IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Buckler, 2009 NSPC 22

Date: May 8th, 2009
Docket: C# 1904890, 1904891
Registry: Digby, Nova Scotia

Between:

Her Majesty The Queen

v.

Donald Gregory Buckler

Editorial Notice

Identifying information has been redacted from this electronic version of the judgment.

Judge:	Hon. Jean-Louis Batiot
Written decision:	May 8th, 2009 (on Charter Issues)
Charge(s):	Contrary to sections 163.1(2) and 163.1(4) of the **Criminal Code**
Counsel:	Craig Botterill, Q.C., for the Crown
	Darren MacLeod, for the Defence

By The Court:

1. Mr. MacLeod, for the defence, argues that the accused's rights to counsel were infringed, contrary to s. 10(b); unlawful search and seizures pursuant to s. 8; and asks the court to exclude the evidence obtained, pursuant to s. 24(2); all sections being those of the **Canadian Charter of Rights and Freedoms**, Canada Act 1982 (U.K.) c. 11.

2. On May 5th, 2008 Constable Girma, of the Digby Detachment of the RCMP, attended at * , in Digby, in the county of Digby, in this Province, and spoke with A. A.. She advised him that a photograph of her grand-daughter had been stolen by Mr. Buckler, when he came to use her phone. She had confronted the accused, who admitted taking the picture.

3. Constable Girma then engaged the accused in a conversation, at his home. He identified himself as a peace officer but did not tell the accused the nature of the investigation (theft) nor did he provide him with a police caution nor an advice of his **Rights**.

4. The accused admitted taking a photograph belonging to A. A., of one of her grand-daughters. Upon further questioning, he admitted to having done something immoral with the picture and then of having disposed of it.

5. The officer then entreated the accused to be honest and to bring forth any inappropriate images he may have. Upon the accused doing so, Constable Girma arrested him and transported him to the detachment for processing, and then released him.

6. The issue is whether Mr. Buckler was "*detained*", since everything took place at his apartment; if so, whether he should have been advised of his Rights, and the lawfulness of the seizure of photographs.

7. The issue of whether detention has occurred can only be decided through a "*contextual analysis*" of *"all the circumstances"* **R. v. Pomeroy**, [2008] O.J. 2550, 2008 ONT. C.A. 521.

8. Crown counsel argues that the accused was not detained as the questions and answers occurred in the apartment doorway, the accused was never taken into custody nor arrested, nor was he taken to the police car, during the exchange. He refers to **R. v. Hawkins**, [1993] S.C.J. No 50 (S.C.C.), and more particularly to the dissenting decision of Goodridge C.J.N., in the judgement of Newfoundland Supreme Court - Court of Appeal, [1992] N.J. No. 147, upheld by the Supreme Court of Canada, at [1993] S.C.J. 50.

9. The Supreme Court there agreed with the learned Chief Justice, that there was no detention in that case. The accused had agreed to go to the detachment, to talk about an allegation of sexual assault made against him. He did so voluntarily, and never testified about being detained. There was thus no evidence of detention.

10. Goodridge, C.J.N., at p. 14, states:

> *The fact that a suspect is being asked to give up his right to remain silent without more does not amount to a detention and, absent a detention, there is no obligation to advise a suspect of his right to retain and instruct counsel.*
> *If the suspect is asked to give up his right to remain silent and there is evidence before the trial judge that the suspect felt compelled to do so, or even that he was unsure as to whether he was under compulsion or not and decided to act as if he were, then there may be a detention within the meaning of the Charter.*

11. Constable Girma was entitled to contact a suspect, and ask him questions. He was investigating a possible theft, and was looking for information. He had an educated guess where to find an answer. There was no reason not to ask the questions he did.

12. When the officer obtained a confirmation from the accused of Ms. A.' complaint to him, that the accused had stolen a picture of her grand-daughter, then there was sufficient evidence to arrest Mr. Buckler or at least to detain him. He did not, but asked further question, to obtain further evidence. The accused admitted having done something immoral with the picture.

