SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Alkhawaji , 2013 NSSC 233

Date: 20130722
Docket: Hfx. No. 410617
Registry: Halifax

Between:

Ali Mohammed Alkhawaji

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Arthur LeBlanc

Heard: May 9, 2013, in Halifax, Nova Scotia

Counsel: Wayne Bacchus, for the Appellant
Jim Janson, for the Respondent

By the Court:

Introduction

[1] On November 22, 2012, the appellant pled guilty to having operated his motor vehicle without insurance contrary to section 230(1) of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293. He was thereafter convicted and sentenced. He now appeals to this court, seeking to have the conviction and sentence overturned and his guilty plea withdrawn.

Issues

[2] The Notice of Appeal set out two issues, which the Crown rephrased as questions in its brief. These are:

1. Did the trial judge err in law by accepting the guilty plea of the Appellant?

2. Was the guilty plea made in circumstances that resulted in a miscarriage of justice? In particular:

    a. Did the Appellant fail to fully appreciate the nature of the charge?

    b. Did the undisputed facts support a conviction? Specifically: had the insurer failed to cancel the Appellant's policy in the manner required by *Automobile Insurance Contract*

Mandatory Conditions Regulations, N.S. Reg. 181/2003, s 8(1)(a)?

Summary of Facts

[3] The appellant was issued a summary offence ticket on October 22, 2012 and the matter came before the Night Court on November 22, 2012. Mr. Alkhawaji initially pled guilty to Kelly Shannon, the Presiding Justice of the Peace, and admitted that he was driving without a valid insurance policy in place. However, he then explained that he had recently been in the process of moving and he had previously spoken to his insurance company to advise them that money was not coming into his bank account and that he would therefore be unable to make payments on his insurance policy that way for some time. He asked whether that that would affect the status of his policy and was told that it did not and that they would be back in touch with him if their position changed.

[4] He then told Justice of the Peace Shannon that, once he received the ticket, he contacted his insurance company again and was only at that time told that his insurance policy had been cancelled for non-payment.

[5] Justice of the Peace Shannon informed the appellant that his explanation, if true, might constitute a defence of due diligence, but that would require a trial. Mr. Alkhawaji said that, by pleading guilty, he meant only that the officer was right for giving him the ticket since he was driving without a valid insurance policy. Justice of the Peace Shannon began to explain further but was interrupted by the Crown, who submitted that this was dangerous territory since it was getting into the merits of the case. Justice of the Peace Shannon agreed with the Crown's objection and asked Mr. Alkhawaji if he still wanted to plead guilty. Mr. Alkhawaji indicated that he did.

[6] Justice of the Peace Shannon accepted the guilty plea, and then accepted submissions about Mr. Alkhawaji's financial circumstances. At the end, Mr. Alkhawaji indicated that he had wanted to bring an interpreter, but Justice of the Peace Shannon noted that Mr. Alkhawaji was enrolled in an English-language Master's program at Dalhousie University and proceeded to sentence him. Justice of the Peace Shannon reduced the ordinary fine somewhat to account for Mr. Alkhawaji's financial circumstances, and the total fine with court costs and a victim surcharge ended up being $802.41.

Standard of Review

[7] In *R. v. Nickerson* (1999), 178 N.S.R. (2d) 189, the Nova Scotia Court of Appeal confirmed that the standard of review on factual matters is one of reasonableness, but will be correctness if it is an error of law. For the court, Cromwell, J.A., wrote at para. 6 that:

> [6] … 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**, [1994] 1 S.C.R. 656 at 657, 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 some evidence to support the trial judge's conclusions nor a new trial on the transcript. [Underlining in original]

[8] The Appellant argues that the proper application of section 606(1.1) of the *Criminal Code* is a question of law for which the standard is correctness.

