COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Dibbs***,
2006 YKCA 10

Date: 20060815
Docket: YU0553

Between:

Regina

Respondent

And

Stephen Dibbs

Appellant

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine
The Honourable Madam Justice Kirkpatrick

Oral Reasons for Judgment

J.A. Van Wart — Counsel for the Appellant

M. Cozens — Counsel for the (Crown) Respondent

Place and Date: Vancouver, British Columbia
15 August 2006

[1] **KIRKPATRICK, J.A.**: Mr. Dibbs seeks leave to appeal and, if leave is granted, appeals from the sentence of one year imprisonment with credit given of 75 days for 50 days spent in pre-trial custody. The sentence included a one year probation period and a five and one-half year prohibition from driving. Mr. Dibbs asks this Court to substitute the sentence with a curative discharge and an attached two or three year probation period or, in the alternative, a one year conditional sentence followed by 12 months' probation.

[2] Mr. Dibbs was convicted on a charge that he operated a motor vehicle with a blood alcohol concentration in excess of 80 milligrams of alcohol in 100 millilitres of blood, contrary to s. 253(b) of the ***Criminal Code***. The charge arose from an incident on 25 July 2004, when the truck that Mr. Dibbs was driving went off the road and down an embankment. The truck was demolished. Mr. Dibbs and his passenger fortunately were not seriously injured.

[3] Upon his conviction in January 2006 Mr. Dibbs sought a curative discharge under s. 255(5) of the ***Criminal Code***. The trial judge addressed his concerns with respect to Mr. Dibbs' application at paras. 5 and 6 of his reasons:

> [5] The test for a curative discharge, as set out in s. 255(5) of the *Criminal Code*, is deceptively simple to state: the Court must be satisfied that the offender is in need of a curative discharge in relation to alcohol or drugs and that it would not be contrary to the public interest to grant the discharge.
>
> [6] As always, the devil is in the details. How is the public interest to be measured? At bottom, this amounts to a weighing of, on the one hand, the likelihood that the accused will be successful in treatment and remain abstinent versus, on the other hand, the risk to the public posed by leaving the offender in the community.

[4] The trial judge then considered Mr. Dibbs' personal circumstances. He was 46 at the time of sentencing. He has been an alcoholic for at least 20 years. He has undertaken residential treatment on four occasions with his last attempt ending in January 2005 when he was asked to withdraw from the program by reason of him threatening another patient. Mr. Dibbs' criminal record includes 19 convictions; six for drinking and driving; two for driving while disqualified; and seven convictions for breaches of probation and release conditions.

[5] Mr. Dibbs contends that the trial judge failed to give adequate consideration to the evidence that he says supported the imposition of a curative discharge. In particular, Mr. Dibbs says that the trial judge did not give adequate consideration to his evidence that he had abstained completely from the consumption of alcohol since October 2004, that he regularly attended meetings of Alcoholics Anonymous and that he had pursued counselling until October 2005 and that he had made arrangements to meet with another counsellor.

[6] In my opinion, the appellant has not demonstrated any significant error in principle or failure by the trial judge to consider a relevant factor. The trial judge properly considered the repeated attempts and failures by Mr. Dibbs to maintain sobriety and to follow-up on residential treatment. Mr. Dibbs has a serious criminal record that reflects his struggle with alcoholism. The trial judge was understandably sceptical of Mr. Dibbs' assertions as to his attempts to rehabilitate himself and the general absence of convincing corroboration to that effect.

[7] In the end, the trial judge was simply not persuaded that Mr. Dibbs' discharge would be in the public interest. In my opinion, that finding was supported by the evidence. The fresh evidence that Mr. Dibbs asks us to consider on this appeal would not, in my view, alter that finding.

[8] Further, the trial judge, in refusing to impose a conditional sentence, was obviously considering the equivalent public interest component that exists in both s. 253(b) and s. 742.1 of the ***Criminal Code***. Having concluded that the public interest would not be served by the imposition of a curative discharge, it is unsurprising that the trial judge would not be satisfied that Mr. Dibbs serving his sentence in the community would not endanger the community.

[9] I would allow leave to appeal but would dismiss the appeal.

[10] **NEWBURY, J.A.**: I agree.

[11] **LEVINE, J.A.**: I agree.

"The Honourable Madam Justice Kirkpatrick"