IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Collicutt, 2008 NSPC 45

Date: 20080721
Docket: 1791383 & 1791384
Registry: Bridgewater

Between:

R.

v.

Sterling Collicutt

Judge:	The Honourable Judge Anne E. Crawford
Heard:	May 13, 2008, in Bridgewater, Nova Scotia
Written decision:	**on *Charter* application**
Charge:	s. 253(a) of the *Criminal Code* s. 253(b) of the *Criminal Code*
Counsel:	Mr. Paul Scovil, for the Crown Mr. Robert Cragg, for the defence

By the Court:

[1] Sterling Collicutt is charged with impaired driving and driving with a blood alcohol concentration over the legal limit contrary to s. 253(a) and (b) of the *Criminal Code*.

[2] The matter proceeded as a *voir-dire* in regard to an alleged breach of the defendant's right to counsel under s. 10(b) of the *Charter of Rights and Freedoms*.

Issue

[3] The only issue raised by the defence is whether or not the defendant's right to counsel of choice was breached on the facts of this case.

Facts

[4] On the *voir-dire* Cst. Caldwell and Cst. Collins of the R.C.M.P. testified for the Crown and the defendant testified on his own behalf. I will relate here only the facts relevant to the issue on the *voir-dire*.

[5] On Sunday, June 10, 2007 Cst. Caldwell and Cst. Collins responded in separate police vehicles to a complaint of a possible impaired driver on the Chester Grant Road in Lunenburg County, Nova Scotia, a very short distance away from the detachment office. They located the vehicle in question in very short order, and stopped it. After the defendant failed the approved screening device test, Cst. Collins read the defendant his right to counsel in his police vehicle at the scene. The defendant said that he wanted to speak to Mr. Cragg, the lawyer who represented him at trial.

[6] Upon arrival at the detachment office at 1:50 p.m. Cst. Collins placed the defendant in an interview room with a table and a telephone. There were two telephone books on the table in front of both the defendant and the officer. Cst. Collins testified that as the defendant did not know Mr. Cragg's number, they looked it up in the phone book. He said he himself then dialled Mr. Cragg's office number and, not surprisingly on a Sunday afternoon, no one answered nor was there an answering machine on which to leave a message. Cst. Collins told the defendant there was no answer and asked if he would like to call legal aid, meaning duty counsel. The defendant replied no; he would call his own lawyer later after he took the test.

[7] On cross-examination the officer was shown the telephone book in effect at the time and testified that he called the bolded number from the white pages. He said he did not call the non-bolded number below the bolded entry, with a civic address on Armview Avenue in Halifax, as there was no indication it referred to the same person, nor did he offer to call it. He did not recall the defendant asking him to look for any other numbers. If he had asked, he said, he would have done so.

[8] The defendant testified on direct that when Cst. Collins said there was no answer, he repeated 4 times that he did not want to talk to legal aid; he wanted to speak to Bob Cragg. On cross-examination he added further details: that he told Cst. Collins that Cragg was probably home, that he would not be in the office and told the officer to look for his home phone number. When asked why he had not said this on direct he said he did not understand the question.

[9] On rebuttal, the police officer denied that the defendant had asked him to call Mr. Cragg at home.

[10] On this *Charter* issue, the burden is on the defendant to establish on a balance of probabilities that his right to counsel has been breached. Although I accept that the defendant initially asked to speak to Mr. Cragg, I do not believe his testimony that he persisted beyond the initial request. He appeared on both direct and cross examination to be tailoring and embroidering his evidence to conform to the questions his lawyer had put to the officer on cross-examination. I find, on a balance of probabilities, that when he was told there was no answer at Mr. Cragg's office and was offered an opportunity to speak to legal aid, he declined and said that he would call his lawyer later.

Right to counsel of choice

[11] Judging by the cases cited by both counsel, it appears that two lines of authorities are developing on this issue: one in the West, and one in the East.

[12] With the exception of *R. v. Keagan,* [2003] N.J. No. 89 (NLSCTD) all of the cases cited by the defence in this matter *(R. v. Brouillette* [2007] S.J. No. 288 (Prov. Ct.); *R. v. Liknes* [1999] A.J. No. 1579 (Prov.Ct.); *R. v. Jacobs* [2002] B.C.J. No. 1358 (Prov.Ct.); *R. v. Campbell* [2003] S.J. No. 355 (Prov.Ct.); *R. v. Meston* [1995] A.J.

