

Case Name:
R. v. Turner

Between
Her Majesty the Queen, and
Douglas Turner, Defendant

[2012] O.J. No. 3859

2012 ONSC 4685

Court File No. CR62/10

Ontario Superior Court of Justice

C. Hill J.

Heard: August 13, 2012.
Judgment: August 15, 2012.

(51 paras.)

Criminal law -- Criminal Code offences -- Offences against the administration of law and justice -- Misleading justice -- Obstruction of justice -- Trial of accused charged with obstruction of justice -- During traffic enforcement investigation, accused falsely identified himself to police as his brother - At preliminary inquiry and trial, officer identified accused as driver of vehicle -- Identification of accused was weak -- Officer spent only a few minutes of face-to-face time with driver of vehicle, did not make any contemporaneous notes as to physical description of driver and had no photo identification produced by driver or other documents bearing his name.

Criminal law -- Evidence -- Methods of proof -- Identification -- Trial of accused charged with obstruction of justice -- During traffic enforcement investigation, accused falsely identified himself to police as his brother -- At preliminary inquiry and trial, officer identified accused as driver of vehicle -- Identification of accused was weak -- Officer spent only a few minutes of face-to-face time with driver of vehicle, did not make any contemporaneous notes as to physical description of driver and had no photo identification produced by driver or other documents bearing his name.

Trial of an accused charged with obstruction of justice. After observing a vehicle with an expired licence validation sticker, police directed the driver to stop. The driver was unable to produce a valid driver's licence or the vehicle registration, but orally identified himself as Donald Turner and

produced an expired insurance card for the vehicle. After verifying the information with the police dispatcher, the officer was satisfied that the driver had correctly identified himself. The officer performed a vehicle inspection and noticed safety problems relating to the tires and parking brake. As a result of the inspection, Donald Turner was charged with six infractions relating to failure to produce required documentation and vehicle safety deficiencies. Donald Turner failed to appear in court and was convicted and fined in absentia. Subsequently, Donald Turner received a notice of the fine and, as he had not been driving in the area, he made a complaint to police. Following the complaint, a further investigation was conducted and a warrant was issued for the arrest of the accused, who was Donald Turner's younger brother. At the preliminary inquiry and at trial, the officer who conducted the traffic stop identified the accused as the driver of the vehicle. At trial, the accused's brother, Donald Turner, testified that he, the accused, and their two brothers all looked similar.

HELD: Accused acquitted. The identification of the accused was weak as the officer's in-dock identification of the accused at the preliminary inquiry was valueless and the in-dock identification at trial was merely repetition. The officer spent only a few minutes of face-to-face time with the driver of the vehicle, did not make any contemporaneous notes as to the physical description of the driver and had no photo identification produced by the driver or other documents bearing his name.

Counsel:

R. Fetterly, for the Crown.

R. O'Brien, for the Defence.

REASONS FOR JUDGMENT

C. HILL J.:--

INTRODUCTION

1 A police officer stopped a motor vehicle in a traffic enforcement investigation. It was subsequently determined that the driver falsely identified himself to the constable. The prosecution maintains that the accused was the driver and that he misrepresented himself as his brother.

2 The accused did not testify and no defence evidence was called at trial.

FACTUAL BACKGROUND

The Traffic Stop

3 On September 28, 2008, Ontario Provincial Police (OPP) Constable Jason Tardif, who became a police officer in January 2006, was engaged in the lawful execution of his duties in Caledon in the Region of Peel.

4 Observing a southbound 1993 Chrysler vehicle with an expired licence validation tag in the Highway #10 and King Street area, the constable directed the driver to pull into a road scales location on the highway. The vehicle's validation sticker had expired in January 2008.

5 There were four occupants in the Chrysler - a male driver as well as an adult female and two children. At the driver's window, the officer requested the driver's operating licence as well as the

ownership and insurance documentation for the car. The driver was unable to produce a valid driver's licence or the ownership slip issued by the Ontario Ministry of Transportation (M.O.T.). The driver orally identified himself as Donald Arthur Turner with a date of birth of October 15, 1963. He produced an expired insurance card for the vehicle (dated September 4, 2004) in the name of Wanda Hodgson resident at 40 Madison Street, Brampton.

