PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Rondelet*, 2013 NSPC 74

Date: 20130826
Docket: 2408586
Registry: Pictou

Between:

Her Majesty the Queen

v.

Kirby Rondelet

DECISION ON ADMISSIBILITY VOIR DIRE

Judge:	The Honourable Judge Del W. Atwood
Heard:	August 26, 2013, in Pictou, Nova Scotia
Charge:	Paras. 253(1)(a) and 253(1)(b) of the *Criminal Code*
Counsel:	William Gorman, for the Nova Scotia Public Prosecution Service H. Edward Patterson, for Kirby Rondelet

By the Court:

Procedural history

[1] This is an admissibility-*voir-dire* decision in relation to Mr. Rondelet's charges under paras. 253(1)(a) and 253(1)(b) of the *Criminal Code.*

[2] A blended *voir dire* is being conducted by the court regarding the admissibility of evidence collected by police from Mr. Rondelet in the course of an impaired-driving investigation.

[3] On 30 April 2013, I was asked to rule on the admissibility of a statement made by Mr. Rondelet in the immediate aftermath of his arrest by Cst. Sutherland. I found that the statement was voluntary, and I found that there was no violation of Mr. Rondelet's Section 10 *Charter* rights.

[4] On 9 July 2013, when the trial resumed, I heard Cst. Sutherland's testimony regarding the content of that statement: "He said he wasn't driving. His friend, Earl MacNeil, was driving, but he was taking full responsibility. No big deal."

[5] The court resumed at that point the broader blended *voir dire* regarding the admissibility of utterances made allegedly by the accused to Cst. Sutherland and to Cpl. Lisa Dawn Whittington further on in the investigation. The court also re-embarked upon that broader *voir dire* to determine the admissibility of breath analyses performed by Cpl. Whittington. The Crown admits a para. 10(b) *Charter* breach in relation to this evidence, and it is in relation to this evidence that I now render a decision.

Governing law

[6] The law governing the right to counsel upon arrest or detention was stated concisely by the Alberta Court of Appeal in *R. v. Luong*.[1] The onus is upon the person asserting a violation of his or her *Charter* rights to establish that the right to counsel as guaranteed by the *Charter* has been infringed or denied. Para. 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person. The informational duty consists in informing the detainee of his or her right to retain and instruct counsel without delay, and of the existence and availability of legal aid and duty counsel.

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[1] 2000 ABCA 301 at para. 12.

[7] The implementational duties are two-fold and arise upon the detainee expressing a desire to exercise his or her right to counsel. The first implementational duty is to provide the detainee with a reasonable opportunity to exercise the right, which may be delayed or deferred only in urgent or dangerous circumstances. The second implementational duty is to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity to retain and instruct.

[8] A trial judge must determine, first, whether in all the circumstances the police provided the detainee with a reasonable opportunity to exercise the right to counsel. The Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise that right. If the trial judge concludes that the first implementational duty was breached, an infringement is made out. If the trial judge is persuaded that the first implementational duty has been satisfied, only then will the trial judge consider whether the detainee who has invoked the right to counsel has been reasonably diligent in exercising it. The detainee has the burden of establishing that he was reasonably diligent in the exercising of his rights. If the detainee who has invoked

the right to counsel is found not to have been reasonably diligent in exercising it, the implementational duties either do not arise in the first place, or will be deemed suspended. In such circumstances, no infringement is made out. If a detainee who has asserted his or her right to counsel has a change of mind and withdraws the request for counsel, the state is required to prove a valid waiver. In such a case, state authorities have an additional informational obligation, which is to reassure the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity to retain and instruct. This is outlined in the decision of the Supreme Court of Canada in *R. v. Prosper*,[2] and is referred to commonly as a "*Prosper* warning."

The facts

[9] The facts before me are that, upon making the arrest, Cst. Sutherland read to the accused a para. 10(b) compliant right-to-counsel notification. When asked by Cst. Sutherland whether he wished to contact counsel, the accused's reply was

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[2][1994] S.C.J. No. 72 at para. 50.