[9] The Crown maintains that they are questions of fact, relying on the decision of our Court of Appeal in *R. v. McCollum*, 2008 NSCA 36. This was an appeal from a decision of the provincial court judge to refuse the application of the defendant to withdraw her guilty plea which had been entered while she was represented by counsel. The defendant maintained that her plea was not voluntary

but was made in response to the pressure from her then-counsel. At para. 10, Bateman, J.A., wrote that:

> [10] In determining Ms. McCollum's appeal we are guided by the following law: a judge's factual findings in determining whether a guilty plea is valid are to be accorded significant deference on appeal (**R. v. Leonard**, [2007] S.J. No. 612 (Q.L.) (C.A.)); the decision whether or not to allow an accused to withdraw a guilty plea is a discretionary one which, if exercised judicially, will not be lightly overturned (**R. v. Thibodeau**, [1955] S.C.R. 646). (Emphasis in original)

[10] I agree that sets out the governing standard for the first issue on this appeal, but it is worth noting that deference only applies to the *factual* findings of the judge. As an example, a finding that an accused had not been coerced to enter a guilty plea may be entitled to deference, but whether the admitted facts are sufficient to support a conviction is a pure question of law which should be assessed on the correctness standard.

[11] Neither party addressed the standard of review to be applied to issues 2(a) or 2(b). In my view, issue 2(a) is basically an element of issue 1, and if it has been made then it is a factual finding accorded the reasonableness standard. Issue 2(b) was never brought to the Justice of the Peace's attention, so there is no decision on the point to be reviewed. I will assess the consequences of that later.

The Law on Withdrawing a Plea

[12] Section 606(1.1) of the *Criminal Code* provides that:

> **606 […] (1.1)** A court may accept a plea of guilty only if it is satisfied that the accused
>
> **(*a*)** is making the plea voluntarily; and
>
> **(*b*)** understands
>
> **(i)** that the plea is an admission of the essential elements of the offence,
>
> **(ii)** the nature and consequences of the plea, and
>
> **(iii)** that the court is not bound by any agreement made between the accused and the prosecutor.

The Appellant argues that provision also applies to provincial offences by virtue of s. 7(1) of the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450. That section provides that:

> **7 (1)** Except where and to the extent that it is otherwise specially enacted, the provisions of the Criminal Code (Canada), except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, mutatis mutandis, to every proceeding under this Act

[13] Although the Crown does not directly dispute that, it notes at paragraph 23 of its brief that s. 8(15) of the *Summary Proceedings Act*, *ibid*, allows a judge to enter a conviction without any inquiry at all if an accused does not attend. The

Crown states that "[t]his is a different process from the criminal trials referred to in argument."

[14] To the extent that argument could imply that a judge need not be satisfied of the section 606(1.1) factors for a guilty plea to an offence governed by the *Summary Proceedings Act*, I reject it. Under section 8(17A), the accused can have such a conviction automatically struck out simply by attending the court office within sixty days and requesting it. At that point, he or she would have an opportunity to plead not guilty. As such, section 8(15) does not imply that the guilty pleas of persons accused of provincial offences do not need to be voluntary or understood. The requirements under section 606(1.1) of the *Criminal Code* are not onerous and I see nothing which abrogates the operation of s. 7(1) of the *Summary Proceedings Act*.

[15] As for the discretion of an appeal court to set aside a guilty plea, our Court of Appeal set out the proper analysis in *R. v. Nevin*, 2006 NSCA 72. At para. 7, Bateman, J.A., adopted the approach of the Ontario Court of Appeal in *R. v. R.T.*, [1992] O.J. No. 1914 (Q.L.):

