

SUPREME COURT OF QUEENSLAND

CITATION: *Attorney-General for the State of Queensland v. Foy* [2007] QSC 141

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v.
MARK ANTHONY FOY
(respondent)

FILE NO: BS10626 of 2006

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 5 June 2007

DELIVERED AT: Brisbane

HEARING DATE: 19 March 2007

JUDGE: Helman J.

CATCHWORDS: CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – *Dangerous Prisoners (Sexual Offenders) Act 2003* – application by Attorney-General for an order pursuant to s 22(1)(a) of the Act amending supervision order – whether respondent contravened order – appropriateness of proposed amendments

Dangerous Prisoners (Sexual Offenders) Act 2003 ss 16(1)(a) and (b), 22(1)(a)

COUNSEL: Mr M. Hinson S.C. and Ms M. Maloney for the applicant
Mr P.E. Smith for the respondent

SOLICITORS: Mr C.W. Lohe, Crown Solicitor, for the applicant
Fisher Dore for the respondent

- [1] By an originating application filed on 6 December 2006 the applicant seeks an order that, pursuant to s. 22(1)(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003*, a supervision order to which the respondent is subject be amended and that the respondent be subject to such amended conditions as the court considers appropriate. Section 22(1)(a), so far as it is relevant, provides:

(1) If the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, the supervision order ... the court may –

(a) amend the conditions of the supervision order ...;

[2] The order to which the respondent is currently subject is an order made by Douglas J. on 6 January 2005, as amended on 14 June 2006 by an order of McMurdo J., who ordered that the respondent must:

- (a) be under the supervision of a corrective services officer (“the supervising corrective services officer”);
- (b) reside at a place within the State of Queensland that has received prior approval from a corrective services officer by way of a suitability assessment;
- (c) not be in the area within 100 metres of the boundary of any school grounds between 7.30 am and 4.30 pm on school days without reasonable excuse;
- (d) report to his supervising corrective services officer on Monday and Friday every week, such visits to occur at the Area Office closest to Mr Foy’s residence;
- (e) report to the officer in charge of police at Goodna or Roma Street between the hours of 8 am and 4 pm on a weekly basis, on either Saturday or Sunday or at such police station as otherwise directed by the supervising corrective services officer;
- (f) notify the supervising corrective services officer of any affiliation with any club or organisation that has child membership or child participation in its activities;
- (g) comply with every reasonable direction of an authorised corrective services officer;
- (h) notify the supervising corrective services officer of the make, model, colour and registration number of any motor vehicle owned by, or generally driven by him, whether the vehicle is hired or otherwise obtained for his use;
- (i) notify the supervising corrective services officer of the nature of his employment, the name of his employer and the address of the premises where he is employed;
- (j) notify the supervising corrective services officer of every change of his name, place of residence or employment at least two business days before the change happens;

- (k) not leave or stay out of Queensland without the written permission of the supervising corrective services officer;
- (l) not commit an offence of a sexual nature during the period for which these orders operate;
- (m) not be on the premises of shopping centres between 8.00 am to 9.30 am and between 2.30 pm and 4.30 pm on school days other than for the purpose of his employment;
- (n) not visit either:
 - (i) any public parks, or,
 - (ii) other public places containing children's playgrounds;
- (o) not have any unsupervised contact with children under 16 years of age except with the supervising corrective services officer's prior written approval and provided the respondent discloses the terms of this order to the guardians of the child/ren before any such contact takes place;
- (p) abstain from alcohol and non-prescribed drugs for the duration of this order and take prescribed drugs as directed by a medical practitioner;
- (q) submit to alcohol and drug testing as directed by a corrective services officer;
- (r) not access pornographic images containing photographs of children on the Internet;
- (s) attend and complete a Sex Offender Maintenance Program;
- (t) attend a psychiatrist, psychologist or other suitably qualified mental health professional who has been approved by the supervising corrective services officer at a frequency and duration which shall be recommended by the treating psychiatrist/psychologist, the expense of which is to be met by the Department of Corrective Services;
- (u) permit any treating psychiatrist, psychologist, or other suitably qualified mental health professional to disclose details of medical treatment and opinions relating to his level of risk of re-offending and compliance with this order to the Department of Corrective Services if such request is made in writing for the purposes of enhancing rehabilitation and/or updating or amending the supervision order and/or ensuring compliance with this order;

