

ONTARIO COURT OF JUSTICE

Central West Region

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

PETER CORBASSON

Before Justice Richard H.K. Schwarzl
Heard on April 15, 16 and June 16, 2015
Reasons released on September 1, 2015

Mr. Sean Doyle for the Crown
Mr. Douglas Lent..... for the Defendant

SCHWARZL, J.:

1.0: INTRODUCTION

[1.] On May 9, 2014 the Defendant, Peter Corbasson, was found by the police sleeping in his car which was parked at a fast food restaurant in Mississauga. Police investigation revealed that when they found the Defendant, his ability to operate a motor vehicle was impaired by the consumption of alcohol and that his blood alcohol concentration was 180 milligrams of alcohol per one hundred millilitres of blood. Mr. Corbasson was released unconditionally from the police station at 8:30 a.m. which was seven and a-half hours after being lodged in the cells once the breath test procedure was completed. The Crown

agrees with the Defendant that Mr. Corbasson was arbitrarily detained at the police station after the completion of the police investigation in violation of his constitutional rights.

- [2.] The trial was conducted on the basis that the evidence of both parties apply both to the trial proper and to all voir dices. There are only two issues for me to decide. The first issue is whether or not the Crown has proven beyond a reasonable doubt that the Defendant was in care or control of his motor vehicle. With respect to this first issue, I made a mid-trial ruling that statements made by Mr. Corbasson to the qualified breath technician in the breath room were voluntary and admissible. The second issue is what remedy or remedies, if any, should be granted in the face of a breach of the Defendant's rights under section 9 of the *Canadian Charter of Rights and Freedoms*.

2.0: ISSUES AND ANALYSIS

2.1: Was the Defendant in care or control of his motor vehicle?

- [3.] The defence submits that the Defendant was not in care or control of his car. They point to the following facts: his car was off the road in a parking lot; the engine was off; the keys were not in the ignition; he was sleeping in a reclined position; he felt fine when he left the restaurant and pulled over only because he was tired, not drunk; he had a plan which was to rest then proceed only when he felt better; and he had no intention to drive when he pulled over to rest. I was invited by the defence to not rely upon the Defendant's statements against his interest made to the qualified breath technician because the Defendant testified that he was intimidated and only told the officer what he thought the officer wanted to hear.
- [4.] The defence also submits that the presumption outlined by section 258(1)(a) of the *Criminal Code* does not apply. That section states that where a person is found to be in the driver's seat of a motor vehicle while intoxicated by alcohol and/or drugs, he is presumed to have occupied the seat with the intention to drive. In the alternative, the

Defendant submits that if the presumption does apply, then he has rebutted it in which case he submits that the Crown has failed to prove that he was in actual care or control.

- [5.] The Crown submits that the statutory presumption applies and has not been rebutted. They submit that even if the presumption does not apply for any reason, it has proven actual care or control based on the evidence as a whole.

- [6.] There is binding authority in Ontario interpreting the Supreme Court's decision in *Boudreault* [2012] S.C.J. No. 56 such that the Crown need not first prove a realistic risk of danger when seeking to rely upon the presumption in 258(1)(a). The Crown must only prove the realistic risk of danger when seeking to establish *de facto* or actual care or control, but not when the Crown is relying on the presumption: *R v Blair*, [2014] O.J. No. 4296 (S.C.J.); *R v Agyemang*, [2014] O.J. No. 5047 (S.C.J.); *R. v. Wendell*, [2015] O.J. No. 3297 (O.C.J.). If the statutory presumption in s. 258(1)(a) is not rebutted on a balance of probabilities, then care or control is deemed proven.

- [7.] The relevant timeframe for consideration of the defendant's intention is the time when he first entered and occupied the driver's seat: *R v Hatfield*, [1997] O.J. No. 1327 (Ont. C.A.); *R v Miller*, [2002] O.J. No. 4896 (S.C.J.) at paras 21 to 29 *aff'd* [2004] O.J. No. 1464 (Ont. C.A.); *R v Maslek*, [2004] O.J. No. 2770 (S.C.J.); *R. v. Baird*, [2008] O.J. No. 5758 (S.C.J.); *R. v. Amyotte*, [2009] O.J. No. 5122 (S.C.J.).

