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R. v. Nedelkof

Between
Her Majesty the Queen, respondent, and
Dimitir Nedelkof, appellant

[1998] O.J. No. 4493

79 O.T.C. 76
38 M.V.R. (3d) 30
40 W.C.B. (2d) 152

Court File No. SCA(P)1965/98

Ontario Court of Justice (General Division)
Brampton, Ontario

Thomas J.

October 30, 1998.

(8 pp.)

Criminal law — Mens rea or intention — Proof of mens rea — Offences against person and reputation — Motor vehicles — Impaired driving — Meaning of care and control — Care or control, what constitutes — Procedure — Information or indictment, charge or count, indictable offences — Civil rights — Right to counsel — Evidence.

This was an appeal by Nedelkof from a conviction for having care or control of a motor vehicle with an excess blood alcohol level. Nedelkof argued that the trial judge lost jurisdiction when the original information was lost after the trial had commenced. He also argued that the investigation police officers did not have reasonable and probable grounds to make an arrest. Nedelkof further argued that his right to counsel under section 10(b) of the Charter of Rights and Freedoms was infringed when he was arrested. Nedelkof spoke to duty counsel prior to providing breath samples. Nedelkof also claimed that he did not have the requisite mens rea for the offence. Nedelkof was found in the driver's seat of his vehicle while impaired.

HELD: The appeal was dismissed. The trial judge continued to have jurisdiction after the original information was lost. Although the information was not present at trial, it was in existence. There were sufficient grounds for the investigating officers to arrest Nedelkof. He showed signs of impairment in his vehicle. The police did not violate Nedelkof's right to counsel. The Crown established that Nedelkof had the necessary mens rea for a conviction as he was in care and control of his vehicle.

Statutes, Regulations and Rules Cited:

Canada Charter of Rights and Freedoms, 1982, s. 10(b). Criminal Code, s. 253, 258(1)(a).

Counsel:

Randy Norris, for the respondent/Crown. H. Michael Kelly, Q.C. for the appellant/defendant.

1 **THOMAS J.** (endorsement):— The appellant appeals against his conviction on a charge of having the care or control of a motor vehicle with excess blood alcohol (over 80 milligrams) in his system.

2 His counsel advances four grounds of appeal:

1. I am satisfied that the trial judge did not lose jurisdiction over the appellant or the offences when the original information was lost after the trial had commenced.

3 The appellant was charged with "impaired care or control" and "care or control over 80 milligrams". On October 2, 1997, he was arraigned on both charges contained in the original information. The Crown elected to proceed by way of summary conviction and the appellant pleaded not guilty to both charges. The case for the prosecution, which consisted of the testimony of two investigating police officers and the breathalyzer technician, was tendered on October 2nd. A defence witness was permitted to testify out of turn on October 2nd to accommodate the witness.

4 The trial was not completed and the charges were adjourned and the appellant was remanded to November 7, 1997 for continuation of the trial.

5 On October 30, 1997, the appellant brought an application for an adjournment of the November 7, 1997 date. The original information was not before the court on that date and a "missing information" form was substituted in its place. The application was adjourned to November 3, 1997 to be heard by the trial judge, who granted the request for an adjournment. Again, the information was not before the court on November 3rd and the same "missing information" form was in its place. On November 3rd, the matter was adjourned to November 7th to set a date for the continuation of the trial. On November 7th, the trial was adjourned to December 4, 1997. The original information was not before the court on November 7th and the same "missing information" form was in its place.

6 On December 4, 1997, the trial did not proceed and it was adjourned to February 4, 1998 for a continuation. On December 4th and February 4th, the original information was not before the court and the same "missing information" form was in its place.

7 The appellant was found guilty on February 4, 1998. The original information was subsequently located.

8 It is my respectful view that the trial judge maintained jurisdiction over the alleged offences and the defendant because he was clearly satisfied that an information was in existence although it was not physically present in the courtroom for part of the trial proper: See R. v. Frank Veltri and Veltri Stamping Co. Ltd., [1986] O.J. No. 894, (1986), 3 W.C.B. (2d) 88 (Ont. C.A.).