- (v) attend any program, course, counselling, therapy or treatment, in a group or individual capacity, as directed by the supervising corrective services officer in consultation with the treating psychiatrist, psychologist or other suitably qualified mental health professional, the expenses of which is to be met by the Department of Corrective Services;
- (w) agree to undergo medical testing or treatment as deemed necessary by the treating psychiatrist/psychologist in consultation with the supervising corrective services officer, and permit the release of the results and details of the testing to the Department of Corrective Services, if such a request is made in writing for the purposes of updating or amending the supervision order, the expense of which is to be met by the Department of Corrective Services. Further and specifically, if it is deemed by the treating psychiatrist/psychologist in consultation with the supervising corrective service officer that sexual impulse medication is an appropriate course of therapy/treatment this is only to occur with the respondent's consent;
- (x) the frequency of reporting as stated in clauses (d) and (e) contained herein may be changed, providing the reporting conditions are not more onerous to the respondent, if the supervising corrective services officer considers that in all the circumstances, such a change is warranted;
- (y) the respondent must, if the supervising corrective services officer directs, reside at community residential facilities for periods (not longer than 7 days at a time) that the officer directs.

His Honour further ordered that the respondent be subject to the supervision order as amended until 31 December 2014.

[3] At the hearing of the application a draft of a further amended supervision order was tendered: exhibit 1. On behalf of the applicant at the beginning of the hearing the following thirteen new conditions were contended for, providing that the respondent:

- (xii) not commit an indictable offence during the period of the order;
- (xiv) respond truthfully to enquiries by authorised corrective services officers about his whereabouts and movements generally;
- (xv) not to have any direct or indirect contact with a victim of his sexual offences;

- (xxi) not visit premises licensed to supply or serve alcohol, without the prior written permission of the authorised corrective services officer;
- (xxiii) be assessed for a sexual offending maintenance program and, if referred to participate in such program, attend the program as directed by a [*sic*] authorised corrective services officer;
- (xxiv) nominate a single general practice which you will attend for health and medical reasons and provide this practice's details, in writing, to the authorised corrective services officer;
- (xxv) not attend another general practice, other than the one nominated without the approval of the authorised corrective services officer. Another general practice or facility may be attended if in the case of emergency;
- (xxvi) notify the authorised corrective services officer if he has attended another general practice or facility;
- (xxxii) seek written permission from an authorised corrective services officer prior to joining, affiliating with or attending on the premises of any club, organisation or group;
- (xxxvii) obtain the prior written approval of the authorised corrective services officer before accessing a computer or the internet;
- (xxxviii) submit to electronic monitoring by Queensland Corrective Services and the conditions of electronic monitoring including wearing a monitoring device as directed by the authorised corrective services officer;
- (xxxix) be in attendance at and not leave the approved place of residence between the hours of 10 pm and 6 am without the prior approval of the authorised corrective services officer. The appropriateness and continuation of the curfew is to be reviewed by an authorised corrective services officer upon request, or every three months whilst the curfew remains in force or, after the cessation of the curfew, upon a review based on an assessment that the risk posed to the community has become elevated; and
- (xl) comply with all reasonable curfew restrictions imposed by the authorised corrective services officer.

The numbers are those the suggested new conditions were given in exhibit 1.