6 According to Constable Tardif, because his OPP cruiser was not outfitted with an on-board computer system, he resorted to radio inquiries through the OPP Communications Centre about the driver and the vehicle. He received a radio dispatch that Donald Arthur Turner with a date of birth of October 15, 1963 had a valid Ontario driver's licence. The officer was also informed of Turner's driver's licence number and that the individual's address was 4629 Highway #124, Croft at Magnatawan, Ontario.

7 The constable informed the court that in further discussion with the driver he was told that he had moved from the Magnatawan area in October 2007 to 27 Merton Road in Brampton with a subsequent move to 25 Merton Road in February 2008, all without informing the M.O.T. of these address changes.

8 Constable Tardif did not ask the identity of the vehicle's other occupants. On his evidence, based on his discussion with the driver and the information received from the police dispatcher, he was satisfied that the driver accurately identified himself.

9 Constable Tardif performed a vehicle inspection of the Chrysler. There were vehicle safety problems relating to the tires and to the parking brake. The driver and the vehicle were detained from about 11:49 a.m. to 1:00 p.m. during which the M.O.T. checks were made, the vehicle safety inspection performed, and six provincial offence notices were written up charging the driver with infractions relating to failure to produce required documentation and vehicle safety deficiencies. Each notice charged Donald "Aruther" Turner at the Magnatawan address with a provincial offence.

10 Constable Tardif made no notes of the driver's physical description. This was normal where he believed a driver had properly identified himself in a provincial highway traffic investigation.

Donald Turner is Convicted

11 Donald Arthur Turner failed to appear in traffic court for his trial on the charges issued out of the September 28, 2008 traffic stop. On November 12, 2008, he was convicted and fined *in absentia* as permitted by the relevant provincial legislation.

12 Subsequently, Donald Turner received Notice of Fine and Due Date notices relating to the regulatory convictions and fines imposed. On seeing this paperwork, Donald Turner, a mechanic working in Burks Falls, realized that someone had made a mistake as he had not been driving a vehicle in Caledon on September 28, 2008. Mr. Turner went to the Algoma Highlands OPP detachment near his Magnatawan home to make a complaint.

13 Donald Turner testified at trial that he was not operating a motor vehicle in Caledon on September 28, 2008. He was unable to say whether his younger brother, the accused, was doing so. He has had little contact with him over the years, last seeing him at the November 18, 2010 preliminary inquiry in this case, and before that at a funeral in the summer of 2010, and before that in 2000. To the witness' recall, Douglas Turner had been to his Magnatawan home perhaps fifteen or sixteen years ago.

The Follow-up Investigation

14 In January of 2009, following Donald Turner's complaint, OPP Constable Twilley contacted Constable Tardif to report that someone may have falsely identified himself to the officer in the September 28, 2008 traffic stop. Twilley faxed to Tardif copies of Donald Turner's Ontario driver's licence and Ontario health card. Although both had Turner's photograph, Constable Tardif considered the quality of the copies he received to be unsuitable for identification purposes in terms of comparison to his recall of the driver he had stopped about four months earlier.

15 A 411.cawhitepages internet search, conducted on March 11, 2009, revealed a Wanda Hodgson resident at 27 Merton Road, Brampton. A March 25, 2009 Application for Vehicle Record Search forwarded to the M.O.T. relating to the 1993 Chrysler vehicle led to the issuance of a February 22, 2010 certificate from the Office of the Registrar of Motor Vehicles certifying that the vehicle was registered to Wanda L. Hodgson residing at 40 Madison Street, Brampton.

16 Constable Tardif received some information from Constable Twilley about possible suspects including Douglas Turner. When Constable Tardif went to the 27 Merton Road residence he was unable to locate Wanda Hodgson or Douglas Turner.

17 Constable Tardif initiated the issuance of a warrant for the arrest of Douglas Turner. At this point, the constable had not spoken to the suspect during his investigation and had not seen a computerized M.O.T. driver's photo of the suspect. He had not participated in a photo line-up including a photo of Douglas Turner.

The Identification Process

18 At trial, Constable Tardif testified that he was able to recall the appearance of the driver he dealt with on September 28, 2008 for various reasons. Only two motor vehicle drivers had ever lied to him about their identity - they "stuck out" in his mind. As well, he had spent significant time during the traffic stop with the driver and in conducting follow-up investigation.

19 Questioned further about his recall, Constable Tardif conceded that he was unable to remember the height or weight of the driver, his eye colour, the nature of his hairline, whether he had facial hair or wore eyeglasses, or whether he had scars or pockmarks on his face. The constable was able to say that the driver had teeth and no speech impediment.

