CITATION: R. v. Campbell, 2017 ONSC 4902
COURT FILE NO.: CR-16-0266-00AP
DATE: 20170823

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
HER MAJESTY THE QUEEN	Respondent	Ms. K. Hull, for the Crown
– and –		
MAURICE CAMPBELL	Appellant	Mr. L. Hochberg, for the Appellant
		HEARD: July 17, 2017

REASONS FOR DECISION

DE SA J.:

Overview

[1] The Appellant raises two issues on the appeal. The Appellant argues that the denial of his adjournment request violated his right to make full answer and defence. The Appellant also submits that the trial judge misapprehended the evidence in concluding that the officer had sufficient grounds to arrest the Appellant. For the reasons outlined below, the appeal is dismissed.

The Request for an Adjournment

[2] On June 29, 2015, the Appellant was charged with impaired driving and driving with excess blood alcohol ("Over 80") contrary to sections 253(1)(a) and (b) of the *Criminal Code*, R.S.C., 1985, c. C-46.

[3] Initial disclosure was provided to Appellant's counsel. When Appellant's counsel received this disclosure, he noticed that the arresting officer's notes (Sergeant Buligan) had been photocopied with the last line of the notes inadvertently cut off. The officer's notes consisted of eight pages in total and seven of the eight pages were cut off at the very bottom. On September 15, 2015, after a resolution meeting was held, counsel for the Appellant wrote to the Crown requesting a complete copy of the notes. On that same

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day, the Crown acknowledged the request and indicated they would request a complete copy.

[4] In November of 2015, the Crown's office received a typed transcription of Sergeant Buligan's notes from the police rather than a full copy of the original handwritten notes. This transcription was disclosed to the defence. It appears through inadvertence, the original handwritten notes were not pursued further by the Crown. A judicial pre-trial was conducted on January 21, 2016. At the judicial pre-trial, no issue was raised with respect to the incomplete handwritten notes by counsel for the Appellant. Clearly counsel was content with the transcription as a substitute for the balance of the handwritten notes. A trial date was set for September 8, 2016.

[5] In the days leading up to the trial, Appellant's counsel noticed there were certain minor errors in portions of the typed transcription. None of the errors are alleged to have misled Appellant's counsel in the course of his preparation for trial. Indeed, the record suggests that the transcription combined with the disclosed notes provided the Appellant with the complete contents of the notes. In other words, there is no suggestion that there were errors in the transcriptions related to the undisclosed portion of the notes.

[6] On the morning of trial, Sergeant Buligan provided both the Crown and the defence with a complete copy of his handwritten notes. When the matter was canvassed before the trial judge for readiness, Appellant's counsel made a request to adjourn the trial on the basis of the inaccurate transcription and the late receipt of the officer's "complete" notes. The defence took the position that the Appellant's right to full answer and defence would be impaired if he were required to proceed to trial that day.

[7] The Crown opposed the adjournment. The Crown pointed out that counsel had been provided with the complete handwritten notes that morning which consisted of only eight pages. The Crown also pointed out that the defence had been sitting with the notes and transcription since November of 2015 without a complaint. Given that there was some hours before the trial would be reached, the defence had more than adequate time to prepare.

[8] The trial judge denied the request for the adjournment given the lack of diligence in pursuing the disclosure. The trial judge pointed out that the defence had the balance of the morning to review the eight pages of handwritten notes which would be more than adequate time to prepare. The matter reconvened in the afternoon. Counsel for the Appellant made no suggestion that he was not prepared to proceed with the trial. The trial commenced as expected.

The Trial Judge's Decision on the *Charter* Application

[9] The trial proceeded in a blended fashion. At the conclusion of the evidence, the only issue remaining was whether or not the investigating officer had the requisite grounds to arrest. In dismissing the *Charter* application, the trial judge held that the arresting officer had reasonable grounds to believe the Appellant's ability to operate a motor vehicle was

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impaired by alcohol. The trial judge found the reasonable belief was supported by a combination of Sergeant Buligan's 19 years of experience and observations of the Appellant's physical appearance ("red eyes") and behaviour ("slow and deliberate action") both before and after he exited the vehicle. He explained:

> In sum, I see no rush to judgment by Sergeant Buligan an officer with 19 years of experience at the time, in assessing the question of grounds, indeed he said, and I accept, that until he observed Mr. Campbell's red eyes and slow and deliberate action, once Mr. Campbell was out of his vehicle he felt he did not have grounds and intended to summon an approved screening device. Once the additional indicia were observed he felt the ASD could be dispensed with. I see nothing objectively unreasonable in his conclusion.

