ONTARIO COURT OF JUSTICE

CITATION: *R. v. D*[redacted], 2016 ONCJ 727
DATE: 2016·11·30
COURT FILE No.: Halton 815/15

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

D[redacted] **D**[redacted]

Before Justice Lesley M. Baldwin
Heard on October 17, 2016 and October 18, 2016
Ruling on s. 10(b) *Charter* Application and Judgment on Trial at Large
released on November 30, 2016

L. Jago ..... counsel for the Crown
M. Montes ..... counsel for the defendant D[redacted] **D**[redacted]

Baldwin J.

[1] D[redacted] D[redacted] is charged with impaired operation (alcohol and or drug) and Over 80 in Burlington on February 27, 2015.

Section 10(b) *Charter* Application:

[2] The evidence on the s. 10(b) *Charter* Application comes from Officers Karen Aspden and Lawrens Vandermark of the OPP and from Mr. D[redacted].

Summary of the Testimony of Officer Karen Aspden:

[3] Officer Aspden has been an Officer with the OPP since January 3rd 1994 (over 21 years before her investigation into this matter).

[4] She was the Officer in charge of this investigation.

[5] She was at the Burlington detachment when she received the dispatch radio call at approximately 9:00 p.m., of a single vehicle rollover at QEW eastbound near Walkers Line.

[6] She arrived on scene at 9:09 p.m. Fire and Ambulance pulled up at the same time.

[7] She observed a 2004 Lexus, Ontario plate BEYD 267, on its driver's side, rolled over in the ditch with a snow bank right beside it. The vehicle had extensive damage. The keys were still in the ignition and the car was in drive.

[8] The area was lit by artificial lighting. The roads were dry. It was a cold night.

[9] She spoke with a witness at the scene named Edward who told her that the collision occurred at 8:45 p.m. He had helped the male out of the vehicle and he pointed to the driver, Mr. D[redacted].

[10] She noted a cut on Mr. D[redacted]'s right cheek that was not bleeding. Mr. D[redacted] told her that he was driving. In resonse to questions, Mr. D[redacted] said that he had been coming from a restaurant in Burlington. He could not remember the name. He had consumed one to two glasses of wine.

[11] Officer Aspden could smell alcohol on Mr. D[redacted]'s breath. She noted this his eyes were glassy and his face was flushed.

[12] Mr. D[redacted] was holding his wallet. When asked to produce his driver's licence he went past it in his wallet 2 to 3 times. Officer Aspden ended up finding his driver's licence after the arrest.

[13] Officer Aspden walked Mr. D[redacted] out of the ditch.

[14] At 9:10 p.m. Officer Aspden formed the opinion that Mr. D[redacted]'s ability to operate a motor vehicle was impaired by alcohol and she placed him under arrest.

[15] At 9:23 she read Mr. D[redacted] his Rights to Counsel from her police issued card:

> *"I am arresting you for impaired operation. It is my duty to inform you that you have the right to retain and instruct counsel without delay. You have the right to telephone any lawyer you wish. You also have the right to free advice from a Legal Aid Lawyer. If you are charged with an offence, you may apply to the Ontario Legal Aid Plan for assistance. 1-800-265-0451 is a number that will put you in contact with a Legal Aid duty counsel lawyer for free legal advice right now.*
>
> *And then I asked, do you understand? And he stated 'I do'.(Transcript October 17, 2016 pp. 10, 11)*
>
> *At the same time, 9:23, I read from police card a caution:*
>
> *You will be charged with operation of a motor vehicle while impaired. You*

> *are not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you understand?*
>
> *And he replied, 'yes, thank you'. Do you wish to say anything in answer to the charge? I had asked him if he'd like to speak to a lawyer and he said yes." (pp. 11, 12)*

[16] The Breath Demand was then read and understood. At 9:29 Officer Aspden departed the scene with Mr. D[redacted] for the Burlington detachment for breath testing.

[17] They arrived at 9:39 p.m.

[18] She placed Mr. D[redacted] in a cell and asked him if he wished to speak to a lawyer or duty counsel.

