

DATE: 20071122

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

C. Mullaly, for the Respondent

- and -

ELMER VALENCIA

Appellant

Elmer Valencia, in Person

HEARD: November 15, 2007

GARTON J.:

ENDORSEMENT

[1] This is an appeal from the appellant's conviction on a charge of impaired driving in the Ontario Court of Justice on September 26, 2005. A charge of "over 80" was conditionally stayed.

[2] The main issue on appeal is whether the appellant ought to have been granted an adjournment on the day of trial for the purpose of preparing a section 11(b) *Charter* motion. Transcripts of the appellant's various court appearances were filed with this court so that the merits of such a motion could be assessed. Having reviewed those transcripts, and for the reasons that follow, I find that Marshall J.'s refusal to grant the adjournment does not, in the circumstances, call for appellate intervention. The appellant's assertion that his section 11(b) *Charter* rights were breached is without merit, given that the appellant's actions caused the delay in this case.

History of the proceedings

[3] The appellant was arrested and charged with impaired driving in the early hours of the morning on June 8, 2003. His first court appearance was on July 21, 2003, at which time an agent, Mr. Joel Etienne, appeared on his behalf. The case was remanded to August 5, 2003. Later that same day, T. Dee, an agent from the office of Charles Bourgeois, attended in court on behalf of the appellant. The agent was advised of the August 5 date and was given disclosure and a Crown screening form.

[4] On August 5, 2003, Mr. Etienne appeared on behalf of the appellant and was advised that disclosure had already been provided. Mr. Etienne indicated that he had not been fully retained. He requested that the matter be adjourned so that he could review the disclosure and the appellant could complete his retainer. The case was adjourned to September 3, 2003.

[5] On September 3, 2003, the agent from Mr. Bourgeois' office attended in court and indicated that the appellant had not yet formally retained their firm. She asked that the case be put over to October 1, 2003 for that purpose. She also confirmed that disclosure had been provided.

[6] On October 1, 2003, the appellant was assisted by the Spanish interpreter and by duty counsel. Duty counsel indicated that the appellant was represented by Mr. Etienne, who was in the middle of a pre-trial and who asked that the appellant's case be adjourned to October 29, 2003. The court granted this request.

[7] On October 29, 2003, the appellant was again assisted by the Spanish interpreter and by duty counsel, who indicated that Mr. Etienne was requesting that the case be held down or adjourned to December 1, 2003. The appellant advised the court that he had still not fully retained Mr. Etienne. Noting that this was the appellant's fifth court appearance, the court put the matter over for two weeks to November 13, 2003. The court advised the appellant that he would have to set a trial date at that time, with or without counsel.

[8] On November 13, 2003, the appellant attended in court with a letter from Mr. Etienne suggesting trial dates starting from October 25, 2004. The Crown brief estimated that the trial would take three hours. Duty counsel contacted Mr. Etienne's office in an attempt to obtain earlier dates, but was advised to "stick" with the October 2004 dates. The case was then held down so that the trial coordinator could be consulted. Eventually, a trial date of October 25, 2004 was set with an intervening date of March 26, 2004.

[9] On March 26, 2004, the appellant was assisted by duty counsel. The purpose of this date was to confirm the trial date of October 25, 2004. There was no letter or message from Mr. Etienne. The appellant advised the court that he had still not fully retained Mr. Etienne and that

he would require four more months in order to do so. The court emphasized that the trial was to proceed on October 25, 2004, whether or not he had a lawyer. The appellant indicated that he understood and agreed to proceed on that basis. The case was adjourned to June 24, 2004, at which time the appellant was to advise whether or not he had counsel.

[10] On June 24, 2004, the appellant attended in court and provided a note from Mr. Etienne. Mr. Etienne indicated that although he had not yet been fully retained, he expected to be retained prior to the trial date of October 25, 2004. The appellant advised the court that he wished to be remanded directly to that date. He also confirmed that he was prepared to proceed at that time with or without a lawyer, and that if he did not have counsel, he would not request an adjournment on that basis.

[11] On October 25, 2004, the Crown informed the court that on October 21, 2004, Mr. Etienne had faxed a letter to the Crown's office stating that he had still not been retained by the appellant. Mr. Etienne indicated that the purpose of his letter was to assist the appellant in asking for disclosure materials that had not previously been requested. The letter did not request an adjournment. The Crown witnesses were in attendance on October 25, 2004 and the Crown was ready to proceed to trial.

[12] The appellant confirmed that he had not paid Mr. Etienne's retainer in full. He also advised the court that he wished to pursue his Legal Aid application, which had already been refused. The matter was held down for a short time. Later that morning, Mr. Etienne attended in court and stated that he had not been fully retained. There was some confusion as to who was in possession of the appellant's disclosure materials. When the appellant advised Mr. Etienne that he had also consulted Mr. Bourgeois in this matter, Mr. Etienne attempted, without success, to reach Mr. Bourgeois. In the end, the Crown simply made a copy of the disclosure materials and gave them to the appellant.