No. 876(Prov.Ct.)) are from provincial courts in the western provinces, where the courts appear to place significant emphasis in cases where the police undertake to assist the detainee to contact counsel of choice on the police doing all that the detainee himself would do before having recourse to duty counsel. These courts appear to be suggesting that the police should not attempt to provide assistance and should instead leave the detainee alone to make the contact for him or herself. This approach was summarized by Turpel-Lafond, J.P.C. in *Campbell*, as follows:

> ¶ 43 A preferred approach would be to ensure there are no issues with respect to capacity (physical or mental disability) and there is no danger or urgency. The police could fulfill their obligation to the accused in the exercise of his or her Charter rights under section 10(b) if they did the following:
>
> 1) Provide an operable telephone in a private room that enables outside communication which can be dialed by the detainee free of charge;
>
> 2) Provide current copies of both the White and Yellow Pages local telephone directories;
>
> 3) Written instructions on how to contact Directory Assistance; and
>
> 4) Provide information on how to reach Legal Aid duty counsel should the effort to reach counsel of choice prove unsuccessful.

[13] I find this approach rather disingenuous, as in the majority of breathalyzer cases at least, there will be an issue as to the mental and physical capacity of an impaired person to effectively use the directories and/or telephone for him/herself.

[14] On the other hand, higher court judgments in Ontario, which seem to be followed in other eastern provinces, seem to be taking a more flexible approach, taking into account all the surrounding circumstances, and deciding on a case by case basis whether or not the defendant was provided with a "reasonable opportunity" to consult with counsel of choice.

[15] That approach is typified and summed up by D.S. Ferguson, J. in *R. v. Blackett* [2006] O.J. No. 2999; 36 M.V.R. (5th) 223; 2006 CanLII 25269;70 W.C.B. (2d) 212; 2006 CarswellOnt 4585 (ONSCJ):

> 29 It appears to me that the caselaw dictates this three stage analysis of these s. 10(b) "right to counsel of choice" situations:
>
> > (a) Did the police fulfil their duty to act diligently in facilitating the right of the accused to consult counsel of choice? If the trial judge finds they fulfilled their duty then there is no breach of s. 10(b).
> >
> > (b) If the police did not fulfill their duty then there are two possibilities:
> >
> > > (i) If the police breached their duty because they took no step to facilitate the right to counsel, then a breach of s. 10(b) is established: *Kumarasamy*.
> > >
> > > (ii) If the police breached their duty because they made some effort but it is found not to constitute "reasonable diligence", the trial judge must next decide whether the accused fulfilled his or her duty to act diligently to exercise the right to counsel. If the answer is yes, then a s. 10(b) breach is made out. If the answer is no, then this trumps the breach of duty by the police and there is no breach of s. 10(b): *Brydges*; *Richfield*.
> >
> > (c) If a breach of s. 10(b) is established the court must then go on to consider whether or not to exclude the consequent evidence under s. 24(2). The conduct of the accused is a factor which the court can consider: *Tremblay*; *Richfield*. The court in *Richfield* suggested that the threshold for exclusion is higher in breathalizer cases: at para. 18.

[16] Counsel have not referred me to, nor have I found, any case-law which would indicate that either line of cases is binding upon me; and in my opinion the Ontario cases are more persuasive. *Keagan*, *supra*, a decision of the Newfoundland and Labrador Supreme Court which was relied on by the defence appears to me to be an example of the Ontario reasoning under (b)(ii) above in that the police did not do everything necessary to constitute reasonable diligence and the accused fulfilled the duty to act diligently in exercising his right to counsel.

[17] Applying Ferguson, J.'s summary to the facts of the present case, I answer the questions there posed as follows:

(a) The police officer here made a genuine effort to communicate with the defendant's counsel of choice; however, because it was a summer Sunday when not even the most diligent lawyer could reasonably be expected to be in his/her office, he could have followed that up by attempting to locate a home number for counsel.

(b) (i) the officer here did attempt to facilitate the right to counsel;

(ii) although the officer might have done more and testified that if he had been asked to do more he would have, as I have found above, the defendant has not satisified me on a balance of probabilities that he acted diligently in pursuing his right to counsel. In particular, I do not believe that he asked the police officer to try to locate Mr. Cragg at home, or informed the officer in any way that he wanted to speak to Mr. Cragg before taking the breathalyzer test.

(c) there has therefore been no breach of the section 10(b) right to counsel and I need not consider s. 24(2) of the *Charter*.

Conclusion

[18] The defendant has not satisfied me that his right to counsel of choice under the *Charter* was breached. His motion under s. 24(2) of the *Charter* is accordingly denied. The trial of the charge will continue as scheduled on July 24, 2008.