[19] Mr. D[redacted] stated that the lawyer's name was Masan Millar and he had recently moved to Thunder Bay.

[20] Officer Aspden asked for his number. Mr. D[redacted] said he did not know his cell number. She told Mr. D[redacted] that she "was going to do a search and try (her) best to find his lawyer." (p. 16)

[21] Officer Aspden testified that Mr. D[redacted] did not make any reference to his personal cell phone. He did not ask her if she could retrieve his cell phone. (p. 16)

[22] Officer Aspden testified that she took it upon herself to complete a 411 search and received a phone number and left a message.

[23] She had been given the spelling of the lawyer's name by Mr. D[redacted]. It was "M-A-S-O-N. Sorry, M-A-S-A-N, Millar, M-I-L-L-A-R. "(p. 14)

[24] Officer Aspden testified that she got a number for that name in Thunder Bay of 807-344-9060.

[25] She called that number and left a message at 9:50 p.m.

[26] "There was a recording of a male that said, I believe that - was Mr. Millar and I left a message saying that I had the accused, and I mentioned his name, Mr. D[redacted], under arrest and that he could – I left a phone number for him to call me back." (p. 15)

[27] She made the calls in the breath room.

[28] She advised Mr. D[redacted] that his lawyer had not called back and that she would call duty counsel. Mr. D[redacted] had no response to that. (p. 17)

[29] There was no return call, so at 9:52 p.m., she left a message for duty

counsel. (This was 2 minutes after she placed the call and left a message for what she thought was counsel of choice to call back.)

[30] At 10:03 p.m., duty counsel, Briar Doody called back.

[31] She placed Mr. D[redacted] in the sound proof room at 10:06 p.m. and told him that he was going to be speaking to duty counsel.

[32] After Mr. D[redacted] spoke to duty counsel he was taken directly into the breath room at 10:22 p.m.

[33] Officer Aspden stayed in the breath room with the breath technician Officer Vandermark and Mr. D[redacted].

[34] Officer Vandermark read Rights to Counsel and "the accused did not say that this was not – it was all right". (p. 21) He did not make any complaints or ask to speak with any other counsel.

[35] In cross-examination, Officer Aspden testified that she placed Mr. D[redacted] in a cell at 9:45 p.m.

[36] She agreed she had about a 5 minute conversation with him then about calls to his lawyer and that the room is video monitored and recorded.

[37] When she left the scene of the accident, 3 other officers remained: Officers Pennar, Cheeseman and Parmenter.

[38] Officer Aspden repeated that she had no conversation with Mr. D[redacted] about his personal cell phone at the station. (p. 35) The Officer stated that if there had been such a conversation, she would have noted it.

[39] "If I had a cell phone number or if he requested his phone, I would've given him that opportunity." (p. 36)

[40] Officer Aspden testified that she spoke to an automated voice on 411. It provided a number but no address.

[41] Officer Aspden did not note what the message on that number she called said. She did not note the message that she left.

[42] "I was satisfied at the time that I was leaving a phone message to the appropriate phone number…I don't recall if he mentioned his name…I don't recall [if the recording mentioned that the number belonged to a barrister or solicitor or lawyer]." (p. 39)

[43] Officer Aspden testified that there was a computer in the breath room that was hooked up to the internet. It was right behind her. She did not use that to search for contact information for the accused's counsel.

[44] She did not use a Lawyer's Directory either. She did not see one and she did not look for one. "It never came to mind." (p. 40)

[45] The following exchange took place between defence counsel and Officer Aspden about her call to duty counsel and her note-taking with respect to the RTC:

> Q. I'm going to suggest to you that at no time did Mr. D[redacted] agree to speak with duty counsel.
>
> A. He did not disagree to speak to duty counsel.
>
> Q. He didn't agree, though? I mean, he didn't provide you with a verbal answer that would suggest to you that he's agreeing to speak to duty counsel?
>
> A. Well, when I advised duty counsel was on the phone and I had showed him where the phone booth was – or not the phone booth, the soundproof box, he did not say he did not want to go in there.
>
> Q. Okay. Prior to you calling duty counsel, Mr. D[redacted] did not tell you that it was okay with him to speak to duty counsel?
>
> A. I don't have that noted, sir.
>
> Q. And you don't have it noted because it didn't happen.
>
> A. I'm just saying I don't have that noted. I do not recall.
>
> Q. So you, once you have the number for Mr. Millar, you call a phone number, you leave a message and then immediately you call duty counsel?
>
> A. Well, I called duty counsel at 10:03 p.m.
>
> Q. Which is immediately following you leaving a message for Mr. Millar?
>
> A. It is shortly after, yes.
>
> Q. It was your decision to call duty counsel?
>
> A. Yes.
>
> Q. You wanted to call duty counsel in order for there not to be any time wasted, right?
>
> A. I had not received a phone call, even though it was a short time, from the lawyer and I decided to call duty counsel.
>
> Q. Are you suggesting that you specifically waited for Mr. Millar to call back before calling duty counsel?
>
> A. What my, what I would suggest is that had Mr. Millar phoned back in the time that I was phoning duty counsel or left a message, I would've given him the opportunity to speak to his lawyer.
>
> Q. Right, but you didn't decide to set out a time to wait for Mr. Millar to call back before engaging duty counsel?
>
> A. That's correct.

[46] Officer Aspden testified that she did not recall if the voice message she heard on the number she called was a female voice.

[47] She was aware that the Law Society of Upper Canada has a Lawyers' Directory on-line. She cannot say why she did not look that up.

[48] The defence then introduced a video of the interaction between Mr. D[redacted] and Officer Aspden in the cell area just outside the breath room. The breath room door is open and the audio from that room picks up (sometimes faintly) the conversation about the rights to counsel conversation.[1]

[49] After many play backs of the video, Officer Aspden is heard speaking to Mr. D[redacted] and said to him *"'Okay, I'll see what I can do for you. Your phone um, you know what your car was so messed up that, I'll see if they found a phone but I don't know if they did okay." (Video at 9:54:14)*

[50] Officer Aspden testified that she did not recall saying that.

[51] Officer Aspden testified that she has no note of that.

[52] She did not contact other Officers back at the scene to see if Mr. D[redacted]'s cell phone was located.

Summary of the Testimony of Officer Lawrens Vandermark:

[53] He has been an OPP Officer since 1998 and a qualified breath technician since January 31, 2013.

[54] At 9:22 p.m., Officer Aspden brought Mr. D[redacted] into the breath room.

[55] As seen and heard on the breath room video, Officer Vandermark asked Mr. D[redacted] if he was satisfied with his call to Duty Counsel. Mr. D[redacted] nodded his head, indicating 'yes'.

[56] In cross-examination, Officer Vandermark testified that there is a desk in the breath room with a computer connected to the Internet and a telephone.

[57] There is a Lawyers' Directory in the back of the breath room. It is an 'orange book'.

Summary of the Testimony of D[redacted] D[redacted] on *Charter* Application Only:

[58] Exhibit A – is the Affidavit of MASON MILLAR – He swears that at the time he was Mr. D[redacted]'s lawyer. In February 2015, he was practicing law in the area

[1] Defence counsel brought in special speakers to amplify what can be heard on this video.

of criminal defence in Thunder Bay, Ontario. He worked at a firm called PM Law Offices. At no time was 807-344-9060 his phone number. His contact information was on the Law Society of Upper Canada's online Lawyers' Directory. His name and photo and the main office number and his cellular phone number were listed on the website.

[59] His office employed an after- hours answering service. Calls to the office line after regular working office hours would be routed to the answering service who would take messages and then reach the lawyers on their personal lines and provide the messages to the lawyers.

[60] He made himself available via his cellular phone to speak to his clients on a 24 hours a day, 7 days a week basis. If he had been contacted at approximately 10:00 p.m. on Friday 27th, 2015 with the respect to the Applicant's arrest, he would have spoken to the Applicant.

[61] He did not receive any phone calls or messages from any police service at any time regarding the Applicant's arrest in this matter.[2]

[62] Mr. D[redacted]'s Affidavit was filed as Exhibit B. His *voir dire* testimony was consistent with its content.