- [8.] In this case, the presumption of occupancy applies. I find that the Defendant has failed to establish that it is more likely than not that he got into his car for a reason other than driving. I find that the statements given by the Defendant in the breath room to be reliable. I reject his submission that he was intimidated or that he simply told the police what they wanted to hear. He understood all police cautions; he had the benefit of legal advice before answering any questions; he is clearly a highly intelligent and confident person; his demeanour in the breath room was relaxed, open, and honest. Nothing in his attitude, the atmosphere within the room, or any conduct by the police gave the slightest indication of intimidation or pandering. The Defendant told the police he drove away

from a restaurant where he had been eating and drinking with relatives. His evidence at trial was the same. He never got out of his car between starting to drive and being roused from his sleep by the police. The evidence clearly establishes that he entered the car for one purpose only, namely to drive. Even after he stopped to rest the Defendant never abandoned his intention to drive because he was going to continue on his way home once he decided he was refreshed and fit.

[9.] Having failed to rebut the statutory presumption of occupancy, I find that the Defendant was in care or control of his motor vehicle at the relevant times. If I am wrong and the Defendant has rebutted the presumption of occupancy, I would nevertheless find that the Crown has proven actual care or control for the following reasons: the Defendant drove away from the restaurant despite being told not to by their staff; his plan was to drive after he had rested, showing an intention to drive. Significantly, he told P.C. Nichols prior to knowing the test results that he felt fit to drive at that time. When he said this, his blood alcohol concentration was 180 milligrams of alcohol per hundred millilitres of blood which is more than twice the legal limit. The absence of a reliable plan, his poor self awareness of his own sobriety, the immediate availability of his keys within easy reach next to him on the passenger seat, and his uninterrupted intention to drive all demonstrate that there was a real risk of danger that the Defendant would drive while intoxicated.

[10.] Accordingly, I find that the Crown has proven that the Defendant was in care or control while he was impaired by alcohol and while his blood alcohol concentration exceeded the legal limit.

2.2: What remedy or remedies, if any, should be granted on the section 9 Charter breach?

[11.] In this case, the final breath test was completed at 12:29 a.m. He was removed from the breath room around 1:00 a.m. and lodged in the cells. He was served with the Certificate of Qualified Technician and the Notice of Intention to Produce at 1:24 a.m. At 8:30 a.m. the Defendant was released unconditionally from the station. The defence submits that

the Defendant was arbitrarily detained for eight hours, being the time between the last breath test and his release. The Crown submits that the Defendant could not be released until being served with the documents, resulting in a post-offence detention of seven, not eight, hours. I agree with the Crown that the reviewable period of post-offence detention is seven hours because it was not reasonable to expect a release instantaneously after the breath tests. The one hour required to prepare and serve these documents as well as release papers appears reasonable in such cases.

- [12.] Both parties agree that the police violated the Defendant's section 9 Charter right by not releasing him until 8:30 a.m. His release was not effected until this time for a number of reasons. The investigating officer was of the view the Defendant was releasable from the get-go but it was not his decision to say when that release would happen as this was a matter for the Staff Sergeant in charge of the station. Regardless, the investigating officer prepared a Promise to Appear and delivered it to a cell's officer sometime between 1:30 and 3:00 a.m. The Defendant's release in this case could realistically have happened as early as 1:30 as the service of investigative documents and the availability of the Promise to Appear coincide with this point in time.
- [13.] When the Defendant was brought into the station the officer in charge of the station was S/Sgt. Manvati who was aware why the Defendant had been brought in and was told of the breath test results. As the officer in charge of the station, Manvati was responsible for the welfare and control of all prisoners and was also responsible for deciding which of them was to be released or held for bail. While he was in charge of the station, S/Sgt. Manvati had nine prisoners, including the Defendant. S/Sgt. Manvati went off duty at 5:00 a.m.
- [14.] In this case, S/Sgt. Manvati decided to release the Defendant unconditionally right after learning of the breath test results. However, he also decided that based on the readings to hold the Defendant for four or five hours because he doubted the Defendant could comprehend the release documents given those readings. In making his conclusion about comprehension, S/Sgt. Manvati made no effort either directly or indirectly to assess the