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Issues on Appeal

[10] There are two primary issues to be decided on this appeal.

1) Did the denial of the adjournment request violate the Appellant's section 7 rights?

2) Were there reasonable and probable grounds to arrest the Appellant?

Did the Denial of the Adjournment Request violate the Appellant's Section 7 rights?

[11] The Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged or clearly irrelevant: *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326. Material is relevant if it could *reasonably* be used by the defence in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence: *R. v. Egger*, 1993 CanLII 98 (SCC), [1993] 2 S.C.R. 451, at p. 467.

[12] The threshold requirement for disclosure is low. The Crown's duty to disclose is triggered whenever there is a reasonable possibility of the information being "useful" to the accused in making full answer and defence. See *R. v. Chaplin*, 1995 CanLII 126 (SCC), [1995] 1 S.C.R. 727, at p. 742. As Sopinka J. explained in *R. v. Carosella*, [1997] 1 S.C.R. 80 (S.C.C.), at para. 37:

> The right to disclosure of material which meets the Stinchcombe threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.

[13] However, just because there has been a violation to the right to disclosure does not mean a remedy is warranted. The right to disclosure is extremely broad in scope and accordingly will include material which may only have *marginal* relevance to the

ultimate issues at trial. No doubt, if the disclosure sought is material to the issues at trial, an order of production and/or an adjournment will be warranted. However, if the nature of the information sought is more peripheral in nature, and/or the defence failed to exercise the requisite diligence in pursuing that information, an adjournment will not likely be granted. As the Supreme Court explained in *R. v. Dixon*, [1998] 1 S.C.R. 244 (S.C.C.) at para. 37:

> The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.

[14] What is of primary importance to the judge's assessment is whether or not the accused's right to full answer and defence will be meaningfully impaired by refusing the adjournment. If a trial judge's refusal to grant an adjournment prejudices the accused's right to full answer and defence, a remedy will be warranted on appeal.

[15] That being said, in many instances an adjournment request will be directed at delaying the trial and will not really further the fair trial interests of the accused. Granting adjournments in such instances is hardly appropriate and inevitably undermines the administration of justice. *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, confirms that trial judges are obliged to take an active role in ensuring criminal cases proceed expeditiously. As such, trial judges are called upon to make meaningful assessments of the true "merits" of an adjournment request having regard to all the circumstances. This assessment will often require that trials proceed in the face of outstanding disclosure, regardless of which party is at fault when the disclosure can have no possible impact on the outcome of the trial or the fair trial interests of the accused. Such assessments should be afforded substantial deference on appeal absent the accused demonstrating that his/her right to full answer and defence has been impaired.

Right to Full Answer and Defence

[16] On appeal, where the accused demonstrates a violation of the right to disclosure, the accused bears the additional burden of demonstrating on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose. This burden is only discharged where an accused demonstrates that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. As the Court explained in *Dixon* at paragraph 34:

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> It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure.
>
> ..the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence. [citations omitted]

[17] Again, in considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. See *Dixon* at para. 38:

> Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information yet remained passive as a result of a tactical decision or lack of due diligence it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial. See *R. v. McAnespie*, 1993 CanLII 50 (SCC), [1993] 4 S.C.R. 501, at pp. 502-3.

[18] In situations where the materiality of the undisclosed evidence is, on its face, very high, a new trial will be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial.

[19] In this case, the late disclosure can hardly be characterized as something that may have impacted the outcome of the trial and/or prejudiced the overall fairness of the trial process. Nothing in the record would suggest that the Appellant was foreclosed from exploring possible avenues of investigation or impeded in any way in his use of the information. Indeed, the Appellant was in possession of all "relevant" information well in advance of trial. While the transcriptions may have not been the original notes, they were clearly an adequate substitute. Any errors in the transcription were evident to Appellant's counsel in that he had the original notes to compare with the transcriptions. Moreover, nothing would suggest that Appellant's counsel was somehow misled by the transcriptions in the course of his preparation or during the course of the trial. Having regard to the record here, I find that the Appellant has not satisfied its onus to show that

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his rights to full answer and defence have been impaired by the late disclosure of the original notes. I dismiss this ground of appeal.