[63] Mr. D[redacted] is 59 years of age. He resides in Toronto with his wife. He has 3 children and has previously worked as a financial advisor.

[64] On February 27, 2015, he asked Officer Aspden at the OPP detachment to contact his lawyer, Mason Millar. He spelled out the last name and said that his lawyer had moved to Thunder Bay maybe in the summer of 2014.

[65] Officer Aspden asked if he had a phone number for him and he told her that it was in his cell phone.

[66] Officer Aspden said she did not know where his cell phone was and she would see what she could do to retrieve it.

[67] Officer Aspden said if she could not get a hold of his lawyer, is Duty Counsel okay.

[68] He advised Officer Aspden that Mr. Millar's number was in his cell phone and asked that he be provided with his cell phone. Officer Aspden did not provide him with his cell phone or any information about his cell phone. There was no other discussion about his lawyer Mr. Millar.

[2] The Crown stated in this proceeding that they wished to cross-examine Mr. Millar on his Affidavit. Unfortunately, Mr. Millar passed away 1 week before this trial began.

[69] When Officer Aspden returned to the cell area, she stated that Duty Counsel was on the phone. She opened the door to his cell and placed him in the booth with a phone, with Duty Counsel on the line.

[70] He had not agreed to speak with Duty Counsel but he did speak to Duty Counsel believing that his desire to speak to his own lawyer did not mean much to the police and would not be accommodated.

[71] Following his conversation with Duty Counsel, he was immediately taken to another room to provide breath samples. He thought his chance to speak to his own lawyer had passed and was no longer an option for him.

[72] In the breath room, one of the Officers asked if he was satisfied with his phone call with Duty Counsel.

[73] Although he was not satisfied with receiving generic advice, not from his own lawyer, he responded 'yes' because he felt that speaking to his own lawyer was no longer an option, that saying anything else would accomplish nothing, and because he thought the best course of action in the circumstances was to be cooperative.

[74] Two days after his arrest, his brother drove him to the compound where his car was impounded. His cell phone was lying on the floor on the driver's side.

[75] After his arrest he also called 807-344-9060. A female voice came on the line and said 'Hi you've reached 807-344-9060 please leave a message.'

Position of the Parties on Section 10(b) Application:

Applicant's Position:

[76] The issue is whether the police were reasonably diligent in contacting counsel of choice.

[77] The Applicant seeks exclusion of the breath samples and all evidence obtained after Officer Aspden's one attempt to call Mr. Millar.

[78] It is submitted that the Applicant was diligent in his efforts to contact his counsel of choice – he spelled the name of the lawyer and provided the city he worked in. He asked for his cell phone where his lawyer's cell phone number was stored.

[79] It is submitted that after one minimal effort using a 411 search, Officer Aspden did not wait for a call back and immediately placed a call to Duty Counsel. The Applicant relies upon the case of *R. v. Swaide* [2015] O.J. No. 3310, a decision of Justice P.A.J. Harris of the Ontario Court of Justice at paragraphs 22 and 23 in support of the submissions that this conduct alone constitutes a breach of s. 10(b) of

the *Charter.*

[80] The Applicant submits that Officer Aspden's notes are sparse and where her testimony differs from her notes, her testimony is unreliable. Most notable is her initial testimony that there was no mention of Mr. D[redacted]'s cell phone in her discussions with him about locating his counsel of choice.

[81] Further she has no notes about what was on the message machine for the number she called. She has no notes of what she left on the message machine.

[82] In cross-examination she was not sure if the voice message on the number she called was a male or female. She was not sure if the message indicated that she had reached Mr. Millar or a lawyer.

[83] It is submitted that she did nothing to satisfy herself that she had reached counsel of choice.

[84] It is submitted that she should have used the computer right behind her to look up the Law Society's website. She had no explanation for not doing so. She did not think about it.

[85] According to Officer Vandermark's testimony, the orange-coloured Ontario Lawyer's Directory was also right behind where she was sitting in the breath room when she called 411. Officer Aspden made no effort to use it.