> [7] When the validity of a guilty plea is raised for the first time on appeal the accused has the onus of showing it was invalid. Doherty, J.A. in **R. v. R.T.**, (1992), 10 O.R. (3d) 514; O.J. No. 1914 (Q.L.)(Ont.C.A.) said at p. 519:
>
> > Where the validity of a guilty plea is raised for the first time on appeal, the appellant has the onus of showing that the plea was invalid. The appellate court will examine the trial record and any additional material proffered by the parties which, in the interests of justice, should be considered in assessing the validity of the plea. In this case, both parties had submitted material which, in my view, should be received and considered in assessing the validity of the pleas.
> >
> > A guilty plea is a formal admission of guilt. It also constitutes a waiver of both the accused's right to require the Crown to prove its case beyond a reasonable doubt and the related procedural safeguards, some of which are constitutionally protected: *Korponay v. Canada (Attorney General)*, [1982] 1 S.C.R. 41 at p. 49, 65 C.C.C. (2d) 65 at p. 74; *Brady v. United States*, 397 U.S. 742 (1970), at p. 748, *Fitzgerald, The Guilty Plea and Summary Justice* (1990) at pp. 192-203.
> >
> > To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea: *R. v. Lyons*, , [1987] 2 S.C.R. 309 at p. 371, 37 C.C.C. (3d) 1 at p. 52; *Law Reform Commission of Canada* Working Paper No. 63, "Double Jeopardy Pleas and Verdicts" (1991) at p. 30.
> >
> > (Emphasis added)
>
> (Emphasis in original)

As well, Bateman, J.A., adopted the Ontario Court of Appeal's analysis of the element of voluntariness at para. 8, but that is not is issue in this appeal so I will not set it out at length.

[16] There are a number of valid grounds upon which an appeal court can permit an accused to withdraw his or her guilty plea. Although not an exhaustive list,

some were set out by Beveridge, J.A., in *R. v. Riley*, 2011 NSCA 52, [2011] N.S.J. No. 284 (Q.L.) at para. 31:

> **31** There are a number of circumstances that have been accepted as constituting valid grounds. They include a failure by the appellant to fully appreciate the nature of the charge, the effect of the plea, or a lack of intention to admit facts which are an essential element of the offence charged, or if on the admitted facts, he could not be convicted of the offence (see *R. v. Melanson* (1983), 59 N.S.R. (2d) 54 (C.A.) at para. 6). Other circumstances include improper inducements or threats by the police, defence counsel, or the trial judge (see *R. v. Nevin*, 2006 NSCA 72; *R. v. Lamoureux* (1984), 13 C.C.C. (3d) 101 (Que. C.A.); *R. v. Laperrière* (1995), 101 C.C.C. (3d) 462, [1996] 2 S.C.R. 284; *R. v. Djekic* (2000), 147 C.C.C. (3d) 572 (Ont. C.A.); *R. v. Rajaeefard* (1996), 104 C.C.C. (3d) 225 (Ont. C.A.).

[17] In assessing those factors, our appeal court has also emphasized that whether an accused was represented by counsel at the time of the plea is a significant factor to be considered. In *R v Melanson*, [1983] N.S.J. No. 453 (Q.L.), 59 N.S.R. (2d) 54 (CA), Pace, J.A., noted that:

> **8** It is my view that an appeal court in evaluating the grounds upon which a plea of guilty can be changed should give great importance to whether at the time the accused entered his plea he was represented by counsel. Certainly an accused who is speaking to the court on his own behalf may not fully understand the questions raised or the complexity of law involved and, even if he did, may not reply for fear of mistake or some other reason. However, where the accused is represented by counsel, who is trained and learned in the law, the court should be able to entertain and accept a plea of guilty upon the reliance that the charge has been fully explained to the accused and that the accused not only fully appreciates the nature of the charge, but also the effect of his plea and that he is admitting the facts as alleged in the charge.

[18] Indeed, where an accused is unrepresented, the judge who accepts the plea may have a duty to inquire into its validity. In *R. v. Clermont*, [1996] N.S.J. No. 170 (Q.L.), 150 N.S.R. (2d) 264 (CA), Chief Justice Clarke noted at para. 35 that:

> In an Annotation entitled Change of plea [1968] 2 C.R.N.S. 168, Eugene Ewaschuk reviewed a number of judgments that have dealt with this subject. He concluded that a judge must exercise more care in cases where an accused person is not represented by counsel. Professor Ewaschuk, as he then was, wrote that in the case of the non-represented accused the trial judge must ask sufficient questions to be satisfied that the accused person understands the implications of entering a guilty plea.

That conclusion was approved by the Chief Justice.

