IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Bailey, 2008 NSSC 68

Date: 20080306
Docket: 278551
Registry: Pictou

Between:

Joseph Alexander Bailey

Appellant

v.

Her Majesty the Queen

Respondent

DECISION

Judge:	The Honourable Justice Douglas L. MacLellan
Heard:	January 22nd, 2008, in Pictou, Nova Scotia
Decision:	March 6th, 2008
Counsel:	Stanley W. MacDonald, QC, for the appellant Del Atwood, for the respondent

By the Court:

[1] The appellant, Joseph Alexander Bailey, appeals his conviction by Judge Clyde MacDonald of the Provincial Court on three drinking and driving related charges.

[2] The appellant was charged as follows:

> "That he did, at or near Plymouth, Nova Scotia, on or about the 5th day of September, A.D. 2006, did while his ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle, contrary to Section 253(a) of the Criminal Code of Canada.
>
> Furthermore, did without reasonable excuse, failed to comply with a demand made to him by a peace officer under subsection 254(3) of the Criminal Code in the circumstances therein mentioned, to provide then, or as soon thereafter as is practicable, such sample of his breath, contrary to Section 254(5) of the Criminal Code of Canada.
>
> Furthermore, did operate a motor vehicle while disqualified from doing so by reason of an order pursuant to Section 259(1) of the Criminal Code, contrary to Section 259(4) of the Criminal Code of Canada."

[3] At the trial of these charges in Provincial Court and after hearing the evidence and the submissions of Crown counsel and from the appellant who was

self-represented, Judge MacDonald found the appellant guilty of the three charges but stayed the refusal charge and entered convictions on the two other charges.

[4] The appellant was sentenced to a total of six months in custody but was given credit for two months for time he had served prior to his sentencing. As a result of that credit he was therefore sentenced to three months on the impaired driving charge and one month consecutive on the driving while disqualified charge. He was also placed on probation for a period of three years and prohibited from driving for a period of five years.

[5] Shortly after his sentence the appellant filed a Notice of Appeal and made application for release from jail pending his appeal. His release was denied and he has now served all his jail time. Prior to the hearing of the appeal the appellant engaged counsel to act for him and counsel filed an Amended Notice of Appeal dated November 15th, 2007, in which he alleges the following grounds of appeal:

> "(1) That the learned trial judge erred in determining that the Appellant's right to counsel was not infringed;
>
> (2) That the learned trial judge erred in finding that the Crown had proven the offence of failing to comply with the breathalyzer demand without first

> considering whether the Appellant's evidence raised a reasonable doubt on that issue;
>
> (3) That the learned trial judge conducted the trial of the unrepresented Appellant in such a manner as to deprive the Appellant of a fair trial or to result in the appearance of an unfair trial."

[6] The test which this Court must apply to this summary conviction appeal is set out in the case of ***R. v. Nickerson*** (2002), 178 N.S.R. 189 where Cromwell J.A. of our Court of Appeal said: [page 191]

> "The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see ss. 822(1) and 686(1)(a)(i) and **R. v. Gillis** (1981), 45 N.S.R. (2d) 137; 86 A.P.R. 137; 60 C.C.C. (2d) 169 (C.A.), per Jones, J.A., at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns (R.H.)**, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was <u>some</u> evidence to support the trial judge's conclusions nor a new trial on the transcript."

[7] Counsel for the appellant in his brief argues that this Court should order a new trial for the appellant because of alleged errors made by the trial judge in how he dealt with the appellant at trial and because of errors he maintains were made by

the trial judge in his interpretation of the law. I will deal with each issue as raised by counsel for the appellant.

GROUND ONE - Right to Counsel

[8] Counsel in his brief sets out the basis for this ground of appeal. He states:

> "It is submitted that the Appellant's right to counsel was, in fact, infringed in three ways:
>
> (1) the Appellant was not provided with the full informational component of his right to counsel and, in particular, his right to free representation through Nova Scotia Legal Aid;
>
> (2) the implementational component of the right to counsel was infringed in that the Appellant was not permitted or assisted to contact counsel of choice;
>
> (3) the police failed to advise the appellant of their obligation to "hold off" once it was apparent that the Appellant advised the police that he no longer wished to contact a lawyer."

[9] I agree with appellant's counsel that here the trial judge did not apply the proper test to determine if the appellant was advised of the availability of Legal Aid.

