SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Bruhm*, 2018 NSSC 295

Date: 20181121
Docket: CRBW473972
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Austin James Douglas Bruhm

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By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the person described in this decision as the victim may not be published, broadcasted or transmitted in any manner. This decision complies with this restriction so that it can be published
***Voir Dire* Decision**

Judge: The Honourable Justice Michael J. Wood

Heard: November 20, 2018, in Bridgewater, Nova Scotia

Oral Decision: November 21, 2018

Counsel: Leigh-Ann Bryson, for the Crown
David Hirtle, for the Accused

By the Court (Orally):

[1] On September 2, 2016, Austin Bruhm was arrested by Cst. Andrew Cowper of the RCMP and charged with sexual assault and sexual interference contrary to ss. 271 and 151 of the *Criminal Code*. On November 11, 2016, Mr. Bruhm attended at the RCMP detachment in Cookville, N.S., met with Cst. Cowper and provided samples for DNA testing.

[2] There was no warrant authorizing the taking of DNA samples from Mr. Bruhm and he says that this process violated s. 8 of the *Canadian Charter of Rights and Freedoms*. That section says that everyone has the right to be secure against unreasonable search and seizure. The taking of a DNA sample without a warrant is a violation of s. 8 unless the individual has provided their consent. The issue on this *Voir Dire* is whether Mr. Bruhm properly consented to the taking of DNA samples by Cst. Cowper on November 11, 2016. The Crown says that he did, and Mr. Bruhm says that he did not.

[3] Both parties agree that the burden is on the Crown to prove Mr. Bruhm's consent on a balance of probabilities. Cst. Cowper was the only witness called.

Circumstances Leading to the taking of Samples on November 11, 2016

[4] Cst. Cowper was the lead investigator with respect to this matter. He first became involved as a result of a telephone call from the IWK Children's Hospital in Halifax, on September 1, 2016. He took possession of a sexual assault kit from the IWK which included swabs taken from the body of the victim.

[5] Mr. Bruhm was arrested on September 2, 2016, charged with offences under ss. 271 and 151 of the *Code* and released on a promise to appear and undertaking. His first court appearance was scheduled for October 12, 2016.

[6] As part of the investigation Cst. Cowper sent samples from the sexual assault kit to the RCMP lab for analysis. On November 2nd or 3rd, 2016, he received a report from the lab, which indicated the presence of male DNA on a vaginal swab taken from the victim. Cst. Cowper wanted to obtain DNA samples from Mr. Bruhm to compare with the male DNA found on the sexual assault kit samples.

[7] On November 6, 2016, Cst. Cowper located Mr. Bruhm at the residence of Kenny Bruhm. He spoke to him for about ten minutes and explained that he wanted to obtain a DNA sample from Mr. Bruhm. He told him that he could

request a warrant from the Court or Mr. Bruhm could consent. Cst. Cowper explained that Mr. Bruhm did not have to consent and could talk to a lawyer before making his decision.

[8] Mr. Bruhm told Cst. Cowper that he would agree to provide the DNA samples and the Constable said that he should speak to his lawyer before doing so. Mr. Bruhm said that he would. They agreed to meet at the Cookville detachment on November 11th for the sampling process.

[9] In his direct examination Cst. Cowper said that he told Mr. Bruhm on November 6 that he had received a report of analysis from the sexual assault kit showing the presence of male DNA on the victim's body and that he wanted Mr. Bruhm's DNA to compare with that sample. The occurrence report which he prepared about ten minutes after the meeting did not refer to the specific discussion about comparing the DNA samples. In cross-examination Cst. Cowper agreed that this was important information which should have been in the occurrence report. After a number of questions from the defence, Cst. Cowper agreed that he did not have an independent recollection of those specific details from the conversation with Mr. Bruhm.

[10] On November 11, 2016, Mr. Bruhm went to the Cookville RCMP detachment as agreed. The meeting with Cst. Cowper was audio and video recorded and a DVD of that was played at the hearing. Prior to Mr. Bruhm entering the interview room, Cst. Cowper stated on the record the location, date, time, and purpose of the meeting. He indicated that he is going to take DNA from Mr. Bruhm to do a comparison with the male DNA from the sexual assault kit. Mr. Bruhm then entered the room with Cst. Cowper and they reviewed a written consent form, which is then signed by Mr. Bruhm.

