to commit an indictable offence. As part of his sentence he received a weapons prohibition under section 109. He appealed.

Ruling

On appeal the Crown conceded that the order was not proper — the Court of Appeal agreed. The court held that “[v]iolence, per se, is not an incidental or presumed element of the offence of unlawfully entering a dwelling house”. The court also held that the facts of the case do not disclose that “violence was used, threatened or attempted” [para 6]. The court noted that the trial judge only made a finding that there was a “violation and intrusion”.

Comment

The ruling in *MacKenzie* recognizes that the “violence” prerequisite can be satisfied by either the nature of the offence or the facts surrounding its commission. However, what the court does not seem to accept (or appreciate) is that implicit violence may suffice: see *Mills*; *Samery*. Unfortunately the facts are sparse and the lower court decision is not reported, so the actual facts of the offence are unclear, but it is certainly understandable that violence could be found to be implicit in this offence — unlawfully in a dwelling house.

2.4 — SCOTT

Facts

Scott was charged, *inter alia*, with sexual interference in relation to a thirteen-year-old child — he was forty-three at the time of the offences. Scott had sexual intercourse with the child on several occasions (he used a condom during intercourse). The child was a friend of Scott’s thirteen-year-old daughter.

Scott pleaded guilty. Scott had two prior convictions for sexual assault.

Ruling

The court imposed a sentence of 4 years and 4 months in jail. It also imposed a section 109 weapons prohibition. In doing so the court cited the following passage from *R. v. B. (G.)*, 2005 CarswellNB 408 (NB. C.A.) for the proposition that such an offence is “inherently violent”:

> As far as the nature of Mr. B’s acts is concerned, it is difficult for me to understand how it could seriously be argued that the trial judge erred in holding that violence was used against the child in the commission of this criminal offence. In my view, even if an eight or nine-year-old child engages in sexual acts such as fellatio with an adult following persistent requests, as opposed to an act of violence or threats of violence, by the adult, the fact remains that the child was subjected to a violent assault on his well-being. The child’s sexual integrity has been compromised, and this form of sexual abuse can only be considered a form of violence in and of itself. In fact, the trial judge’s conclusion in this regard finds strong support in the authorities.

This concept has been cited, as noted by the court, numerous times: see *R. v. White*, 2014 CarswellOnt 13185 (Ont. S.C.J.); *R. v. Apolinario*, 2014 CarswellMan 584 (Man. Q.B.); and *R. v. Vincent*, 2014 CarswellOnt 3428 (Ont. S.C.J.).

Comment

Scott is another case, like *Mills*, that recognizes the inherent "violence" in some offences. Scott also emphasizes the point that "violence" in this context is not to be narrowly defined in reference to some physical character, but rather is broadly defined as encompassing any "violence" including psychological or emotional.

3.0 — EPILOGUE

Weapons prohibition orders are often imposed; in some cases the order is mandatory. Sections 109 and 110 set out the basis for imposition and the duration of the orders. The following principles govern the application of these provisions.

First, the provision does not violate section 12 of the *Charter*: *Wiles*.

Second, the primary purpose of the provisions is preventative: *Wiles*; *Mills*. The imposition of such an order is intended to protect the public: *Mills*; *Samery*. The provision is "punishment" within the context of *Charter* as it *may*, for *some* offenders, have a punitive impact: *Wiles*; *Wauer*; *Levesque*; *Woloshyn*. While its character as punishment *may* bring the principle of proportionality into play in relation to whether or not it is imposed and its duration (see *Wauer*), that assessment must be overshadowed and put in the context of the primary purpose of the provision: protection of the public.

Third, to the extent proportionality is at play, section 113 allows for a waiver of the order where a weapon is necessary to "hunt or trap" for sustenance or is necessary for employment: section 113; *Wiles*.

Fourth, there is no need for specific violence, actual or apprehended, in order to impose such an order: *Wiles* at para 9; *Mills*. The nature of the offence may be enough to imply the "threat of violence": *Mills*; *Simpson*; *Wauer*; *Samery*. For example, child sexual assaults are "inherently violent" and warrant such an order: *Scott*; *White*; *B. (G.)*; *Apolinario*; *Vincent*. Similarly, the nature of the conduct, regardless of the actual offence, may be sufficient: *Mills*; *Samery*.

Footnotes

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