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Misapprehension of the Evidence by the Trial Judge

[20] The test for deciding whether there are reasonable and probable grounds includes both a subjective and an objective component: (i) the officer must have an honest belief that the suspect committed an offence under s. 253 of the *Criminal Code*, and (ii) there must be reasonable grounds for this belief: *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 S.C.R. 254 at para. 48.

[21] Where a court is satisfied that the officer had the requisite subjective belief, the sole remaining issue is whether that belief was reasonable in the circumstances. The test is not an overly onerous one. As the Court of Appeal explained in *R. v. Wang*, 2010 ONCA 435, [2010] O.J. No. 2490, at para. 17:

> In short, *Shepherd* explains that where a court is satisfied that the officer had the requisite subjective belief, the sole remaining issue is whether that belief was reasonable in the circumstances. The test is not an overly onerous one. A *prima facie* case need not be established. Rather, when impaired driving is an issue, what is required is simply that the facts as found by the trial judge be sufficient objectively to support the officer's subjective belief that the motorist was driving while his or her ability to do so was impaired, even to a slight degree, by alcohol: see *R. v. Stellato* (1993), 1993 CanLII 3375 (ON CA), 12 O.R. (3d) 90 (C.A.), aff'd 1994 CanLII 94 (SCC), [1994] 2 S.C.R. 478.

[22] In the present case, the question raised is whether the trial judge misapprehended the officer's evidence in assessing whether there was a sufficient *objective* basis for the arrest. The Appellant points to the fact that on Sergeant Buligan's evidence, the Appellant's movements were "slow and deliberate" both when he was sitting inside the vehicle and when he was standing outside the vehicle. According to the Appellant, the trial judge *mistakenly* concluded that the Appellant's "slow and deliberate" movements once he exited the vehicle provided the officer with *additional* grounds. The Appellant submits that the trial judge incorrectly viewed this continuing behaviour outside the vehicle as somehow enhancing the grounds, when it did not.

[23] The Appellant's submission seems to ignore that indicia of impairment can take on additional significance if they persist. No doubt, the slow and deliberate movements were something that were observed by the officer at the original stop. However, as the Appellant exited the vehicle, the continuation of this behaviour combined with the observations of his red eyes provided the officer with a more complete picture of the Appellant's impairment. It was the cumulative observations which provided the officer

with the requisite grounds. As the Court of Appeal explained in *R. v. Bush*, 2010 ONCA 554, [2010] O.J. No. 3453, at paras. 55-6:

> In assessing whether reasonable and probable grounds existed, trial judges are often improperly asked to engage in a dissection of the officer's grounds looking at each in isolation, opinions that were developed at the scene "without the luxury of judicial reflection": Censoni, at para. 43; also Jacques, at para. 23. However, it is neither necessary nor desirable to conduct an impaired driving trial as a threshold exercise in determining whether the officer's belief was reasonable: R. v. McClelland, 1995 ABCA 199 (CanLII), [1995] A.J. No. 539, 165 A.R. 332 (C.A.).
>
> An assessment of whether the officer objectively had reasonable and probable grounds does not involve the equivalent of an impaired driver scorecard with the list of all the usual indicia of impairment and counsel noting which ones are present and which are absent as the essential test. There is no mathematical formula with a certain number of indicia being required before reasonable and probable grounds objectively existed; *Censoni* at para. 46.

[24] Where appellate courts are called upon to review the trial judge's conclusion on the issue whether the officer had reasonable and probable grounds, the appellate court must show deference to the trial judge's findings of fact, but the trial judge's ultimate ruling is a question of law reviewable on a standard of correctness. I see no error and have no reason to interfere with the trial judge's assessment of the evidence.

[25] The appeal is dismissed.

Justice C.F. de Sa

Released: August 23, 2017

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