IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Spencer, 2006 NSSC 365

Date: 20060825
Docket: CRSK 260119
Registry: Kentville

Between:

Her Majesty the Queen

Defendant

v.

Peter Lewis Spencer

Appellant

Judge:	The Honourable Justice Gordon Tidman.
Heard:	August 25, 2006, in Kentville, Nova Scotia
Written Release of Decision:	December 1, 2006
Counsel:	Robert Stewart, Q.C., counsel for the appellant Lloyd Lombard, Esq., counsel for the Crown

By the Court: (Orally)

[1] The appellant, Peter Spencer, by Notice of Appeal, dated December 15, 2005, provides in the Notice that he appeals against his conviction made by the Honourable Judge Claudine MacDonald on November 16, 2005, that he on December 18, 2004, at or near Kentville, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, operated a motor vehicle contrary to s. 253(b) of the **Criminal Code**.

[2] The central issue of the appeal is whether Judge MacDonald erred in law when she failed to consider the appellant's alleged denial of counsel of choice as a breach of his s. 10(b) rights under the **Charter of Rights and Freedoms**. Prior to the conviction entry Judge MacDonald heard the appellant's Charter motion as a preliminary application and found that his Charter rights were not breached. The appellant, following that decision, pled guilty to the breathalyzer charge. At the time of the appeal hearing on June 6, 2006, the Crown presented three issues for the Court's resolution: (1) whether the Court has jurisdiction to deal with the appeal; (2) if the Court has such jurisdiction that the appellant bears the burden of satisfying the Court that his guilty plea must be struck, and (3) if the appellant is

successful then the Court must decide whether the appellant's s. 10(b) rights were infringed on the facts before the trial court.

[3] At the hearing on June 6, 2006, I was not satisfied with the material provided to the Court on the first jurisdictional issue. Consequently, I adjourned the hearing to give counsel an opportunity to provide additional materials and argument on this essential and important issue. Counsel provided such additional material and argument. However, at the adjourned hearing I advised counsel that I had no evidentiary basis upon which I could determine whether there would be a miscarriage of justice if the Court declined jurisdiction by refusing to hear the Charter appeal on its merits. Mr. Stewart asked the Court for an adjournment in order to provide an evidentiary basis for the Court's determination. Mr. Lombard had no objection to Mr. Stewart's request for an adjournment. That being so, the Court granted the adjournment to August 25, 2006, at 9:30 a.m. and Mr. Stewart was to provide his evidentiary basis by affidavit.

[4] Today, Exhibit 1 was provided, which is an affidavit of Mr. Spencer, which is very brief and reads as follows:

> That I am the Appellant in this Appeal and have personal knowledge of the matters herein referred to, except where stated to be based by way of information and belief.
>
> That when I attended Court on November 16, 2005, for the continuation of my Trial, I was advised by my counsel, Robert C. Stewart, Q.C., that there were no other defences available.
>
> That he further told me that even if I plead guilty I would still be able to appeal the Trial Judge's ruling on the ***voir dire***.
>
> That he did not tell me that I may not be able to appeal the Trial Judge's decision if I plead guilty. (presumably meaning pled guilty)

[5] Mr. Lombard cross-examined Mr. Spencer on the basis of the affidavit. So, dealing now with the matter of jurisdiction, the appellant's right to appeal is statutory and it is provided for by s. 813 of the **Criminal Code** which states in part:

> 813. Except where otherwise provided by law,
>
> (a) the defendant in proceedings under this Part may appeal to the appeal court
>
> (i) from a conviction or order made against him,
>
> (ii) against a sentence passed on him, or
>
> (iii) against a verdict of unfit to stand trail or not criminally responsible on account of mental disorder.

[6] Mr. Lombard, on behalf of the Crown submits that under s. 813 of the **Criminal Code** there is no provision for an appeal from an interlocutory decision of the trial court. He points out that s. 813 provides for an appeal from a conviction only and where an accused pleads guilty to an offence, there is no right to an appeal. He submits that had there been a conviction by the Court the accused could then have properly included the alleged Charter violation decision as a ground of appeal.

[7] Mr. Stewart, on behalf of the appellant, allows that Mr. Lombard is correct in his submissions as far as he goes. Mr. Stewart submits that the appellant is, however, entitled to an appeal if such refusal would amount to a miscarriage of justice. Mr. Stewart submits that in this case he advised the accused to plead guilty under the mistaken assumption that the preliminary Charter decision could be appealed despite the guilty plea. Mr. Stewart submits that no defence other than the Charter application was available to the accused and it was for that reason he advised the appellant to plead guilty to the breathalyzer charge after unsuccessfully advancing the Charter challenge.

