

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 SCA #: 0020/2016
5

6
7 PHILIP GLENNON EBANKS
8

9 V.
10

11 THE QUEEN
12
13



14 **Appearances:**

Nicholas Dixey of Nelson & Co. for the
Appellant

Ms. Nicole Petit for the Crown/Respondent

18
19 **Before:**

Justice Michael Mettyear (Actg.)

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21 **Oral Submissions Heard:**

2nd and 9th September 2016

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23 **Delivery of Judgment:**

27th September 2016
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28 **HEADNOTE**

29 *Criminal Law –s.12(3) of the Drug Rehabilitation Court Law (2015) – Mode of Trial and*
30 *Taking of Plea - .*
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JUDGMENT

1. This is an appeal against conviction following the Appellant's plea of guilty to the offence of burglary. The plea was recorded in front of the learned Magistrate Foldats on the 17th December 2015. A sentence of 4 years' imprisonment was imposed by him on the 30th May 2016.

2. The nub of the appeal is that both the mode of trial enquiry and the taking of the plea were rendered void by operation of s.12(3) of the Drug Rehabilitation Court Law (2015). If that argument is correct it would follow that the conviction and sentence would also be void.

3. The facts of the offence are not material.

4. The appeal raises a purely technical point. I have not been asked to hear any evidence, however, with Counsel's consent a memorandum has been sought and received from Magistrate Foldats to which I will later refer.

5. Put simply the argument from Mr Dixey, for the Appellant, which he has advanced with skill and enthusiasm, runs as follows:

a. The case started in the Summary Court;

b. The Appellant applied to enter the Drugs Court on the 17th November 2015;

c. The case was transferred to the Drug Court on the 25th November 2015;



- 1 d. On the 26th November 2015 a transfer back to the Summary Court was mooted,
2 because the Drug Court was told the Appellant was ineligible for that court.
3 However, that did not happen because the Appellant's Counsel was asking the
4 Crown to review the question of eligibility;
- 5 e. The mode of trial enquiry and the plea of guilty took place in the Drug Court
6 on the 17th December 2015;
- 7 f. On the 14th January 2016 the Crown reaffirmed its position that the Appellant is
8 ineligible, and he was transferred back to the Summary Court for hearing on the
9 29th February 2016.

10 6. Section 12(3) of the Drug Rehabilitation Law reads:



11 *"12 (3) If the Drug Court makes an order referring a person back to the*
12 *regular sitting, the proceedings against the person are to be continued*
13 *before the regular sitting at a time and place specified in the order, as*
14 *if -*
15 *(a) the person had not been referred to the Drug Court; and*
16 *(b) the proceedings had merely been adjourned to the time and*
17 *place specified in the order."*
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19

20 7. Mr. Dixey submits that the effect of s.12(3) is to turn back the clock so that the
21 original referral the 25th November, was in fact an adjournment of the case to the
22 regular sitting on the 29th February 2016.

23

24 8. The Crown do not accept this submission. In particular they submit that the case
25 was not transferred to the Drug Court and that the plea was tendered in a regular
26 sitting of the Summary Court.

1 9. At the heart of this appeal is the Appellant's submission that the case was transferred
2 to the Drug Court and the Crown's contention that it never was.

3
4 10. Mr Dixey has accepted that if the case was not transferred to the Drug Court the
5 appeal cannot succeed.

6
7 11. The Drug Court was established by the forerunner of the Drug Rehabilitation Court
8 Law (2015 Revision). The procedure is regulated by the Drug Rehabilitation
9 Regulations 2008 and the Drug Court Rules 2006.

10
11 12. An eligible Defendant who is also deemed suitable may be dealt with in the Drug
12 Court in a way very different to a Defendant in a regular Summary Court. The
13 "Mission Statement" of the Drugs Court is:

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15 *"To hold criminal offenders accountable to stop criminal activities related to*
16 *the abuse of alcohol and drugs and to increase the likelihood of successful*
17 *rehabilitation of offenders..."*

18
19 13. No doubt criminals are willing to join or apply to join the Drug Court for a variety
20 of reasons - some creditable, others not. However, motivation is not of importance
21 for present purposes. What is crucial is first eligibility and secondly suitability.

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23 14. In the present case it is eligibility that matters.



