

CITATION: *R. v. Charles*, 2017 ONCJ 176
COURT FILE No.: 15-7978
County of Middlesex
DATE: 2017-03-16

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

KEITH CHARLES and HAMID GOLBASZ

Before Justice Wayne G. Rabley
Heard on January 19th and February 16th, 2017
Reasons for Judgment released on March 16th, 2017

J. Carnegie and L. Maguire for the Crown
J. Smith for the accused Keith Charles
B. Colquhoun..... for the accused Hamid Golbasz

RABLEY J.:

INTRODUCTION

1. These appeals deal with the difficult issue of trying to determine the appropriate manner in which to analyze charges of Driving While Under Suspension where the defendant denies having received notice that he or she was under suspension at the time of driving.

BACKGROUND OF THE GOLBASZ CASE

2. Hamid Golbasz was on his way to work at 6:15 in the morning on March 18th, 2015 when he was stopped by Constable Wood of the London Police Services. After conducting some computer checks the officer determined that Mr. Golbasz was under suspension and charged him accordingly.
3. To prove that Mr. Golbasz was under suspension at his trial, the Prosecutor filed a Ministry of Transportation certificate setting out that on March 11th, 2015 the license of Mr. Golbasz was suspended for an unpaid fine and that the notice was mailed to 1799 McCready Road, Bothwell, Ontario which was agreed to be the address of the Defendant.
4. Mr. Golbasz testified in his own defence. He told the Court that Bothwell is a rural community in Ontario and that he was working in London at the time of the offence. He recalled that he had worked late on March 17th and stayed at his parent's residence in London. On the 18th, he went home after he was charged. He checked his mailbox and there was no mail. On the 19th he checked his mail again and received the Notice of Suspension for an outstanding fine. He immediately went and paid the fine and his license was reinstated on March 20th.
5. The presiding Justice of the Peace found Mr. Golbasz guilty and concluded that the:

“evidence provided in support of the defence of due diligence, in my view, fails to support that Mr. Golbasz, on a balance of probability, took all reasonable steps to prevent his license falling into suspension.”

6. His Worship did not reject the evidence of Mr. Golbasz. Rather he found that Mr. Golbasz had not met the criteria to raise the due diligence defence because:

1) The Defendant acknowledged that approximately ten years prior to the offence he had been convicted of Driving While Under Suspension and therefore “it is impossible to imagine how he could not have taken all required steps to avoid a similar outcome in the event of a future ticket”

and

2) “that he did not respond to a traffic ticket that ultimately led to an unpaid fine and the license suspension.”

THE BACKGROUND OF THE CHARLES CASE

7. Keith Charles was operating his motor vehicle on January 3rd, 2016 when he was stopped by Constable Van Belleghem of the London Police Services at 1:44 in the morning. After the officer conducted a computer check he learned that the

Mr. Charles' license had been suspended because of an outstanding fine. He charged him accordingly.

8. To prove that Mr. Charles was under suspension, at his trial, the Prosecutor filed a Ministry of Transportation certificate setting out that on December 17th, 2015 the license of Mr. Charles was suspended for an unpaid fine and that the notice was mailed to his address of 1889 Culver Drive, in the City of London.
9. Mr. Charles testified in his own defence. He told the Court that he had no idea that his license was under suspension and that he had never received any notice. He agreed that he had resided at 1880 Culver Street for a number of years and that he attended to pick up his mail regularly. There was no other evidence other than the presumption in section 52 of the Highway Traffic Act to prove that Mr. Charles had actually received the Notice from the Ministry.
10. As a result of the charge, Mr. Charles attended at the Provincial Offences office and requested an ICON printout of the ticket that led to the suspension. When he received it, he learned that the fine originated in Brantford on January 22nd, 1991. The Ministry had renewed the license of Mr. Charles five times since the date of the ticket. The ICON printout was filed with the Court and the presiding Justice of the Peace concluded that the letters ENF meant 'enforcement' and that the date indicated for that was December 15th, 2015, just two days prior to the date that the Notice of Suspension was mailed out by the Ministry.
11. After hearing all of the evidence, the presiding Justice of the Peace found Mr. Charles guilty and concluded that:

“your due diligence defence is not accepted. It has not been proven on a balance of probabilities.”
12. Her Worship did not give any reasons or analysis to reject the evidence of Mr. Charles other than:
 - 1) *“I am satisfied beyond a reasonable doubt that this notice did go to you at your last known address. And the fact that you have resided at that last known address for a number of years, that you're the one that has access to the mail, that there is nothing within the evidence to suggest that this document did not get to you in accordance with the ability to serve documents by mail;” and*
 - 2) *“what I understood your evidence to be is that you didn't get notice of the fact that this fine was due. That's not the same thing in my view of you saying, you didn't get notice that your license was under suspension.”*

THE LAW

13. Section 52 of the Highway Traffic deems that service of a Notice of Suspension mailed by the Ministry of Transportation shall be seven days after the document has been mailed. The section states as follows:

(2) Notice sent by registered mail under clause (1) (a) or by mail under clause (1) (b) shall be deemed to have been given on the seventh day after the mailing unless the person to whom the notice is sent establishes that he or she did not, acting in good faith, through absence, accident, illness or other cause beyond his or her control, receive the notice. 2000, c. 26, Sched. O, s. 4

14. Justice D.A. Harris has done an excellent summary of the law on this issue in a trilogy of cases: *R. v. Harry*, 2011 ONCJ 891; *R. v. MacLeod*, 2013 ONCJ 93 and *R. v. Beatty*, 2013 ONCJ 686. In *Beatty*, His Honour concluded that:

[11] The Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 (S.C.C.) determined that all regulatory offences fall into one of three classifications. One of these classifications is that of strict liability offences.

[12] The Supreme Court of Canada in *R. v. MacDougall*, [1982] S.C.J. No. 89 (S.C.C.) and the Ontario Court of Appeal in *R. v. Miller*, [1988] O.J. No. 253 (Ont. C.A.) stated that driving while suspended falls into the classification of a strict liability offence.

[13] The effect of this is set out in *R. v. Montgomery*, [2006] O.J. No. 2267 (Ont. C.J.), where MacDonnell J. stated that:

"Because it is a strict liability offence, the burden on the Crown is discharged upon proof of the actus reus of the offence, namely (i) that the defendant's licence to drive was suspended, and (ii) that while it was suspended, he drove. The Crown does not have to prove knowledge of the suspension, although in most cases it will attempt to do so with the aid of s. 52(2) of the Highway Traffic Act."

[14] So, applying the principles set out in *Sault Ste. Marie*, once the Crown had proved the actus reus beyond a reasonable doubt, it would have then been open to Mr. Beatty 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.

[15] The onus was therefore on Mr. Beatty to prove on a balance of probabilities that **he reasonably believed that his driver's licence was not suspended at the time that he was caught driving.**" (emphasis in bold is always mine)

15. In Canada, we are very proud of a postal system that ranks as one of the best in the world, but can we honestly say that the mail always gets where it is supposed to arrive within a few days of delivery? Even the most ardent supporter of Canada Post would have to agree that we cannot. So the question is fairly asked by those who legitimately do not get delivery of the Notice of Suspension from the Ministry "how do I prove something that didn't happen?" In my view, it is a fair question to ask especially when there may be significant consequences for the inability to prove a negative, even on a balance of probabilities.
16. Justice Fairgrieve wrestled with this issue in *R. v. Bellomo*, [1995] O.J. No. 313 (O.C.J.), and concluded that the balance of probabilities test offended Section 7 of the Charter and that an individual need only raise a reasonable doubt as to whether or not he knew that he was under suspension.
17. The *Bellomo* decision was followed by Justice Tetley in *R. v. Lupo*, [2008] O.J. No. 5591 (O.C.J.), but neither of these cases appears to have been appealed to a higher court so they remain decisions from the O.C.J. and therefore are not binding. While I prefer the reasoning in those cases, I agree with Justice Harris that I am bound to follow the law as stated in *Montgomery and Miller*.
18. The challenge for me is to reconcile the need to protect those who genuinely are not guilty of the offence with the onus placed on the defendant to satisfy a court on a "balance of probabilities" that he was not aware that he was under suspension at the time of driving and that his lack of knowledge was not due to his own 'negligence'.
19. The Crown advocates that chaos will result in the prosecution of Driving While Under Suspension charges should individuals be acquitted solely on the basis of their testimony that they simply did not receive a Notice of Suspension from the Ministry because this will make it very difficult for the Province to prove that these people had knowledge that they were under suspension. The Crown views this as problematic because it will impede the Province's ability to administratively enforce the collection of outstanding fines. The position was best echoed by the presiding Justice of the Peace in the *McLeod* decision where she stated:

"Taking that logic of defence that he did not know he would be suspended, taking that logic one step further, if police officers issue tickets and there was no mechanism set in place by the Province to enforce those tickets and fines it would lead to a ludicrous outcome. Officers would be issuing tickets and everyone would be ignoring them because they would think that there would be no consequence for that."
20. I agree that the Province should enforce outstanding fines that have not been paid and that the ability to do so is a factor for a court to consider. However, the essence of the argument is that administrative efficiency has greater value than ensuring that the

"morally innocent," as Justice Fairgrieve described them, are found guilty.

21. With respect, I disagree with this approach. It must be remembered that s. 53 of the Highway Traffic Act is a penal provision which can ultimately result in an individual receiving a sentence of incarceration for up to 6 months. As Chief Justice Lamer stated in the case of *Reference Re Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3D) 289 (S.C.C.):

“Indeed, administrative expediency certainly has its place in administrative law. **But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency.** Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.”

22. The language used by Justice Harris in *Beatty* appropriately sets out the test for a Court to consider when he states:

"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."

23. Therefore, if an individual testifies that he did not know that he was under suspension and that he did not receive notice from the Ministry, in my view, seldom will be the case that he will not have met the test on a balance of probabilities unless his evidence is rejected by the presiding Justice of the Peace or there is other evidence that can be relied upon to conclude that notice was given. In such a case, reasons must be given to explain what evidence the Justice of the Peace was relying upon in rejecting the defence of due diligence.

24. It is open to a trier of the facts to find that an individual was not **'reasonable** in a mistaken set of facts" where he was negligent in his obligations to make himself aware of the possibility of a suspension. So for example, a presiding Justice of the Peace could reject the evidence of a defendant, if having received a ticket;

- a) he had not picked up his mail;
- b) he had not open or read his mail making himself wilfully blind;
- c) he did not provide a forwarding address; or
- d) he had moved and not updated his license with the Ministry.

25. Justice Fairgrieve went on to address the argument that this might make it more difficult for the prosecution to prove its case:

"Mr. Stinson's justification was essentially one of law enforcement expediency. He submitted that it would simply be too easy for anyone charged with driving while suspended to deny having received the notice that was sent. People making that assertion, however, would be subject to cross-examination. The Crown in many cases would be in a position to contradict such evidence by producing a postal receipt, or by calling evidence of notice having been given personally by a police officer on another occasion, or by demonstrating other circumstances that could compel the rejection of the defendant's denial of knowledge. **The traditional methods relied upon by courts to ascertain the truth would still be available.**"

THE GOLBASZ APPEAL

26. In the Golbasz Appeal, the presiding Justice of the Peace concluded that the defendant had not taken all reasonable steps to avoid a suspension because he had failed pay an outstanding ticket and therefore he could not rely upon the due diligence defence.
27. In my view, His Worship was in error. While the fact that a person's negligence might compromise the ability of the Ministry to effect notice upon him is a factor for a Court to take into account, the fact that an unpaid ticket 'might' lead to a suspension is not. It is too remote to come to this conclusion given that situations do exist where the failure of those to pay tickets does not necessarily lead to suspension (such as the non-filing of the ticket by the officer, the quashing of the ticket by a justice of the peace or the failure of the Ministry to act upon a suspension for an unspecified period of time (as illustrated by the Charles Appeal).
28. With respect, the test is whether a person "reasonably believed that his driver's licence was not suspended at the time that he was caught driving." The presiding Justice of the Peace in Golbasz did not apply this test, but relied upon the words of Justice Harris where he stated "or if he took all reasonable steps to avoid the particular event". In my view, these words cannot be sectioned off from the first half of the sentence and their clear meaning because those words are in reference to negligence in the receipt of appropriate notice, not in the act of allowing a license to potentially be suspended. Otherwise there would be no purpose served by section 52(2) of the HTA.
29. I agree with the proposition that individuals should pay their tickets unless they are pleading not guilty, but many circumstances arise where an individual unintentionally may not do so. For example, he may innocently forget or ask another person to pay the ticket on his behalf and that person may forget. If such a person is not advised by the Ministry that they are under suspension as a result of this omission, should they potentially be subjected to a loss of license and incarceration because they cannot prove on a balance of probabilities something that did not happen (i.e. receipt of mail that was not delivered)? I would find, that they should not, unless a justice of the peace having heard all of the evidence rejects their explanation and provides cogent reasons for so doing.
30. I find support in this conclusion in Bellomo where Justice Fairgrieve reasoned:

"It cannot be denied that driving while suspended differs from most other strict liability public welfare offences in that it does not necessarily in-

volve any conduct that is dangerous or harmful. *Unlike such public welfare offences ... driving while suspended is not the kind of proscribed conduct that, in an effort to avoid it, one expects inquiries to be made or care to be taken.* In the normal course, people simply do not take steps to ensure that their licences which purport to be valid in fact continue to be so, nor is it reasonable to think that they should do anything in that regard. Any concept of "fault" in the context of this offence must recognize that reality."

31. I would also disagree with the finding of the presiding Justice of the Peace when he concluded that Mr. Golbasz could be found to have imputed knowledge of how the Ministry administrative procedures work because 10 years prior to the offence he had been found guilty of Driving While Under Suspension. In my view, this was a dangerous leap in logic which cannot be supported.
32. There was no evidence that Mr. Golbasz had any knowledge of the inner workings of the Ministry of Transportation as a result of his previous dealings with the law. His Worship's conclusion that Mr. Golbasz should have "taken all required steps to avoid a similar outcome in the event of a **future ticket**" also presupposes that the Defendant had his license suspended for non-payment of a fine. There was no evidence of this. There are a multitude of different ways that a person might find his license under suspension. Only one of them is as a result of the non-payment of a ticket.
33. I would find that it was dangerous and incorrect to conclude that because Mr. Golbasz had been found guilty of Drive While Under Suspension in the past that somehow this was evidence to rebut his clear testimony that he did not know that he was under suspension at the time of this offence.
34. A Defendant who testifies is entitled to know why his evidence has been rejected by a Court and there must be reasons to justify that decision. In the Golbasz case, I find that the presiding Justice of the Peace did not reject the evidence of the Defendant and that there was nothing to contradict it, but for the mailing of the notice by the Ministry, which appeared to have arrived late. In my view, Mr. Golbasz satisfied the test set out in Beatty and therefore I have allowed the appeal and dismissed the charge.

THE CHARLES APPEAL

35. With respect to Mr. Charles, I would adopt the same principles as I have done in the Golbasz case. Mr. Charles testified that he did not receive the 'fine'. Her Worship interpreted that evidence to mean that he did not receive notice of when the fine was due, but it is clear that Mr. Charles was referring to the Ministry of Transportation notice filed by the prosecutor which set out that the suspension was as a result of a 'ticket' or a 'fine'.
36. In his evidence, Mr. Charles, who was unrepresented at the time, testified:

"Um, according to that paper, the Ministry have sent me that paper there and they claimed that they sent it to me in the mail."
37. He then went on to explain:

“And I was told that. That’s what they claim, but it never came, I never received that mail.”

38. The only paper in the Courtroom at the time was the Ministry documentation. Unfortunately, Her Worship misunderstood what Mr. Charles was saying.
39. Her Worship also did not offer reasons why she believed that Mr. Charles received the Notice in the mail other than to state that he did so because he lived at his address and he therefore must have received it. With respect, there was no evidentiary basis to dispute the testimony of Mr. Charles that he did not receive the Notice and as I have stated earlier, I am not prepared to find that the mail is always delivered promptly and to the right address. Since the evidence of Mr. Charles was not rejected, I find that it satisfied the test on a balance of probabilities.
32. Therefore, as stated eloquently by Justice Fairgrieve, those who are "morally innocent" of the offence because they did not know that they were under suspension and who were "persons who really have done nothing wrong" should not be found guilty in these circumstances. I would allow the appeal and dismiss the charge against Mr. Charles.

Released March 16th, 2017.

Justice W. G. Rabley