

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CRI 2009-404-000113

SHANE THOMAS MOORE
Appellant

v

DEPARTMENT OF CORRECTIONS
Respondent

Hearing: 15 June 2009

Appearances: S T Moore in person
K L Bannister for the Respondent

Judgment: 16 June 2009 at 3:30pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 16 June 2009 at 3:30pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitor:
Crown Solicitor, P O Box 2213, Auckland

Copy to:
S T Moore, 194A Campbell Road, Green Lane, Auckland

[1] The appellant, Mr Moore was sentenced to 100 hours community work in the District Court at Auckland on 30 January 2009. This followed a conviction for common assault.

[2] On 20 March 2009, on the respondent's application, the sentence of community work was reviewed by Judge M E Perkins in the District Court at Auckland. The review of sentence was not opposed and the balance of the sentence of community work was cancelled. Instead Mr Moore was sentenced to supervision for six months. A special condition was imposed. Mr Moore was directed to attend such medical appointments and undergo treatment as directed by the Probation Officer.

[3] Mr Moore appealed by notice of appeal dated 20 April 2009. It is clear from the notice of appeal that Mr Moore does not seek to revisit the sentence of supervision; rather that he challenges the special condition.

District Court Judge's decision

[4] Judge Perkins' sentencing notes are understandably brief. They do not expressly deal with the relevant statutory criteria. I do however have before me a record of the discussions which occurred between Mr Munro on behalf of the appellant, Mr Adams on behalf of the Department of Corrections, and the Judge at that time. It is recorded in those notes that the audio tape was not particularly clear. Nevertheless it is apparent that whether Mr Moore's mental health status should be monitored was discussed. Mr Adams made it clear that the Department of Corrections was content to substitute a sentence of supervision, as long as it could monitor Mr Moore's mental status. Judge Perkins discussed the issue direct with Mr Moore, and the audio tape records that Mr Moore was not opposed to this, although he did raise a concern that such an order might aggravate matters.

Submissions

[5] Mr Moore appeared in person. In his notice of appeal and in his written and oral submissions he submitted as follows:

- a) That he is not mentally ill, and that he does not need treatment in relation to mental health issues.
- b) That it would be unjust were he to be forced to become involved with the mental health authorities, and that this would cause him pain, distress and suffering, and cost him money and time.
- c) That the sentence is contrary to the New Zealand Bill of Rights Act 1990.
- d) That there is no significant risk that he will reoffend.
- e) That Judge Perkins erred in assessing his mental health.

[6] The Department of Corrections was represented by Ms Bannister. She referred me to ss 50 and 51 of the Sentencing Act 2002. She then went through each of the special conditions which she submitted must be satisfied before the Court could impose a special condition or conditions requiring *inter alia* psychiatric or other counselling or assessment. She submitted that there is a significant risk of Mr Moore further offending, that the standard conditions alone would not adequately reduce that risk, and that Mr Moore requires a programme to reduce the likelihood of further offending through rehabilitation and reintegration.

Analysis

[7] Neither Mr Moore or Ms Bannister suggested that a sentence of supervision was inappropriate. The sole issue before me was whether or not a special condition imposed by Judge Perkins was or was not appropriate.

[8] The sentence of supervision is provided for by ss 45 to 54 of the Sentencing Act 2002. Section 45 details when a Court can sentence an offender to supervision, and s 46 provides that a Court may impose a sentence of supervision only if it is satisfied that such a sentence would reduce the likelihood of further offending by the offender through the rehabilitation and reintegration of the offender. Standard conditions of a sentence of supervision are set out in s 49 of the Act. Section 50 details special condition which the Court can impose. It reads as follows:

A court may impose any special condition or conditions related to a programme if the court is satisfied that—

- (a) there is a significant risk of further offending by the offender; and
- (b) standard conditions alone would not adequately reduce that risk; and
- (c) the offender requires a programme to reduce the likelihood of further offending by the offender through the rehabilitation and reintegration of the offender.

For the purpose of s 50, a programme *inter alia* means any psychiatric or other counselling or assessment or attendance at any medical, psychological, social, therapeutic, cultural, educational, employment related, rehabilitative, or reintegrative programme.

[9] Before the Court could impose the special condition here in issue, it had to be satisfied of the various matters detailed in s 50(a) to (c). It is not possible from the limited notes made by Judge Perkins to conclude whether or not he was so satisfied. I have therefore considered the matters myself.

a) *Significant risk of further offending*

[10] In my view there is a significant risk that Mr Moore will offend again.

