In the Provincial Court of Alberta

Citation: R. v. McKay, 2013 ABPC 13

Date: 20130121
Docket: 111003307P1
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Christopher Scott McKay

Ruling on Voir Dire by the Honourable Judge H.A. Lamoureux

[1] The accused is charged under s. 253(1)(a) and 253(1)(b) of the *Criminal Code*. The accused has a filed a Notice pursuant to the *Charter* s. 24(2), to exclude evidence obtained arising from alleged breaches of the accused' rights pursuant to s. 7, 8 and 10 of the *Charter.* In particular, the accused says that he was not given a reasonable opportunity to exercise his right to counsel and that the accused was not provided with a full range of resources and access to sources of information which reasonably were or ought have been made available to him to contact a lawyer, including internet access. The Defence also says that the accused was not given reasonable assistance by police to contact his choice of counsel and that he did not waive his right to counsel in any legally binding manner.

[2] There is a specific issue in this case, in that the accused says that internet access should form part of the resources provided by police to detainees in order to allow them a reasonable opportunity to exercise the right to counsel.

Evidence in the Voir Dire

[3] In this case, both the Crown and Defence have called evidence in the *voir dire.*

Crown Evidence

[4] The Court has evidence from Constable Dennis Vink who has been a member of Calgary Police Service for 13.5 years and is a qualified breath technician who has administered hundreds of tests. The officer testified that on August 22, 2011, he stopped the motor vehicle being operated by the accused in a traffic stop as a consequence of his observation that the vehicle proceeded through a red light without stopping. The officer noted that the accused had a very light smell of alcohol on his breath and he informed the officer that he had consumed one beer at a friend's house that evening. The officer formed the requisite suspicion that the accused had alcohol in his body at the time of operating a motor vehicle and he radioed for an ASD. At 1:43 am, the officer made an ASD Demand and the sample which was acceptable registered a fail at 1:44 am. The ASD was an Intoxilyzer 400D and it was working properly. The officer testified that the fail meant that the accused' blood alcohol exceeded the legal limit and he formed the opinion that the accused' ability to operate a motor vehicle was impaired by alcohol. The accused was arrested at 1:49 am for the offence of operating a motor vehicle while his ability to do so was impaired by alcohol. The accused was read his *Charter* rights at 1:49 am from a card. The accused was asked if he understood and he replied, "yup". The accused was asked if he wanted to call a lawyer and he replied, "yes". The officer read a proper Caution at 1:51 am followed by a proper breath demand at 1:53 am. The accused was transported from the scene at 1:54 am and arrived at 2 District office at 2:00am. Upon arrival the officer showed the accused the resources available to contact counsel. In particular the officer showed the accused the 1-866 telephone number on the wall, 411 for information as to phone numbers, the White Pages and the Yellow Pages of the telephone book. The accused was given privacy and he made a telephone call at 2:04 am. The accused finished the telephone call at 2:09 am. He was asked if he spoke with someone and he replied, "yes". At 2:13 am the accused was brought before a qualified breath technician and he provided samples into an approved instrument, the first sample at 2:14 am and the second sample at 2:36 am. The breath technician produced a Certificate of Analysis of the accused' breath which was given to the arresting officer. Officer Vink signed the bottom of the Certificate of Analysis, explained the document to the accused, read the Notice of Intention to Produce the document at Trial to the accused, served a true copy of the original of the Certificate of Analysis (a carbon) on the accused. The officer, prior to service, compared the original Certificate with the carbon copy given to the accused, determined that they were exact duplicates of one another. Service of the Certificate of Analysis was effected and the accused was released shortly after 3:00 am with his documents, including the Certificate of Analysis, Exhibit "A" in the *voir dire*, "in his hands". The accused was also served with an Appearance Notice, a Second Offender Notice, and a license suspension.

[5] In cross examination the officer clarified that the White and Yellow Pages from the telephone book were current editions. In cross examination the officer also testified that at the time of dealing with the accused, police did not have any ability to provide access to the internet to detainees in a secure holding area. The officer testified that no access to the internet was given and he testified that no access to the internet was requested by the accused. He did reiterate in cross examination that the toll free number, the White Pages, the Yellow Pages and 411 information was given to the accused. The officer also testified in cross examination that to his knowledge, lists of lawyers who practice in the area of impaired driving offences are contained in the Yellow Pages of the Calgary telephone book.