20 After September 28, 2008, Constable Tardif did not see the accused or a photograph of him until he observed the accused at the November 2010 preliminary inquiry. Asked in his in-chief testimony at that proceeding to identify the driver of the vehicle he had stopped over two years earlier, the witness stated:

Q. Pardon me. Let me ask you this. Do you see the person that you stopped on the 28th of September, 2008?

A. Yes.

Q. And where is that person?

A. He's sitting behind you, wearing a black jacket with Adidas symbol and three stripes on the right side.

CROWN COUNSEL: Identifies the defendant for the record.

- Q. What is it about him that leads you to say that that's him?
- A. I had an extensive conversation with the individual on the side of the road. The fact that shortly thereafter, within a few months actually, another, the rest of this information came to light that he had provided me with a false identity. That ingrained the image of the person I had the conversation with on the side of the road, as well as the continuing effort that I put in to locate him.
- Q. What is it about his, describe the person that you dealt with on the 28th of September, 2008?

DEFENCE COUNSEL: For the record, the officer is looking at my client.

A. It's the same person.

CROWN COUNSEL: Fair enough.

A. Skinny build, skinny face, light hair.

DEFENCE COUNSEL: For the record, the officer's looking at my client while he's giving that description.

THE COURT: Yes, that is, that is noted.

21 Under cross-examination at this trial, Constable Tardif agreed that while he may have been looking at the accused at the preliminary inquiry as he gave his descriptors, he did not need to look at him to describe him.

22 In this proceeding, the constable testified that, to his recall, the driver he stopped was in his mid to late forties, had white unkempt hair, and wore dishevelled clothes as though they had been worn for a couple of days. The officer identified the accused seated in the courtroom beside defence counsel as the driver.

23 According to Constable Tardif, the accused appeared similar at trial to his appearance at the preliminary inquire except that he was heavier at the earlier proceeding and his face was not then as thin.

24 Donald Turner testified that for years, and certainly prior to 2008, the accused has been missing 80% of his teeth. This is "very noticeable". He has never had false teeth. As a result, he speaks with a noticeable slur. The witness also informed the court that the accused's ears stick out a bit and he walks with a limp. It is unclear when the witness first observed his brother to have a limp when he walks.

25 Donald Turner testified with respect to the four Turner brothers who have been alive since 2008 that "we all look similar". Danny, who resides in Dunnville, Ontario is aged about 51 years of age, and Gary, who may reside in Brantford, Ontario, is 50 years of age.

Positions of the Parties

The Crown

26 On behalf of the Crown, while sensitive to the caution necessary in eye-witness identification cases, Mr. Fetterly submitted that it was open to the court to find that the prosecution had proved, beyond a reasonable doubt, that the accused was the person who wilfully obstructed Constable Tardif on September 28, 2008 by personating his brother thereby falsely identifying himself to the constable.

27 Crown counsel argued that Constable Tardif, as a police officer, was a trained observer of people. He spent significant time with the driver during the traffic stop. Given the rarity of the officer encountering drivers misleading him as to their identity, he had reason to recall the appearance of the driver. As a result, the dock identifications are deserving of some weight.

28 In any event, it was submitted, there is circumstantial evidence supporting the constable's in-court identification of the accused as the driver. On September 28, 2008, the driver was able to accurately provide not only Donald Turner's name but also his date of birth of October 15, 1963 and that he had lived in the Magnatawan area. It is said that only a small population of persons could do so including the complainant's brother, the accused. Further, the driver of the stopped motor vehicle produced an expired vehicle insurance card in the name of Wanda Hodgson who investigation revealed resided at some point at 27 Merton Road an address given by the driver on September 28, 2008 as one of his past home addresses.

29 It was submitted that there is no cogent evidence of any viable third party suspect being in Caledon on the relevant date. The only reasonable inference on the totality of the evidence, including the dock identifications and the circumstantial evidence, is that the accused was the driver.

The Defence

30 On behalf of the accused, Mr. O'Brien submitted that in the context of a stranger identification case, where caution is always warranted, features of the instant case mandate the existence of reasonable doubt on the crucial issue of identification of Douglas Turner as the driver.

31 Constable Tardif made no contemporaneous notes of the description of the driver he stopped. He was unable to recall many descriptor characteristics relating to the driver. He never saw the accused, or a photograph of him, during the investigation. Long after the traffic stop, the constable purported to describe the driver while looking at the accused in the preliminary inquiry courtroom. There, as here at trial, only relatively generic descriptors were advanced. In-dock identifications are essentially valueless. The officer reported no observation of the state of the driver's teeth although the accused is noticeably missing teeth.