[19] That said, the judge ultimately cannot take the place of legal counsel and the requirements of the inquiry are not necessarily onerous. I approve the comments of Justice Williams in *R. v. Laudisio*, 2009 BCSC 235, [2009] B.C.J. No. 333 (Q.L.), where he said at paras. 20-22 that:

> **20** … I conclude that there may be an obligation on a judicial officer, presented with a guilty plea, to make certain inquiries. Whether that is required will be informed by the particular circumstances, certainly including whether the accused is represented by counsel or acts for him or herself. Also relevant may be the nature and seriousness of the charges, and whether or not the accused gives some indication of reservation, uncertainty, or some other reason to believe there is a concern.
>
> **21** All that said, I do not accept that it is incumbent on the presiding judicial officer to engage the accused in an exhaustive exchange which examines all details of the accused's circumstances or which purports to canvass all available

> defences or legal considerations. To require the judicial officer to do so would be to impose a responsibility akin to that which lies upon the legal representative of the accused. That would be impractical, and would place an unrealistic and unreasonable burden on the judicial officer. In my view, the imposition of such expectations would be a radical change to the present dynamic, and I specifically decline to do so.
>
> **22** Ultimately, the matter must be considered contextually, and the extent of the obligation will depend upon the particular circumstances at hand. At a minimum, it would be good practice to ensure that an accused understands that the plea is an admission of responsibility for the offence charged, and that the consequence will be the entering of a conviction and liability to imposition of a sentence. However, failure to do so will not necessarily invalidate a guilty plea, as any application to vacate a plea must be assessed in light of the substantive considerations established by the authorities.

The Hearing

[20] Although described briefly earlier, I believe it is useful to review some parts of the transcript in slightly more detail with the above-cited principles of law in mind.

[21] Justice of the Peace Shannon began by stating the charge and asking for a plea, and Mr. Alkhawaji indicated that he was pleading guilty. Mr. Alkhawaji then went on to give his excuse regarding the mix-up with the insurance company.

[22] The Crown objected to the explanation on the basis that this was not a trial and that he had already pled guilty. At pages 7-9, the transcript records Justice of the Peace Shannon agreeing with the Crown and telling Mr. Alkhawaji that:

> **The Court:** … And just so I'm clear, if you plead guilty with respect to matters, Mr. Alkhawaji, the fine will be set on the face value unless you're able to establish circumstances under the **Remission of Penalties Act** that might cause me to reduce the fine. Now the Registrar will assess their own penalties with respect to a conviction under this section which will include a suspension of driving privileges and so on and so forth.
>
> You have a defence available to you if you were duly diligent and through the exercise of due diligence on your part. It was not brought to your attention. Or that you had reason to believe that you had a valid policy of insurance in force and effect at the time you were driving your car.
>
> And if I'm satisfied that you were duly diligent and through the exercise of due diligence on your part that this was due to some administrative error or there was something not properly brought to your attention, I'm at liberty to find you not guilty based on the facts and the circumstances.
>
> The problem I have is that you've entered a plea of guilty and you're saying, well, you know, there was this mix-up, I moved, and I didn't pay my insurance premiums. They cancelled it for non-payment. …
>
> **[…]**
>
> **The Court:** … And so I don't know whether you're really intending to plead guilty or not guilty to the matter.

[23] At page 9 of the transcript, Mr. Alkhawaji responded to that by saying that:

> **Mr. Alkhawaji:** What I mean by guilty, that because the receptionist here when I tried to, you know, a date for … a Court date, she told me if you plead

> yourself, like, guilty, that means the officer is … (inaudible) when he gave you that ticket, you know what I mean?
>
> I mean, the officer was right. … (inaudible) he gave me the ticket because I was driving without my certificate … without my insurance. That's what I mean by …

[24] Justice of the Peace Shannon began to give another explanation, but was soon interrupted by the Crown, who expressed some concern that this was entering dangerous territory since Mr. Alkhawaji was making admissions on the record that could be used against him if he did elect to plead not guilty. Justice of the Peace Shannon agreed and simply asked Mr. Alkhawaji again whether he wished to plead guilty. Mr. Alkhawaji said that he did.