[13] The court reluctantly granted the defence request for an adjournment. The appellant confirmed that he would be hiring a lawyer with his own money and the case was remanded to October 27, 2004. The court advised the appellant that he would have to return to court every Wednesday until he had retained counsel. The court also ordered that a transcript of the proceedings on October 25 be attached to the information.

[14] On October 27, 2004, the appellant appeared and advised the court that he had attended at the Legal Aid office the previous day. Although his original application had been refused, Legal Aid had agreed to consider further financial information. The matter was remanded to November 17, 2004, in order to give the appellant time to receive an answer from Legal Aid.

[15] On November 17, 2004, the appellant, who was assisted by duty counsel, indicated that Legal Aid had denied his application and that he intended to consult with counsel, Mr. Lawrence Cohen, about the possibility of retaining him. The matter was put over to November 24, 2004, at which time the appellant was either to provide the name of the lawyer he had retained or to set a date with or without counsel.

[16] On November 24, 2004, a trial date of September 26, 2005 was set, with an intervening date of May 20, 2005.

[17] For some reason, the case was brought forward to May 17, 2004, at which time the appellant indicated that he was still looking for a lawyer. The matter was adjourned to May 24, 2004.

[18] On May 24, 2004, the appellant indicated to Marshall J., through duty counsel, that he would be representing himself and that the case should now go directly to the trial date. Justice Marshall, who recognized the case, offered an earlier trial date. She reviewed with the appellant his intentions in terms of retaining counsel and discussed certain disclosure concerns. After noting that any further adjournment applications were to be brought before her, the matter was adjourned to the trial date of September 26, 2005.

[19] On September 26, 2005, the appellant attended before Lindsay J. with an agent, R. Keston, whom the appellant had retained on September 16, 2004. Mr. Keston requested that the trial be adjourned so that he could prepare a factum and obtain the transcripts necessary for a section 11(b) *Charter* motion. The adjournment request was traversed to Marshall J.'s court. Justice Marshall reviewed the situation and denied the request. The trial then proceeded before Lindsay J.

The delay issue and Marshall J.'s refusal to grant an adjournment

[20] As the Ontario Court of Appeal stated in *R. v. Olbey* (1977), 38 C.C.C. (2d) 390 at 398, the granting of an adjournment is within the discretion of the trial judge. An appellate court will not interfere with the exercise of that discretion unless the trial judge has failed to exercise it in a judicial way, or unless the refusal to grant an adjournment has resulted in a miscarriage of justice.

[21] In considering the appellant's request to adjourn his trial for a second time, Marshall J. reviewed the history of the case, found that the appellant had "stalled" matters since July 2003, and ordered the trial to proceed. It cannot be said that in refusing the adjournment, Marshall J. failed to exercise her discretion in a judicial way. Nor did her refusal result in a miscarriage of justice since the section 11(b) motion for which the adjournment was sought was, in my view, without merit and would have had no prospect of succeeding.

[22] The factors the court must consider in assessing whether there has been a breach of an accused's right to a trial within a reasonable time were set out in *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.) at p. 13 and are as follows:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
 - (a) inherent time requirements of the case;
 - (b) actions of the accused;

- (c) actions of the Crown;
 - (d) limits on the institutional resources, and
 - (e) other reasons for delay, and
4. prejudice to the accused.

[23] The delay in this case from arrest to trial was almost two years and four months. None of the delay was attributable to the Crown, who provided disclosure at the appellant's first court appearance. It was the appellant who kept asking that the case be put over in order to give him time to retain counsel. On October 29, 2003, which was the fifth court appearance, the appellant was told to be prepared to set a trial date at his next court appearance. On November 13, 2003, the trial date of October 25, 2004, was set. Earlier dates were available but the appellant's counsel insisted on this later date.

[24] The appellant indicated on June 24, 2004, that he was prepared to proceed with his trial with or without counsel and that he would not seek an adjournment even if he were unable to retain counsel by the trial date. However, on October 25, 2004, the appellant did seek an adjournment on that basis and asked for time to pursue a further application to Legal Aid. Although the Crown was ready for trial and its witnesses were present, the adjournment was granted. More remands followed as the appellant continued with his efforts to retain counsel. On November 24, 2004, the trial date of September 26, 2005 was finally set.

[25] The appellant retained Mr. Keston on September 16, 2005. It is not surprising that Mr. Keston, upon learning that the case had taken over two years to get to trial, felt that the merits of a section 11(b) motion should be explored. However, he was not familiar with the history of the case and the fact that the delay was the result of the appellant's own actions.

[26] The appellant cannot rely on his own delay to support his assertion that his section 11(b) rights have been breached. Since a section 11(b) motion had no prospect of succeeding, Marshall J.'s refusal to grant an adjournment for the purpose of bringing such a motion could not be said to have caused a miscarriage of justice. I would not give effect to this ground of appeal.

Right to Counsel

[27] The appellant submitted in his factum and during oral argument that his right to counsel under section 10 (b) of the *Charter* was violated. He stated that after his arrest and while at the police station, he was not allowed to have a private conversation with duty counsel and that the officer in charge hung up the telephone in the middle of his discussions with counsel. The appellant complained that he was not provided with a videotape of what transpired during his discussions with duty counsel.