[86] On all the evidence, Mr. D[redacted] did not ask to speak to, or agree to speak to, Duty Counsel at any time.

[87] His evidence should be accepted that he felt he had no choice but to speak to Duty Counsel and indicate that it was satisfactory once in the breath room, given how his request to speak to counsel of choice had been treated. The Applicant relies upon a very similar set of circumstances in the case of *R. v. Ramkalawan [*2015] O.J. No. 7147, a decision of Judge C. Brewer from the Ontario Court of Justice that found a s. 10(b) breach in these circumstances.

[88] The Applicant submits that in the present case, the s. 10(b) breach is even more serious than the two cases referenced above because Officer Aspden did not reach counsel of choice.

Crown's Position:

[89] The Crown submits that the Applicant did not ask for his cell phone at the scene and he should have done so.

[90] After Officer Aspden left a message for what she thought was Mr. Millar's number, she called Duty Counsel out of an abundance of caution. If she had not done so, there could have been an as soon as practical argument.

[91] After speaking to Duty Counsel for 16 minutes, Mr. D[redacted] said he was satisfied with his call with Duty Counsel. He made no complaints and did not ask in the breath room to speak with Mr. Millar.

[92] The Crown submits that the police are not required to go beyond his stated words and that the Applicant has not met his onus on a balance of probabilities. It is submitted that even if the court does find a breach, the breath readings and statements to the breath technician should not be excluded.

Decision on the s. 10(b) Application:

[93] I accept and adopt as part of my reasons the Applicant's submissions in this ruling.

[94] The Applicant has met the onus on a balance of probabilities that there was a breach of s. 10(b) in this investigation.

[95] The breaches were numerous and cumulatively egregious.

[96] They are as follows:

(1) Officer Aspden's notes of the important exchange about reaching counsel of choice in this case are sparse to nothing;

(2) her testimony that there was no conversation about Mr. D[redacted]'s cell phone during this exchange was proven to be false;

(3) she told Mr. D[redacted] that she would see if the other Officers on scene had located his cell phone – she did nothing in that regard;

(4) she did not record the proper spelling of counsel of choice – Mason Millar. She stumbled over this part of her testimony and spelled it eventually as Masan Millar;

(5) she made one effort to locate counsel of choice by using the automated 411 system;

(6) she has no note of what the recording was one the number she dialed or what message she specifically left;

(7) within 2 minutes she called Duty Counsel without any request or acceptance of that option by the Applicant;

(8) she did not wait for any reasonable time at all for a call back from counsel;

(9) she did not call a number that would satisfy a reasonable person that this was the number for stated counsel of choice;

(10) she did not use the computer with internet hookup to search for the Law Society's Directory of Lawyers – Mr. Mason Millar was listed on that website;

(11) she did not look behind her to check the Ontario Lawyers' Directory;

(12) she did not go back to the Applicant and advise him that she could not reach his lawyer;

(13) she did not ask if there was any other lawyer he wished to contact;

(14) the Applicant did not agree to speak to Duty Counsel but was ushered into the private booth anyway.

[97] In all of these circumstances, it was reasonable for the Applicant to believe that there was no point in further requesting to speak to counsel of choice in the breath room. He capitulated and said he was satisfied with the conversation with Duty Counsel even though he was not.

Section 24(2) Analysis – R. v. Grant, 2009 SCC 32, [2009] 2 S.C. R. 353:

[98] I have made the three inquires: Seriousness of the *Charter* Infringing Conduct; Impact of the *Charter* Protected Interests of the Accused; Society's Interest in an Adjudication on the Merits; which encapsulates considerations of "all the circumstances of the case", I have determined that the *Charter* infringing conduct in this case was serious. The accused's liberty, privacy, and right to counsel interests were significantly undermined. The admission of the evidence regarding the taking and analysis of the seized breath samples would bring the administration of justice into disrepute.[3]

[99] Accordingly the breath sample evidence and evidence obtained after the breach are excluded from the evidence. The Over 80 charge is dismissed.