[25] After that, Justice of the Peace Shannon asked for submissions on Mr. Alkhawaji's financial circumstances. Mr. Alkhawaji did not understand what was meant by "submissions," and it was explained to him. Mr. Alkhawaji went on to explain that he was studying Anatomy at Dalhousie University and had limited financing. At the end of his submissions, this exchange occurred:

> **Mr. Alkhawaji:** … Actually, sir, you know, I asked to have an interpreter here but …
>
> **The Court:** You're studying at Dalhousie in English?
>
> **Mr. Alkhawaji:** Yes.

> **The Court:** In a Master's level?
>
> **Mr. Alkhawaji:** Yes.
>
> **The Court:** And you want an interpreter?
>
> **Mr. Alkhawaji:** An interpreter just, you know, to clarify the specific details and … (inaudible) what, you know, the trial … (inaudible).

The transcript does not disclose any response from the court to that last statement by Mr. Alkhawaji.

Analysis

Issue 2(b): Improper Termination

[26] I wish to begin by dealing with issue 2(b). The Appellant argues that there is a reasonable doubt as to whether the Appellant's policy was actually cancelled, and he relies on s. 8 of the *Automobile Insurance Contract Mandatory Conditions Regulations*, N.S. Reg. 181/2003. It provides that:

> **8 (1)** *Termination* - This contract may be terminated
>
> **(a)** by the insurer giving to the insured fifteen days' notice of termination by registered mail, or five days' written notice of termination personally delivered;
>
> **(b)** by the insured at any time on request.

Where the requirements under s. 8(1)(a) have not been proven, the appellant is of the view that it would be a miscarriage of justice to allow the guilty plea to stand.

[27] The Crown simply notes that nobody had mentioned those regulations at the hearing. It points out that the applicant admitted he had no insurance and that is enough.

[28] As I noted earlier, this was never mentioned before Justice of the Peace Shannon so there is no decision to review. Further, I agree with the Crown that the transcript discloses that Mr. Alkhawaji admitted that he had no valid insurance policy at the time he was issued the ticket. I am unaware of any authority which allows a person to withdraw a plea solely because he or she no longer wishes to admit the facts he or she admitted when the plea was accepted. It will almost always be possible to argue that there is a reasonable doubt about something in a criminal matter. Part of the bargain in a guilty plea is that the accused agrees to waive his right to have such matters proved beyond a reasonable doubt. If an accused was permitted to withdraw his or her guilty plea on appeal only by showing that he might be able to *argue* there was a reasonable doubt, then a guilty plea would be meaningless. Absent other considerations, it is not usually

manifestly unjust to believe an accused when he or she admits the elements of an offence.

[29] Further, the proposed defence is not so strong that it would inevitably succeed. In *Patterson v. Gallant*, [1994] 3 S.C.R. 1080, the Supreme Court of Canada considered an identical statutory condition for automobile insurance, also labelled 8(1), contained in Prince Edward Island's *Insurance Act*, R.S.P.E.I. 1988, c. I-4 (see Statutory Condition 8(1) following section 220). Justice Major stated at pages 1095-1096 that:

> It is unnecessary for the appellant to terminate or cancel the alleged insurance in accordance with Statutory Condition 8(1). This is only necessary where there is a binding insurance policy. Where the policy simply expires because of the non-payment of the renewal premium, no formal termination procedure need be followed by the appellant.

There may be relevant differences between the contract in that case and the one in this case which would dilute the strength of that binding authority. Of this I am unaware since the contract is not before me, and I do not here intend to preclude that possible defence.

[30] However, I reiterate that whatever the merits of this potential defence, Mr. Alkhawaji admitted that he had no valid insurance policy. The mere existence of a possible argument that he did is not alone sufficient to disturb his admission.

Issues 1 & 2(a): Did the Justice of the Peace err by accepting the guilty plea?