1 15. For a person like the Defendant, a prolific offender, facing the prospect of a
2 substantial prison sentence, it cannot have escaped him that, to be a participant in
3 the Drug Court, he would have to be both eligible and suitable for inclusion. If he
4 did not know this from other sources he had the benefit of highly capable and
5 knowledgeable Counsel, Miss Lee Halliday-Davis, looking after his interests
6 throughout this saga.

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8 16. It is not necessary to look in detail at the criteria for eligibility or the process for
9 deciding if a person is eligible. It is sufficient to record that both sides agree that the
10 question of eligibility is decided by the Crown. If a person is ineligible he cannot
11 properly be transferred to the Drug Court. Here the Crown never declared the
12 Appellant eligible and therefore he could not legitimately be transferred to the Drug
13 Court.

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15 17. Suitability comes after an eligible person is professionally assessed as a suitable
16 candidate. The Appellant's suitability was never assessed, because the process
17 never got that far.

18
19 18. Mr Dixey accepts that the Appellant should not have been transferred to the Drug
20 Court (because he was not eligible), but claims that in fact he was so transferred
21 and that this is demonstrated by the court files.

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23 19. The defence case in favour of there having been a transfer to the Drug Court rests
24 solely on the documentation emanating from the regular Summary Court and the
25 Drug Court.
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1 20. Each Court keeps a file concerning cases involving Defendants who come before
2 them. For ease of reference these have been designated as SCF for Summary Court
3 files and DRCF for Drug Court files.

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5 21. Mr Dixey relies mainly on the note in the SCF dated the 25th November which
6 reads: “*Def has applied to Drug Court. No response yet as to the def’s suitability*”.

7
8 22. It goes on to report that an appointment was made for the Appellant to attend the
9 Drug Court the next afternoon at 2 p.m. The use of the word “suitability” was
10 unfortunate and confusing. The Magistrate must have meant eligibility. No question
11 of suitability had yet arisen.

12
13 23. Mr. Dixey claims further support for his proposition from the DRCF note for the
14 26th November which reads “*Crown: not eligible, back to S.C.*” These words are
15 crossed through, because, Mr Dixey claims and I accept, it must have been that the
16 Appellant’s Counsel expressed the wish to contact the Crown and ask for a review
17 of their decision. This is the explanation for the entry immediately below the
18 crossing out “*LH-D will write to Crown re:eligibility...*” Mr Dixey claims that the
19 note confirms that the case was in the Drug Court, and that although consideration
20 was given to transferring it back to a regular sitting of the Summary Court, no
21 transfer was in fact made.

22
23 24. The next file entries are on the SCF and the DRCF dated the 17th December 2015.
24 The DRCF notes, in effect, that the Crown’s review was continuing. The SCF states
25 “*EST-PG to DRC*”. This clearly means that the defendant elected summary trial and
26 pleaded guilty. Mr Dixey claimed that the “*...to DRC*” meant that the plea had been
27 tendered to the Drug Court.



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2 25. This is not accepted by the Crown or supported by the location of the entries. It was
3 the confusion as to what these entries meant which caused the parties to agree to
4 seek an account from the Magistrate.

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6 26. On the 14th January 2016 the DRCF records, "*Crown-not eligible back to SC*" and
7 notes other matters that do not touch on the issues raised by this appeal. This is the
8 last entry for this case on the DRCF.

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10 27. It is common ground that no further hearing took place in which the question of
11 election or plea is mentioned. As Mr. Dixey said at paragraph 10 of his written
12 submissions:

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14 *"...all the parties and the Summary Court are proceeding on the basis that the*
15 *election and plea on the 17th December 2016(sic) remain valid"*.

16
17 28. I agree with this. The question is: Were they right to do so.

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19 29. Although I agree with Mr. Dixey that the file notes taken at face value lend some
20 support for his submissions, there are also powerful reasons to think that the
21 submissions are mistaken. The case throughout benefited from continuity of
22 tribunal and defence Counsel. The Crown were also represented throughout.
23 Magistrate Foldats is very experienced with the workings of Drug Court.



1 30. All must have realised that, unless eligible, the Appellant could not enter the Drug
2 Court programme. The question of eligibility is mentioned more than once in the
3 file notes and must have been at the forefront of everyone's mind. That the Court
4 would deliberately ignore the requirement of eligibility is nonsensical. There would
5 be no point.