[10] The evidence before the trial judge was from the police officer, Cst. Foster. He testified about what he told the appellant. [Transcript Page 22]

> "Um...and then I read him, you have the right to retain and instruct a lawyer promptly without delay. You also have the right to free and immediate legal advice from...from duty counsel when making free telephone calls to (902) 420-8825 during business hours, and 1-800-300-7772 during non-business hours."

[11] On this point the trial judge said: [Page 8 of decision]

> "[17] I might return to this *Charter of Rights* regarding counsel. Mr. Bailey argues that this is not a proper right to counsel articulated by the police officer. Mr. Bailey argues that he should have been told about Legal Aid. And it's interesting in the cross-examination of Constable Foster, Constable Foster was asked if he mentioned Legal Aid. And, of course, Constable Foster's reply was that he didn't mention Legal Aid. And that's right if you look at his *Charter of Rights* caution regarding a lawyer/counsel. It doesn't specifically say Legal Aid. But if you look at it very carefully, it says:
>
> > You have the right to retain and instruct a lawyer in private without delay. You also have the right for free and immediate legal advice from duty counsel in making free telephone calls to 902-420-8825 during business hours and 1-800-300-7772 during non-business hours.
>
> [18] And there it is. And, of course, I have to determine whether or not that complies with the leading case coming out of the Supreme Court of Canada *R. v. Cyril Prosper*, a native and resident of Pictou County. And in that leading case, the majority of the Supreme Court of Canada noted that Section 10(b) of the *Charter* not only requires the detainee to be advised of his right to retain and instruct counsel without delay, the detainee must also be provided with

> information about access to counsel, free of charge. Where an accused meets the prescribed financial criteria set by provincial Legal Aid plans and information about access to immediate, although temporary, legal advice irrespective of financial status, through duty counsel. Thus if there is in existence a 24-hour duty counsel service, this must be communicated to all detainees as part of the standard Section 10(b) caution delivered by police.
>
> [19] So, I come to the conclusion that the officer complied with the law of the land regarding *Prosper* and gave Mr. Bailey a proper *Charter of Rights* caution regarding legal counsel, and indeed duty counsel, free and immediate duty counsel."

[12] In ***R. v. Moore***, [2002] N.S.J. No. 561 Justice Moir of this court dealt with the issue of what a detained person must be told about the availability of duty counsel and Legal Aid in which he said: [Paragraph 7]

> "On behalf of the Crown, Ms. Whalen submitted that the right to information guaranteed by s. 10(b) does not include being informed of "the difference between Legal Aid and duty counsel". It is sufficient that the police conveyed "the fact that free and immediate advice was available". R. v. Brydges, [1990] 1 S.C.R. 190, [1990] S.C.J. No. 8 established the obligation to inform detainees of the availability of immediate and temporary legal advice at no costs in places where duty counsel are available. Justice Lamer, as he then was, delivered the majority judgment. After providing an overview of Legal Aid and duty counsel systems in Canada and after referring to Canada's international commitments, which include reference to the provision of legal assistance without payment where the interests of justice require, Justice Lamer concluded at para. 23, p. 215 of the S.C.R.:
>
> > All of this is to reinforce the view that the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately. It now also means the right to have access to counsel free of charge where the accused meets certain financial criteria set up by the provincial Legal Aid plan, and the right to have access to immediate,

> although temporary, advice from duty counsel irrespective of financial status. These considerations, therefore, lead me to the conclusion that as part of the information component of s. 10(b) of the Charter, a detainee should be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel.

It is clear from this passage and from the discussion leading up to it that in jurisdictions offering both duty counsel and Legal Aid, the constitutionally guaranteed information pertains both to temporary, immediate, free advice from duty counsel and to free representation through Legal Aid for those who qualify. Subsequent authorities have made this equally clear: see R. v. Bartle, [1994] 3 S.C.R. 173 at p. 197, [1994] S.C.J. No. 74 at para. 27, "detainees be advised of the existence and availability of Legal Aid plans and duty counsel" (emphasis is original) and para. 28, "police authorities are required to inform detainees about Legal Aid and duty counsel services" and see R. v. Latimer [1997] 1 S.C.R. 217, [1997] S.C.J. No. 11 at para. 33:

> In R. v. Brydges ... this court engrafted two requirements upon the informational component: first, information about access to counsel free of charge provided by provincial Legal Aid where an accused meets financial criteria with respect to need, and second, information about access to duty counsel, who provide immediate and temporary legal advice to all accused, irrespective of financial need.

I conclude that both information concerning Legal Aid and information concerning duty counsel must be communicated to persons detained by the police."