[31] The Appellant argues that his plea was equivocal and that Justice of the Peace Shannon therefore erred by accepting it. He maintains that he never abandoned the version of the facts where he was duly diligent. Once it was established that he did not admit to a failure of due diligence, Justice of the Peace Shannon should not have accepted the plea.

[32] The Crown, on the other hand, submits that Justice of the Peace Shannon did more than enough to satisfy himself that Mr. Alkhawaji's plea was voluntary and unequivocal. The Crown notes that in the course of his explanation, Mr. Alkhawaji plainly admitted that he was driving a motor vehicle without a valid insurance policy, thus admitting all the elements of the strict liability offence.

[33] Further, the Crown notes that Justice of the Peace Shannon explained well that a defence of due diligence was available and said that Mr. Alkhawaji could not both plead guilty and yet maintain this explanation he was trying to give. He also

gave Mr. Alkhawaji the opportunity to withdraw his plea and plead not guilty, which Mr. Alkhawaji declined.

[34] However, I think it must be recalled that Mr. Alkhawaji had no counsel and there is no indication that he was aware that he could ask for an adjournment or seek counsel. As noted in *R. v. Melanson*, *supra*, "an accused who is speaking to the court on his own behalf may not fully understand the questions raised or the complexity of law involved and, even if he did, may not reply for fear of mistake or some other reason."

[35] That analysis is only compounded in this case by the fact that the Appellant's first language is not English. It is obvious from the transcript that the appellant did not know the meaning of "submission," or at least not its meaning in a legal context. In fact, the Appellant said at the end that he needed an interpreter, but that appears to have been rejected by Justice of the Peace Shannon on the basis of the Appellant's enrollment in a Master's program at Dalhousie.

[36] Further, it is evident from my reading of the exchange between Justice of the Peace Shannon and Mr. Alkhawaji that Mr. Alkhawaji had no meaningful

appreciation of what was meant by due diligence or how he could advance that defence.

[37] Although Justice of the Peace Shannon said that a defence of due diligence might be available, it is plain to me that Mr. Alkhawaji did not understand the explanation. Immediately thereafter, Mr. Alkhawaji said that what he meant by guilty was that "I was driving without my certificate … without my insurance." From that explanation, it is plain that he did not understand that if he could make out his defence of due diligence, he was not guilty and should plead not guilty. Although it appears that Justice of the Peace Shannon was about to give a further explanation, that exchange was interrupted by the Crown before it went anywhere and the Justice of the Peace simply asked Mr. Alkhawaji to affirm his guilty plea. There is no indication in the transcript that Mr. Alkhawaji's misunderstanding about what was meant by guilty was ever cleared up, nor does he abandon his story about the misunderstanding with the insurance company. As such, he never admitted that he was not duly diligent.

[38] That said, a lack of due diligence is not technically an element of the offence in the same way that a lack of *mens rea* would be for a traditional criminal offence.

In *R. v. Sault Ste. Marie,* [1978] 2 S.C.R. 1299. the Supreme Court described strict liability offences at page 1326 as:

> Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

In that sense, it could be arguable that Mr. Alkhawaji nevertheless admitted all the elements of the offence and that is good enough to accept the guilty plea even if he did not admit that he had no defence.

[39] However, if it is true that the insurance company represented to him that the status of his policy was valid despite non-payment and that they would contact him if that changed, then it is a reasonable mistake of fact which entirely justifies his failure to have a valid insurance policy on October 22, 2012. Given that his admission of elements of the offence was situated within that explanation, it was plainly equivocal and based on his misunderstanding that he was still guilty even if his explanation was true. In my view, a person who pleads guilty without

abandoning a positive defence has not made an unequivocal guilty plea and it should be rejected by a judge.

[40] I draw support for this finding that a guilty plea should not be accepted where an accused advances a defence of due diligence from *R. v. Wells*, [2003] O.J. No. 2025 (Q.L.) (CJ). In that case, the accused had been stopped for minor traffic violations, and it was discovered that his license had been suspended nine years before for non-payment of a fine. He represented himself and plead guilty, only afterward explaining that he had been unaware of the 10 year old fine. The justice of the peace in that case did not believe him.