32 It was further submitted that any circumstantial evidence, such as it is, is weak and fails to offset the very real concerns of misidentification in the present case.

ANALYSIS

33 Because of "the dangers inherent in eye-witness testimony" (*R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.), at p. 421), eye-witness identification evidence "is inherently unreliable": *R. v. Goran*, [2008] O.J. No. 1069 (C.A.)(QL), at para. 19. The "inherent frailties of eye-witness identification evidence are well-established" and can "lead to wrongful convictions, even in cases where multiple witnesses have identified the same accused": *R. v. F.A.* (2004), 183 C.C.C. (3d) 518 (Ont. C.A.), at para. 39. "[S]pecial caution is called for when assessing eye-witness identification evidence": *R. v. Hersi*, [2000] O.J. No. 3995 (C.A.)(QL), at para. 14; *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.), at pp. 515-16. Accordingly, "although identification is a matter of fact, appellate

courts will subject such findings to closer scrutiny than is generally the case with findings of fact": *Goran*, at para. 20; *R. v. Harvey* (2001), 160 C.C.C. (3d) 52 (Ont. C.A.), at para. 19.

34 The lay opinion evidence of a police officer is not entitled to any "special regard": *R. v. Graat*, [1982] 2 S.C.R. 819, at p. 840. This is especially so where the officer's evidence is unassisted by contemporaneous notes regarding a suspect's physical description. The importance of documenting an immediate and fulsome description in an eye-witness case has long been recognized: *R. v. Atfield*, [1983] A.J. No. 870 (C.A.)(Q.L.), at para. 60. Such a recording marker operates to temper suggestive influences as a criminal case progresses.

35 As a general rule, in-dock identifications, by an individual previously unacquainted with a suspect prior to the relevant event, are valueless in terms of probative impact. Not only has time passed since the alleged crime, but also the physical set-up of the courtroom recognizably presents the accused as the individual on trial and therefore as the suspect toward whom the finger of accusation has pointed: see *R. v. Hibbert*, [2002] 2 S.C.R. 445, at para. 49; *R. v. Cranham*, 2012 ONCA 457, at para. 11; *R. v. Manley*, 2011 ONCA 128, at paras. 20-2; *R. v. Brown*, 2009 ONCA 563, at para. 23; *R. v. Hasson*, 2008 ONCA 615, at para. 7; *F.A.*, at para. 47; *R. v. Izzard* (1990), 54 C.C.C. (3d) 252 (Ont. C.A.), at pp. 255-6.

36 Judicial experience with eye-witness identification evidence has established that all too often it has been the cause of wrongful convictions. The underlying causes have been many and various including reliance upon an honest and convincing witness who is mistaken, suggestive and improper police techniques, witness contamination, poor opportunity to view a stranger suspect, the distorting effect of stressful circumstances (i.e. weapon focus), unconscious filling in of gaps with erroneous characteristics, etc.

37 The notorious risk associated with eye-witness identification prosecutions tends to be accentuated where there is an absence of confirmation by forensic or other evidence.

38 In the instance of the purported identification of a stranger, as opposed to reported recognition of a person previously known or encountered by the witness, the court must proceed cautiously in assessing the evidence of an eye-witness claiming that the person observed at a crime scene is, in his or her opinion, the person subsequently identified.

39 The parties agreed that no voluntariness admissibility issue arises as to the statements made by the driver to Constable Tardif given that they form the *actus reus* of the alleged crimes of personation and wilful obstruction of a peace officer by misrepresenting identity: *R. v. Hanneson et al.* (1989), 49 C.C.C. (3d) 467 (Ont. C.A.), at pp. 471-2; *R. v. Stapleton* (1982), 66 C.C.C. (2d) 231 (Ont. C.A.), at pp. 233-4.

40 Three issues can be quickly dispensed with. There is no question that Constable Tardif was in the lawful execution of his police duties on September 28, 2008 when he stopped the 1993 Chrysler vehicle. There is no suggestion but that Donald Turner was telling the truth when he testified that he was not the operator of that vehicle on September 28, 2008. Further, there is really no dispute that Constable Tardif honestly believes that the accused was the driver he stopped on that date.

41 The critical issue is whether the prosecution has established that the constable's identification, having regard to the totality of the evidence, is sufficiently reliable to exclude reasonable doubt.