"sure, call one". When asked by the officer whether the accused wished to make contact with legal aid duty counsel, the accused's response was "yep". At this point, Cst. Sutherland's constitutional duty was clear: He was to implement the accused's right to counsel by affording him access to legal advice in privacy via telephone once he had escorted the accused to the police detachment; he was under a positive duty to cease any attempts to collect evidence from the accused until that implementational obligation had been fulfilled. Unfortunately, that is not what happened; this is because, upon arriving in the bay area of the detachment, Cst. Sutherland proceeded to ask the accused if he still wanted to contact counsel. The accused's reply was "no". At that point, Cst. Sutherland steamed ahead and proceeded to turn the accused over to Cpl. Whittington, the qualified technician, in order to have her collect breath samples. Cst. Sutherland failed to provide the accused with a *Prosper* warning. Cpl. Whittington collected two breath samples from the accused and performed analyses of those samples. The corporal also had a conversation with the accused about what had lead up to his arrest. Mr. Rondelet was then turned back over to Cst. Sutherland and they spoke again about the circumstances that gave rise to the charges.

[10] The results of the breath-sample analyses and the utterances made by the

accused to Cpl. Whittington and to Cst. Sutherland following the para. 10(b) *Prosper* breach are the subject of this admissibility hearing.

Should unconstitutionally obtained evidence be excluded ?

[11] The prosecution concedes that in failing to provide Mr. Rondelet with a *Charter* compliant *Prosper* warning, the state's conduct constituted a violation of Mr. Rondelet's para. 10(b) *Charter* rights.

[12] Accordingly, there is no issue for the court to determine whether a *Charter* breach occurred. The existence of a *Charter* breach has been conceded. Nevertheless, the prosecution asserts that the entire evidence ought to be admitted; defence argues for exclusion. Therefore, the court turns its mind to a sub-s. 24(2) analysis as directed by the Supreme Court of Canada in *R. v. Grant*.[3]

[13] The prosecution, in its submissions to the court, placed considerable emphasis on *R. v. Williams* out of Ontario.[4] While informative, *Williams* is not

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[3] 2009 SCC 32.

[4] 2013 ONSC 1399.

binding upon this court. What I do find binding and very persuasive because of its factual similarity is the decision out of our Supreme Court in *R. v. LaFosse.*[5] In *LaFosse*, Robertson J. was required to embark upon a *Grant* analysis in the circumstances of a violation of a *Prosper*-warning breach, not unlike the fact pattern in this trial. I will use *LaFosse* as a binding guide for my decision regarding a sub-s. 24(2) remedy.

Seriousness of the breach

[14] With respect to the seriousness of the breach in this case–"seriousness" being the first criterion to be addressed by the court embarking upon a *Grant* analysis–the court would observe that the conduct of Cst. Sutherland was not blatant or flagrant. The initial *Charter* notification read by the constable to Mr. Rondelet was constitutionally compliant. Furthermore, unlike the situation in *R. v Burlingham*,[6] Cst. Sutherland did not pressure the accused into changing his mind about contacting counsel, and did not belittle counsel to undermine the accused's initial decision to speak with a lawyer. Having said that, it was Cst. Sutherland

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[5]2010 NSSC 240.

[6][1995] S.C.J. No. 39 at para. 14.

who instigated the problem by re-visiting the issue, after the accused had stated initially in clear and unequivocal terms that he wanted to talk to a lawyer.

[15] I cannot agree with the Crown's assertion that the breach in this case was a technical one. A technical breach is not one that undermines core *Charter* values. It is a core value that a person who has been arrested or detained be informed properly of the right to consult with legal counsel. This supports the core constitutional protection against self-incrimination as set out in para. 11(c) of the *Charter*.

[16] A waiver of the right to counsel must be clear and unequivocal. This is the purpose behind the necessity of a *Prosper* warning in circumstances when a detainee has changed his mind about seeking legal counsel.

