IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Rhyno, 2013 NSPC 53

Date: July 23, 2013
Docket: 2358517 and 2358518
Registry: Dartmouth

Her Majesty the Queen

v.

Duane Alan Rhyno

DECISION

Judge: The Honourable Judge Jamie S. Campbell

Heard: June 28, 2013

Decision: July 23, 2013

Charge: cc 253(1)(a) and 253(1)(b)

Counsel: Roland Levesque - Crown Attorney

Stanley MacDonald, Q.C. - Defence Counsel

By the Court:

1. This case involves a series of applications under the Canadian Charter of Rights and Freedoms, (the "Charter"). The first of those is for a stay based on the assertion that Mr. Rhyno has been denied the right to a trial within a reasonable time as provided in section 11(b) of the Charter. If that application is successful the other matters would become moot. Those applications each relate to the manner in which a demand for a breath sample for analysis using an approved screening device is made.

2. Mr. Rhyno was charged with these offences on 4 August, 2011. His first court appearance was on 14 September 2011. The matter is now tentatively set to conclude on 13 December, 2013, some 27 months later. The first request for disclosure was made on 12 September two days before that first court appearance. At that time, his counsel, Mr. Stan MacDonald Q.C., requested audio/video footage of Mr. Rhyno while he was at the police station, RCMP call history/dispatch records, handwritten notes made by the arresting officer, and maintenance records for the screening device and the approved instrument for the 6 months preceding the date of the incident. On 14 September there were some additional requests for disclosure made. Those involved footage from any camera equipment in the police vehicles, details of video surveillance in the police station and computers from the police computer in the vehicle operated by the officer at the scene.

3. On 14 September 2011 the matter was adjourned until 22 November 2011, while the defence waited for that disclosure.

4. In the meantime however, the matter did not simply go quiet. Mr. Roland Levesque, Senior Crown Attorney responded in a letter to Mr. MacDonald dated 3 October 2011. He addressed each of the requests. Mr. Levesque indicated that there were no audio or visual recording capabilities at the police station on 4 August 2011. He said that with respect to the maintenance records for the approved screening device and the DataMaster, those machines undergo routine maintenance on an annual basis. During the time period in question there had been no maintenance performed on the DataMaster and the ASD was newly issued and had not undergone maintenance. Mr. MacDonald promptly answered three days later. He clarified that he was looking for both the maintenance records from the last maintenance carried out and the results of all tests performed on the instrument in the 6 months before Mr. Rhyno's test. He said that it was "difficult to believe" that there were no audio or visual recording capabilities in the police station at the time. He said that Mr. Rhyno had observed surveillance cameras in the area. Mr. MacDonald asked for some follow up specifically on that request.

5. Once again, Mr. Levesque promptly responded on 24 October. He said that he would request the records of the last maintenance performed but would not

request or provide records of the results of all tests performed in the previous 6 month period. He confirmed his understanding that at the time of the incident cameras and recording equipment were in the process of being installed but were not active until 6 September 2011. That at least was what the RCMP had told him. Mr. MacDonald replied on November 4th. He noted that no disclosure had been provided regarding the requirement to have an ASD brought to the scene. He asked for that information. He noted that he had still not received the notes of the officer at the scene, despite the passage of three months. With regard to the request for records of tests performed in the previous 6 months he noted that the information would be relevant to the issue of the functionality of the instrument. There was a clear disagreement about that specific issue. Mr. MacDonald didn't give up on the recording issue either. He asked for "any and all documentation in the possession of the Royal Canadian Mounted Police pertaining to the installation of those devices."

6. Without delay Mr. Levesque got back to him on 8 November. He disagreed with the assertion that the records for the previous 6 months would be relevant in the absence of a factual foundation. He also confirmed that as of the date of the incident the video equipment was being installed but actual recording did not take

place until 6 September. If further information was still being sought he noted that an application to court would have to be made.

7. Mr. MacDonald, once again, very promptly, got back to him on 16 November. He noted that the police notes were photocopied in a way that cut off time notations. As Mr. MacDonald asked rhetorically in this application, one might ask just how difficult it can be for the police to make photocopies of notes. Mr. MacDonald in that letter alluded to making a court application to get the records of the tests he had requested. On the video recording issue, on 14 November 2011 Mr. Rhyno made an application to Public Works Canada under the Access to Information Act. That request was for information about the cameras that had ben installed and operational at the RCMP detachment in Sackville.