[11] The consent form, which was read to Mr. Bruhm before he signed it, says that the samples have been requested in relation to the investigation of the charges under ss. 271 and 151 of the *Criminal Code*. In addition the form states that Mr. Bruhm has been informed that:

> 1. Prior to giving voluntary samples for DNA comparison that I have the right to retain and instruct counsel without delay. This means that I may call a lawyer or get free advice from duty counsel immediately. If I am charged with an offence I may apply for Legal Aid for assistance, if I cannot afford a lawyer.
> 2. I have been advised and understand that the results of such comparison may be given in evidence in criminal proceedings and that the evidence may serve to incriminate or to exonerate me.

3. I have been informed that if I voluntarily give samples suitable for DNA comparison that they will be used for comparison in the above noted investigation only.

4. I fully understand that I am under no legal obligation to give DNA samples and that if I do so, it will be of my own free will.

5. I have read all of the above and I am in agreement to voluntarily provide the RCM Police samples suitable for DNA comparison in this case.

6. I understand that I have the right to refuse to provide samples and that I am free to discontinue this process at any time.

[12] After the consent form was reviewed and signed by Mr. Bruhm, Cst. Cowper obtained DNA samples in the form of blood and saliva from him. During the discussion Mr. Bruhm was advised that the process was voluntary and he was free to leave at any time. Mr. Bruhm was not under any threat or oppression, nor was he offered any promises in exchange for providing the samples. His participation was voluntary.

[13] The issue raised by the defence is whether Mr. Bruhm was provided with sufficient details concerning the use that would be made of his DNA samples in order to provide an effective and informed consent.

Requirements for Consent or Waiver of s. 8 Rights

[14] The leading case on consent waiver of s. 8 rights is the Ontario Court of Appeal decision in *R. v. Wills*, 1992 CanLII 2780. In that case the accused provided a breath sample following a motor vehicle accident. The police officer had no grounds to believe that the accused was impaired and suggested the test would be useful in the event of civil law suit. The accused was not aware that a passenger in his car had been killed and that the police officer was still undecided as to what charges might be laid, and that the breathalyser result would be used in making that decision.

[15] The Court concluded that the accused's consent did not operate as a waiver of his s. 8 rights and set out the criteria to be applied when considering the issue. The Court's conclusion is found in the following paragraph:

> In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:
>
> (i) there was a consent, express or implied;
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> (ii) the giver of the consent had the authority to give the consent in question;

(iii) the consent was voluntary in the sense that that word is used in *Goldman*, *supra*, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;

(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,

(vi) the giver of the consent was aware of the potential consequences of giving the consent.

[16] The Court found that the first five criteria were met on the facts of this case, but that the accused was not sufficiently aware of the consequences to give a valid consent. The Court went on to expand on the requirement to understand the consequences of giving consent as follows:

> The awareness of the consequences requirement needs further elaboration. In *Smith*, *supra,* at pp. 726-28 S.C.R., pp. 322-23 C.C.C., McLachlin J. considered the meaning of the awareness of the consequences requirement in the context of an alleged waiver of an accused's s. 10(b) rights. She held that the phrase required that the accused have a general understanding of the jeopardy in which he found himself, and an appreciation of the consequences of deciding for or against exercising his s. 10(b) rights.
>
> A similar approach should be applied where s. 8 rights are at stake. The person asked for his or her consent must appreciate in a general way what his or her position is vis-a-vis the ongoing police investigation. Is that person an accused, a suspect, or a target of the investigation, or is he or she regarded merely as an "innocent bystander" whose help is requested by the police? If the person whose consent is requested is an accused, suspect or target, does that person understand in a general way the nature of the charge or potential charge which he or she may face?
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> In addition, at least in cases where the person is an accused, suspect or target of the investigation, the person whose consent is sought must understand that if the consent is given the police may use any material retrieved by them in a subsequent prosecution.

[17] After reviewing the information which was not provided to Mr. Wills the Court explained that his consent did not meet the sixth criteria for the following reasons:

> In my view, the cumulative effect of this non-disclosure and misinformation caused Mr. Wills, when he agreed to take the test, to fail to realize both his potential jeopardy and the potential consequences of taking the test. Mr. Wills did not know that the police wanted the breathalyzer results in part to assist in an

> ongoing investigation into a very serous car accident. Mr. Wills was in jeopardy of being charged with some non-alcohol related offence and he was not told of that jeopardy when asked to consent to the breathalyzer. Instead, the taking of the test was presented to him exclusively as a potential source of information should he become involved in civil litigation. Mr. Wills was not told that the breathalyzer had some potential relevance to an ongoing police investigation of which he was the target.