- [4] The applicant alleges that the respondent contravened two conditions of the amended supervision order: (p) and (t).
- [5] A urine toxicology confirmation report dated 9 November 2006 issued by the Pathology and Scientific Services branch of the Queensland Health Department shows that a sample collected from the respondent on 1 November 2005 revealed the presence of creatinine, amphetamine, methylamphetamine, nordiazepam, oxazepam, temazepam, morphine, and codeine. It is noted in the report that the presence of methylamphetamine and/or amphetamine would generally indicate the use of illicit drugs. An exception to that is when prescription medications of Selgene/Eldepryl or Dexamphetamine have been indicated. Those medications can produce a methylamphetamine and/or amphetamine result in urine. In a report dated 5 December 2006 by Mr Bob Andersen, psychologist employed by Queensland Corrective Services, setting out the results of an ACUTE Risk Assessment of the respondent on the same day, Mr Andersen recorded, however, the respondent's admitting using methylamphetamine. Mr Andersen referred to the urine analysis and recorded that during the interview the respondent admitted that he had used 'ice' (a potent form of that drug) on approximately two or three occasions 'that month'.
- [6] The respondent admits having bought pre-mixed Scotch whiskey and cola at the Geebung-Zillmere R.S.L. & Services Club on 3 February 2007 and drunk it at his home after a woman accused him of being a paedophile. He asserts that her accusation had upset him and that that was the first time he had drunk alcohol in contravention of the amended supervision order. The respondent also admits that he had smoked cannabis on 26 February 2007.
- [7] Accordingly I am satisfied on the balance of probabilities that the respondent has contravened condition (p) of the amended supervision order on three occasions: on or about 1 November 2006, on 3 February 2007 and on 26 February 2007.
- [8] In an affidavit filed on 6 December 2006 Dr James Wright affirmed that he had treated the respondent from 7 January 2004, and that the respondent had failed to attend appointments with him on 23 October 2006 and 6 November 2006. Those contraventions of condition (t) were not challenged on behalf of the respondent, who admitted that he had failed to attend on the days in question but claimed that in each case he also had an appointment with an officer of Corrective Services and was unable to attend both appointments on the days in question. I am therefore satisfied on the balance of probabilities that the respondent has contravened condition (t) of the amended supervision order on 23 October 2006 and 3 November 2006.
- [9] The respondent, who was born on 28 July 1961, has an extensive criminal history that includes many sexual offences against children of both sexes. The details of his criminal history may be found in the reasons for judgment of Douglas J. In his reasons delivered on 14 June 2006 McMurdo J. recorded that the operation of the supervision order made by Douglas J. could be summarized by reference to three periods. The first was until about September 2005 during which the respondent performed satisfactorily. From then until about mid-February 2006 he was taking illicit drugs, out of work, and subject to attempts to dislodge him from his accommodation. McMurdo J. recorded that it was that set of circumstances that, not surprisingly, brought the application before him by the Attorney-General. His Honour continued by recording that no test had revealed any

further use of drugs and the respondent had found employment and alternative and apparently satisfactory accommodation. At the time of the hearing before me the respondent was unemployed, and receiving unemployment benefits. He was living in a boarding house at Spring Hill.

[10] Section 16(1) of the *Dangerous Prisoners (Sexual Offenders) Act* provides for conditions that must be contained in a supervision order. Section 16(2) provides that such an order may contain any other order the judicial authority considers appropriate to ensure adequate protection of the community, or for the prisoner's rehabilitation or care or treatment. The focus on an application of this kind must of course first be upon any contraventions by a respondent, but I do not think it is contrary to principle to conclude that when considering the application the court can review the existing conditions to see whether some refinement, or addition not necessarily following from the contraventions, is desirable.

[11] Dr Joan Lawrence, adjunct professor in psychiatry at the University of Queensland, examined the respondent on 22 January 2007 pursuant to an order made in the court on 15 December 2006. She provided a report dated 30 January 2007 to be put before the court at the hearing of this application. The report is exhibit 2. She had examined the respondent previously on 20 December 2004 and 29 March 2006. In her report dated 30 January 2006 she included the following discussion and opinion:

9. DISCUSSION AND OPINION

9.1 Mark Foy continues to display behaviour which continues to put him at risk of re-offending. The primary risk factor in this man is his continuing **Substance Abuse**. At the present time, this appears to be primarily of prescribed medications, Panadeine Forte (an opiate) and Valium and Mogadon (Benzodiazepines). It is clear that he obtains these from the Macarthur Central Practice but it is very likely that he also obtains such drugs from other sources. In discussion, he clearly knew about 'doctor shopping' and described being informed of how to do this by a previous female associate who used the practice. He denies any dealing in the opiate based drugs but clearly has exposure to persons he recognises as being actively involved in drug use. He is clearly in a position to obtain these prescription drugs used by addicts and to sell them to willing buyers, as well as using them himself.

