IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Crawley, 2009 NSPC 72

Date: 2009Dec. 18
Docket: 1981202
Registry: Halifax

Between:

Her Majesty the Queen

v.

Kyle Andrew Crawley

Judge:	The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.
Heard:	September 1, 2009 November 2, 2009
Date of Decision:	December 18, 2009
Charge:	That he, on or about the 26th day of October, 2008 at or near Westphal, Nova Scotia, did operate a motor vehicle while prohibited from doing so by an order pursuant to Section 259 of the Criminal Code, contrary to Section 259(4) of the Criminal Code.
Counsel:	John Feehan, Senior Crown Attorney Marian Mancini, Defence Attorney

By the Court:

[1] Kyle Andrew Crawley, herein called the accused, is charged with the operation of a motor vehicle on or about the 26th day of October, 2008 at or near Westphal, Nova Scotia while prohibited from doing so by an order pursuant to S.259 of the **Criminal Code** and thereby committing an offence contrary to S.259(4) of the **Criminal Code**.

[2] The evidence establishes that the accused was driving his motor vehicle at or near Westphal, Nova Scotia on October 26, 2008, at which time he held a valid Nova Scotia driver's license. However, on December 20, 2007, in the Province of Ontario, the accused was convicted of an offence contrary to S.249.1 of the **Criminal Code** arising from the operation of a motor vehicle in that Province. In proof of the S. 259(4) charge herein the Crown relies upon a prohibition order issued by the Ontario Court of Justice on December 20, 2007, herein called the Prohibition Order. The Prohibition Order states that "this Court did make an Order prohibiting Kyle Andrew Crawley who resides at 2144 Highway 7, East Preston, Nova Scotia from operating a motor vehicle on any street, road, highway or other public place for a period of three years". The outstanding issue, relative to proof of the charge herein,

is whether the Crown has established that the Ontario Court of Justice, in the course of issuing the Prohibition Order, complied with the requirements of S.260(1)(c) of the **Criminal Code.**

[3] The Ontario Court of Appeal held in R. v. Molina (2008) 231 C.C.C. (3d) 193, that proof that an accused had been informed of S.259(4), as required by S.260(1)(c), is an essential element of the offence of driving while disqualified under S.259(4). There is conflicting case authority with respect to whether proof of compliance with S.260(1)(c) is a pre-condition for proof of driving while disqualified contrary to S.259(4). [See R. v. Thimsen [1993] B.C.J. No.395 (B.C.S.C.) and R. v. Chapman [2009] B.C.J. No. 539 (B.C.P.C.)]. However I find the position taken in R.v. Molina, being a decision by the Ontario Court of Appeal, to be more persuasive and I have therefore followed that decision.

[4] In proof of compliance of the S.260(1)(c) informational requirements, the Crown relies solely upon the Prohibition Order issued on December 20, 2007. If there were any deficiencies with respect to the S.260(1)(c)

notification requirements, the Crown relies upon the "presumption of regularity" to cure such deficiencies.

[5] Section 260(1) of the **Criminal Code** states as follows:

> "If a court makes a prohibition order under section 259 in relation to an offender, it shall cause
>
> (a) the order to be read by or to the offender;
>
> (b) a copy of the order to be given to the offender;
>
> (c) the offender to be informed of subsection 259(4)."

[6] Section 259(4) of the **Criminal Code** states as follows:

> "Every one who operates a motor vehicle, vessel, aircraft or railway equipment in Canada while disqualified form doing so
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) is guilty of an offence punishable on summary conviction."

[7] The accused signed the acknowledgement portion of the Prohibition Order, which sets out that the Prohibition Order was read to him, that he received a copy of the order, that the order was explained to him and that he understood

its terms and conditions. The signature of the accused on the Prohibition Order is sufficient to establish that the S.260(1)(a) and (b) requirements were met. I am not prepared to infer by his signature on the Order that the S.260(1)(c) requirements were met. The reasons for reaching that conclusion should become apparent from the analysis set out below.

[8] In order to determine whether the accused was informed of the provisions of S.259(4) and thereby conclude that the informational requirements of S.260(1)(c) were met, the following issues required further assessment: 1) whether the Prohibition Order was deficient in any way relative to providing full information about S.259(4) as required by S.260(1)(c); 2) if the required S.260(1)(c) information was deficient, is the Crown entitled to rely on the "presumption of regularity" to cure the deficiency; 3) if the Crown is entitled to rely on the "presumption of regularity", has the accused rebutted that presumption?

