IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Kyle Whiteway, 2003 NSPC 022

Date: 20030423
Case No.(s): 1145951
Registry: Halifax

Between:

R.

v.

Kyle Whiteway

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally on April 23, 2003 in Halifax, Nova Scotia
Counsel:	Christopher Nicholson for the Crown Roger A. Burrill for the Defence

By the Court

Introduction

[1] The police stopped the accused, Kyle Whiteway, as he was operating a motor vehicle with a flat tire on a highway in the Halifax Regional Municipality. On further investigation, they observed that he slurred his speech, alcohol emanated from his breath and he was unsteady on his feet. They chartered and cautioned him and be blew and failed the SL2 test. Consequently, they arrested him for impaired driving and later at the police station he provided samples of his breath that on analysis recorded that his blood alcohol concentration was above the legal limit. He now challenges the informational component of the ***Charter*** advice that the police read to him.

Voir Dire

[2] Essentially, the evidence on the voire dire disclosed that the police read from a card that did not mention the availability of duty counsel or Legal Aid. The card referenced only that he could receive free legal advice. Accordingly, the accused submitted that subsequent to decided cases such as ***R.*** v. ***Moore***, [2002] N.S.J. No.561 (S.C.), upheld on appeal, [2002] N.S.J. No.570 (C.A.), the police did not meet the constitutional requirements for the ***Charter*** advice.

[3] On the other hand, the Crown submitted that the police acted in good faith as they made every effort for him to exercise his rights. The card referred to free legal advice which the accused declined to accept. Therefore, I should consider the total circumstances, as disclosed by the evidence, and not just the fact that the police read from a card.

Analysis

[4] Following a line of authorities such as ***R.*** v. ***Brydges***, [1990] 1 S.C.R. 190, [1990] S.C.J. No. 8, ***R.*** v. ***Bartle***, [1994] 3 S.C.R. 173, [1994] S.C.J. No.74, ***R.*** v. ***Chisholm*** (2001), 191 N.S.R. (2d) 369 (C.A.), [2001] N.S.J. No.58 (C.A.), ***R.*** v. ***Nickerson***, [2001] N.S.J. No.448 (C.A.) and ***R.*** v. ***Moore***, [2002] N.S.J. No.561 (S.C.), upheld on appl. [2002] N.S.J. No. 570 (C.A.), it ought now to be clear what information the police must supply as a matter of constitutional right to an arrested or detained person. On the evidence before me and which I accept, I find that the information that the police provided to the accused was not comprehensive as it made no reference to the availability of the Legal Aid program or to duty counsel. It merely said: "You have the right to instruct and retain a lawyer without delay. You also have the right to free and immediate legal advice by calling 424-8825, or 1-800-300-7792. Do you understand?" Consequently, I conclude that the accused has established that his right to information under s.10(b) ***Charter*** was violated.

[5] Therefore, the issue remains on whether, pursuant to s.24(2), I should exclude the results of the Breathalyzer test. When contemplating the exclusion of evidence, ***Collins*** v. ***The Queen*** (1987), 33 C.C.C. (3d) 1 (S.C.C.), and ***R.*** v. ***Stillman*** (1997), 113 C.C.C. (3d) 321 (S.C.C.), set out that I must consider the fairness of the trial, the seriousness of the ***Charter*** violation and the possibility that if I were to exclude the evidence whether the exclusion would bring the administration of justice into greater disrepute than if I were to admit it.

(a) trial fairness

[6] I think that a detained person should understand that free advice from duty counsel was also available whether or not he qualified for Legal Aid. Additionally, the Legal Aid Program was also available should he qualify to use it. Here, I find that the accused was not aware of these options and conceivably, he might have acquiesced to the demands of the police believing, in the circumstances, that it was the beneficial thing to do. If, as it was suggested, he had been properly informed of all the options available it would have given him an opportunity to make a real informed choice that could affect the outcome of the trial. Not being fully informed had indeed prejudiced him at his trial and has rendered it unfair. I agree.

(b) seriousness of the breach

[7] The information that the police must provide is a matter of constitutional right. Those rights have been pronounced in many recent authoritative cases, such as ***Chisholm*** and ***Moore***, yet with no changes in police practices. Thus, I can reasonably infer and conclude, as the old practice persists, that it must be a case where the police have not turned their minds to address this important issue. Thus, I think that given the lack of care in discharging their duty to communicate the constitutional rights as determined by the courts, in the circumstances, it precludes a finding that the police acted in good faith. Further, it is indicative of a more serious violation.

(c) the effect of exclusion on the reputation on the administration of justice

[8] I think that, in the circumstances, admitting the evidence after the violation of s.10(b) ***Charter*** would adversely affect the administration of justice than by excluding it. Its admission would appear to condone what seems to be a persistent failure by the police to recognize the importance of what they are required constitutionally to communicate to an arrested or detained person. Consequently, I will exclude the obtained evidence.

Conclusion

[9] On the evidence before me and on the analysis that I have made, I conclude that the police violated the accused ***Charter***, s.10(b) rights. Consequently, in the circumstances, I will exclude the evidence obtained.