[13] Justice Moir's decision was upheld by our Court of Appeal, [2002] N.S.J. 57.

[14] The trial judge here did not refer to the ***Moore*** case and I conclude that he was in error when he concluded that Cst. Foster had properly advised the appellant of his rights under Section 10(b) of the ***Charter***. In light of my finding that the appellant was not properly advised of his Section 10(b) rights it is not necessary for me to deal with the other issues argued by counsel for the appellant in regard to the refusal charge.

[15] In ***R. v. Moore*** the Court held that the violation of the accused's Section 10(b) rights should result in an exclusion of the breathalyzer reading result. The headnote from that case sets out the significant facts of the case. It reads:

> "Appeal by Moore from his conviction on a charge of operating a motor vehicle while his blood-alcohol level exceeded 80 milligrams. Upon arresting Moore, the police officer advised him of his right to retain and instruct counsel and that free and immediate legal advice was available, and he gave Moore telephone numbers to obtain such advice. Moore indicated that he did not wish to seek legal advice at the moment. He subsequently argued that the caution was insufficient because the officer did not tell him that there was a difference between duty counsel and legal aid, and that he could avail himself of duty counsel's advice even if he could afford a lawyer.
>
> **HELD:** Appeal allowed. Moore was acquitted. The police were required to advise Moore that both legal aid and immediate duty counsel advice were available, and that he could speak to duty counsel immediately, even if he could afford a lawyer. The Crown did not present evidence from which one could reasonably infer that Moore would have acted the same had he been properly informed of his right to counsel. While the police did not act in blatant bad faith, their lack of care in discharging the duty to communicate these simple concepts

> precluded a finding of good faith and indicated a more serious violation. The long-term effects of admitting the evidence obtained after the violation stood to affect the administration of justice more adversely than would its exclusion."

[16] Here I conclude that the accused would be entitled to an acquittal on the refusal charge in light of the Section 10(b) violation if the refusal charge had resulted in a conviction against him.

[17] My finding in regard to the refusal charge does not however resolve the critical issue before me. Crown counsel has pointed out in his brief that the accused was in fact not convicted on the refusal charge, therefore arguments about that offence are of no significance because that charge was stayed by the trial judge.

[18] I agree with Crown counsel that a finding that the trial judge erred in dealing with the refusal charge will only benefit the accused if I conclude that there should be a new trial on the impaired driving charge. If that was the case I would order that the refusal charge be retried or an acquittal entered thereby quashing the judicial stay entered by the trial judge.

GROUND TWO

[19] The second ground of appeal relates to the refusal charge and that charge has been stayed.

GROUND THREE

[20] The appellant's third ground of appeal applies to the impaired driving charge. It provides:

> "(3) That the learned trial judge conducted the trial of the unrepresented Appellant in such a manner as to deprive the Appellant of a fair trial or to result in the appearance of an unfair trial."

[21] Counsel for the appellant alleges that the trial judge made rulings that were unfair to the appellant, especially in light of the fact that he was self-represented at trial.

[22] Counsel points to a point in the trial when the appellant objected to Cst. Foster giving his opinion about whether the appellant was providing a proper breath sample. The trial judge ruled that Cst. Foster's opinion was admissible despite the fact that Cst. Foster was not doing the breathe test.

[23] Counsel also points to the appellant's attempt to introduce documents as exhibits while he was cross-examining Cst. Foster and the ruling of the trial judge that he should do that when he took the stand himself.

[24] Counsel also argues that the trial judge should not have permitted cross-examination by Crown counsel on previous incidents when the accused had been charged with refusal. That arose while the appellant was on the stand testifying on direct. He explained to the trial judge that he had been involved in two other refusal trials where the Court accepted the fact that he could not blow properly and acquitted him of the charges of the refusal.

[25] I reject the suggestion from appellant's counsel that the trial judge treated the appellant unfairly. On the previous conviction issue the appellant led that evidence in the hope of convincing the Court that it was evidence that supported his position that he could not blow hard enough to provide a proper sample. Once he did so it was appropriate for the Crown to be able to cross-examine on these convictions and in effect turn it against the appellant.

[26] As far as the introduction of the exhibits is concerned, the trial judge inquired from the appellant if he intended to give evidence himself before he suggested that he could introduce the exhibits when he took the stand. I see no prejudice to the accused on that issue.

[27] On the issue of the ruling about the appellant's objection to Cst. Foster's opinion about his breath sample, I conclude that the trial judge should have probably sustained that objection, especially in light of the fact that the breathalyzer technician was not to be a witness. However, that issue once again only goes to the refusal charge.