[41] On appeal, the accused argued that the justice of the peace had erred by accepting his guilty plea, and Judge Lane agreed. At paragraphs 13-14, Judge Lane said:

> **13** In this case, Mr. Wells told the Justice of the Peace, prior to taking his plea, that at the time of the alleged offence, he thought that he had paid the outstanding fine and that he had no knowledge that his licence was still suspended. His immediate explanation should have alerted the Justice of the Peace to the obvious fact that his proposed guilty plea was not unequivocal. When the facts were read in by the crown, he still did not admit them, but reiterated that, when he was pulled over, he had assumed all his fines were paid. Prima facie, driving while suspended is a strict liability offense, where no proof of mental element is required, although a defendant can avoid liability by proving that he took all reasonable care or exercised "due diligence:" R. v. Sault Ste. Marie (City) (1978),

> 40 C.C.C. (2d) 353 S.C.C.). Where an accused has paid the outstanding fines before being stopped by the police, however, the charge could potentially be dismissed because the actus reus of the offence has not been proven: R. v. Zembal (1987), 1 M.V.R. (2d) 335 (Ont. Prov. Ct.). In that case, the licence was pending reinstatement as opposed to under suspension. Notwithstanding Mr. Wells' equivocation, the Justice of the Peace entered a conviction against him.
>
> **14** Having heard an indication that there could be a potential defence to the charge, the Justice of the Peace was duty-bound to halt the proceedings and refer the matter for trial. I do not accept the submission of Mr. Sweeney that Mr. Wells' plea of "I guess guilty" was "a manner of speech which could well indicate resignation rather than equivocation." Nor do I accept that a defendant who does not explicitly accept the facts read in by the crown, but gives an explanation that could raise a potential defense, can be said "not to disagree." In this case, the record is clear that the guilty plea entered by Mr. Wells was qualified and uncertain. The refusal of the Justice of the Peace "to get into the case right now" and his refusal to make any further enquiries, effectively forced Mr. Wells to enter a plea which on its face was clearly equivocal.

[42] Similarly, in *R. v. Laudisio, supra*, an accused pled guilty to a regulatory offence and thereafter attempted to advance a due diligence defence. On appeal, Justice Williams permitted him to withdraw his guilty plea at paragraph 27, saying that:

> **27** I accept, on a balance of probabilities, that Mr. Laudisio did not have the necessary understanding of the effect of entering the pleas as he did. He has asserted, in essence, that he believed he would have the right to advance his defence following the pleas and could thereby avoid the entering of convictions and having penalties imposed upon him. As noted, he was self-represented and apparently had not taken legal advice. Although that was a choice he made, and one that may, in hindsight, seem to have been unwise, it is a factor that must be taken into account.

[43] In my view, these cases are on point and the reasoning is persuasive. It is an error of law for a judge to accept a guilty plea if he or she is aware that the guilty plea is deficient because the unrepresented accused does not understand the nature of a guilty plea, or is not admitting the essential elements of the offence, or for any other reason.

[44] In this case, Mr. Alkhawaji's explanation of his guilty plea evinced a misunderstanding of its nature, and it is apparent from Justice of the Peace Shannon's further brief attempt to clarify that he knew that Mr. Alkhawaji did not understand that a defence of due diligence meant he was not guilty. It was both unreasonable and an error of law for Justice of the Peace Shannon to ask that Mr. Alkhawaji confirm his guilty plea while he knew that Mr. Alkhawaji still did not understand the nature of a guilty plea.

[45] The Crown also submits that the defence of due diligence is bound to fail and its potential existence should not permit Mr. Alkhawaji to withdraw his guilty plea. The Crown says that "it would not be reasonable for the Appellant to believe that if he stopped paying his insurance in July, it would still be valid in October." If an agent of the insurance company explicitly told him that the status of his

policy was unaffected, I fail to see why relying on that representation would be unreasonable.