Trial at Large – Impaired Operation:

Position of the Defence:

[100] It is submitted that the evidence of impairment at the roadside is equivocal and does not rise to proof beyond a reasonable doubt.

[101] It is submitted that the evidence is consistent with bad driving in navigating the snow on the bullnose which resulted in the accused's car going over a snow bank and flipping sideways into the ditch.

[3] I have adopted the *Grant* Analysis undertaken in detail in the cases of *R. v. Ramkalawan* and *R. v. Swaida (supra)*

[102] It is submitted that there is no evidence of impaired motor skills – no stumbling or swaying. In the video filed by the Defence, the accused is seen to take off his coat, shoes and a necklace with no problem.

[103] It is submitted that the difficulty in locating his driver's licence after the accident at the roadside is not sufficient evidence of impairment.

Position of the Crown:

[104] The Crown submits that it is an irresistible conclusion that the accused's ability to operate a motor vehicle was impaired by alcohol.

[105] The Crown submits that this single unexplained motor collision occurred on a clear cold night when the roads were clear. The independent witness did not see anything that would have caused the accused's motor vehicle to end up in the ditch. The independent witness did not believe that the accident was caused by the snow on the bull nose.

[106] The Crown submits that the physical observations of Officer Aspden at the scene and the smell of alcohol on the accused's breath are evidence of impairment by alcohol.

Decision on Impaired Operation:

[107] Gregory Whignill was the independent civilian witness who observed this accident on the QEW.

[108] He observed the accused's vehicle a few lanes ahead of him. It appeared that the accused was going to exit at Walkers Line (to the right), then his car drifted back to the left. The car hit snow on the bull nose. The car fishtailed and went over a snow bank and landed on its side, facing the opposite direction of travel, in the ditch. The car had been travelling at the highway speed of 115 to 120 kilometres an hour before the accident.

[109] Mr. Whignill hit his brakes so he would not come into contact with the accused's car before it landed in the ditch.

[110] He pulled over to the shoulder and got out of his car to check on the well-being of the occupant(s).

[111] He stepped over the approximately 2 foot high snow back and yelled through the windshield at Mr. D[redacted] who was the driver and sole occupant. Mr. D[redacted] said he was okay.

[112] With the assistance of 4 or 5 other people who attended to help, Mr. D[redacted] was able to crawl out of the rear of the vehicle.

[113] There was a lot of stuff strewn around the vehicle. One of them was an empty mickey of Rye which Mr. Whignill saw lying on the ground within two feet of the vehicle. He spoke to Mr. D[redacted] for a minute or two and noted that he seemed a bit disoriented.

[114] He could not smell any odour coming from Mr. D[redacted]. It was cold out and Mr. Whignill had a cold.

[115] Officer Pennar also had dealings with Mr. D[redacted] at the scene. He searched, cuffed, and put Mr. D[redacted] into the back Officer Aspden's cruiser. Mr. D[redacted] was cooperative but several times put his hands in his pockets contrary to instructions and appeared confused.

[116] Officer Pennar did not smell any alcohol coming from the accused. It was minus fourteen degrees in temperature. The Officer testified that it is hard to smell alcohol in cold temperatures.

[117] I am aware of the test in *R. v. Stellato* that any degree of impairment from slight to great when proven beyond a reasonable makes out the offence.

[118] In this case there is an unexplained accident. There is the odour of alcohol noted on the accused's breath by Officer Aspden only. Mr. Whignill did not smell anything. Officer Pennar did not smell anything.

[119] There is the problem finding the driver's licence after the accident when Officer Aspden and the accused are still standing in the ditch.

[120] There were no problem with motor skills at the scene or in the cell area as captured on the Defence filed video. There were no problems with speech or comprehension.

[121] I cannot find on the scant evidence that impairment by alcohol has been established beyond a reasonable doubt.

[122] What would have been established if the charge had been laid, is one of dangerous operation of a motor vehicle.

[123] In technical cases like these, the police should consider laying that additional charge where the circumstances warrant.

[124] For these reasons, a finding of not guilty is registered on the Impaired Operation count.

Released: November 30, 2016

Signed: “Justice Lesley M. Baldwin”