

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

AMY C. WILSON

Before Justice of the Peace D.L. Jackson

Heard on May 28, 2004

Reasons for Judgment released on June 22, 2004

ANDREW FORDHAM **for the Crown**
DENNIS K. LENZIN **for the defendant AMY C. WILSON**

CASES CITED:

R. v. White [1999] S.C.J. No. 28 [1999] 2 S.C.R. 417

R. v. DaCosta [2001] O.J. No. 2392

R. v. Naces [2001] O.J. No. 3854

R. v. Rolph [2002] O.J. No. 3591

JUSTICE OF THE PEACE JACKSON:

[1] Amy Wilson was charged with Highway Traffic Act offences of Careless Driving, Fail to Remain and Fail to Report Accident. On May 28, 2004 her counsel, Dennis Lenzin, brought an application on her behalf for an order excluding her statements on the grounds that her rights under Sections 7 and 10 of the Canadian Charter of Rights and Freedoms were violated.

[2] ISSUES BEFORE THE COURT:

- (a) Were the statements given voluntarily;**
- (b) Was she detained and therefore should have been given her rights to counsel;**
- (c) Should the statements be excluded due to the compelled nature as a result of the provisions of the Highway Traffic Act.**

[3] The evidence of P.C. Pengelly is that at 3:52 a.m. he was dispatched to investigate a single motor vehicle property damage accident. He determined the name and address of the registered owner of the motor vehicle, checked the hospitals for injured parties and finding none, went to her address. He woke up her father and advised him that there had been an accident and asked him to see if Miss Wilson was home. Her father checked her room and advised the officer that she wasn't there but she may be at her boyfriend's house. The officer and Miss Wilson's father went to the boyfriend's home. The officer's knocking got the boyfriend to come to the bedroom window. He told the officer that Miss Wilson was sleeping. He was asked to wake her up and come to the front door so that he could talk to her. P.C. Pengelly told Miss Wilson that he was investigating a motor vehicle accident involving her car. He asked her if she was the owner and driver and she replied "yes. These were not utterances but responses to questions. He then asked her to get her documents and come to his cruiser. Miss Wilson's evidence is that she knew it was a Highway Traffic Act accident and she had to answer the officer's questions and give a statement.

[4] Dealing with the first issue. After hearing the evidence on the voir dire this court finds that the prosecution has proven beyond a reasonable doubt that Miss Wilson's responses were made voluntarily. There were no threats, promises or inducements made by the officer. Her responses were the product of an operating mind.

[5] Secondly, Constable Pengelly's evidence is that he was investigating a Highway Traffic Act accident. His first mission was to determine if anyone was injured. There is no requirement of the officer to advise the defendant of her rights to counsel when investigating a Highway Traffic Act incident. When speaking with Miss Wilson he had not determined if any charges would be laid. Miss Wilson was not under arrest. The duty to caution is triggered by arrest. Miss Wilson was sitting in the back of the cruiser and could not get out until the officer let her out. She did not, however, ask to get out or had even realized that she couldn't get out. She is working as a Security Guard and is familiar with the powers of arrest and the right to counsel, but she did not ask if she could speak to a lawyer. In these particular circumstances, although she was in the back seat of a cruiser she was there for the purposes of giving a statement as she is required to do under S. 199 the Highway Traffic Act and was not detained for the purposes of the Charter of Rights.

[6] In *R. v. DaCosta* the investigating officer had been told by another officer that Mr. DaCosta had said he was hung-over from last night. There was therefore reason to believe that criminal charges were a possibility and he was cautioned.

[7] Thirdly, Constable Pengelly was investigating a Highway Traffic Act accident and was required to make a report. There were no other witnesses to the accident and therefore Constable Pengelly chose to make enquiries of Miss Wilson directly concerning the details of the accident. *R. v. White* deals with statements made under provincial motor vehicle law not being admissible in a criminal prosecution. The Supreme Court of Canada held that:

“The application of the principle against self-incrimination begins, and the societal interest in the effective investigation and prosecution of crime is subordinated, at the moment when a driver speaks on the basis of a reasonable and honest belief that he or she is required by law to do so. (at para.77).

[8] The applicant is relying upon the cases of *R. v. DaCosta* and *R. v. Naces*. Both these cases concern criminal charges. The case law has been quite clear that statements induced by the obligations under the Highway Traffic Act to report an accident cannot be used in criminal proceedings. Their use in a Highway Traffic Act prosecution, however, has not been as clear. In *R. v. Rolph*, the defendant was convicted of a Highway Traffic Act offence and appealed the decision. In response to being asked who was driving this vehicle, Mr. Rolph came forward and acknowledged that he was driving. Justice Carr allowed the appeal and held that the statement was the only proof of Rolph’s status as driver and to allow it into evidence breaches the principle of self-incrimination. The appeal was allowed and the charge dismissed against Mr. Rolph.

[9] The applicant has proven on a balance of probabilities that Miss Wilson knew she had to give a statement to the officer and she therefore told him what happened. The officer did not advise her that she must give a statement. There would be no point of advising her that anything she said could be used against her if she was compelled to make a statement. My interpretation of the case law would be that once an officer has sufficient details to complete an accident report and wishes to investigate further for the purposes of laying criminal charges, he must then caution the person that anything further said could be used against that person. As soon as she told the officer she was the driver of the motor vehicle she had incriminated herself. The statements given by Miss Wilson were used to complete the motor vehicle accident report and no criminal charges were going to be laid. The issue here is can her statement be used in the Highway Traffic Act charges?

[10] If indeed, Constable Pengelly’s mission was to determine if anyone had been injured, as soon as he had made that determination he could choose to investigate the possibility of

laying charges or just complete the accident report. If his intention was to lay charges, then he had to use other means to obtain his evidence, rather than getting a statement from Miss Wilson. He could have questioned the boyfriend about Miss Wilson driving on the previous evening and perhaps received enough information to lay the charges. I find that the questions asked and answered at the front door and in the cruiser all form part of the statement Miss Wilson was compelled to give to satisfy the requirements of S. 199 of the Highway Traffic Act. The admission into evidence of any statements made under the compulsion of the Highway Traffic Act offends the principle against self-incrimination embodied in S. 7 of the Charter. Accordingly, the evidence is ruled inadmissible under s. 24(1) of the Charter.

Released: June 22, 2004

Justice of the Peace D.L. Jackson