C.A.C. No. 117989

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Maloney, 1995 NSCA 226

Hallett, Chipman and Flinn, JJ.A.

BETWEEN:

DALE FRANCIS MALONEY	)	Joseph A. MacDonell
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	William D. Delaney
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	November 20, 1995
	)	
	)	
	)	Judgment Delivered:
	)	December 15, 1995
	)	

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Chipman and Flinn, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a summary conviction appeal court decision dismissing an appeal from a decision of a provincial court judge convicting the appellant of refusing the breathalyzer contrary to s. 254(5) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The appellant was also charged with impaired driving contrary to s. 253(a). After finding the appellant guilty of the first charge the trial judge stayed the second charge.

The appellant and his supporting witnesses testified that the appellant was not driving the vehicle on the morning in question. The trial judge accepted the evidence of an independent witness that he was driving. At the start of the trial counsel for the appellant made a formal admission that the appellant, at the relevant time, was impaired by alcohol. The appellant also testified that he was "soused".

The summary conviction appeal court judge determined that the trial judge did not err in finding that the appellant was the driver.

The Charter Issue

At trial, counsel for the appellant argued that the appellant's s. 10(b) **Charter** right to counsel was infringed. He relied on the decision of Lamer C.J., writing for the majority, in **R. v. Prosper**, [1994] 3 S.C.R. 236, 92 C.C.C. (3d) 353, 33 C.R. (4th) 85; [1994] 118 D.L.R. (4th) 154. In that decision, which had just been released, Lamer C.J. summed up the principles that have been developed respecting the s. 10(b) **Charter** right, including the duties owed by police officers to detained persons. The two passages from that decision that are relevant to a consideration of the issue before this Court are as follows:

> "Given the importance of the right to counsel, I would also say with respect to waiver that once a detainee asserts the right [to counsel] there must be a clear indication that he or she has changed his or her mind, and the burden of establishing an unequivocal waiver will be on the Crown: *Ross*, at pp. 135-6. Further, the waiver must be free and voluntary and it

> must not be the product of either direct or indirect compulsion. This court has indicated on numerous occasions that the standard required for an effective waiver of the right to counsel is very high: *R. v. Clarkson* (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383 (S.C.C.); *Manninen*, and *R. v. Evans, supra*." (118 D.L.R. (4th) at p. 180)

Lamer C.J. in 118 D.L.R. (4th) at p. 182 reaffirmed the principle that the police must provide a detainee with a reasonable opportunity to contact counsel and that during such period there is an obligation on the police to hold off from eliciting incriminating evidence from the detainee provided the detainee has asserted his or her right to counsel and is reasonably diligent in exercising it. Lamer C.J. then went on to enunciate the extraordinary additional duties that were imposed on the police by his decision in **Prosper**. He stated at p. 182:

> "In addition, once a detainee asserts his or her right to counsel and is duly diligent in exercising it, thereby triggering the obligation on the police to hold off, the standard required to constitute effective waiver of this right will be high. Upon the detainee doing something which suggests he or she has changed his or her mind and no longer wishes to speak to a lawyer, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee."

Facts

The facts relevant to the alleged **Charter** infringement start with Constable Brown's evidence with respect to what took place at the arrest scene. He testified that he advised the appellant of his **Charter** right to counsel in the following words:

> "You have the right to retain and instruct Counsel without delay. You may call any lawyer you wish. You have the right to apply for legal assistance without charge to the Provincial Legal Aid program. Do you understand that? (and) Do you wish to call a lawyer now?"

The appellant acknowledged that he understood the foregoing. Constable Brown then read the appellant the breathalyzer demand. Following this the appellant questioned how Constable Brown could give him a breathalyzer demand since he did not see him drive the car.

Constable Brown and the appellant then proceeded to the police station arriving at approximately 3:30 a.m.