[28] Police Constable David Murray testified that when he arrived at the police station, he arranged for a Spanish-speaking officer, Detective Constable Eduardo Wulff, to advise the appellant over the telephone in Spanish as to his right to counsel and the breath demand. Officer Wulff confirmed in his testimony that he followed through with these instructions.

[29] Officer Murray testified that he then arranged for the appellant to speak over the telephone and in a sound proof room to a Spanish-speaking duty counsel, Mr. Gesta Abols. The police do not videotape an accused person speaking to his lawyer; therefore, the videotape requested by the appellant does not exist.

[30] It was never suggested to Officer Murray in cross-examination that he did not allow the appellant to have a private conversation with duty counsel, or that he interrupted the appellant during his discussions with counsel. Nor did the appellant, while giving evidence at his trial, mention any problem or difficulty concerning his access to counsel.

[31] The Ontario Court of Appeal recently reaffirmed the general rule for raising *Charter* issues on appeal in *R. v. Lewis* (2007), 86 O.R. (3d) 46, 219 C.C.C. (3d) 427 at para. 20:

There is no doubt that the clear general rule is that Charter issues ought not to be raised for the first time on appeal. There is good reason for this. There is possible prejudice to the adversely affected litigant who is unable to call the evidence it would have wished on the issue. As well, there may be an absence of a sufficient record for the appellate court to properly determine the matter.

In *R. v. Hayes*, [2003] O.J. No. 4590 (C.A.) at para. 64, the Court of Appeal commented on the discretion to permit new issues to be raised as follows:

Generally speaking, Charter issues ought not to be raised for the first time on appeal, particularly where, as here, a factual and evidentiary foundation may be necessary. While appellate courts have discretion to permit the raising of a new issue, this discretion is generally restricted to where there has been a fundamental change in the law since the time of trial, and where there is a sufficient evidentiary foundation. Neither is the case here.

[32] Had the appellant's rights to counsel been interfered with in the manner alleged – an allegation that the appellant made in comments before Marshall J. as early as May 24, 2005 - there was nothing to prevent him from exploring and raising this issue during cross-examination of the Crown witnesses and during his own testimony. Mr. Abols could also have been subpoenaed to testify as to whether his conversation with the appellant had been prematurely terminated.

[33] Having chosen not to raise this issue at trial, the appellant cannot now raise it on appeal. This ground of appeal must fail.

The toxicologist's report

[34] The appellant also raised before this court certain issues with respect to the toxicologist's report.

[35] The appellant noted in his factum that the breathalyzer tests were taken outside the two-hour limit. This is correct. As a result, the Crown did not rely on a certificate of analysis, but called the breath technician, P.C. Robert Kerr, as a witness and filed his report as an exhibit.

[36] The appellant asserted that he only received a copy of the toxicologist's report on the trial date and consequently was unable to prepare properly for his trial. However, the appellant's assertions in this regard contradict Mr. Keston's comments to the trial judge. When asked by the court if he had a copy of the report, Mr. Keston replied that the "accused was given a copy some time ago."

[37] I would not give effect to this ground of appeal.

Other issues

[38] The appellant raised other issues in his factum that he did not pursue during oral argument. For example, he submitted that the trial judge erred in permitting Police Constable Wells to refresh her memory from a photocopy of her original notes, which had been lost in a flood. The officer testified that there had been no changes or alterations to the notes and that she had an independent recollection of the events that evening. No objection was made to the use of the notes at trial.

[39] The appellant also raised the issue of identification, which was addressed by the trial judge in a motion for a directed verdict, which he dismissed. The evidence regarding identification included the testimony of P.C. Wells, who stated that she followed the car until P.C. Murray stopped it. No one else was in the car. P.C. Wells advised the officers at the scene that this was in fact the vehicle she had been following and which had been driven erratically. The driver identified himself as Elmer Valencia with a proper driver's licence. P.C. Murray eventually handed the appellant over to the breathalyzer technician, P.C. Kerr, who identified him in court.

[40] In his factum, the appellant also took issue with the trial judge's finding that he was not a credible witness. As stated in *R. v. Coates*, [2003] O.J. No. 2295 (C.A.), an appellate court must show great deference to findings of credibility made by the trial judge, who has the advantage of seeing and hearing the witnesses. Although an appellate court may review, re-examine and re-weigh evidence in order to assess whether the verdict is reasonable and can be supported by the evidence, it must not simply substitute its opinion for the findings made by the trier of fact.

[41] In the present case, the trial judge reviewed the evidence and related it to the issue of whether the appellant's ability to operate a motor vehicle was impaired by alcohol. His reasons for judgment indicate that he instructed himself with respect to the principles in *R. v. W.(D.)* (1993), 63 C.C.C. (3d) 397 (S.C.C.) and that he properly applied those principles. The evidence supporting the trial judge's decision that the appellant was guilty of impaired driving was, in my view, overwhelming.

[42] There was no error by the trial judge in permitting the officer to refer to her photocopied notes, in his findings with respect to the issue of identification, or in his application of the principles in *R. v. W.(D.)*, *supra*.

Conclusion

[43] For the reasons provided, the appeal is dismissed.

GARTON J.

Released: 20071122

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