[28] The trial judge here was dealing with an unrepresented accused. It is clear from the transcript that the appellant was clearly aware of the issues relevant at trial. He raised appropriate arguments on certain issues and was clearly evasive on issues that adversely affected him.

[29] Appellant's counsel at the hearing of this appeal suggested that it is the cumulative effect of the trial judge's rulings that made the trial unfair.

[30] Appellant's counsel argues that the trial judge's ruling on the refusal charge was not based on evidence from Cst. Foster about whether the appellant provided a proper sample or not but that the appellant never intended to give a sample.

[31] In his decision the trial judge said [Page 29]:

> "So his initial response to the breathalyzer demand at Plymouth, Pictou County, was, "no" and I find that his approach was consistent throughout and I find the Crown has proven all of the essential elements of that particular charge beyond a reasonable doubt and I find Mr. Bailey guilty of the refusal charge as well."

[32] If, as Crown counsel argued, the trial judge made a finding that the appellant in fact refused to give a sample instead of failed to give a proper sample then I would conclude that the trial judge should have made that clear in his decision.

[33] In his submission to the trial judge Crown counsel indicated [Page 109]:

> "And the Crown suggests that certainly the elements of refusal have ... failing to comply which is refusal have been met."

[34] I conclude that Crown counsel at trial was arguing that Mr. Bailey did not provide a proper sample while the trial judge made a finding that he had in fact refused the demand.

[35] This error on the part of the trial judge, however, is of no benefit to the appellant because it relates only to the refusal charge for which he has not been convicted.

[36] I am not able to conclude that the trial judge treated the appellant unfairly and that his rulings caused an unfair trial. Just because a number of rulings were made against the appellant during the course of the trial does not mean that there was an unfair trial. The only ruling I conclude could be considered as wrong was the one in relation to Cst. Foster's opinion about the breath sample.

[37] I would dismiss the ground of appeal based on an unfair trial.

[38] Appellant's counsel has not raised before me any significant issues as to the trial judge's finding that the appellant was guilty of the offence of impaired driving.

[39] I have reviewed his finding on that issue and conclude that he applied the proper legal principles to the facts and he quoted the leading case law on the issue. I would therefore confirm the trial judge's decision on the impaired driving charge.

[40] At the hearing of this appeal appellant's counsel argued that the trial judge's finding that the appellant was guilty of driving while prohibited was not appropriate because the appellant was arguing officially induced mistake. The accused was suggesting that his conviction in New Brunswick only applied to his right to drive in that province and that he thought he could drive in Nova Scotia.

[41] Introduced into evidence before the trial judge was an Order of Prohibition out of the Provincial Court in New Brunswick. That Order of Prohibition provides as follows:

> "IT IS HEREBY ORDERED pursuant to Section 259(1) of the Criminal Code that you the said JOSEPH ALEXANDER BAILEY, in addition to any other punishment which may be imposed, be prohibited from operating a motor vehicle on any street, road, highway or other public place for a period of 18 months from this date."

[42] It is to be noted that this Order of Prohibition does not restrict itself to Canada. It certainly does not in any way attempt to restrict itself to the Province of New Brunswick.

[43] I conclude that if the appellant believed he was only prohibited in the Province of New Brunswick that would be a result of a mistake of law on his part and not provide a defence to him for driving while prohibited in Nova Scotia.

[44] I conclude also that the New Brunswick Order of Prohibition conforms to Section 259(2) of the ***Criminal Code*** which provides:

> "Where an offender is convicted or discharged under section 730 of an offence under section 220, 221, 236, 249, 249.1, 250, 251 or 252, subsection 255(2) or (3) or this section committed by means of a motor vehicle, vessel or aircraft or of railway equipment, the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel, an aircraft or railway equipment, as the case may be ..."

[45] I would note that the Order of Prohibition made by Judge MacDonald following the appellant's conviction in this case does appear to order a prohibition only in Canada. It provides:

> "**IT IS ORDERED** that, in addition to any other punishment which has been imposed, the offender be prohibited from operating a motor vehicle on any street, road, highway, or other public place in Canada for a period of 5 years, 4 months, effective immediately. (Includes the 5 years plus the 4 months Mr. Bailey is sentenced to imprisonment)"

[46] I would therefore dismiss the appellant's appeal from his conviction of driving while prohibited and confirm the conviction entered by the trial judge.

[47] The appeal is therefore dismissed and the convictions and sentence imposed by the trial judge are confirmed.

J.