Constable Brown testified on direct examination that from approximately 3:30 a.m. until 3:53 a.m. the appellant was in the holding room and that Constable Brown was able to view him through a plexiglass window. He testified that there was a list containing the names of Legal Aid lawyers and their phone numbers taped to the plexiglass. He directed the appellant's attention to this list and provided him with a telephone and a telephone book. During part of this period the appellant was observed to be on the telephone apparently talking to someone. At 3:53 a.m. the breathalyzer technician arrived. The appellant was no longer using the telephone. Constable Brown then went to the door and asked the appellant to come out, which he did. Constable Brown asked him if he was going to take the breathalyzer test which he refused to do.

Under cross-examination Constable Brown was asked if he recalled knowing that the appellant did not reach counsel. He responded, "I don't think I knew if he did or not" but that he did recall that the appellant was not making any demands for counsel. He was also asked under cross-examination if he recalled the appellant asking him if he knew of any other lawyers he could call. He responded :

> "A. No. He did not because I do know of some lawyers that readily accept phone calls and I would have given him the number of one. So, he . . . he wouldn't have asked that."

Constable Brown also acknowledged under cross-examination that he helped detainees obtain telephone numbers and that it was a common procedure to assist the person. He acknowledged that the appellant did not have his glasses. He was not asked, either under direct or cross-examination, if he was requested to assist the appellant in dialing his lawyer's number nor asked if he did dial for the appellant.

The appellant testified that after his arrest for impaired driving he did not recall being informed about Legal Aid services. He testified that he had in his possession his counsel's card

which he gave to Constable Brown at the Police Station with a request for assistance in dialing his counsel's telephone number. He testified that Constable Brown dialed the number as requested but there was no answer. When asked under direct examination whether he had spoken with anybody on the phone he testified that he could not recall making any telephone calls beside the call to his counsel and that he could not recall talking to anybody. He was asked under direct examination if he had given any indication to Constable Brown whether he had been successful in calling a lawyer or not; he answered that he did not think the Constable had asked. The appellant went on to add:

> "A. I don't think he asked. I don't . . . I don't remember that at all, whether, you know . . . he probably got the drift of it, because I told him - I don't know what to do here - you know. I assume that if I had talked to a lawyer, he would have told me, one way or the other, what to do."

The appellant was then asked by his counsel whether or not he may have asked Constable Brown if there were any other lawyers available. He responded:

> "A. I asked him if he knew anybody I could get a hold of and he said no."

He was then asked "And what happened then?" and he responded:

> "A. Well, he read . . . you know, he asked me if I'd take it. And I said, look, I can't . . . I don't know if I'm. . . you know, either way I do this, I don't know what's going on, so I thought . . . I said, we'll just settle it in Court. You know? Because I don't know."

Under cross-examination he was asked the following questions and gave the following answers:

> "Q. You don't remember him telling you anything about Legal Aid, though?
>
> A. I don't ... he never said nothin' about Legal Aid.
>
> Q. Okay. When you were in that interview room ...
>
> A. Um-hm.
>
> Q. ...do you remember that there was a phone in there?

A. Yes.

Q. Okay. Do you remember that there was a phone book in there, too?

A. There probably is, but I don't recall right off. Yeah. There is. There is the Yellow Pages in there.

Q. All right. And you remember that there was a list of lawyers posted to the wall.

A. I don't remember that at all.

Q. Okay. And you don't remember Const. Brown pointing that out to you, either.

A. No, sir.

Q. Okay. Did you open up that list of lawyers in the Yellow Pages and try any lawyers?

A. Without these on, Sir, I can open it forever and I'll never be able to read anything in the phone book except big letters.

Q. Okay. Are you legally blind without those glasses?

A. I'm not legally blind at all. I wear bifocals. And I can't read. I wear them to read more than anything else.

Q. Okay.

A. I can't read small print with . . . without these. I can't even see you very well without them.

Q. Can you see me at all without those?

A. Yeah. But you sort of look like you've got three noses.

Q. If you don't have your glasses on, Sir . . .

A. Um-hm.

Q. . . . and you hold writing up close to you, can you see it?

A. It would depend on the print and the light. It's pretty hard to read anything, you know, and be sure of it.

Q. But you can read it, can't you.

A. I don't know. Give me something to read. Or put the . . . if you've got somebody that's got 20/20 vision, they can wear them and see what they

can read. I don't know.

