IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. D.T.W., 2012 NSPC 58

Date: June 22, 2012
Docket: 2389076; 2389078; 2389080; 2389082; 2389084; 2389086; 2389088; 2389090; 2389092; 2389094; 2389096; 2389098; 2389099; 2389100; 2389101
Registry: Halifax

Her Majesty the Queen

v.

D.T.W.D.

Judge: The Honourable Judge Jamie S. Campbell

Heard: June 13, 2012 and June 19, 2012

Oral decision: June 22, 2012 – Voir Dire

Charges: Criminal Code 86(2) x 2; 88(1) x 3; 91(2); 92(1) x 2 95(5) x 2; 96(1); 145(3) x 4

Counsel: John Nisbet - Crown Attorney
Luke Craggs- Defence Attorney

By the Court:

1) This is the decision in a voir dire with respect to the admissibility of an utterance made by a young person during the course of his arrest.

2) On November 8th, 2011 the police executed a search warrant for firearms on a property in Halifax. They arrived in some force and operated on the basis that firearms were present in that residence. Upon entering the property they found a number of people including the accused young person, D. D. They also found drugs in Mr. D.'s pockets, a 12 gauge shotgun, a .38 caliber revolver, and brass knuckles.

3) Mr. D. was arrested. The home belonged to the family of one of the other young men involved. While being escorted out of the house that young man said that everything in the bedroom belonged to him. The police officers also heard the accused in this case, say, over his shoulder, that the shotgun belonged to him.

4) In order for any such utterance to be admissible it must first be proven to have been voluntary. That matter is not in issue here. The comment was made while in police custody, but was not in response to any question, must less in response to a promise, threat or any form of oppressive conduct on the part of the police officers involved.

Section 146 Procedures

5) The issue is whether the statement is not admissible here because the police did not fully comply with the requirements of section 146 of the Youth Criminal Justice Act, ("YCJA"). More precisely, the issue is whether the statement was made before the police had a reasonable opportunity to fully comply with those requirements.

6) Section 146 is designed to address the power imbalance when a young person is a suspect in a criminal investigation. For many young people, the involvement with the police is itself an intimidating experience. Because of that they are provided with procedural protections that go beyond being advised of the right to retain counsel and the right to remain silent.

7) The young person has to be given the right to consult with a lawyer and a parent or other appropriate adult. If the young person asks for such a person any statement has to be made in that person's presence unless the young person doesn't want the person there.

8) In preparation for a formal statement, the process can be cumbersome. The police are required to inform a young person of his or her rights and must take great care to make sure that the young person understands. There are a number of questions that have to be asked and what seems like a large number of hoops that have to be jumped through before the statement itself can get under way. Young people who give such statements often appear to be restless when going through those preliminary

warnings, cautions and waivers.

9) Section 146(2)(b) requires that “the person to whom the statement was made”, clearly explain to the young person, “in language appropriate to his or her age and understanding”, that he or she has certain rights. That would appear to require that the explanation be given by the person to whom that statement was made. The explanation could not be given by one person and the statement then taken by another. It is far from clear in this situation to whom the young person was directing the comment. The section appears however to contemplate a statement made in a setting where the young person is being interviewed by an officer as the person to whom any such statement is made.

10) It would also appear to require the police officer to be in a position to make an assessment of the person’s age and level of understanding. The rights must not simply be read but explained. That would be remarkably difficult to do without having had the opportunity to engage the young person in some way. Once again, this would be consistent with the circumstances in which a statement is taken.

11) If those rights are to be waived, after having been “clearly explained” in appropriate language, according to section 146(4) the waiver must be either recorded on video tape or audio tape or be made in writing and contain a statement signed by the young person that he or she has been informed of the right being waived. Once again, the provisions of s. 146 contemplate the statement being made or taken in a situation where recording equipment is available or at least where the written release forms can be accessed. It would not be at all reasonable to require a police officer to

fully explain the rights under s. 146 in the meaningful way intended, and have the young person sign a waiver of those rights, perhaps in his or her notebook, all while dealing with the safety issues of getting the young person securely in custody.