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7 31. If Mr. Dixey's submissions are correct the only other possibility is that the Court,
8 Crown Counsel and defence Counsel negligently overlooked the eligibility
9 requirement and allowed an inappropriate transfer to the Drug Court. One cannot
10 simply dismiss this. Judges make mistakes and so do lawyers, but in the
11 circumstances of this case, it seems unlikely. So the question arises as to how, if at
12 all, is it possible to reconcile that which seems manifestly unlikely, with the courts'
13 files. Here the Memorandum of Magistrate Foldats comes into play.

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16 32. The Magistrate refers to the "dual jurisdiction" of the Drug Court sitting as both a
17 Summary Court and a Drug Court. He also refers to the requirement that:

18 *"Proceedings before the drug Court are to be conducted...with as little*
19 *formality and technicality and as much expedition, as the requirement of the*
20 *Law, the regulations, the rules and the proper consideration of the matters*
21 *before the Drug Court permit".*

22
23 33. I unhesitatingly accept the submission of Mr. Dixey that if the Court has conducted
24 itself inappropriately so as to deprive the Summary Court of jurisdiction to convict
25 and sentence the Appellant, these provisions cannot rectify the situation.
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34. More importantly the Memorandum deals with the procedure adopted in cases like the present. It states:

"In practice, there are two main routes that an accused may take to enter the Drug Court: a) a guilty plea is entered in a regular sitting of the summary court followed by a referral to a Drug Court sitting or, b) a matter is adjourned without plea from a regular sitting of the summary court to a Drug Court session where a guilty plea is then entered. Regardless of which route is taken, the accused is initially viewed as an applicant only and is not viewed as a Drug Court participant unless and until he has been found eligible and a provisional treatment order made pursuant to s 8(9) of the Rules.

For administrative convenience, a Drug Court folder is created for all applicants. Consequently, there are two folders in relation to an applicant – a purple coloured "Drug Court" folder and a manila coloured folder for the original summary court criminal charges. Magistrates endorse the file folders with a brief summary of what occurred on any given court appearance.

Endorsements are made on both folders in respect of a single court appearance where applications are pending or a case has concluded. In the case of a successful application to enter the Drug Court, no further endorsements are made on the "regular" summary court file (until the case is concluded) because the applicant is viewed as a Drug Court participant.

In the appellant's case, the two folders were logged as C # 6623/2015 and DRC # 53/2015. The folder for C # 6623/2015 catalogues the appellant's appearances in the "regular" summary court. The folder for DRC # 53/2015 catalogues the appellant's appearances in Drug Court.

The crucial endorsements relate to the appellant's court appearance on 17 December 2015. Both of the appellant's folders were endorsed although there may have been only one court appearance. The endorsement on C # 6623/2015 indicates that the appellant was put to his election and plea in the summary court. He elected to be tried summarily and he entered a guilty plea; his case was then referred to the Drug Court (no stay of proceedings was sought or entered in the regular summary court pursuant to s 4 (3) of the Law). The endorsement on DRC # 53/2015 for the same date indicates that the Crown would review the defendant's application to the Drug Court. "

35. Mr. Dixey does not accept the contents of the Memorandum and stated that parts of it are illogical. However, I accept the submission of Miss Petit that it truly reflects the procedure adopted and accurately explains the file notes that might otherwise seem to support the Defence submissions.



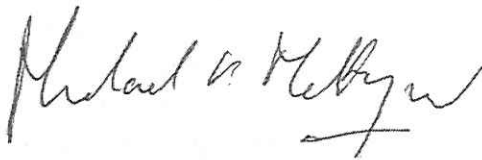
1 36. I can see nothing wrong with the Summary Court allowing Applicants, who they no
2 doubt hope will be accepted as eligible, appearing before the Drug Court, pending a
3 decision, as a sensible and pragmatic means of expediting proceedings. It involves a
4 Defendant appearing before the Drug Court, but not being transferred to it.

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6 37. In my view nothing in this case happened that caused the Summary Court not to
7 have jurisdiction to accept the Appellant's election of summary trial or his plea of
8 guilty. Further, I find, that the Appellant pleaded guilty before a regular sitting of
9 the Summary Court and that he was never a participant in the Drug Court.

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12 38. In view of those findings this appeal fails and is dismissed.

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14 39. Had my decision been different on the above issue, other interesting questions
15 would have required consideration, but they do not now arise.

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19 **Dated this the 27th September 2016**

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21 **Mr. Justice Michael Mettyear (Actg.)**
22 **Acting Judge of the Grand Court**