[9] The Prohibition Order did not specifically inform the accused that the territory, in which the operation of a motor vehicle was prohibited, included "any street, road, highway or other public place **in Canada"** (emphasis

added). The Prohibition Order therefore failed to fully inform the accused about the territorial aspect of S.259(4) as required by S.260(1)(c) and was therefore deficient relative to the S.260(1)(c) informational requirement.

[10] Despite that deficiency it is the Crown position that the language used in the Prohibition Order was sufficiently in compliance with the S.260(1)(c) requirement to entitle the Crown to rely on the presumption of regularity. In support of that position the Crown relies upon comments made by the Court of Appeal in R.v.Molina, which the Crown submits, approves the same language found in the Prohibition Order herein as being sufficient to give rise to a presumption of regularity relative to the full S.260(1)(c) requirement. That language is the following:

"**AND TAKE NOTICE THAT** everyone who operates:

- a motor vehicle on any street, road, highway or other public place

- a vessel, an aircraft or railroad equipment while disqualified from so doing under the *Criminal Code*, or in the case of motor vehicles, for such longer period provided for in the *Highway Traffic Act* is, upon conviction:

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction

> **and**, in addition to the above in the case of motor vehicles, is subject to an additional twelve month driver's license suspension under the *Highway Traffic Act*."

[11] I respectfully disagree with the Crown's position. Firstly the comments in the Molina decision that might be regarded as authority for such a conclusion, are no more than *obiter*. Secondly, any approval of such language by that Court as being sufficient to give rise to a presumption of regularity could only have been intended to apply to the prosecution of S. 259(4) charges which arise in the same Province as the Province in which the Prohibition Order, underlying such a charge, was issued. That was the situation in R.v.Molina. The failure to provide information about the potential punishment provisions of S.259(4) was the particular concern of the Court in R.v.Molina and not the failure to provide information about the territorial scope of the prohibition order as set out in Section 259(4). Finally I have observed that the Court of Appeal in the Molina decision did not specifically state that the foregoing language was without deficiency relative to the full S.260(1)(c) requirements.

[12] Having rejected the Crown's position the question that nevertheless must be addressed is whether failure to specify the territorial scope of the Prohibition Order as any street, road, highway or public place "in Canada" as set out in S.259(4), is a deficiency of sufficient significance to prevent the operation of the presumption of regularity. In R. v. Molina, the Court reviewed the four requirements which must be present in order for the presumption of regularity to apply. These are: 1) the matter is something done in the past and therefore incapable of easily procurred evidence; 2) the matter involves a mere formality or detail of required procedure within the routine exercise of a public official's duty; 3) the matter must involve the security of apparently vested rights, so that the presumption will operate to prevent an "unwholesome uncertainty"; and 4) the circumstances of the case in which the presumption is sought to be applied must add some element of probability that the matter presumed to occur actually did occur. These four requirements were adopted by the Court in the R. v. Molina from Wigmore a Treatise on the *Anglo-American System of Evidence in Trials at Common Law on Evidence*, 3rd ed. (1940), Vol.IX p.488.

[13] I have concluded that neither the second nor fourth requirement set out in R. v. Molina have been met or shown to exist, as the case may be for the reasons set out below.

[14] In R. v. Molina, the Court concluded that informing an offender about the penal consequences of a breach of a Prohibition Order is not simply a formality or procedural detail which can be met by simply advising an offender of the existence of S.259(4). I find it to be equally important that an offender know the full territorial scope of a Prohibition Order so he knows which streets, roads, highways or other public places he is prohibited from operating a motor vehicle upon. The significance of a failure to include the full territorial scope of a Prohibition Order becomes much greater when the alleged breach of the Prohibition Order occurs in a province different than the one where the Prohibition Order was granted. In this case, it appears that the Court when issuing the Prohibition Order was aware that Mr. Crawley resided in Nova Scotia. I infer that to be the case by virtue of the description of Mr. Crawley on the Prohibition Order as residing in Nova Scotia and inserting thereon his full name and Nova Scotia address. The Prohibition Order neither recites the full provisions of S.259(4) nor

specifically refers to S.259(4) on the portion of the Order, being the first page, which I infer was intended to meet the S.260(1)(c) notification requirement. The only specific reference to S.259(4) is found near the bottom of the second page of the Prohibition Order where it is stated that: "Should you drive a motor vehicle while your driver's license is suspended, you will be guilty of an offence under subsection 259(4) of the Criminal Code or of an offence under subsection 53(1.1) of the Highway Traffic Act".

