SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Murray, 2010 NSSC 296

Date: 20100727
Docket: Hfx No. 323044
Charge No. MVA106AC
Person No. 348135-2
Registry: Halifax

Between:

Monte Murray — Appellant

and

Her Majesty the Queen — Respondent

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: June 23, 2010

Counsel: Monte Murray, acting on his own
Stephan Jedynak, counsel for the respondent

Moir, J.:

Introduction

[1] Mr. Murray was charged with speeding. He pleaded not guilty and chose to act on his own. For personal reasons, Mr. Murray did not prepare well for the trial.

[2] The trial judge found Mr. Murray guilty of exceeding the posted limit by thirty-one or more kilometres an hour. As a consequence, he was fined $394.50 and his driving privilege was suspended for six months.

[3] After that experience, Mr. Murray became informed about Crown disclosure obligations. He appealed. His grounds read:

> 1 I did not have, nor was I aware of my right, to request a copy of the evidence the Crown used against me, at my trial on January 07, 2010.
>
> 2 Not having disclosure of evidence presented against me, prevented me from adequately defending myself.

Mr. Murray seeks a new trial.

[4] Shortly before the appeal was argued, Mr. Murray obtained from the Coordinator - Municipal Prosecutions "our file", that is, "Copy of summary offence ticket #4036822 (officer's notes are recorded on back)". Mr. Murray says that this was the first time he saw the notes.

[5] The Crown does not take issue with Mr. Murray's assertions that he was unaware of his right to disclosure and that he only received disclosure of the officer's notes last month. The Crown's position is that it does not have to disclose officers' notes in a speeding case and, even if it does have such an obligation, the failure to perform does not justify a new trial.

[6] I have to decide,

1. Whether the Crown was obligated to disclose the officer's notes?

2. If so, whether setting aside the conviction and ordering a new trial is the appropriate remedy?

I have concluded that the Crown breached its disclosure obligation and the case meets the established threshold for ordering a new trial.

Mr. Murray's Defence

[7] Unfortunately, Mr. Murray failed to obtain and file a transcript. It was agreed at a pre-hearing conference that we could do without it because the grounds of appeal have little to do with the record. Mr. Murray did provide a recording just before the appeal was heard. So, I am reviewing the decision under appeal without the benefit of a transcript.

[8] Mr. Murray argued the facts of his defence over again in his factum. Mr. Jedynak rightly took exception to that, and he also argued that new points brought up by Mr. Murray could not have affected the results in his favour. Without a transcript and with the narrowly framed grounds of appeal, I will not review the trial judge's findings or his conclusion based on them. However, the disclosure issues cannot be decided without a general understanding of Mr. Murray's defence.

[9] Highway 118 leads from Miller's Lake south-west ward into Dartmouth. The limit is 100 kilometres an hour most of the way . A person, like Mr. Murray on the day in question, who wants to travel to the south side of Dartmouth, points south of it, or the Eastern Shore may make a connection to the Circumferential Highway by taking an off-ramp that spirals at a fairly steep incline almost 360 degrees.

[10] The incline takes the vehicle into a merging lane. Usually, the Circumferential is busy and one has to work with the speed of traffic to fit in. Further lane changes are required over a fairly short distance for those who wish to go beyond central Dartmouth. Again, one watches closely the speed of traffic.

[11] Mr. Murray says that he was not familiar with this road when he was stopped for speeding, that he was only trying to gage the limit by the speed of traffic, and that the limit was not posted in any kind of reasonable way to be noticed by drivers in his position.

[12] Further, he was convicted under s. 106A(c) of the *Motor Vehicle Act*, which applies to speeds of thirty-one or more kilometres over the speed limit, the top of three tiers. Hence, the hefty fine and the long suspension. He was clocked at

exactly thirty-one. He would like to have the opportunity to argue that the margin of error for the speed detection device used on him leaves a reasonable doubt for a s. 106A(c) conviction, as opposed to s. 106A(b).

The Officer's Notes

[13] When police in Nova Scotia decide to charge a driver for speeding, they fill in and deliver a ticket that has three parts and a place for the date and signature. The parts are the information, the summons, and a place for details about the fine, the driver, and the vehicle. This is given to the accused.

[14] A duplicate ticket provides for the officer's notes on the reverse. It provides for recording conditions, such as visibility, the names of witnesses, and with a view to a trial, the days on which the officer has scheduled vacation. The reverse also provides space in which the officer summarizes the grounds for the charge.

[15] In Halifax, the duplicate ticket with the officer's notes is sent to the Legal Services Department of the Halifax Regional Municipality.

[16] Mr. Murray says that the reverse contains information that would have been useful to the presentation of his defence. It identifies the kind of equipment used to clock his speed, a device referred to as LIDAR. Had he known about it before trial, he could have investigated the margin of error for a LIDAR and may have been able to produce evidence, through direct or cross-examination, to call into question the reading that was at the starting speed for a s. 106A(c) charge.