[18] The criteria found in *R. v. Wills* has been approved and applied in many cases, including the Supreme Court of Canada decision in *R. v. Borden*, [1994] 3 S.C.R. 145. In that case the police were investigating two sexual assaults. Mr. Borden was arrested and advised that he was a suspect in the second assault and was asked if he would agree to provide samples of his hair and blood. He agreed to do so and signed a written consent form. The police did not tell Mr. Borden they were primarily interested in the blood sample to use for DNA analysis in relation to the earlier sexual assault. The Court held that Mr. Borden was not sufficiently aware of the consequences of his consent, and therefore the sixth *Wills* criteria was not met. They explained their conclusion as follows:

> The degree of awareness of the consequences of the waiver of the s. 8 right required of an accused in a given case will depend on its particular facts. Obviously, it will not be necessary for the accused to have a detailed comprehension of every possible outcome of his or her consent. However, his or her understanding should include the fact that the police are also planning to use the product of the seizure in a different investigation from the one for which he or she is detained. Such was not the case here. Therefore, I conclude that the police seized the respondent's blood in relation to the offence forming the subject matter of this charge. (pp 164-5)

[19] The consent form which was signed by Mr. Borden read as follows:

> I, Josh Randall Borden, of Frederick Street, in New Glasgow, Pictou County, do hereby give my consent to the New Glasgow Police Department to take a sample of my blood for the purposes relating to their investigations.

[20] The Supreme Court of Canada held that this consent was sufficient to waive any s. 8 rights and allow the blood sample to be used in relation to the investigation of the second sexual assault (see page 159).

[21] I interpret these authorities to mean that for the sixth *Wills* criteria a consent will only be valid if the person understands the jeopardy they are facing in terms of the investigation in which the evidence will be used and the potential charges which might result. In the *Borden* case, the fact that Mr. Borden was told that he was a suspect in a particular assault under investigation meant that the sample

could be used in relation to that event. Since he was not told anything about the earlier sexual assault, his consent did not extend to use of the sample in that investigation.

Analysis of Mr. Bruhm's Consent

[22] Mr. Bruhm was aware, as of September 2, 2016, that he had been charged with sexual assault and sexual interference on a particular person. On November 6, 2016, he was aware that the investigation was ongoing and the RCMP wanted to obtain a sample of his DNA for purposes of that matter. He was told that his decision whether to consent was voluntary, and that he should discuss it with his lawyer. He said that he would do so. He agreed to come to the RCMP detachment on November 11th and meet with Cst. Cowper, which he did. At that time he was again told that the process was voluntary and that the DNA was being sought for comparison purposes in relation to the sexual assault and sexual interference investigation. Mr. Bruhm willingly provided the samples. At no point was he under threat, pressure, or inducement.

[23] When I examine these circumstances against the six *Wills* criteria it is obvious that the first, second, third, and fifth have all been established on a balance of probabilities. With respect to the sixth criteria, which is awareness of the potential consequences of giving the consent, Mr. Bruhm was fully aware of the scope of the investigation and, in fact, had been charged with the offences currently before the Court. He knew or ought to have known what was at jeopardy and what his risk was if the samples resulted in evidence relevant to the allegations. This satisfies the sixth *Wills* criteria.

[24] The fourth criteria was not discussed in any of the cases which counsel provided to me. It indicates that the person giving consent must be aware of the nature of the police conduct which will take place. The *Wills* criteria apply to any search or seizure and are not limited to DNA samples, and so a wide range of police conduct is potentially in play. This could include searches of people, places and things.

[25] The defence argues that Mr. Bruhm's consent is invalid unless he was told specifically that his DNA was going to be compared to the unknown male sample found on the victim's body. They say that it is not sufficient to know that the sample is being used for comparison purposes in relation to this particular investigation.

[26] In my view the fourth *Wills* criteria does not require that the person understand how the potential evidence might be used by the police in the investigation or how it may relate to other evidence which they obtain. I think the fourth criteria requires an understanding of how the police will conduct the search, which, in this case, involved taking blood and saliva samples. The issue of the consequences which flow from giving those samples is covered by the sixth criteria, which I have already discussed. Mr. Bruhm was clearly told what would happen during the sampling process and that is sufficient to satisfy the fourth *Wills* criteria.

Conclusion

[27] I am satisfied that the Crown has established all of the *Wills* criteria on a balance of probability and that Mr. Bruhm provided his consent to Cst. Cowper taking the DNA samples on November 11, 2016. As a result, there is no violation of Mr. Bruhm's s. 8 rights in relation to that process.

Wood, J.