[15] Relative to the fourth Wigmore requirement, the Court in R. v. Molina cites with approval the following remarks made by the Summary Conviction Judge at page 201:

> "Far from making it probable that the act [required by s.260(1)(c)] had been done, *the evidence available to the trial court here made it unlikely that there was compliance* with Section 260(1) in that the only evidence on point, the signature and acknowledgment of the accused, relates to a deficient and inadequate level of warning. There is no basis upon which to utilize the presumption of regularity to assume, as proof, that the officer who witnessed the signature of Mr. Molina went beyond the form of the order that the accused signed, and either read from a correct version of an order, or advise the accused orally out of his own knowledge. There would be no point in having the accused sign and acknowledge a lesser and deficient form of warning if in fact the accused had been provided with a proper warning. {Emphasis added.}"

[16] The foregoing remarks are equally applicable to the case before me. Furthermore, I am unable to judicially take notice of the court processes in Ontario so as to infer that the accused was informed about the S.259(4) territorial scope of the Prohibition Order.

[17] I conclude that the Crown is not entitled to the presumption of regularity. As such I cannot infer by virtue of the language of the Prohibition Order alone that the S.260(1)(c) requirements have been met. In the absence of any other evidence to establish compliance with S.260(1)(c), I conclude that the Crown has failed to prove a necessary element of the alleged S.259(4) offence.

[18] The accused did testify. However his evidence did not serve to assist the Crown in proof of S.260(1)(c) compliance.

[19] The context for my conclusions, relative to a rejection of the presumption of regularity sought by the Crown, was the language of the Prohibition Order. Therefore, a few further brief comments about the language of the Prohibition Order may be appropriate. A substantial majority of the

language contained on the two page Prohibition Order, prepared on a pre-printed form, was directed at the implications or potential implications arising in respect of the Province of Ontario Highway Traffic Act from the imposition of the Prohibition Order or the underlying conviction that led to that Order. Aside from the relative merits, or otherwise, of providing information on a S.259 Criminal Code prohibition order about the implications arising therefrom relative to provincial legislation, in this case the Highway Traffic Act, such detailed information can serve to confuse an offender, especially one who is a non resident of Ontario. Although due to my findings herein regarding S.260(1)(c), it was not necessary to consider the evidence of the accused beyond the S.260(1)(c) issue, I concluded that such detailed information and apparent focus of the Prohibition Order language on the Ontario Highway Traffic Act implications could reasonably have served to mislead or confuse Mr. Crawley, a non resident of Ontario, about the territorial scope of the Prohibition Order, as he so claimed in his evidence.

[20] The Prohibition Order herein stands in stark contrast with the straight forward language of the standard, single page S.259 prohibition order form

used in Nova Scotia. That order form, which is before this Court as an exhibit, sets out the offence, including the date thereof, committed by the offender; provides the direction that the offender is "prohibited from operating a motor vehicle on any street, road, highway, or other public place **in Canada** for a period of....."; sets out the full provisions of S.259(4) and requires a signed acknowledgment by the offender that he received a copy of the order, that it was read by or to him and that the offender " was informed of the provisions of S.259(4) of the Criminal Code of Canada".

[21] For completeness of the record, I concluded, relative to proof of compliance with S.260(1)(c), that S.19 is not applicable. However, it would be reasonable to conclude that, by virtue of these charges, Mr. Crawley has now been informed of the S.260(1)(c) requirements and the S.19 of the Criminal Code provisions would likely be seen as applicable in the future should Mr. Crawley operate a motor vehicle prior to the expiry of the Prohibition Order. Simply because I have concluded that the Crown has not proven the guilt of Mr. Crawley relative to the charge herein, I have not found the Prohibition Order dated December 20, 2007 to be invalid.

[22] In conclusion, I find Kyle Andrew Crawley not guilty of S.259(4) charge herein.

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R. Brian Gibson, J.P.C.
Associate Chief Judge