9.2 Of real concern is the fact that he is seeing a range of different doctors and is, no doubt, not telling them a truthful or reliable story. In my opinion, there is virtually no valid medical reason why this man should be being prescribed Panadeine Forte nor is there any valid medical reason why he should be prescribed, on a long term basis, any Benzodiazepines. I note also that the IOMS [Integrated Offender Management Strategy] notes refer to his having seen Dr Wright one day and then going to get a prescription for antidepressants from a GP the next. This would be an example, again, of doctor shopping or the exploitation of the medical situation.

- 9.3 He has clearly not made use of the opportunity for professional support and counselling from his chosen Consulting Psychiatrist, Dr Wright, and, in my opinion, there is no valid reason for this, in spite of his various excuses.
- 9.4 He has clearly also dabbled in abuse of Amphetamines, mainly, Methamphetamine (Ice). He has attended a Biala Counselling program, by the sound of it, and, indeed, reports that he has been classified as “*a recreational user and not dependent.*” This may be the case but the extent of his drug abuse and the long duration of this dependence, which, from past history, dates back to early life, undoubtedly increases the risk of his relapsing into greater dependence with an increased risk of disinhibition and loss of control of any inappropriate sexual drives that may be present.
- 9.5 There is no evidence to suggest there has been any sexual offending against children since last seen nor was there any 12 months ago. Nevertheless, the risk increases with his persistent and increasing use of drugs.
- 9.6 Underlying the problem is Mark Foy’s personality difficulties, particularly his passive dependence, narcissistic and avoidant traits and these, coupled with his failure to accept responsibility for his own actions (though he knows cognitively the outcomes) and his failure to involve himself in any meaningful professional support or counselling since discharge from prison, is a matter of ongoing concern.
- 9.7 Mark Foy understands the risks of returning to jail and claims not to want this. In discussion, he clearly understands what he should be doing to promote a healthy lifestyle but there has been little or no significant improvement since his last review.

[12] Dr Lawrence made the following recommendations in her report:

11. RECOMMENDATIONS

- 11.1 I cannot see that a jail sentence is likely to achieve any rehabilitative benefit for this man and clearly the potential for such has not proved a significant deterrent to him at this point in time. His abuse of drugs may not be quite so extensive or concerning as it was 12 months ago but the risks associated with his drug abuse remain.
- 11.2 He has clearly used Amphetamines in the past 9 months but there is no evidence of escalating use or dependence on this drug.
- 11.3 There is no concerning evidence of Cannabis use.

- 11.4 There is evidence of Opiates and Benzodiazepines in his tests consistent with prescription drug abuse and his stated obtaining of these drugs from doctors. One cannot be sure, however, that he uses all the drugs obtained.
- 11.5 His abuse and exploitation of medical practitioners and medical complaints remains a difficulty. I would strongly recommend that efforts be made to limit his contact with doctors to a nominated Consultant Psychiatrist and one only nominated General Practitioner. Those doctors should be enabled to provide regular reports, if requested, to his Probation Officers, and they should be informed of details of Mark Foy's background, possibly through provision of psychiatric reports provided to the Court, to enable them to have sufficient information to properly address his real medical needs. Mark Foy would need to give consent to the release of information about him to meet Privacy laws, if efforts are to be made to contain his exploitation of doctors and prescribed medication.
- 11.6 Should there be a true emergency situation, assistance can always be received at the Emergency Department of Royal Brisbane Hospital.
- 11.7 It may be useful to notify him of the Prescription Shopping Information Service as well, in an effort to limit his access to prescribed medication.
- 11.8 A summary of the avenues available through the Commonwealth Health Department to contain prescription drug abuse is provided at **Appendix E**.
- 11.9 Overall, however, I would remain guarded about the possibility of change in behaviour in the longer term for Mr Foy.

[13] Dr Lawrence gave oral evidence at the hearing of the application in which she referred to her opinion as to the respondent's continuing substance abuse, as set out in paragraphs 9.1 and 9.2 of her report. She also made certain suggestions concerning amendments to the proposed further amended supervision order. I shall refer to submissions made on behalf of the applicant which took into account Dr Lawrence's suggestions later. She was the only psychiatrist to give evidence orally at the hearing. Dr Wright did not give oral evidence.