[8] Mr. Lombard has referred the Court to three cases dealing with the jurisdictional issue. They are: **R. v. Murdock**, [1995] N.S.J. 194, a decision of the Nova Scotia Court of Appeal; **R. v. Davidson** [1992] N.S.J. 27 and (1992) 110 N.S.R.(2d) 307; also a decision of the Nova Scotia Court of Appeal and **R. v. Luong Duong**, 2006 B.C.J. 1452, a decision of the British Columbia Court of Appeal.

[9] **Murdock** simply affirms that there is no right of appeal from an interlocutory decision. The appellant takes no issue on that matter. In **Davidson** the Nova Scotia Court of Appeal dealt squarely with the issue before the Court and found that an appeal must be from a conviction and that a plea of guilty precludes an appeal. In coming to that conclusion Jones, J.A., speaking for the Court, relied on the following excerpt from a decision of the Supreme Court of the United States in **Tollett v. Henderson** given by Mr. Justice William Rehnquist to wit:

> We thus reaffirm the principle recognized in the **Brady** trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offence with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in **McMann**.

[10] In **R. v. Duong**, in circumstances even more similar to the case at bar, the British Columbia Court of Appeal allowed on appeal a review of a Charter decision of the trial judge, wherein the judge had found no charter violations in a search of the accused's premises and allowed evidence found thereby to be admitted at the accused's trial. In that case the appellant accused, on appeal, provided an affidavit of the appellant that he pled guilty on the advice of his lawyer that there was no defence on the merits and the **Charter** decision could be appealed after a guilty plea. The Crown took no issue with the facts alleged in the affidavit. The Court in allowing the appeal relied on s. 686(1)(a)(iii) of the **Criminal Code** which reads in part to what is relevant to this case:

> 686. (1) On the hearing of an appeal against a conviction . . . the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> . . .
>
> (iii) on any ground there was a miscarriage of justice.

[11] It is interesting that in the case Rose, J.A., made the following observation and agreed with the procedure described , and I quote from paragraph 8 of the **Duong** decision:

> The respondent (being the Crown in that case) submits that appealing a conviction in the face of a guilty plea is inappropriate and a practice that ought not to be encouraged. The respondent recognizes that there are occasions when an accused after unsuccessfully challenging the admissibility of evidence may not wish to contest other evidence to be put forward by the Crown but nonetheless may wish to preserve his right to appeal that ruling. In that case the respondent submits the proper procedure is not to enter a guilty plea but to admit the underlying facts and invite the judge to convict.

[12] I agree with those submissions. The Court in **Duong** concluded, however, in any event, that in view of the contents of the appellant's affidavit that it would hear the appeal on the **Charter** decision on its merits.

[13] In the case at bar, I am satisfied that at the time of a guilty plea the appellant was mistakenly given to understand by his counsel, and did understand, that he could plead guilty to the offence charged and still maintain his right to appeal the preliminary **Charter** decision of the trial judge. Thus the guilty plea of the appellant was not, in the Court's view, a properly informed plea. To deprive the appellant of his right of appeal of the trial judge's **Charter** decision, in the circumstances, would amount to a miscarriage of justice. The appellant has successfully attacked the "voluntary and intelligent character" of the guilty plea as described by Justice Rehnquist in **Tollett v. Henderson** and quoted by Justice Jones in **R. v. Davidson,** to which I have previously referred. Thus, I will consider the appeal of the trial judge's decision on the alleged **Charter** violation.

[14] Unfortunately for the appellant, although he has won the jurisdictional battle, he must lose the war on the merits. The Court concurs with Judge MacDonald's decision on the **Charter** issue as to whether the appellant's right to counsel as guaranteed by s. 10(b) of the **Charter** was violated.

[15] Judge MacDonald, in the Court's view, conscientiously dealt with all of the cases put forward in the appellant's submission that his **Charter** right was violated. She differentiated the circumstances in the case at bar from the circumstances in all of the cases presented. She found that the police had not acted unreasonably while and in the course of attempting to assist the appellant in securing his own choice of legal counsel. She found further that the appellant had every opportunity to examine the phone directory and locate the phone number and call his own counsel after office hours at his own home. The officer himself telephoned the number listed in the telephone directory on more than one occasion and got no answer. The officer provided the name of duty counsel and gave the accused the opportunity to phone duty counsel. The accused, in fact, spoke with duty counsel. Duty counsel advised the accused to call the accused's own counsel. Again, the police office dialed Mr. Stewart's office telephone number and the

office telephone numbers and the home number were listed together in the directory. Although it was night time and after usual working hours, it was not, in my view, incumbent upon the officer to telephone Mr. Stewart and disturb him at home in the early morning hours. The directory was available to the accused. The accused had an opportunity to use it and to call Mr. Stewart at home. He made no request or gave no instructions to the police officer in an effort to call Mr. Stewart at home.

[16] In the circumstances of this case to, in effect, find that the police failed to secure counsel of the appellant's choice, would be to find a right not intended by the **Charter** and thus, I would dismiss the appeal on its merits.

J.