Court of Queen's Bench of Alberta

Citation: R. v. Owusu, 2008 ABQB 715

Date: 20081119
Docket: 030867253Q1
Registry: Calgary

Between:

Kwasi Poku Owusu

Applicant

- and -

Her Majesty the Queen

Respondent

Restriction on Publication: By Court Order, information that may identify the complainant may not be published, broadcast, or transmitted in any manner. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information or submissions at the hearing of the application. See the *Criminal Code*, s. 486.5.

Memorandum of Decision
of the
Honourable Madam Justice B.E. Romaine

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[1] The Crown applies for an order under s. 490.012 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 compelling Kwasi Poku Owusu to register personal information pursuant to the *Sex Offender Information Registry Act*, S.C. 2004, c. 10 ("SOIRA") and report to the nearest registration centre on an annual basis for 20 years.

[2] Mr. Owusu was convicted of sexual assault and sentenced after appeal to three years imprisonment. In varying the original conditional sentence of two years imposed by this Court, the Court of Appeal did not find that Mr. Owusu was a danger to the community or was likely to

reoffend, but that, citing ***R. v. Sandercock*** (1985), 22 C.C.C. (3d) 79, "major sexual assaults without gratuitous violence by an offender without a criminal record will attract a starting point sentence of three years": ***R. v. Owusu***, 2006 ABCA 239 at para. 7. The original sentencing proceeded the decision of the Court of Appeal in ***R. v. Redhead***, [2006] A.J. No. 273; ABCA 84; [2006] 6 W.W.R. 19; 56 Alta. L.R. (4th) 15; 384 A.R. 206; 386 A.R. 206; 206 C.C.C. (3d) 315; 69 W.C.B. (2d) 338; 2006 CarswellAlta 294 which clarified the law with respect to established sentencing practice relating to SOIRA orders, and thus the issue of whether a SOIRA order should be made was referred back to this Court.

[3] The offence of sexual assault is a designated offence within the meaning of s. 409.011 of the *Criminal Code* and therefore a SOIRA order is mandatory unless Mr. Owusu can establish pursuant to the exception set out in s. 490.012(4) that the impact of such an order on his privacy and liberty would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature.

[4] In ***R. v. Redhead*** at para. 20, the Court of Appeal noted that the test set out in s. 490.012(4) required the sentencing court to assess the impact of a SOIRA order on the offender, including the impact on his privacy, in determining whether the impact is grossly disproportionate to the public interest.

[5] The Court suggested at para. 31 that any relevant type of impact can be considered, including impact on privacy and security interests, personal handicaps, the stigma of registration, the importance of rehabilitation and reintegration into the community and the possibly of police harassment. As noted in ***R. v. G.E.W.***, 2006 ABQB 317 at para. 23, "(w)hile economic impact was not specifically mentioned by the Court, it would appear to be relevant." The Court of Appeal commented in ***Redhead*** however that factors such as the lack of prior record of sexual assault, the influence of alcohol on the offender or the circumstances of the offence are not relevant to the question of the impact of the registration and reporting requirements on the offender.

[6] Mr. Owusu bears the evidentiary burden of establishing the impact of an order: ***Redhead*** at para. 26. The focus of the inquiry is on Mr. Owusu's "present and possible future circumstances": ***Redhead*** at para. 28.

[7] There is no presumption of impact arising from the length of reporting obligations alone: ***Redhead*** at para. 33. The inquiry is not on whether there is a public interest in having the offender registered, but on whether the impact on the offender is "grossly disproportionate": para. 42. "Grossly" in this context means "a marked and serious imbalance": para. 43.

[8] As noted in ***G.E.W.***, the SOIRA was enacted to help police investigate sexual crimes. It requires an offender to register his name, address, place of employment or education, telephone number, and physical description within 15 days of when he first becomes subject to its

provisions. It then requires the offender to report within 15 days of any change of residence or name, and between 11 months and 12 months after he last reported.

[9] The *Act* also provides for notification of temporary absences from the offender's residence where they exceed 15 days:

> 6.(1) A sex offender shall notify a person who collects information at the registration centre that serves the area in which their main residence is located
>
> (a) of every address or location at which *they stay or intend to stay*, and of their *actual or estimated dates of departure from, and return to*, their main residence or a secondary residence, *not later than 15 days after departure* if they are in Canada but are absent from their main residence and every secondary residence for a period of at least 15 consecutive days;
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> (b) of their actual or estimated date of departure from their main residence or a secondary residence, not later than 15 days after departure if they are outside Canada for a period of at least 15 consecutive days; and
>
> (c) of their actual return to their main residence or a secondary residence after a departure referred to in paragraph (a) or (b), not later than 15 days after they return, unless they are required to report under section 4.1 or 4.3 within that period.

As noted in ***G.E.W.*** at paragraph 21, the Court has no ability to ameliorate any disproportionate impact of registration by varying the reporting conditions in any way.