8. When the parties were in court on 22 November 2011, plea was again set over until 2 February 2012. The dispute with regard to disclosure issues particularly with regard to what information was relevant was still ongoing.

9. That dispute continued actively. On 4 January 2012, Mr. Rhyno got an answer from Public Works. The document they provided told him that cameras had been installed in 2003/2004. The cameras were upgraded in September 2011 with the addition of some cameras and the switch to a digital format. A note from Terry Holland, with Finance Administration of the RCMP indicated that prior to the

system upgrade in the first week of September 2011, the system recorded to hard disk drive with a retention period of about 40 days. The old system was operational until the first week of September 2011. On 16 January 2012, Mr. MacDonald emailed Mr. Levesque. He once again mentioned the need to have a copy of the police notes with the time notations included. His frustration is understandable at this point. It just shouldn't take that long to get someone three properly photocopied pages.

10. Mr. Levesque responded on 26 January 2012. At that time the complete police notes were provided. Mr. MacDonald again replied quickly. On 7 February 2012 he clarified the request for information pertaining to an "offline search" for all CPIC queries conducted on a particular license plate. Once again, Mr. Levesque was right back to him. Some information was provided with regard to the "offline" computer logs.

11. At this point it is quite apparent that neither lawyer is inclined to waste time. When a letter is received the response is both timely and relevant. There is very little by way of "churn" or letters intended to get the ball back in the other person's court with a curt acknowledgement of receipt. They are both attentive to the issues. There was, once again, a clear and rather precisely defined disagreement about what should be disclosed.

12. The parties were in court again on 5 March 2012. A trial date was set for 28 January 2013.

13. On 16 November 2012 Mr. MacDonald wrote to Mr. Levesque setting out a list of 11 outstanding items for disclosure. He drew Mr. Levesque's attention to the Supreme Court of Canada decision in R. v. St.–Onge Lamoureaux[1] which had been decided only that month. He reiterated his request for disclosure of the records of other tests performed using the instrument in light of the Supreme Court judgment. That decision confirmed that the so called "Carter defence" was no longer available and that the functioning of the instrument was of increased significance.

14. Once again, Mr. Levesque responded on 4 December 2012 and noted that his interpretation of the R. v. St.–Onge Lamoureaux decision did not support the disclosure of those additional items. He noted that he believed it was important to have the court rule on the disclosure request. On 12 December Mr. MacDonald emailed him and asked whether this meant that the 28 January 2013 trial date would now be used for a disclosure application. Mr. Levesque replied the same day and confirmed that understanding.

15. That trial date was then used for the disclosure application which resulted in an order being made requiring the Crown to disclose six of the 11 items that the

[1] [2012] S.C.J. No. 57

Crown had argued it should not be required to disclose. Two of the remaining five had been abandoned. There was no requirement to disclose three of those items. Those required to be disclosed largely involved documents pertaining to the operation of the approved instrument, including maintenance records and records of its functioning over a period of time.

16. The matter was set for trial on 28 June, and 5 July, 2013. The first date was used for this application. On 5 July when the parties appeared to hear the decision on the application things started to unravel again. Mr. MacDonald noted that he had recently been provided with a copy of a video of Mr. Rhyno at the police station in Sackville. The video that the police had firmly and in no uncertain terms told him through Crown counsel did not exist, not only existed but had been retained over all these months. Mr. MacDonald quite properly requested an adjournment to review the recording because it was relevant to both the Charter applications and the trial itself. The next court date available for the trial, when both counsel and I would be available was 13 December 2013, just about 2 and a half years after Mr. Rhyno was first charged.

17. The onus with respect to the stay application is on Mr. Rhyno. He must show, on the balance of probabilities that his rights under s. 11(b) of the Charter

have been breached and that a stay is the appropriate remedy. A stay of proceedings should be ordered in only the clearest of cases.

18. The Nova Scotia Court of Appeal has provided a summary of the law as it relates to post-charge delay in R. v. MacIntosh [2]. The court affirmed the principles set out in the Supreme Court of Canada decisions in R. v. Morin[3] and R. v. Askov[4].