[11] The original offence occurred on 25 November 2008 when Mr Moore behaved in an aggressive manner to a WINZ staff member. Mr Moore spat at the staff member, hitting him on the side of the face.

[12] Subsequently on 5 December 2009 Mr Moore approached the WINZ staff member and shouted aggressive and racially charged comments at him.

[13] The affidavit filed by Mr Bissett, a Probation Officer, in support of the application to review the sentence discloses that on 18 February 2009 Mr Moore made racially discriminatory remarks to a community work supervisor and other offenders on the work party. Similar events occurred on three separate occasions on 20 February 2009. The affidavit also discloses that Mr Moore has a history of this type of behaviour while on community work programmes. Copies of the incident reports were attached to Mr Bissett's affidavit. They were before Judge Perkins and they were before me.

[14] In addition Mr Moore's criminal record discloses that he has a number of convictions for common assault, for disorderly behaviour and for threatening behaviour.

[15] Having read those materials, I am satisfied that there is a significant risk of further offending by Mr Moore.

b) Standard conditions

[16] The standard conditions normally attaching to supervision orders are set out in s 49 of the Act. They relate to the requirement for the offender to report to his Probation Officer, and to reside at a specified address. Section 49(1)(i) requires the offender to take part in a rehabilitative and reintegrative needs assessment if and when directed to do so. This reflects the guidance given in s 46. There is however no standard condition requiring an offender to attend medical appointments or undergo treatment when and if required.

[17] The standard conditions alone would not require the appellant to get the psychological treatment that could help him address the problems it seems he presently faces. I am therefore satisfied the second condition in s 50(b) is met.

c) *Need for a programme*

[18] In my view it is clear that Mr Moore does need a programme to reduce the likelihood of further offending through rehabilitation and reintegration. The special condition imposed incorporates that programme.

[19] When the review was sought Mr Moore through his counsel submitted to Judge Perkins an affidavit and a medical certificate. In the affidavit, Mr Moore set out what he alleged had occurred at the Department of Corrections centre. Mr Moore stated that he had been upset and ill from what he believed was happening at the Department of Corrections office, and that as a result he said bad things to the people who worked there.

[20] More importantly, counsel for Mr Moore submitted to Judge Perkins a letter from Mr Moore's GP, a Dr Brake. It recorded that Mr Moore had a significant past history with mental health services relating to a severe anxiety condition. This had involved in-patient psychiatric hospital admission. The letter raised concern that Mr Moore might be heading back to his earlier severe psychiatric problems. It referred to the need to amend Mr Moore's sentence, "to take account of his fragile mental health".

[21] The special condition imposed by Judge Perkins required Mr Moore to attend medical appointments and to undergo treatment as deemed appropriate by the Probation Officer. To my mind, that was clearly appropriate. The condition was intended to ensure that any mental health issues were picked up and addressed, thus reducing the risk of Mr Moore reoffending.

[22] Mr Moore raised other concerns in support of his appeal. I detail them as follows:

- a) That it would be time consuming for him and his family if he is required to attend regular appointments.

This may be the case, but of itself it does not assist. Counsel for the respondent has confirmed that it is not envisaged that the appointments will be more than one hour at any one time. I cannot see that there is any great inconvenience to Mr Moore and his family.

- b) That complying with the condition will be costly for him.

Counsel advised that the Department of Corrections will require Mr Moore attend medical appointments with their own psychological services team, and that there will be no cost to Mr Moore personally.

- c) That Mr Moore will be inhumanely incarcerated.

Mr Moore is not incarcerated by the special condition imposed. Judge Perkins made it clear first, that he would not receive a compulsory treatment order at least until Mr Moore's mental health was assessed further and secondly, that the purpose of the special condition was simply to monitor Mr Moore's mental health.

Conclusion

[23] In my view the condition imposed by Judge Perkins was appropriate. I am satisfied that each of the factors detailed in s 50 of the Act was met. The appeal is dismissed, and the special condition imposed by Judge Perkins is confirmed.

[24] I record that the respondent advised that it has recently made application to the District Court to cancel the current supervision order, and to replace it with a sentence of intensive supervision. That matter is due to be heard at the District Court at Auckland on 19 August 2009. I have not taken this factor into account in determining this appeal.

Wylie J