[10] Mr. Owusu gave evidence as to the potential impact of a SOIRA order on his privacy and liberty. He had just turned eighteen at the time of the offence. As set out in both my reasons for sentence and the reasons on appeal, Mr. Owusu's background prior to the offence was impressive. He has a close and supporting relationship with his family and had been working part-time since junior high school and supporting his mother financially. He was attending SAIT attempting to obtain a diploma in chemical engineering with the goal of eventually transferring to university. He had been supported through the sentencing process by his teachers and a coach, who spoke strongly of his qualities as a leader in sports, a role model to young people and of his high potential. The pre-sentence report was the most positive one I have ever reviewed and was described by the appeal panel as being "extremely positive".

[11] When Mr. Owusu was originally sentenced to a conditional sentence, he began a program of out-patient counselling that was interrupted by the sentencing appeal. When incarcerated, he took advantage of a penitentiary program designed as for the "moderate sexual offender" and postponed applying for parole a number of times in order to do so. He also took advantage of classes in computing and English as a second language, later volunteering in that program. Mr.

Owusu still intends to continue at SAIT when released and still hopes to attend university. After his release, he must complete one additional semester at SAIT to achieve a diploma in Chemical Engineering technology and then another two years of school for his diploma in chemical engineering. The earliest he could complete his schooling would be the spring of 2011. Mr. Owusu testified that he may have to interrupt the completion of his schooling periodically in order to work. Given his financial circumstances, he hopes to obtain work in the oilfield to fund his educational aspirations. He also hopes that he may be able to obtain a position where an employer may help him financially with school in return for a commitment on future work.

[12] One of Mr. Owusu's major concerns about the reporting requirements of a SOIRA order is that oilfield work requires flexibility in terms of travelling and considerable time away from the major urban areas of Alberta, and that the reporting requirements would be difficult and even impossible in some situations to observe . He also has concerns with respect to his employability as a chemical engineering technologist and a chemical engineer if his flexibility with respect to travel is impacted by the reporting requirements and the stigma arising from the requirements. Mr. Owusu gave evidence of the travel requirements of this kind of employment gleaned from his instructors at SAIT and his own experience. His testimony in that regard was not challenged, including the requirements of flexibility in timing and location and uncertainties in duration of travel.

[13] Counsel for Mr. Owusu concedes that ***R. v. Redhead*** makes it clear that the requirement of showing a marked and serious imbalance between the impact of a SOIRA order on an offender and the public interest imposes a high threshold on an applicant, but submits that the threshold should not be so high that no applicant can satisfy it. If the legislation allows exemptions, he submits, some applicants have to be able to satisfy the test. This was effectively recognized in ***Redhead*** at para. 44 where the Court noted that if the exception was so narrow that a SOIRA order was effectively mandatory, the exception became meaningless.

[14] Counsel for Mr. Owusu also submits that it is clear both from his testimony and the sentencing proceedings that Mr. Owusu has a low risk of re-offending and that he has shown a willingness to undergo treatment. It appears that the Court of Appeal in ***Redhead*** at para. 42 has rejected any emphasis on whether there exists a public interest in registering an offender on a case-by-case basis, instructing the sentencing court to focus instead on the issue of the impact of the order on the offender. However, Slatter, J. (as he was) suggests in ***G.E.W.*** at para. 23 that in the process of balancing personal impact with public interest in order to determine whether there would be a disproportionate effect, the Court can consider the risk that an offender would re-offend, the nature of the crime likely to be committed if there is another offence and the effect that exemption might have on the ability to investigate crime. In this case, I am satisfied by the evidence that Mr. Owusu would be at low risk to re-offend and note that he and the victim of his offence were close in age and that there is no suggestion that Mr. Owusu is a paedophile.

[15] In summary, Mr. Owusu has presented the following evidence of disproportionate impact:

a) that he has an achievable dream of following a career path that requires flexibility and frequency of travel and a SOIRA order would thus impose onerous reporting requirements; and

b) that the reporting requirement may affect his employability, particularly given that he is at the beginning of his career path and faces unique challenges, given his position in Canadian society as a first generation immigrant with poor language skills, thus affecting his ability to reintegrate into society and to fully rehabilitate.

[16] While it is certainly true that many positions require some degree of travel and many new Canadians face similar challenges in integration, the combination of these factors with Mr. Owusu's relative youth and his realistic efforts to achieve a long-held educational goal persuade me that, in the unique circumstances of this offender, a SOIRA order would undermine the important sentencing purposes of rehabilitation and re-integration into society. I am satisfied that the impact of registration on this applicant would be grossly disproportionate and that the impact of an exemption order on the public interest would be relatively slight.

[17] I therefore decline to make such an order and grant the applicant an exemption from SOIRA registration pursuant to s. 490.012(4) of the *Criminal Code*.

Dated at the City of Calgary, Alberta this 19th day of November, 2008.

B.E. Romaine
J.C.Q.B.A.

Appearances:

H. M. Silver
for the Applicant

F.E. Turner
for the Respondent