Defendant's actual mental or physical condition. The evidence at trial makes it clear that neither the investigating officer nor the qualified breath technician had any problems regarding the Defendant's comprehension because he understood his rights to counsel, all cautions, demands, and other inquiries made of him throughout the investigation. It is clear S/Sgt. Manvati assumed, without considering anything else, that because the Defendant's blood alcohol concentration was more than twice the legal limit it would be unsafe to release him until his blood alcohol concentration was under the legal limit. There is merit to this belief especially in light of the Defendant's statement to the qualified breath technician that he felt fine to drive right after the breath tests. There are many cases in which courts have found that blood alcohol concentration is a relevant factor when considering post-investigative release. S/Sgt. Manvati used a rate of elimination of 15 mg/100ml/hour. Given the lowest result truncated result of 180 and using this rate of elimination it would take just over 6.5 hours for the Defendant's blood alcohol concentration to be under the legal limit. Taking the highest result truncated of 190, it would take over seven hours to reach that level.

- [15.] At no time after making the decision to hold the Defendant based on blood alcohol concentration alone did S/Sgt. Manvati make any inquiries, whether directly or indirectly, to assess the fitness of the Defendant for release. Manvati testified that had a responsible person been brought to his attention, he would have released the Defendant to that person. However he never made any such inquiries of the Defendant. As it turns out the Defendant's sister was just such a person but she was not contacted by the police. However, the Defendant did not ask to call her either. Shortly before 4:00 a.m. S/Sgt. Manvati came into possession of the release papers for the Defendant. He went off duty at 5:00 a.m. not knowing if the Defendant was suitable for release at that time or not.
- [16.] I find that S/Sgt. Manvati's conduct cannot be described as capricious or malignant. His decision to hold the Defendant for several hours was not made on a whim or in a vacuum. It was based on a valid consideration. However, his conduct cannot be countenanced for two reasons. First, for not making any actual assessment of the Defendant's fitness, and second by only considering one factor (blood alcohol concentration) and not the wider

palette of factors regarding this very issue as set out in the well-known, and local, summary conviction appeal case of *R. v. Price*, [2010] O.J. No. 1587 (S.C.J.). No evidence was led as to whether or not S/Sgt. Manvati was aware of the principles set out in *Price*, or if he was that he deliberately ignored them.

- [17.] S/Sgt. Manvati was succeeded as officer in charge of the station by S/Sgt. Armstrong at 5:00 a.m. Unlike S/Sgt. Manvati, Armstrong obviously understood very well the need to consider the factors set out in *Price* when deciding if, and when, a prisoner charged with a drinking and driving offence can be released. When he came on duty, S/Sgt. Armstrong was briefed about all the prisoners, including the Defendant. There were an unusually high number of prisoners that day. Like Manvati before him, Armstrong was responsible for dealing with all of them equitably and promptly to the best of his ability. With respect to the Defendant he was told that his high reading was 195 mg% at 12:30 a.m. After considering all of the *Price* factors, S/Sgt. Armstrong decided that the Defendant was releasable without any conditions or restrictions as soon as possible which meant by 6:00 a.m. Release was not reasonably possible prior to this time because he had other prisoners to release or sort out for bail. He also had other important duties to tend to when coming on shift. Unfortunately, there was only one other officer and him available to deal with everything and everyone.
- [18.] It took longer than expected to release the Defendant because not only was there an unusually high volume of prisoners to begin with, but more prisoners came into the station as others were set to be released or processed for bail. The police have a reasonable policy of dealing with only one prisoner at a time, either coming in or leaving, to minimize safety risks for everyone. Although S/Sgt. Armstrong wanted to release the Defendant right away, he could not do so until five other prisoners had to be prepared for a 7:00 a.m. deadline to be taken to court for bail and until the new prisoners had been lodged.
- [19.] S/Sgt. Armstrong summarized the delay in releasing the Defendant as the result of the rare circumstance of having too many other things and prisoners to deal with and too few

resources to do it all at once. I accept his evidence that this was a very unusual occurrence.

