

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Stennett*, 2018 ONCJ 182

DATE: 2018-03-20

COURT FILE No.: Newmarket 17-02833

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

LERRELL STENNETT

RULING ON STATEMENT VOLUNTARINESS AND CHARTER APPLICATION

Evidence heard March 19, 20, 2018.

Delivered: March 20, 2018.

Mr. Philip Hsiung counsel for the Crown
Ms. Susan Pennypacker counsel for the defendant

KENKEL J.:

Introduction

[1] Mr. Stennett left a nightclub after celebrating his brother's birthday. He was driving a black Jaguar with two passengers. At one point he drove off the roadway, hit a hydro pole, then a light pole, and then crashed in to several large parked vehicles in a lot. Mr. Stennett was badly injured in the crash as was the front seat passenger. The third passenger received less serious injuries. One month and three weeks after the accident the police attended Mr. Stennett's home to take a statement from him regarding the circumstances of the accident. This application considers whether the Crown has proved that statement voluntary beyond a reasonable doubt, and whether the defence has proved on the balance of probabilities that the accused was detained, that his s.10 *Charter* rights were breached and that the statement should be excluded pursuant to s.24(2).

The Statement

[2] Detective Constable (DC) Rorke called Mr. Stennett to arrange to speak with him on October 3rd, 2016. They agreed to meet on October 11th at the accused's home as he was still recovering from his injuries. DC Rorke didn't have notes of that conversation but explained that he typically would advise the person that the meeting was voluntary.

[3] On October 11th DC Rorke went to the accused's home in St. Catharines along with DC McLean. They conducted a videotaped interview. Both were in plain clothes but with sidearms and badges. They identified themselves to Mr. Stennett and the video recorded the discussion beyond that point.

[4] DC Rorke asked Mr. Stennett if there was anything the officer should know about his condition including medications. Mr. Stennett told the officer he had taken Tylenol and Naproxen but had not taken hydromorphone as he'd finished that prescription. He told the officers he was all right to speak with them, "I'm good".

[5] Mr. Stennett was told that the officers were investigating a potential, "impaired driving charge". He was specifically told he could be charged and have to go to court for that offence. He was also reminded that everything was being recorded and the statement would be admissible in court if charges were laid. DC Rorke explained that the interview was, "completely voluntary, you don't have to talk to me at all". He was told that if at any point he wished to stop the interview, "just say so and we'll stop". Mr. Stennett then explained in his own words that he understood that "everything I say is gonna be evidence if they have to go to court if I'm to be charged about being an impaired driver". He further explained he understood that anything he said could be used against him.

[6] DC Rorke told Mr. Stennett that he wasn't under arrest nor was he detained. Nevertheless the officer provided the accused with right to counsel advice in informal terms. He was told he had the right to call a lawyer "at any point, right now if you want to call a lawyer". The accused declined saying, "it's all good". DC Rorke further advised Mr. Stennett that if he wanted to call a lawyer at any time during the interview he could simply ask to stop for that purpose and the officer would help him call a lawyer. The officer explained he could contact the accused's lawyer or also had access to immediate free legal advice available from legal aid duty counsel. Mr. Stennett would be given access to a private conversation with a lawyer at any time. Mr. Stennett confirmed he understood.

[7] Mr. Stennett was cautioned that if he'd talk to any police officer or anyone else who was in authority like a parent or others that the officer didn't want anything that person may have said to make him think he had to speak to police. He also didn't want anything that may have been promised by anyone in authority to influence the accused's choice to speak with him. The accused confirmed he understood. DC Rorke said, "This is absolutely a hundred percent voluntary". The accused

replied, “Yeah it’s voluntary”.

[8] The interview lasted for 38 minutes. It was not an interrogation. The interview was conversational and relaxed. For the most part the questions were open-ended. The accused was alert and responsive throughout. He did not ask for food, water or a bathroom break. He did not show any signs of being in discomfort or being disoriented. At times he smiled and laughed. There were no threats, promises or inducements during the interview and there’s no evidence of any such conduct prior. No stratagem or trickery was used. The officers did not make any physical contact with the accused. Mr. Stennett knew he could pause or terminate the interview at any time and knew he could obtain immediate legal advice at any time he wished.

Voluntariness

[9] As explained in *R v Oickle* 2000 SCC 38 at para 47, the voluntariness assessment is broad and contextual, requiring the court to take into account all of the circumstances of the statement to determine if any circumstance gives rise to a reasonable doubt that the statement was voluntary.

[10] In this case there is no evidence of any threats, promises or inducements. The accused was asked to give a voluntary statement and he agreed. He chose the time and the location and invited the officers to attend his home. The video shows that the interview was a simple and polite conversation. Mr. Stennett appeared to be comfortable and made no request of the officers nor did he make any complaint. He knew he could terminate the interview at any time but he did not make that request. There’s no evidence of any oppression or oppressive condition. The video shows plainly that Mr. Stennett had an operating mind at the time and fully understood his choice to give a statement, the opportunity to call a lawyer if he wished, and the questions asked of him. His answers were responsive and showed no effect of the injury or medication other than the lack of memory he described. The officers did not use any trickery or stratagem to undermine Mr. Stennett’s right to silence.