13. The investigation thus changed: the officer was no longer investigating a theft, acknowledged, but a charge of possession of child pornography at the very least, an

illegal act, a more serious offense under the **Criminal Code of Canada**, R.S.C. 1985, Chap. C-46. It was incumbent on the officer, at that stage, to inform the accused of this development and of his Charter Rights, both for the theft charge, but more particularly, of the new, now pending, charge, so that the accused could exercise, meaningfully, his rights to consult counsel: see **R. v. Black**, [1989] 2 S.C.R. 138

14. Constable Girma had sufficient grounds to obtain a search warrant and arrest Mr. Buckler for that other charge. He did not do so, but enlisted the accused's help to incriminate himself; he asked the accused to surrender any inappropriate images, meaning pornographic images of children. The accused complied promptly. In doing so, he realized, but too late, the extent of his jeopardy: *God, what have I gotten myself into?* he exclaimed.

15. That Crown evidence is confirmed by the affidavit of Mr. Buckler who says that he felt that he was "*obliged to answer*" and that he felt he was "*detained despite the fact that I was in my own apartment*". He did so because he didn't have any choice and that "*when the police ask you to do something you do what they say*".

CONCLUSIONS

16. At the very least Mr. Buckler faced a situation described in **R. v. Therens**, [1985] 1 S.C.R. 613, where the police officer did not advise the accused of his Charter Rights upon making a Breathalyzer demand upon him. At para. 53:

> *Detention may be effected without the application or threat of application of physical restraint if the person concerned submits* or *acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.*

17. In the case at bar, the officer was no longer inquiring about the theft of a photograph of a child; rather his line of questioning was more specific, to obtain further incriminating evidence from the accused: **R. v. Moran** (1987), 33 CCR (3d) 225 Ont. C.A. at 225.

18. This distinguishes this case from **Hawkins**, **supra**, which held there was no detention because the accused, under suspicions of having sexually assaulted a young woman, wished to discuss the complaint with the investigator, all interviews were done voluntarily, and a police caution had been provided before the statement was made. His statement was exculpatory. There was no evidence of detention.

19. The officer's further questioning of Mr. Buckler, after the latter revealed his improper action, was to obtain incriminating evidence for a different possible charge, in spite of the fact that sufficient grounds already existed to charge Mr. Buckler with theft. The nature of the investigation had changed to something more serious, as in **R. v. O'Donnell**, [2008] O.J. 4440; **Black, supra**.

20. On all the evidence, and particularly on that of the accused, I can conclude there was a psychological detention. He felt compelled to answer the officer's questions, even at his own doorstep. Mr. Buckler ought to have been advised, at the very least, of his rights. He was not.

21. Understandably, the officer wished to ascertain the existence of, and seize that illegal material. It was an important factor in the exercise of his functions. Yet he must do so according to law, and a breach of a suspect's Charter right is not to be condoned. The officer had sufficient evidence to obtain a search warrant.

22. Clearly, the accused was very compliant, even naive, in his dealings with the officer. This does not equate to a waiver of his right, of which he appeared to have been ignorant. Courts have insisted on the principle that peace officers, in the exercise of their functions, are best placed to advise a citizen of those basic rights, the right to remain silent, to consult a lawyer, as soon that citizen is *detained*, upon reasonable suspicions, at least, that an offence has been committed.

23. We know that immediately upon being arrested and being given the opportunity to consult counsel, he did so. This greatly enhances the conclusion that he would likely have done so as well before, given the incriminating evidence Constable Girma obtained. At any rate, he was entitled to be told, no matter what he would do with the advice.

24. Constable Girma ought to have done this, as soon as he had reasonable grounds an offence had been committed, as he continued to question the accused, thus detain him; indeed that duty remains present, and must adapt to the circumstances, particularly as they change, and become more serious (**Black**).

25. On the evidence, the officer elicited the help of the accused to incriminate himself. It is not reasonable, absent the proper advice to him of his right to remain silent and to counsel. In light of the accused's evidence, this is a flagrant breach.

S. 24 OF THE CHARTER

26. To not exclude that evidence from this trial would bring the administration of justice into disrepute, contrary to s. 24(2) of the Charter. A Lamer, J. stated, at para. 24, in **Therens**, **supra**:

> *the test was required by the peace officer and then given to the detainee prior to his being informed of his right to counsel. By so doing, the police officer violated the accused's rights under s. 10(b) and obtained the "breathalyzer evidence" in a manner which infringed and denied those rights.*

The Breathalyzer readings were excluded there. Similarly, in the case at bar, the evidence forming the basis of the charges was obtained as a direct result of the accused's Rights, and must be excluded.

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Jean-Louis Batiot, J.P.C.

May 8th, 2009
Digby, N.S.