Q. You didn't tell Const. Brown that you needed your glasses to read the phone book, did you?

A. Yes. That's why I got him to do the . . . to dial the number for me and read the card, because I couldn't do it. He knew I didn't have the glasses. I told him that.

Q. Who were you talking to on the phone?

A. I don't recall talking to anybody on the phone.

Q. You said, when you were giving your evidence, under oath, on Direct . . .

A. Um-hm

Q. . . . that you might have been talking to yourself on the phone. Do you remember saying that?

A. (laughing). I. . .If you ask me who I was talking to on the phone, I wasn't thinking of myself. Yeah. I could have . . . I could have been just muttering to myself, or whatever.

Q. Do you think that you . . .

A. I couldn't . . .

Q. . . . were you so intoxicated that you picked up the phone and weren't talking to anybody? Is that possible?

A. Well, if you couldn't see what you were doing, what would you be doing with the phone? You'd just sort of be standing there thinking, what the hell am I gonna do with this? I was trying to see if I could read things. I couldn't get enough . . . enough vision to . . . in the phone book to get numbers.

Q. Can you even remember having that receiver up next to your ear and your mouth and speaking into it?

A. I can remember . . . I don't remember speaking into it, but I remember having the receiver in my hand after he dialled the number and passed it to me. Yeah. And the phone rang and rang, but there was not answer.

Q. And how many other lawyers did you try and call after that?

A. I didn't try and call any other lawyers because I didn't have any other lawyers I knew to call. I asked Brown if . . . I said, do you know anybody

> else I can get a hold of? Because my only problem with this was the fact that I didn't quite know what to do and Mr. Brown was not very much help with that at all."

At trial counsel for the Crown took the position that the appellant was given a reasonable opportunity to contact counsel but was not reasonably diligent in exercising his right and, therefore, the police duty to refrain from eliciting incriminating evidence from him (the breathalyzer test) was suspended.

The Trial Judge's Decision

After finding: (i) that the appellant was the driver of the vehicle and was intoxicated; (ii) that the police officer had reasonable and probable grounds to make a demand to take the breathalyzer; and (iii) that the accused unequivocally refused to do so without reasonable excuse the learned trial judge went on to deal with the **Charter** argument as follows:

> "The accused has argued, through Counsel, that he was not, in this specific, afforded his rights pursuant to s. 10(b) of the *Charter*, particularly, in light of the most recent *Proposer* Decision of the Supreme Court of Canada, and that, therefore, evidence of his subsequent refusal should be excluded.
>
> I find that, at the scene - this is at the Green Gables - Const. Brown, the demanding officer, also read to the Defendant a s. 10(b) Notice of his Rights under that Section.
>
> I'm satisfied that that Notice, given at that time, satisfied the requirements of the *Bridges* case. It was a *Bridges* case quality notice.
>
> I find that, at that point, the officer asked the accused if he wished to call a lawyer and the accused answered no. Subsequently, at the Police Station, it is the testimony of Const. Brown that he put the Defendant, put the accused, in a private holding room and that, in that room, there was access to a telephone, a telephone book, and a list of Legal Aid lawyers taped to the window, to the plexiglas.
>
> The officer testified that the accused was in that room with phone access for 23 minutes and that, for part of that time, the accused appeared to be talking to someone. When he was no longer on the phone, when the accused was no longer on the phone, the officer, Const. Brown, entered the room again and asked the accused if he was going to take the breathalyzer.