[17] The officer's notes also record "Traffic Conditions" as "Light". Mr. Murray says he would have challenged this to help his defence about having to pay attention to, and track the speed of, traffic to the left rather than look for a speed limit sign to the right. The challenge might have been made through cross-examination of the officer, the police witness who operated the tracking device, or other means.

Disclosure Obligation: Speeding and Unrepresented Accused

[18] The Crown refers to para. 26 of *R. v. Stinchcombe*, [1991] S.C.J. 83 where Justice Sopinka, who wrote for a unanimous court, pointed out that "The general principles referred to herein arise in the context of indictable offences." The

disclosure obligation arose from the right to make full answer and defence as entrenched by s. 7 of the *Charter*. Justice Sopinka warned that in summary conviction offences the right "may be of a more limited nature". He left the question of "the extent to which the general principles of disclosure extend to summary conviction offences" for a future decision but said "In view of the number and variety of statutes which create such offences, consideration would have to be given as to when to draw the line."

[19] On the basis of those remarks in *Stinchcombe*, the Crown submits that "initial relevant disclosure" is provided through delivery of the ticket when the charge was laid. "Further disclosure, after the initial disclosure, means that the Appellant must ask."

[20] The law and practice of Crown disclosure in criminal cases developed in the twenty years since *Stinchcombe* was decided. We have moved from the Crown position in *Stinchcombe* (the content of witness statements does not have to be disclosed) to an expectation that is inconsistent with the two parties attending for trial, one with a contemporaneous statement prepared by the principal witness in his file and the other without knowledge of it. The present practice appears to

include the preparation of a disclosure package that includes all relevant information in the prosecutor's possession. One does not expect defence counsel to have to ask for this disclosure. It appears from the cases that the contentious issues usually concern what is, or is not, relevant or obligations of the Crown for disclosure of relevant documents that are not necessarily in its possession.

[21] *Stinchcombe* itself shows that "He did not request it." is no answer, at least not in cases of accuseds who act on their own. The question is whether it is an answer in speeding cases.

[22] The first thing to observe about the Crown's position is that the paragraph it relies on in *Stinchcombe* decides nothing. "A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings."

[23] The Supreme Court of Canada has not, as far as I am aware, dealt with the issue of disclosure in less serious cases. However, the weight of authority is with these propositions:

1. The requirement for Crown disclosure as established by *Stinchcombe* applies to all charges.

2. The extent of disclosure, the application of the principle in *Stinchcombe*, may be relaxed for lesser charges, but not necessarily according to the distinction between indictable offences and summary conviction offences.

3. In less serious cases, the extent of required disclosure depends on a number of factors, many of which have now been identified by the courts.

[24] The Newfoundland Court of Appeal is responsible for some of the earliest developments on this issue. In *R. v. Luff*, [1992] N.J. 204 (C.A.) at para. 14 Justice Gushue wrote:

> The nature of the offence, the offender and the surrounding circumstances must all carefully be looked at. Nevertheless, the general principle enunciated by Stinchcombe must surely be the same. To as great an extent as possible, the accused person must be provided with any information held by the prosecution

> which might assist him in making full answer and defence to the charge. How that will be accomplished will depend on the circumstances of each case.

In *R. v. Petten*, [1993] N.J. 54 (C.A.) at para. 14 he said "The principles of disclosure and their manner of application are no different for indictable offences or summary conviction offences." Rather, the question in reference to lesser charges is "the nature and degree of disclosure warranted".

[25] In *R v. Robichaud*, [2008] N.S.J. 362 (P.C.), at para. 22 to 33, Judge Embree provides an extensive review of decisions in speeding cases in which disclosure of materials related to the operation of a speed taking device was sought. Judge Embree concluded that the Crown was obliged to produce parts of a manual on the operation of the device in issue in that case.

[26] Thus, the state of the law in Nova Scotia is that in speeding cases the Crown's obligation for disclosure may extend to materials requested by the defence and shown to be relevant although they are not directly in the possession of the prosecutor.

[27] *R. v. Driscoll-Rogers*, [2008] O.J. 4572 (C.J.) was also a speeding case. It held that "the nature of this offence" was such that "disclosure can be simple and brief" (para. 21). The Crown had provided the officer's notes. The accused argued that she was entitled to an explanation of the notes and to the operating procedures for the speed tracking device. The court held that the production of the notes was sufficient.

[28] *R. v. Collins*, [2010] A.J. 666 (P.C.) was also a speeding case. Judge Rosborough said at para. 50:

> Pre-trial disclosure of the case for the prosecution is intended to assist the accused in making full answer and defence and, ultimately, enjoy a fair trial. That principle maintains regardless of whether the offence is criminal or regulatory; simple or complex. The application of that principle will vary, however, depending on a variety of factors to be discussed below.

These factors include the seriousness of the offence, the complexity of the case, and the range of penalty (para. 61).