Section 146(3) Exception

12) A statement given by a young person before those rights are explained is not admissible. There is an exception. Section 146(3) provides that such a statement may be admissible if it is an oral statement, made spontaneously before the police officer has had a reasonable opportunity to comply with the requirements. Obviously, the exception does not apply to a written statement. It does not apply to answers to questions asked by the police. The police simply cannot interrogate, question or even invite a statement from a young person before the rights under s. 146 have been explained.

13) The statement here was made orally and was spontaneous. It was not solicited by the police but was made by the young person before any questions were asked of him. The issue is whether this was before the police had a reasonable opportunity to explain those rights.

Reasonable Opportunity to Comply

14) The evidence of Detective Constable Fish, who effected the arrest of Mr. D. was that he advised the young man of the right to remain silent, the right to call counsel and the right to contact a parent. He says that when arresting young people he

always includes the reference to the right to contact a parent. He did not add that the young person had the right to have a parent present with him before making a statement.

15) Defence counsel argues that this is a fatal flaw in the procedure. Even though the arrest was being undertaken in the context of the execution of a warrant for firearms, adding that one informational component would not have taken any significant time over and above what had already been done. If there is time to tell him that he has a right to call a parent, there is time to tell him that he has the right to have any statement made in the presence of a parent.

16) The issue of reasonable opportunity has to be considered in the context. The matter does not turn simply on whether Detective Constable Fish could have taken 15 seconds to have uttered the words. The rights under s. 146 are not determined by how fast a police officer can fire the words at a young person and perhaps elicit a mumbled response. At that point and in those circumstances, there would be no way for the officer to have properly assessed the level young person's level of understanding, and no way in which he could have reasonably had a waiver explained and signed by the young person.

17) This was not a situation in which the police had detained a person and were in the stages of preparing to take a statement or to ask questions. They were in the process of executing a warrant. The concern at the time was with safely gaining control of the situation, searching the residence and making the arrests. This was neither the time nor the place to sit with the young person and explain in detail the

rights under s. 146, including having him sign the waivers that are a part of that process.

18) Detective Constable Fish told him about the rights that were relevant in the context of the arrest in the form appropriate to the circumstances. The young person was made aware that he did not have to say anything. He was told that anything he did say would be used against him in court. He was told that he had the right to call a lawyer and a parent. His response was that he did not want to call either. His words were to the effect, "Just get me out of here Cuz."

19) Reasonableness or the definition of "reasonable opportunity" involves considering both time and situation. In this case, no significant period of time elapsed from the arrest to the utterance. The young man had been arrested only moments before and was being transported to the police vehicle. He was not even stationary at the time. He had not been asked to sit somewhere and wait. If a young person is arrested and some time passes before he or she is advised of those rights under section 146, it may well be that any spontaneous utterance made during that time would not be admissible.

20) This was a situation in which firearms had been found in the residence. There was what was described as a "din", with a number of police officers, family members and some young children present. It is not reasonable to require the police to stop, in the middle of this, and undertake the kind of process that is often seen in advance of statements being taken from young persons.

21) In terms of time elapsed, Detective Constable Fish could indeed have uttered the additional words that the young person had the right to have an adult present prior to making any statement. As he said, no one was anticipating taking or receiving a statement. It would, in that sense, have amounted to just words, in a charged situation that really meant nothing unless they had been explained and understood. The detective constable quite properly informed him of his rights upon arrest. He was told that he didn't have to say anything and that if he did, it could be used against him. He was told that he had the right to contact a parent. When no statement was being taken that is what was reasonable in these circumstances.

22) If the police do decide to take a statement and question a young person, those rights would have to be explained fully with all of the waivers associated with them. That is an important process. If that can be done, while standing in the midst of a weapons search, section 146 will have been rendered a mere formality. Those requirements involve more than merely firing words at a teenager. It should have more meaning than that.

23) In the few moments before getting into a police car, expecting the police to provide the kind of explanation required is not reasonable.

24) In this case, the utterance was made before the police had the reasonable opportunity to comply with the requirements of section 146.

25) The utterance as alleged to have been made is admissible in evidence.

Judge Jamie S. Campbell
Judge of the Provincial Court of Nova Scotia