[11] The defence submits that beyond the usual categories listed in *Oickle* the Crown must prove that the accused gave informed consent – that he understood the nature of his jeopardy when speaking with the police. The Crown must also prove that the choice to speak to the police was freely made. In this regard the defence submits that the cautions explained to the accused weren’t “hitting home” even though the accused repeated back the words and said he understood. This is because the accused had been told by an Aunt earlier that she heard an officer say at the hospital that “alcohol wasn’t a factor” in the accident. In a further but related point, DC Rorke did not cite the full potential charge – Impaired Driving instead of Impaired Driving Causing Bodily Harm and made no mention of the possibility of Dangerous Driving Causing Bodily Harm. The result was an interview that was designed to cause Mr. Stennett to incriminate himself.

[12] Mr. Stennett was specifically cautioned to disregard any statements others made that might cause him to speak with police and his responses showed he understood that caution. DC Rorke agreed that it would have been better if he'd added the words "bodily harm" when advising Mr. Stennett of potential charges. However, this interview was well after the crash and Mr. Stennett knew the very serious nature of the accident and he knew it had resulted in serious injury to others. In this case the officer's reference to "impaired driving" brought home sufficiently to Mr. Stennett the nature of the potential criminal investigation. Mr. Stennett knew that the circumstances were serious and had sufficient appreciation of his potential jeopardy on that basis. If he wished more detailed information on that point he was able to immediately speak to a lawyer. There's no evidence to support the defence submission that the cautions and explanations provided at the outset of the interview didn't "hit home". Mr. Stennett knew that he didn't have to speak to the officers and that if he chose to do so it could result in evidence that could be used against him in court. There's no evidence of a police strategy "designed" to make the accused incriminate himself. The police were interviewing the accused to see if alcohol or other driving was a factor in the serious accident. The accused plainly understood and was content to offer the police what limited recollection he had of the evening.

[13] I find the Crown has proved the statement voluntary. There's no evidence that could reasonably leave a doubt in that regard.

Right to Counsel

[14] The *Charter of Rights and Freedoms* provides s.10 rights to legal advice "on arrest or detention". The defence submits that Mr. Stennett was detained during the October 11th interview. While they concede he was not physically detained, the defence submits that the accused was psychologically detained in the circumstances. Detention includes either significant physical or psychological restraint – *R v Grant* [2009] SCJ No 32 at para 44. Even where the accused is not under arrest, a detention can occur where a person reasonably concludes that they no longer have the freedom to choose whether to cooperate with the police – *R v Suberu* [2009] SCJ No 33 at para 22. I agree with the defence that police questioning doesn't necessarily have to be confrontational to involve a detention.

[15] There's no evidence of detention in this case. The accused agreed to speak to the police and he chose the time and location of the interview. The evidence shows the fact that armed officers went to his bedroom was to accommodate his medical situation at his request, not to intimidate him in that setting. The officers did not block the doorway and the accused was free to stop the interview or leave the room at any time. DC Rorke explicitly told Mr. Stennett that he was not arrested and not detained at the outset of the interview. There's nothing in the circumstances of the interview that reasonably could have led Mr. Stennett to conclude otherwise.

[16] The defence submits that the fact that the accused was given right to counsel advice in informal terms shows that he was detained as that's only triggered un-

der s.10 of the *Charter* by a detention. DC Rorke explained that if the accused had been detained or arrested he would have given him right to counsel advice in the formal wording set out in his notebook. He chose to give the accused right to counsel advice in this case to ensure that the accused understood the statement was voluntary and that he could obtain legal advice in that regard before he decided whether to proceed or at any time thereafter. The officer's explanation was credible and consistent with the informal nature of the right to counsel discussion including the explicit explanation to Mr. Stennett that he wasn't detained or under arrest.

[17] Mr. Stennett had time after the accident and after arranging the police interview to obtain legal advice. He may have done so. Whether or not he spoke to a lawyer, it was not improper for DC Rorke to offer Mr. Stennett a further opportunity prior to the interview to consult counsel. It was good practice to ensure that the accused's decision to speak with him was fully informed. For the same reason, after Mr. Stennett declined to call a lawyer it was also good practice to offer to stop the interview at any time and contact counsel should he change his mind.

[18] There's no circumstance that could reasonably have deprived Mr. Stennett of his choice to speak with the police. He was not detained and s.10 of the *Charter* was not engaged. I find the defendant has failed to prove the breach alleged on the balance of probabilities.

Conclusion

[19] The Crown has proved beyond a reasonable doubt that the statement is voluntary. The defendant has failed to prove the *Charter* breach alleged. I find the October 11, 2016 statement is admissible in evidence.

Delivered: March 20, 2018.
Justice Joseph F. Kenkel