19. As Justice Cromwell in R. v. Godin[5] said, it is important not to lose sight of the forest for the trees. He referred to Justice Sopinka's comments in R. v. Morin, that the general approach is not by the "application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which s. 11(b) is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay."

20. That would not appear to mandate the simple application of judicial intuition based on a "big picture" sense of the situation. There is a process for deliberation and factors to be considered. The focus however should not be on the precise calculation of the number of days but on a balancing of the interests involved.

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[2] [2011] N.S.J. No. 660, 2011 NSCA 111, 250 C.R.R.(2d) 239, 310 N.S.R. (2d) 274, 281 C.C.C. (3d) 291,100 W.C.B.(2d) 143

[3] [1992] 1 S.C.R. 771, [1992]S.C.J. No. 25

[4] [1990] 2 S.C.R. 1199, [1990] S.C.J. No. 106

[5] [2009] S.C.R. 3, 2009 S.C.J. No. 26, 2009 SCC 26

21. The s. 11(b) interests to be balanced include the right to liberty and security of the person, and the ability to make full answer and defence. They are considered along with the factors that caused the delay and the societal interests of having a trial on the merits.

22. A court should consider the length of the delay and whether there has been a waiver of any time periods. The reasons for the delay should be examined. That should include a consideration of the inherent time requirements of the case, the actions of the accused person as they relate to the delay, the actions of the Crown as they relate to the delay, limitations on institutional resources and other reasons for the delay. The reasons for a delay can be complex and in many respects interrelated.

23. It can be difficult to unravel the reasons why a case has taken as long as it has to get to court. Focusing only on the chronology and gaps of time is, to use Justice Cromwell's metaphor, to see the trees but miss the forest. It is not a simple matter of assigning "fault" for each period of delay and tallying them up.

24. The court should consider the prejudice to the accused caused by the delay. That prejudice may either be inferred or actual.

25. The nature of the case is also a consideration. The value to society of taking a matter to trial must be weighed against the rights of the individual. That is not to say that some matters are just so important that a long and otherwise unreasonable delay which compromises individual rights should be acceptable. Rights are not traded off against practical considerations but their scope and meaning may be in part informed or defined by how they apply in the real world.

26. The remedy for a violation of an accused person's right to be tried within a reasonable time is the issuing of a stay of proceedings. "After the passage of an unreasonable period of time, no trial, not even the fairest trial possible is permissible."[6]

27. The length of time in this case from charge to trial is about 27 months. That period of time is sufficient to warrant an inquiry.

28. There is no suggestion that Mr. Rhyno or his counsel waived any time periods in this matter. Mr. MacDonald, to the contrary, noted in correspondence to Mr. Levesque that he was not waiving any time periods. He was conscious of the delay, and commented on it. This is not a situation where the issue of delay is an afterthought thrown into the mix before a trial.

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[6] R. v. Rahey [1987] 1S.C.R. 588

29. In this case, there are really two main reasons why it has taken two years to get the matter to trial. The first is an institutional delay arising from court dockets that result in trials being scheduled months in the future. On 5 March 2012 a full day trial was set for 28 January 2013. That delay of about 11 months is an institutional delay that is not in any way the responsibility of Mr. Rhyno or his counsel. Institutional delay of that kind is the responsibility of the Crown. That period is three months beyond the 8 to 10 month guideline for Provincial Courts as set out in R. v. Morin.

30. The trial however did not go ahead as planned. The trial date was instead used to deal with disclosure issues. Trial dates were set for June and July 2013. The delay from January 2013 until late June and early July 2013 is not unreasonable. A further delay was caused when the matter was again set over on 5 July 2013. The institutional delay from July until December 2013 is a further 5 months. Once again, that is not unreasonable.

31. The other main cause for delay in this matter was the issue of disclosure. That can be divided again into two categories. One is a dispute regarding disclosure and the other is a failure to disclose. The dispute resulted in some of the delay from the first appearance in September 2011 until 5 March 2012 the date on which the parties appeared to set the first trial date. That also gave rise to the use of

that eventual trial date, in January 2013, for the disclosure application. That application was resolved substantially though not entirely in favour of Mr. Rhyno.