> It is the officer's testimony that the accused responded no.
>
> The officer testified that, at that point, the accused made no request to speak further to a lawyer. Indeed, did not mention a lawyer at that point at all.
>
> The accused testified that he did not have his glasses with him at that time, which is the truth, according to the testimony of the officer. He testified that, as a result of not having those glasses, he could not read the phone book or the list of Legal Aid lawyers and he does not now remember talking to anybody on the phone.
>
> I find, as a fact, that the accused was given access to a telephone and a list of Legal Aid counsel as well as a phone book. I have indicated that he was given a proper s. 10(b) Notice, a *Bridges* quality Notice, prior to that point.
>
> I am satisfied that, if the lack of glasses was a problem, if it was a problem, that he did not complain about it at the time. And finally, that he was not, on the evidence, and I so find, deprived of any s. 10(b) right. I find that to be the case as those rights are defined in the *Prosper* Decision of the Supreme Court of Canada or otherwise.
>
> Having so found, having found that the demanding officer had reasonable and probable grounds to give a Breathalyzer Demand that the Demand that he gave was a proper Demand, that there was a proper s. 10(b) Notice and subsequent proper access to counsel, that there was an unequivocal refusal thereafter, and that there is, on the totality of the evidence, no reasonable excuse.
>
> I find, finally, that all of the constituent elements of the offence are demonstrated beyond a reasonable doubt and I'm entering a conviction in the matter."

It is quite apparent that the learned trial judge did not find the appellant credible having found that he was satisfied that if the lack of glasses was a problem for the appellant it was a problem that he did not complain about at the time. The learned trial judge's finding that there was a proper s. 10(b) notice and "subsequent proper access to counsel" shows that the trial judge did not accept the evidence of the appellant that he was so blind or drunk that he was unable to dial.

On appeal to the summary conviction appeal court, Boudreau J., after quoting that passage from the judgment of Lamer C.J. in **Prosper** (supra) where, writing for the majority, the

Chief Justice imposed the additional duties on police if an accused is unable to reach a lawyer despite reasonable and diligent efforts to do so, the judge hearing the appeal stated:

> "There is nothing in the case at bar which raises the specific concerns addressed in **Prosper**. The police were not informed and had no reason to believe or suspect the appellant had not been successful in reaching counsel. The issue of waiver and "holding off" until counsel can be reached and the resulting duties or obligation on police officers to further inform the detainee of those rights and to verify the understanding and voluntariness of any waiver do not arise. In response to this the appellant contends there is no way for the police to determine whether a detainee has been successful in accomplishing the exercise of his rights to counsel or whether the detainee is waiving those rights unless the police pursue the matter by asking one or two simple questions."

It is clear from the foregoing that the summary conviction appeal court judge was satisfied that the appellant did not say or do anything which would have alerted the police that he had been unable to reach counsel for whatever reason. This is a finding of fact that cannot form the basis of an appeal to this Court. Justice Boudreau then went on to consider whether there was "a positive duty on the police to inquire of a detainee, who had been provided with all apparent aspects of reasonable opportunity to contact counsel, to further inquire as to the results of that opportunity". Boudreau J. did not accept the argument of the appellant's counsel that the police had a duty under these circumstances to inquire if the accused had been successful in contacting counsel. Boudreau J. concluded that once a detainee is given a reasonable opportunity to exercise the right to retain and instruct counsel that:

> ".....absent any indications that the detainee has been unable or unsuccessful in exercising that right, or absent any indications of a change of mind and waiver, there are no further correlative duties or obligations on the police.'
>
> Boudreau J. went on to state:
>
> "It could hardly be said that a detainee who does not indicate any difficulty in reaching counsel, absent a reasonable excuse, was acting reasonably diligently in exercising his or her right to counsel. I am satisfied the appellant's s. 10(b) **Charter** rights were not violated in this case."