[29] The court also took into account the large volume of speeding offences (para. 61). I think that this consideration is within another factor recognized by the courts in settling the limits of disclosure for less serious offences, the ease with

which the prosecution can make the requested disclosure: *Toronto (City) v. Canada Land Corp.*, [2006] O.J. 4489 (O.C.J.).

[30] The court in *Collins* concluded that the duty of disclosure in speeding cases "will generally be satisfied by providing the accused with a copy of the violation ticket and the sheriff's notes on the obverse of that ticket" (para. 94).

[31] In my assessment, the least disclosure required in a speeding case is the production of witness statements actually in the possession of the prosecutor, particularly the contemporaneous statement recorded on the reverse of the ticket, the very document delivered to the city's legal department so that a file can be opened and the prosecution is set up.

[32] Even at the minimum level of the factors of seriousness, complexity, and penalty the right to disclosure exists. Further, the seriousness factor should not be overemphasized. A person who will never face an indictable offence may find a less serious charge to be personally important and, as Mr. Murray pointed out, the loss of driving privileges for six months by a single parent may have serious consequences for him and his children.

[33] Further, the absence of great seriousness, complexity, and penalty must be balanced against the ease of disclosure. In my view, the caution raised by Justice Sopinka at para. 26 is out of concern for fairness to the public in keeping the voluminous summary offence proceedings efficient. Here, the disclosure would be as easy as sending a photocopy of the reverse of the ticket to the accused at the address provided. The requirement would not be onerous in light of the volume of speeding charges if it arose on request by the accused or on instruction of an accused who acts on his own, subjects to be discussed under the next title.

[34] The factors aside, the prospect of two parties appearing for trial, one with a contemporaneous statement from the principal witness and one without, appears unfair to me. Disclosure of such a statement is so basic to fairness that it should be in the minimum of what is required even in cases that are the least serious. Justice Sopinka said at para. 30 of *Stinchcombe* "There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced."

Did Mr. Murray Have to Request a Copy of the Statement?

[35] The Crown submits that I should take "the commonsense approach" of Justice DiTomaso in *R. v. Korevaar*, [2009] O.J. No. 3376 (S.C.J.). However, in that case the Crown had disclosed the existence of the document in question (para. 15), it had been available for inspection (para. 15), and the accused had been represented by counsel (para. 11).

[36] Justice Sopinka discussed the timing of disclosure at para. 28 of *Stinchcombe*. He said "The obligation to disclose will be triggered by a request by or on behalf of the accused." He recognized, however, that this would cause a problem in cases in which the accused acts on his own and does not know about his right to disclosure. Obviously, the requirement about time cannot be allowed to swallow up the right to disclosure itself.

[37] So, Justice Sopinka wrote "In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that has been

done." It is not rare for the accused in a speeding case to act on his own, and Justice Sopinka's reference to "rare cases" shows that he was thinking about indictable offences and that the timing issue may be revisited in less serious cases, as suggested in para. 26.

[38] In my view, the volume of speeding charges and the option of pleading guilty by mail preclude a requirement that the prosecutor inform the accused before a plea is entered. Deciding whether to contest a speeding charge is relatively uncontemplated compared with the kinds of cases Justice Sopinka had in mind. Unfairness would seldom result from a decision to plead guilty to a speeding charge made without knowledge of the prosecutor's duty to disclose.

[39] That does not mean that the problem of the uninformed, unrepresented accused is to be ignored for minor offences. To do so would make the right to disclosure entirely artificial for those people. In my view, the appropriate modification of the timing requirement in speeding cases is to allow for an uninformed plea but not for an uninformed defence after a plea of not guilty.

[40] I conclude that the prosecutor in a speeding case must disclose the ticketing officer's statement on the reverse of the prosecutor's copy of the ticket, and any other relevant statements in the possession of the prosecutor. This must be done on request of the accused, but the prosecutor must inform an unrepresented accused of his right to make the request when a plea of not guilty is entered.

[41] Therefore, Mr. Murray's right to disclosure was denied.

Is a New Trial Warranted?

[42] A denial of the right to disclosure justifies an order for a new trial only if the appellant demonstrates that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process.

[43] In my view, the fairness of a trial is in question when the prosecutor holds a contemporaneous statement made by the principal witness and the accused knows nothing of it.

[44] I am not sure that Mr. Murray's sorry state of preparation for his trial would have improved had he been informed about the kind of tracking device that was used or the officer's assessment of traffic conditions, but he makes a case for finding that as a reasonable possibility. His knowing the name of the speed tracking device might reasonably have led to evidence about its margin of error and that might have affected the finding about his speed being at the threshold. His knowing the officer's assessment of traffic conditions might reasonably have led to a more vigorous preparation on that issue, which bears some relevance to his argument that he had a defence about how the limit was posted.

Conclusion

[45] The conviction entered on January 7, 2010 and the sentence imposed are set aside. A new trial is ordered.

J.