[46] More importantly, it is not my role to determine whether the defence of due diligence would or would not be made out in this instance. It is only to determine if Justice of the Peace Shannon erred by accepting Mr. Alkhawaji's guilty plea when it was equivocal. I am satisfied that he did.

[47] Before leaving this, I wish to make one final comment about the extent of the inquiry conducted by Justice of the Peace Shannon. It is not incumbent on a judge or a justice of the peace to review the entire circumstances of the offence with an accused and explain to him all the possible legal arguments which he might be able to use at trial before he or she accepts the guilty plea. Indeed, the Crown's objections to it in this case raised several good points and the transcript discloses that Justice of the Peace Shannon was also alive to those concerns. By reviewing the circumstances on the record, an unrepresented accused could potentially make admissions that Crown could use against him at a later trial if he or she eventually pleads not guilty, and that is not an ideal result.

[48] Rather, the duty of a judge or a presiding justice of the peace when inquiring into the validity of a guilty plea is only to satisfy himself or herself that the guilty plea is not deficient (i.e. it was voluntary, unequivocal, etc.). Once there is an indication that the guilty plea *is* deficient, the judge or presiding justice of the peace should reject the guilty plea, adjourn the proceedings to permit the accused to seek legal advice, and set the matter down for trial. Although it may be possible to correct minor misunderstandings on the spot, the judge or presiding justice of the peace should not take on the role of counsel for the accused.

The Interpreter

[49] As well, although this was not raised as a ground of appeal and is purely *obiter*, I wish to mention Justice of the Peace Shannon's rejection of Mr. Alkhawaji's request for an interpreter. Section 14 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, provides that:

> **14** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

[50] In *R. v. Tran*, [1994] 2 S.C.R. 951, our Supreme Court of Canada adopted a liberal approach to this provision. Lamer, C.J., noted that a court should usually conduct an inquiry into whether an interpreter is needed where the accused requests an interpreter or where there is some other indication that an interpreter is required. At page 981, he said that:

> [T]he overriding consideration is that of understanding. Failure to conduct an inquiry where there is some positive indication that the accused may not understand or cannot be understood for reasons related to language, and to appoint an interpreter where one may prove helpful, could result in a miscarriage of justice and the ordering of a new trial.

[51] Lamer, C.J., went on to adopt a low standard for showing need, approving at page 984 the statement that:

> [O]nce claimed, the s. 14 *Charter* right to interpreter assistance should not be denied unless there is "cogent and compelling evidence" that an accused's request for an interpreter is not made in good faith, but rather for an oblique motive.

[52] Although Lamer, C.J., notes at page 961 that his analysis is in a criminal context and does not necessarily extend to civil and administrative proceedings, it is my view that that likely applies also to provincial offences. This issue was considered in *R. v. Messina*, 2005 ONCJ 560, [2005] O.J. No. 4663 (Q.L.), and Judge Bovard reached the conclusion that the *Tran* analysis applies to provincial offences. I agree with his comment at paragraph 33 that:

> It would be an untenable situation if persons could be subject to proceedings in Justice of the Peace Court which can result in high fines, serious repercussions for their car insurance rates and for their driving records, and in some cases, incarceration, without the assistance of an interpreter if they need one.

[53] As such, once Mr. Alkhawaji indicated that he would like an interpreter, I do not believe it was appropriate for Justice of the Peace Shannon to dismiss the request out-of-hand as he did. The mere fact that a person is studying for a Master's degree in English is not itself a sufficient indication that he or she does not need an interpreter in accordance with the *Tran* analysis. A more meaningful inquiry probably should have been conducted and Justice of the Peace Shannon should have given reasons for rejecting Mr. Alkhawaji's request.

[54] That said, I reiterate that that issue was not argued before me and is not the ground upon which I have decided this case.

Conclusion

[55] In conclusion, I allow the appeal against conviction and sentence on the basis that Justice of the Peace Shannon erred by accepting the guilty plea of the accused when it was apparent that the accused did not understand the nature of a guilty plea. I order a new trial before a different justice of the peace.

LeBlanc, J.