- [20.] The time spent in the police lockup was not easy for the Defendant. The cell was bleak and cold. The Defendant's shoes were taken from him and his feet were freezing; his requests for his shoes were denied. The Defendant was in poor health, suffering from high blood pressure and arthritis and was not permitted to take medication that had been on him when he was arrested. After his release from the station, the Defendant went to see his doctor because of the way he felt in custody. Every time a cell's officer came by (which was every half hour) the Defendant asked if he could go home. He was told by one officer, "The more you ask, the longer you will stay." When he asked for a blanket, all he was given was what he described as a useless plastic sheet. The Defendant was not given any food while in police custody.
- [21.] In assessing all of the evidence on this *Charter* issue, I find that not all of the seven hour period of post-offence detention was arbitrary or illegal. Specifically, I do not find the period between 6:00 a.m. when S/Sgt. Armstrong intended to release the Defendant and his actual release at 8:30 to infringe the Defendant's rights. This 2.5 hour period was not the result of improper police conduct. Instead, it was the product of an unexpectedly busy and understaffed time at the station. It was not reasonable for the police to be expected to resource their station in anticipation of a perpetual "worst case" scenario.
- [22.] S/Sgt. Armstrong did not act capriciously, tyrannically, or without care and thought for the Defendant. To the contrary, he comported himself with full knowledge of, and attention to, his duties towards this Defendant. S/Sgt. Armstrong did his best to deal with competing but equal interests of all prisoners under his charge and he did so as quickly as reasonably possible and to the best of his ability.
- [23.] While it was argued that Manvati's failure to consider all relevant factors but one in deciding to detain the Defendant for many hours caused the Defendant to be caught in the vortex of conditions facing S/Sgt. Armstrong I cannot ignore the fact that once S/Sgt.

Armstrong came on duty he, unlike his predecessor, implemented all his duties and obligations towards the Defendant. In other words, the arbitrary nature of the Defendant's post-investigative detention ended once S/Sgt. Armstrong became involved.

- [24.] Despite my conclusion that the violation of the Defendant's rights ceased at 6:00 a.m., I will continue my analysis of the issue on the basis I am wrong and that it continued until his release at 8:30 on the basis that he should have been released before S/Sgt. Manvati went off duty. In any case, whether the breach lasted for four and a-half or seven hours, it does not change the fact that there was a breach of the Defendant's right to be free from any arbitrary detention.
- [25.] The core issue is what remedy, if any, should be granted. The Defendant seeks relief by way of a stay of proceedings under section 24(1) of the *Charter*. In *R. v. Zarinchang*, [2010] O.J. No. 1548, the Ontario Court of Appeal noted that there are two categories of cases that may attract a judicial stay of proceedings. The first is where trial fairness is implicated by state misconduct. The second is where the action of the state contravenes fundamental notions of justice that undermine the integrity of the judicial process. In considering whether a stay should be granted in either category, the Defendant must satisfy the court that (a) the prejudice caused by the abuse will be aggravated or manifested by the trial or its outcome and the prejudice and (b) no other remedy is reasonably capable of removing that prejudice. Where a court has uncertainty whether a stay is warranted, the court must balance the interests in favour of granting a stay with those interests in making a final decision on the merits. More recently, the Supreme Court of Canada set out a similar test in *R. v. Babos*, [2014] S.C.J. No.16.
- [26.] Here, trial fairness is not impacted by the breach as it was connected neither in time or cause to any aspect of the investigation of the alleged offences. Rather, the Defendant relies on the second, or residual, category and forcefully submits that arbitrary post-investigative detentions have been found in many cases in Peel Region over a long period of time. They cite cases of similar breaches both before and after the *Price* case. The Defendant argues that this breach was the result of systemic problems in Peel Region and

submits that a stay is the only appropriate remedy as a means to prevent the repetition of the same breach in future cases. In the alternative, the Defendant submits a stay of proceedings and a common law peace bond with restricted driving terms may be appropriate. If I grant a stay, I would not impose a peace bond as to do would dilute the power and gravity of a judicial stay.