32. The Crown has the right to dispute claims for disclosure. It cannot be expected to accede to any request or take the risk that the delay resulting from that dispute will be in every case counted as a delay "caused" by the Crown. Neither the position taken by the Crown in this case, nor the manner in which that position was advanced was unreasonable. The position taken by the Crown with respect to disclosure issues was not accommodating to the defence. The Crown doesn't have to be accommodating. The argument put forward by Crown counsel at the time of the application was based on an interpretation of case law that was considered and not unreasonable. There was no sense at all that the Crown position had been taken as a thoughtless or lazy default to the negative.

33. The decision in St.–Onge Lamoureaux provided some guidance on the matter but it was hardly a firm and explicit statement of the law as it relates to disclosure in these kinds of matters. While I did not ultimately adopt the position advocated by the Crown the arguments advanced by Crown counsel were based on a reasonable interpretation of the Supreme Court of Canada decision.

34. The disclosure issue took up a considerable period of time. That time would be more fairly described as part of the inherent time requirements of the case than

as delay caused by the Crown. Some cases are more complex than others. Impaired driving cases are not usually counted among those that are at the higher end of complexity. Some do require more time than others to resolve reasonable disagreements regarding things such as disclosure. That appears to have been the case here.

35. The second category of disclosure delay relates to the disclosure of surveillance materials immediately before the already long scheduled trial date of 5 July 2013. The Crown action in that case was not based on a reasonable interpretation of case law but on a failure to realize that the police had information that they positively denied having. Mr. Levesque's carriage of the matter was at all times focused and diligent. He could only respond based on what the police were telling him with regard to the internal operations of the detachment. Here he was told there was no recording. There wasn't much else that he could do, other than continue to make inquiries. People make mistakes. That truism is proven every day in courts across the country. The matter here is not about bad faith but here the RCMP continued to deny the existence of the recordings in the face of Mr. MacDonald's continued questioning. He asked more than once. He just didn't take "no" for an answer. Rather than digging deeper, the RCMP it seems just repeated the response assuming they had been right the first time. They would not have to

have dug very deep at all. Mr. Holland, with RCMP Management and Administrative Services had the information all along. As he said, it was "common knowledge" that he was the "go to" person for this kind of thing. The only person it seems who went to the go to person was Stan MacDonald who had him served with a subpoena for court.

36. With regard to the actions of the accused and his counsel, Mr. MacDonald was faultlessly diligent in dealing with the matter. It could not be fairly said that his actions caused any of the delay.

37. There is nothing to suggest that Crown counsel was anything other than diligent in responding to requests and demands for disclosure even though the response may have been in the negative. There were no delays caused by any failure on the part of the Crown to be ready at each court appearance. This was not a case that was caught up in a pattern of repeated and unfruitful court appearances. Crown counsel was clear in taking the position with respect to disclosure. There was no delay occasioned by the Crown's failure to address disclosure or by vague assurances that the disclosure matters would be resolved. Mr. Levesque stated his position clearly at an early stage of the process.

38. Crown counsel did not fumble the ball on the disclosure issue in this case. There was no failure to understand the nature of what was being sought. Mr.

Levesque turned his mind to both the practical and legal issues. The circumstances of the delay here however were such that they were not the responsibility of Mr. Rhyno or his counsel but to the extent that they arose from the position taken by the Crown the reasonableness of the Crown's position and the diligence with which it was pursued and advanced has to be taken into account. The first disclosure issue was not a "failure or delay in disclosure"[7] but a legitimate disagreement about disclosure. With respect, those are different things. The second disclosure issue was clearly a failure to disclose. It is not a matter of bad faith or lack of competence, but it is a delay for which the Crown is ultimately, fully and entirely responsible. Despite the issue being flagged more than once by Mr. MacDonald no one it seems was prepared to go beyond the initial statement that the recording equipment had not been operational.

39. The nature of the charge should also be considered. In this case, Mr. Rhyno is facing charges of driving while impaired by alcohol. There is a high societal interest in having matters of this kind resolved by a trial of their merits. At the same time, it must be acknowledged that impaired driving charges have been among the more common of the subject matters in respect of which stays based on the infringement of the right to a trial within a reasonable time have been issued.