The Appeal to this Court

On the appeal to this Court the appellant's counsel renewed his argument that the duties of the police towards detainees who have indicated in the first instance a desire to consult counsel should be extended to require the police, in circumstances such as existed in this case, to ascertain from the detainee whether he was successful in reaching counsel before attempting to elicit any incriminating evidence from the detainee. Counsel for the appellant argues that the "onus should not be put on the Appellant as part of his duty to be diligent to inform the police that he was unable to consult with counsel when he is, firstly, impaired to some extent and secondly not aware of what his rights and obligations are because he has not had the benefit of legal advise".

The appellant's counsel takes the further position that if a detainee has been unable to contact counsel he is within his rights to refuse to take the breathalyzer test as this constitutes a reasonable excuse for refusing and nothing need be said to the police officer.

Disposition of the Appeal

An appeal to this Court is on a question of law alone (s. 839 **Criminal Code**). The notice of appeal states:

> 1. That the learned Appeal Judge erred in finding that the Appellant's rights under Section 10(b) of the Canadian Charter of Rights and Freedom had not been infringed and in particular the learned Appeal Court Judge erred in finding that there was no correlative duties or obligations on police to inquire as to whether a detained person, who has indicated a desire to consult with Counsel, was successful in consulting counsel before requesting the accused submit to a breathalyzer test."

This appeal gives rise to a preliminary question. How does a court reconcile and apply the law that the burden is on the Crown to prove that a detainee has waived his right to counsel after having asserted it (**Prosper** at p. 180) with the law that imposes the burden on a detainee to prove that his **Charter** right to counsel was infringed, which includes the requirement to prove on a balance of probabilities reasonable diligence in exercising the right? (**R. v. Smith** (1989), 50

C.C.C. (3d) 308, [1989] 2 S.C.R. 368, 71 C.R. (3d) 129)

In my opinion, if a detainee, having been properly informed of his s. 10(b) **Charter** right and if given a reasonable opportunity to exercise it, fails to prove on a balance of probabilities, absent exceptional circumstances, reasonable diligence in exercising that right, there is no obligation on the Crown to prove, before resuming questioning or the eliciting of incriminating evidence, that the detainee waived the right that had initially been asserted. Under such circumstances, the right to counsel is suspended (**R. v. Smith** (supra)).

In this case it is apparent that the appellant failed to satisfy the trial judge that he was reasonably diligent in exercising his right to counsel.

There is no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts. A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect (**R. v. Morin** (1992), 76 C.C.C. (3d) 193).

It is obvious from the trial judge's conclusion that the trial judge rejected the appellant's evidence with respect to what took place at the police station.

It is clear from the decision of the summary conviction appeal court judge that he was satisfied that the appellant failed to prove (i) that the police had any reason to believe he had been unsuccessful in contacting counsel, if, in fact, that was the case; and (ii) reasonable diligence in exercising his right to counsel.

These are findings of fact or, at the highest, findings of mixed fact and law and, therefore, not questions of law alone.

Based on these findings, the summary conviction appeal court judge determined that the duties on the police, as imposed in **Prosper**, did not arise. I agree. It must be remembered that in **Prosper** the police were well aware that the accused had been very diligent in attempting to

contact counsel and had failed to make contact.

We have not been referred to any case authority that imposes on a police officer a general duty to inquire of a detainee, who has been given his **Charter** right to counsel and a reasonable opportunity to exercise that right, if he has been successful in making contact with counsel. I would not extend the duties of police officers to detainees to encompass such an inquiry before resuming the investigation or eliciting incriminating evidence from the detainee. Nor have we been directed to any authority that impairment by alcohol in itself relieves the detainee of his duty to be reasonably diligent in exercising his right to counsel.

Appellant's counsel has not cited any authority that has held that the inability to contact counsel is a reasonable excuse for refusing the breathalyzer. Neither the trial judge nor the summary conviction appeal court judge made a finding that the appellant was unable to contact counsel so this issue is moot.

Summary

The summary conviction appeal court judge did not err in law in finding the appellant's **Charter** right to counsel was not infringed. Leave to appeal is granted but the appeal is dismissed.

Hallett, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.

C.A.C. No. 117989

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DALE FRANCIS MALONEY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.