[17] I cannot agree with the assertion by the Crown that this was a case of a defective *Prosper* warning. Rather, there was an entire absence of a *Prosper* warning. The further concern is that the constable testified that he always double-checks with detainees whether they wish to speak with legal counsel. This may, indeed, be a good practice when a detainee has initially declined the right to speak

with a lawyer. Double-checking with the detainee in such a circumstance fulfills the important *Charter* value of verifying whether the detainee is waiving the right to counsel unequivocally. However, re-visiting the issue after a detainee has expressed clearly a desire to contact legal counsel simply invites the detainee to question his initial judgment.

[18] I would note furthermore that *Prosper* has been around for close to two decades now, more than time enough for police officers to have been instructed properly on how to deal with change-of-mind situations.

[19] However, I draw a distinction in this particular case between the collection of breath-sample evidence which was statutorily compelled from the accused in virtue of Section 254 of the *Criminal Code,* and the non-compelled utterances made by the accused to Cst. Sutherland and Cpl. Whittington. In my view, the statutory compulsion minimizes or renders less serious the nature of the *Charter* violation.

[20] These factors militate in favour of the admission of the breath analysis and militate in favour of the exclusion of the utterances.

Impact of the breach

[21] With respect to the issue of the impact upon the accused's *Charter*-protected rights, police collected and analysed two samples of the accused's breath, potentially highly incriminating evidence should preconditions for the presumptions of identity and accuracy be proven. However, it is also highly accurate evidence that is statutorily compelled.

[22] Breath samples are also minimally intrusive as noted in *LaFosse*[7] and *Grant*.[8] With respect to the collection of breath samples, these considerations militate in favour of inclusion.

[23] However, with respect to the utterances, which were not statutorily compelled, it is not clear to the court that the accused would have made those utterances had he been counselled by a lawyer to remain silent.

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[7] *Supra*, note 4, at para. 55

[8] *Supra*, note 3, at para. 111.

[24] The court also takes into account the principles set out in para. 97 of the *Grant* decision which reads as follows:

> The third inquiry focuses on the public interest in having a case tried fairly on its merits. This may lead to consideration of the reliability of the evidence. Just as involuntary confessions are suspect on grounds of reliability, so may on occasion be statements taken in contravention of the *Charter*. Detained by the police and without a lawyer, a suspect may make statements that are based more on a misconceived idea of how to get out of his or her predicament than on the truth. This danger where present undercuts the argument that the illegally obtained statement is necessary for the trial of the merits.

[25] In my view, the inherent unreliability of utterances made when proper legal advice has been withheld militates in favour of exclusion.

Trial on the merits

[26] With respect to the issue of public interest, as outlined by Robertson J. at para. 55 of the *LaFosse*, there is a substantial public interest in having impaired driving cases tried on their merits especially when personal injury or property damage has occurred. In my view, this interest is advanced when the trial is based on reliable evidence, but not advanced when based upon dubious evidence of

questionable reliability; this militates in favour of the inclusion of the breath analysis and exclusion of the statements.

A balancing of factors and remedy

[27] Pursuing the balancing principle–which is the final step in the *Grant* analysis–recognizing that this is not a mathematical calculation requiring the tallying up of pluses and minuses both in favour of and against the admissibility of evidence, I conclude that based on the less serious nature of the violation pertaining to the collection of the breath samples, based on the inherent reliability and statutory compulsion of the analysis and based on the strong public interest in the trial of the case on the merits, I rule admissible the results of the breath analysis performed by Cpl. Whittington; however, recognizing the inherent unreliability of the statements made by Mr. Rondelet to Cpl. Whittington and Cst. Sutherland following the *Prosper* -warning violation, I rule that those statements be excluded from evidence.

[28] This *Charter* ruling makes it unnecessary for me to rule on the voluntariness of the statements.

ORDERED ACCORDINGLY

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J.P.C.