42 As of September 28, 2008, Constable Tardif was a relatively inexperienced police officer with less than three years on the job. While he spent over an hour with the driver of the Chrysler vehicle

on September 28, 2008, much of his time was spent inspecting the vehicle, speaking to the OPP Communication Centre from his cruiser, writing six provincial offence notices, and writing in his notebook. Clearly, his "face-to-face" time with the driver accounted for only some of the minutes at the scene. That reality, and the officer's lack of any contemporaneous notes as to the physical description of the driver, resulted in the constable having no independent record and no memory respecting the driver's height, weight, eye colour, hairline characteristics, facial hair, scars or other facial markings or whether he wore eyeglasses. The constable professed to accurate recall of only relatively generic descriptors of the driver's age, hair and clothing.

43 Constable Tardif explained the absence of recording a physical description of the suspect in his notebook at the time of the traffic stop. Based on his investigation, and his subjective assessment of the truth of what he had been told, he concluded that he was dealing with Donald Turner. He cannot be faulted, based on the benefit of hindsight, with the approach he adopted.

44 That said, the constable had no photo identification produced to him by the driver nor any document bearing his name or with a past or current address or with a date of birth. The driver was charged with failure to produce a valid driver's licence, failure to advise M.O.T. of a change of address and failure to provide valid proof of vehicle insurance. The existence of a driver's licence with the operator's photograph is an essential aspect of road safety legislation: *R. v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567. It is apparent that later in his September 28, 2008 shift, or soon thereafter, Constable Tardif made no effort at his detachment to access by computer the M.O.T. coloured driver's licence photograph of Donald Turner. Had he done so he would have readily determined that he had been misled. Again, this is not to criticize the officer, or to purport to grade the quality of the police work, but rather to note that armed with this easily accessible information the officer could have immediately launched the criminal investigation and committed to writing fresh memories of the suspect's physical appearance.

45 Neither counsel questioned Constable Tardif as to how he came to spell Donald "Aruther" Turner in the way he did in the provincial offence notices.

46 After the Algoma Highlands OPP detachment initiated the criminal investigation, and before the arrest warrant was sought for Douglas Turner, with the matter having escalated from regulatory highway traffic offences to a criminal investigation, still no attempt was made to have Constable Tardif undertake a photo line-up including good quality photos of both Douglas and Donald Turner and perhaps other relevant suspects. Instead, the default option was to put the constable face-to-face with the accused in the preliminary inquiry courtroom after two years and two months of dealing with scores of other motorists since the traffic stop - essentially, a one-person show-up through an in-dock identification procedure. In these circumstances, not only was the in-dock identification valueless but also, despite the constable's belief that he could describe the driver free of conscious and unconscious corrupting influences, so are his in-court descriptions of the driver deserving of minimal weight. The in-dock identification at trial, simply by repetition, does not strengthen the identification.

47 Noteworthy in assessing the reliability of Constable Tardif's identification opinion is that he recalled the driver as having teeth. Accepting the uncontradicted evidence of Donald Turner that the accused had lost the majority of his teeth and was without false teeth, and therefore noticeably toothless, the constable's failure to describe the driver as having missing teeth is of some significance.

48 Mr. Fetterly is of course quite correct to submit that the driver stopped in Caledon on September 28, 2008 could not have miraculously blurted out the name Donald Turner having a connection to Magnatawan with his accurate date of birth - he must have had some unique ability to provide the correct biographical information. While Douglas Turner was in the group who could do so, although he has had next to nothing to do with his brother Donald for a decade and a half, so were others. It cannot be said that the eligible population of persons able to provide the information was necessarily limited to just family members.

49 While the driver of the stopped vehicle stated that he had resided at 27 Merton Road in Brampton and produced an expired insurance card in Wanda Hodgson's name who was traced to the 27 Merton Road address in 2009, there is no evidence, by way of surveillance or documentation or admission, that this accused before the court ever resided at that address or that he was otherwise associated with Wanda Hodgson.

50 Without resort to the evidence at trial as to "look-alikes" for the accused who may have been responsible for committing the alleged crimes, the circumstantial evidence taken cumulatively as it must be, together with the evidence of Constable Tardif and Donald Turner, falls short of proof of identification of Douglas Turner as the person responsible.

CONCLUSION

51 The accused is found Not Guilty of both charges.

C. HILL J.

cp/e/qlacx/qljxr/qlced