[14] The contraventions are not in themselves at the more serious end of the scale, but it is a matter of concern that this is the second occasion on which the respondent has been returned to the court by reason of contraventions of the conditions of his supervision order. In addition, when interviewed by Dr Lawrence, he revealed aspects of his behaviour, including 'doctor shopping', which are also of some concern. That is because, as Dr Lawrence noted, any return to drug abuse will increase the risk of the respondent's returning to greater dependence on drugs with

an increased risk of disinhibition and loss of control of any inappropriate sexual drives that he may have.

- [15] The matters of concern raised by Dr Lawrence will be dealt with by the amendment of the present supervision order to include the proposed conditions (xxiv), (xxv), and (xxvi) and a further amendment suggested during addresses on behalf of the applicant. It was suggested in the course of Mr Hinson's address that the proposed new condition (xxv) itself be amended by deleting the second sentence and inserting 'Attend only the single general practitioner nominated under condition (xxiv) or the emergency department of a hospital for emergency medical treatment'. The further condition suggested was to require the respondent to permit Queensland Corrective Services to disclose details of treatment, intervention, and opinions relating to the level of risk of re-offending and compliance with this order to any medical, psychiatric, psychological or other mental health practitioner who is treating, or reporting upon, the respondent. I am persuaded that those amendments should be made in order to ensure adequate protection to the community and to assist in the respondent's rehabilitation, care, and treatment.
- [16] The proposed condition (xii) is justified since the respondent admits having used dangerous drugs, and so, it follows, having unlawfully possessed them. The proposed conditions (xiv) and (xv) are justified as additional precautions to ensure adequate protection of the community. Dr Lawrence recorded at para. 6.5 of her report that responses to her questions were frequently not consistent with 'corroborated material or was incompletely so'. When 'his attendances at a range of doctors' were discussed, 'he had many facile excuses which were not internally consistent'. Referring to the respondent's responses in 'all areas where some corroboration was available', Dr Lawrence concluded that '[t]he overall inference must be that Mark Foy's account cannot be seen as open, honest or reliable and he displays glibness and a facile approach to all matters'. Those conclusions are relevant to proposed condition (xiv). The appropriateness of proposed condition (xv) needs no elaboration.
- [17] The remaining proposed new conditions, I conclude, are not called for. They all impose very severe restrictions on the respondent's activities and cannot, it appears to me, be justified by the relatively minor contraventions that brought the respondent to the court on this occasion. I accept, as I have indicated and as was submitted on behalf of the applicant, that it is open to me to impose further conditions upon the respondent which are not necessarily related to any contraventions but which will tend further to ensure adequate protection of the community. For that reason I have been persuaded that the proposed conditions (xii), (xiv), and (xv) are justifiable amendments to the present supervision order. But further restricting the respondent's ability to try to live a normal law-abiding life by preventing his visiting licensed premises – to which he says he resorts for entertainment including karaoke – without prior written permission, requiring him to be assessed again for sexual offending, restricting his joining, affiliating with, or attending club etc., premises, requiring him to obtain written approval before 'accessing' a computer or the internet, and subjecting him to electronic monitoring and a curfew are draconian conditions not justified in my view. He has admitted buying the alcohol he consumed in licensed premises once, but there is no evidence of his consuming alcohol on other occasions. There was also evidence from two employees of the Geebung-Zillmere R.S.L. & Services Club, Messrs John Klemke and Steve Ratcliffe, of 'some tension', as Mr Hinson put it, at the club premises on

occasions. Those incidents do not, however, warrant imposing the proposed condition (xxi). There is no evidence of his having attempted to commit a sexual offence since the making of the supervision order, or of his having done anything else warranting the imposition of proposed conditions (xxiii), (xxxii), (xxvii), (xxviii), (xxix), and (xl).

[18] I should mention two further matters. First, the current order does not, on my reading of it, comply with the provisions of s. 16(1)(a) and (b) which provide for conditions that must be in a supervision order. Secondly, I have dealt with contraventions of conditions committed after the filing of the application. No objection was taken on behalf of the respondent to my doing so, and, in my view it is entirely proper and desirable that that course be followed: once an application of this kind is before the Court all of the respondent's relevant acts and omissions are open to scrutiny to ensure adequate protection of the community and to assist in a respondent's rehabilitation, care, and treatment.

[19] The above conclusions are of course based on the evidence before me at the hearing of the application. I shall invite further submissions on any relevant events that have taken place since the hearing, and on the form of the order to be made.