[7] R. v. Morin supra. Para 46

40. The prejudice to Mr. Rhyno must be considered as well. Prejudice can be presumed when a person is awaiting trial on criminal charges. The stress, both personal and professional is considerable. Mr. Rhyno is a lawyer. Facing these charges and being required to appear in court as an accused person, over a period of time has undoubtedly taken its toll. He has given evidence about that stress. There have been a few newspaper articles and the matter has been reported in an online news provider. He has been under scrutiny of the Bar Society and is aware of what Mr. MacDonald described as its "ominous presence". His former law firm has asked him to leave.

41. In order to instruct counsel for cross examination of Crown witnesses he would also be required to recall the details of what happened more than two years ago.

42. At the same time, this is not a matter in which the delay has resulted in witnesses being unavailable or evidence being lost or misplaced or deteriorating in quality. It is a matter in which the Crown case depends largely on an officer's observations with recorded police notes available to refresh his memory when required. Those notes have been disclosed at a relatively early stage to Mr. Rhyno and his counsel.

43. Furthermore this is not a case in which Mr. Rhyno's liberty has been seriously restricted pending trial. He has not been on house arrest, on curfew conditions or subject to other limitations on his ability to go about his own life. The scrutiny of the Bar Society relates to this matter but as Mr. Rhyno has acknowledged the Society is aware of other charges that he has faced. He has also been subject to previous disciplinary action by the Society.

44. It is important to distinguish between stress arising from the charges and stress arising from the delay. Mr. Rhyno's departure from his law firm was a more complicated matter than simply saying it was because of the delay in getting this matter to trial. As he noted, the charges against him were only part of the reason and at that, it would be very hard to separate the impact of the delay from that of the charges themselves.

45. Mr. Rhyno gave evidence about his insurance being cancelled as of 9 July 2013 if he could not prove that the matter had been resolved by that date. Once again, this may relate to the delay but also relates to the fact of the charge.

46. Mr. Rhyno is concerned about the media attention. To the person charged any media attention probably seems pretty intense. This matter has not been a high profile one. It has been the subject of perhaps a couple of articles in a daily paper

and a couple of articles in an online news subscription service. It has not captured the public imagination.

47. The interests of Mr. Rhyno, along with the principles of individual liberty which those interests represent, have to be balanced against societal interests. The original delay here is significant but not ponderous. The matter has not moved along through numerous meaningless court appearances caught in the churn of the system. The reason for the delay relates in some respects to court scheduling, which does not excuse it, or mitigate it. Some of the delay relates to legitimate disagreements reasonably argued, regarding disclosure. Some further delay relates to the failure of the police to have a process in place to identify the existence of the recordings that were requested. It was in a sense a failure to take the defence request with sufficient seriousness. When Mr. MacDonald insisted that there must be a recording the answer was simply to repeat what had already been said rather than considering that he might just have a point. There were cameras and they had been operating. The new system didn't interrupt that. It merited another inquiry, which it didn't get. The practical result was that on top of the institutional delay has been thrown a further thoroughly unnecessary delay.

48. While Mr. Rhyno has not been subject to serious restrictions on his liberty pending trial and his ability to mount a defence has not been compromised in a

significant way he has a right to a trial within a reasonable time. Neither he nor his counsel has contributed to the delay. The Crown's position on disclosure of some information resulted in a delay but not a delay that was unreasonable given the reasonableness of the position and the promptness with which it was put forward. The failure of the police to disclose information until the last minute was another thing, especially in the context of a matter that had already been ongoing for some considerable time. That has had the effect of stretching the delay out to 27 months. The reason for the delay was to some extent an oversight on the part of the RCMP officers involved, but it was an oversight they were given opportunities to correct by Mr. MacDonald's repeated inquiries. For whatever reasons those inquiries weren't treated with the level of seriousness they properly merited. Both the reason for that most recent delay and the context of that delay, which involves a matter that has already been going on for some considerable time, have to be considered.

49. When the interpretation of the Charter is involved principles matter. Those principles can be overwhelmed in the parsing of the causes underlying specific periods of delay and precise degrees of prejudice. In this case, society's interest in having Mr. Rhyno tried on these charges must give way to the protection of the Charter right to a trial within a reasonable time.

50. The application for a stay is granted.