

SUPREME COURT OF QUEENSLAND

CITATION: *R v Seiler* [2003] QCA 217

PARTIES: **R**
v
SEILER, Kurt Steven
(applicant/appellant)

FILE NO/S: CA No 3 of 2003
DC No 295 of 2002

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Beenleigh

DELIVERED EX TEMPORE ON: 26 May 2003

DELIVERED AT: Brisbane

HEARING DATE: 26 May 2003

JUDGES: McPherson JA, White and Wilson JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **Application granted. Appeal allowed. Orders made below set aside. Order that the applicant undergo 18 months probation and be subject to the requirements of s 93 *Penalties and Sentences Act 1992 (Qld)* to which the applicant consents; no further order about community service; conviction not recorded.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where trial judge erred in making community service a special condition of probation order

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – PARTICULAR MATTERS – OTHER INSTANCES OF INTERFERENCE – where conviction recorded – whether circumstances of offender indicated that discretion not to record conviction should be exercised

Penalties and Sentences Act 1992 (Qld), s12(2)

R v Briese [1998] 1 Qd R 487, followed

COUNSEL: A W Moynihan for the applicant
D A Holliday for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the
respondent

WHITE J: The applicant for leave to appeal against sentence pleaded guilty on ex officio indictment to six counts of burglary and stealing with six counts of fraud before the District Court at Beenleigh on 13 December 2002.

He was ordered to perform 240 hours' community service as a special condition of the two years' probation imposed on him. A conviction was recorded. In fact 200 hours was endorsed on the indictment and the applicant has performed that service in its entirety.

It is conceded by the Crown that there was no power to make such an order. Section 109 of the *Penalties & Sentences Act* 1992 permits a Court to make an order for probation and a community service order, but they must be separate orders and the Court must not impose an order as a requirement of the other order.

Accordingly, the applicant falls to be resentenced by this Court. The applicant does not resist orders that he undergo probation or that he perform community service, but he does seek to have no recording of conviction.

The applicant was born on 27 May 1983. He was 18 when the offences were committed over a one month period in March/April 2002 which involved theft from his home. He had no previous convictions.

Just prior to his offending behaviour, the applicant had been living with his father and sister in his sister's home. His parents had separated when he was 14 and he had left school at about that time. He had been in and out of work since leaving school. He became a substantial smoker of cannabis and, in an effort to wean himself from that drug, turned to alcohol. He was asked to leave home, but subsequently returned on various occasions using a door key which he had retained, and stole various electrical and other domestic goods owned both by his father and his sister. He pawned those goods, which gave rise to the fraud charges.

His father complained to police nominating the applicant as a likely suspect. The applicant made full admissions on 14 April and was charged with four burglary and stealing offences and four fraud offences and given bail. He then committed the last two burglaries and frauds. He made admissions about those offences on 27 April.

The property was recovered, but the various pawnbrokers were \$517.99 out of pocket. Although the Prosecutor nominated that sum as the amount of restitution sought, it was not mentioned in the order made. It may be inferred that restitution has not taken place.

A letter from the applicant's father was tendered below. It is short and can conveniently be mentioned in full:

"I believe Kurt is honestly sorry for his actions leading to the charges being placed against him. I also believe he is doing his best to make amends for those actions and has changed a great deal since. I feel I made the decision to place charges under stress and out of anger and given the opportunity again would not do the same. I feel seeking some guidance for him would have been a much better option".

The applicant has reconciled both with his father and his sister.

Initially after being charged he lived with his mother, but at the time of sentence he lived in shared accommodation. He had the support of both parents.

The factors which a Court may take into account in exercising the discretion to record a conviction or not are set out in s 12(2) of the *Penalties and Sentences Act*. No evidence was offered to the sentencing court about the impact that recording a conviction would have on the applicant's economic or social wellbeing, or change of finding employment, but it might be presumed with some confidence that the revelation could only have a negative impact on his employability.

In *Briese* [1998] 1 QdR 487, Justice Thomas and I discussed the principles upon which the discretion should be exercised and the balance which needs to be struck between the interest of persons such as employers and licensing authorities and the rehabilitation of the offender.

All of the circumstances of this case, to me, point to exercising the discretion in favour of the applicant: his age, lack of any previous criminal conduct, his reconciliation with his family, the nature of these

offences and the timely completion of the 200 hours' community service, which alone is a significant pointer to rehabilitation.

I would grant the application, allow the appeal, set aside the orders made below and instead order that the applicant undergo 18 months' probation and be subject to the requirements of s 93 of the *Penalties and Sentences Act* 1992 to which the applicant consents; would make no further order about community service; and would not record a conviction.

MCPHERSON JA: I agree. On the question of recording the conviction, I consider that a factor to be considered which particularly influences me, is that the primary thefts were committed on or from members of the applicant's own family and that those family members have now evidently forgiven him.

Otherwise I would only add that s 12(2) in referring in paragraphs (a) (b) and (c) to specific matters is inclusive and not exhaustive of the matters that may be considered.

The order I consider should be in the form in which Justice White has propounded it.

WILSON J: I agree. It falls to this Court to resentence in light of facts as they are at the time of resentence. The applicant was given 12 months in which to perform 200 hours of community service. He has completed that in five months.

To my mind, this is a significant indicator both of remorse and of good prospects for rehabilitation. That factor, together with the other factors discussed by Justice White, would lead me not to record a conviction.

I agree with the orders proposed by her Honour.

MCPHERSON JA: The orders will be as Justice White has outlined them.