- [27.] The Crown submits that this is not the clearest of cases wherein a judicial stay is appropriate. They argue that an alternative remedy such as a declaration or a reduced penalty will meet the ends of justice.
- [28.] In this case the personal prejudice to the Defendant was at the lower end of the scale. His unlawful detention was 4.5 to perhaps as much as 7 hours, a range of time that cannot be described as draconian or punitive. Although he was cold and discomforted by his treatment and ignored by S/Sgt. Manvati, he was not abused or maltreated. His dignity and bodily integrity remained intact at all times. There was no duty on the police to inquire if there is a responsible person: *R. v. Hernandez*, [2013] O.J. No. 3347 (S.C.J.). The availability of a responsible person is but one factor to consider. Here, the Defendant did not tell the police such a person could be called. I find the Defendant suffered the prejudice of real inconvenience but not much, if anything, more.
- [29.] In researching the law on this issue, I came across the unreported decision of my brother Justice Kelly in the matter of *R. v. Pavkovic*, released June 5, 2015. The reasons in *Pavkovic* are thorough, persuasive, and on point with this case. I accept and adopt Justice Kelly's statement of the legal principles and his analysis as set out therein at paragraphs 72 to 90. I note that Mr. Lent was counsel in that matter but unfortunately he did not bring this clearly relevant case to my attention when he made his submissions on June 16. I will provide counsel with a copy of the reasons in *Pavkovic*.
- [30.] Here, as in *Pavkovic*, there is some risk to the integrity of the judicial process because (a) there was no adequate justification for not releasing the Defendant shortly after 1:30 a.m. when the investigation was complete and (b) this very issue has arisen time to time in

Peel court cases over a couple of decades. In assessing the prospective risk to the integrity of the judicial process, I take into account that (a) the arbitrary nature of the detention was 4.5 hours or at most 7 hours, (b) the Defendant was not mistreated, (c) there is no suggestion of bad faith, (d) it is clear that S/Sgt. Armstrong has had training and has knowledge of the *Price* factors thus showing that efforts are being made to eliminate any potential systemic concerns, and (e) it is unclear that S/Sgt. Manvati was aware of the *Price* factors and deliberately ignored them. Manvati's conduct can best be described as incomplete and inadequate, but not as egregious or outrageous. On balance, it cannot be said that the integrity of the judicial process has, or will be, undermined if the matter is decided on its merits.

- [31.] I agree with the reasons in *Pavkovic* that in this very similar case there are remedies capable of redressing the prejudice short of a judicial stay. If required to conduct a balancing of competing interests I find that a stay of proceedings would be disproportionate in this case because while the breach and the prejudice were real, they cannot fairly be said to be flagrant, shocking or scandalous. Also, despite a number of cases presented where similar breaches were found, there was no evidence about the frequency of unjustified post-offence detention by the police in Peel Region so as to be able to assess, let alone make, any findings of institutional or systemic bad faith. Lastly, there is a strong public interest in adjudicating serious cases like this on the merits.
- [32.] I reject the Crown's submission that a declaration is a sufficient remedy. While it may operate as a gateway to civil proceedings, it amounts to no immediate or directly meaningful remedy at all. In this case, I believe that the remedy of a reduced sentence is the sole effective remedy. Such a remedy is proportionate to the circumstances and to the competing interests because it will dissociate the Court from the state misconduct in this case while at the same time holding the Defendant accountable for his criminal conduct.
- [33.] I have considered the Defendant's request for costs. I make no such order because (a) I do not find any litigation misconduct by the Crown and (b) the issue was by no means

free from difficulty. In such circumstances it is only fair that each side carry its own costs of litigation: *R. v. Tiffin*, [2008] O.J. No. 1525 (C.A.).

3.0: CONCLUSIONS

[34.] I find that the Defendant was in care or control of his car while impaired by alcohol and while his blood alcohol concentration was over the legal limit. Findings of guilt will be made in respect of each of the two counts on the Information. Crown counsel will advise me upon which count they seek a judicial stay.

[35.] As for penalty, a conviction will be registered. Pursuant to section 24(1) of the *Charter*, there will be a \$250.00 fine together with a victim fine surcharge of \$75, with four months to pay both amounts. Furthermore, there will be a one year driving prohibition. But for the breach of the Defendant's rights, an increased driving prohibition would have been justified given the readings and the very real risk he posed to public safety in this case.

Original Signed By the Honourable Justice R.H.K. Schwarzl

Richard H.K. Schwarzl,
Justice of the Ontario Court of Justice