2. Counsel suggests that the investigation police officers did not have reasonable and probable grounds to make an arrest.

9 The information available to the officers at the time of the arrest included:

(a) a complaint by a citizen of a man attending at the front door of the home at 5090 Warrendale Gate, Mississauga and fiddling with the lock;

(b) observations of a man apparently sleeping in a car in the driveway at 5090 Warrendale Gate, Mississauga, at 6:30 a.m. with the engine running and the lights on;

(c) the odour of an alcoholic beverage on the man's breath;

(d) the observation that the man's speech was slurred, he had slow motor movements and when he was answering questions, he had a delayed response;

(e) when the man exited the vehicle, he was unsteady on his feet, confused, and disoriented as he thought he was in Oakville.

10 I am satisfied that on the totality of the information available to the investigating police officers, viewed objectively, there were grounds to arrest the appellant for having care or control of a motor vehicle while his ability to operate the vehicle was impaired by alcohol.

3. Counsel argues that the appellant's rights to counsel under s. 10(b) of the Canadian Charter of Rights and Freedoms was infringed.

11 Upon arrest, the detainee has the right to obtain and instruct counsel and this right includes both an informational component and an opportunity to contact counsel. The appellant was informed of his right to speak to counsel. He told police he wished to speak to his friend and indicated that his friend was a lawyer. A police officer called the number provided by the appellant and the female person who answered the telephone advised that the appellant's friend was not available and also that he was not a lawyer. The appellant was informed of what had occurred and he did not provide police with the name of a specific lawyer to whom he wished to speak and he did not ask to speak to any other person. In the circumstances, police informed the appellant of the availability of duty counsel and the appellant did speak to duty counsel prior to providing samples of his breath.

12 I am satisfied that there was no infringement of the appellant's right to counsel.

4. Counsel for the appellant submits that the appellant did not have the requisite mens rea for the offence of care or control of a motor vehicle.

13 The mens rea for the offence of having care or control of a motor vehicle contrary to s. 253 of the Criminal Code is the intent to assume care or control after the voluntary consumption of alcohol: R. v. Towes (1985), 21 C.C.C. (3d) 24 (S.C.C.).

14 In order to prove its case, the Crown must establish the presence of impairment in the usual manner. The element of care or control may be established either by reliance upon the presumption in s. 258(1)(a) or by showing actual care or control.

15 In this case, the trial judge found that the Crown had established that the accused was occupying the driver's seat of the vehicle and the Crown was, therefore, entitled to rely upon the presumption that the accused was prima facie in care or control of his motor vehicle at the time of his arrest. Once the Crown has established a prima facie case of care and control, s. 258(1)(a) provides that the defendant may rebut the presumption if he provides evidence which, on a balance of probabilities, proves he did not occupy the driver's seat for the purpose of putting the vehicle in motion: R. v. George (1994), 90 C.C.C. (3d) 502 (Nfld. C.A.).

16 I am satisfied that the trial judge properly considered all of the evidence and reasonably concluded that the appellant had not raised evidence sufficient to rebut the presumption.

17 Accordingly, the appeal is dismissed. In the circumstances, the driving prohibition is stayed until 11:00 p.m. on November 2, 1998. A copy of this endorsement will be faxed to counsel for the appellant and counsel for the Crown. At the conclusion of the hearing of this appeal on October 26, 1998, I advised counsel for the appellant to make certain that the appellant, who was present in court, contacted his office on a daily basis to ascertain if the decision on the appeal had

been received. The purpose of staying the driving prohibition until 11:00 p.m. on November 2nd is to ensure that the appellant has knowledge that his appeal has been dismissed. I am confident that the experienced counsel for the appellant will see to it that his client is so informed.

THOMAS J.