Defence Evidence

[6] The accused, Christopher McKay, testified in his own defence in the *voir dire.* He is 20 years of age and was 19 years of age at the time of the dealing with police in this case. Mr. McKay is a graduate of the Mount Royal University Broadcasting Program and he is currently working as a cameraman in the audio visual field. Mr. McKay testified that upon arrival at the Calgary Police station his cell phone was placed in the police locker along with his other personal belongings. He testified that he was taken to a phone number which was mounted on the wall by telephones and he utilized that telephone number. He testified that he used that telephone number when the officer told him that there was a number to call for free legal advice. The accused testified that to his recollection, that he did not see telephone books and that he does not recall the officer pointing out telephone books to him. However, he did testify that after he dialed the toll free number and was placed inside a holding cell to talk the person on the telephone, he did notice a set of "phone books on the floor". The accused also testified that he usually uses *Google* to access any information that he needs. He was asked by his lawyer if he understood what 411 was. He testified that he did not know what 411 was at the time and that he would not have considered "411 a viable search engine". Mr. McKay testified that he was certainly interested in obtaining legal advice at the time and that he would access *Google* to search out appropriate legal advice. Mr. McKay also testified that at the time of his arrest he believed that he had the right to only one telephone call and that once he had used up that telephone call his rights were exhausted. Mr. McKay also testified that the call that he made using the toll free number did not give him anymore information than he already had received from the arresting officer. He testified that the telephone call was abrupt and it appeared that the person on the other end of the telephone did not want to talk to him. Mr. McKay was asked about his level of satisfaction with his toll free telephone call and he replied, "no satisfaction at all". Mr. McKay reiterated that at the time, he thought he could only have one telephone call and that his understanding arose from pop culture and Hollywood movies. In examination in chief Mr. McKay conceded that he did not tell the arresting officer that he wasn't satisfied with his telephone information and he reiterated that he did not know that he had any rights to further opportunities to get legal advice at the time.

[7] In cross examination Mr. McKay conceded that he had consumed five beers between 7:00 pm and 11:30 pm on the night in question immediately prior to his arrest and he conceded that he lied to the officer about alcohol consumption because he, "didn't want to get in trouble".

Decision

[8] The key issue for consideration in this case is whether internet access should form part of police resources provided to detainees in order to facilitate a reasonable opportunity to exercise the constitutional right to counsel.

[9] There is crucial evidence in the testimony of the accused on the issue of his knowledge of resources available to him to find information that he is not personally aware of. The evidence is at p. 7, ll. 20-24 of the Transcript:

> Q How do you -- how did you generally search for information at that time in your life?
> A By using *Google*.
>
> Q Okay. And what does *Google* do for you?
> A *Google* is the main way that I find information or services that I don't know of.

[10] We are at an unprecedented time in human history. The real world exists parallel to and in tandem with the virtual world. It is uncontroverted that the vast majority of individuals born after the year 1980 first look to the virtual world for information, for education, for access to services, before they consider access to anachronistic services such as paper telephone directories and numbers posted on a wall. The computer generation considers the internet, the cell phone, the iPad, the Smartphone, essential partners in daily life. The average 19 year old looks to *Google* as a source point for much of the information necessary to carry on daily life. *Google* mapping, driving motor vehicles with the assistance of *Google*, access to restaurants, access to medical care, access to Universities and educational information, and access to lawyers, along with millions of other items of information are all contained on the metasource - *Google*. Indeed *Google* seeks as one of its missions to become the source of original information for the world.

[11] So what happens when a 19 year old is arrested and has never faced the prospect of trying to get legal advice before providing potentially incriminating evidence to a police officer? This Court takes judicial notice that the average 19 year old will look to the internet for information to get legal advice *before* checking White Pages, Yellow Pages or 411. In fact the accused himself has testified that he did not at the material time, even know what 411 was. In a statement of deep ignorance, the accused says under oath that he would not have considered "411 a viable search engine". Transcript p. 8, ll. 4-16:

> Q Okay. So at the time, August 22nd, 2011, when you were in that police station with Constable Vink, did -- what was your understanding of 411?
> A I was not a hundred per cent sure. I would not have considered it a viable search engine or directory resource.
>
> Q Okay. In the circumstance that you were in on that occasion, were you interested in receiving legal advice?
> A Absolutely.

Q Okay. If you had not been in a police station, how would you have searched for information about legal advice?

A I would have searched for legal advice using the internet, more specifically, *Google*.

[12] So, what information would have been available to the accused if he had gone on *Google* and questioned *Google* as to "Calgary criminal defence lawyers"?

[13] A search of *Google* in five seconds or less, reveals the following information:

Criminal Lawyer - Respected with 20 Years Experience
www.criminallawcalgary.ca/
Criminal Law Trials and Appeals
Contact Us Now - About Us - Criminal Law Specialty - Impaired Driving Expertise

Criminal Defence Lawyer - Experienced **Criminal Lawyer**
www.mahoneylaw.ca/
Former Crown Prosecutor
Map of 224 11th Avenue SW, Suite 201, Calgary, AB
(403) 617-0035 - Directions

Criminal Defence Lawyer | siroislaw.com
www.siroislaw.com/
Criminal Defence Lawyer. Flat Rate Fees. Free Consult. Call Today.

Calgary Criminal Defence Lawyers
criminal-defence-lawyers.com/lp/criminal_law/calgary
If you've been charged with a criminal offence in Calgary, talk to a criminal defence lawyer who knows what options are available to you, and who to talk to.
736 6 Avenue Southwest #1700 Calgary, AB T2P 3T7
(403) 930-5190

Calgary Criminal Defence Lawyers - Dunn & Associates - Home
www.dunnandassociates.ca/
Home Page for Dunn & Associates, Calgary Criminal Defence Lawyers.

Calgary criminal lawyer David Chow
www.calgarydefence.com/calgary-criminal-lawyer-david-chow/
Calgary Criminal Lawyer. David Chow, is a graduate of the University of Calgary. He has a Bachelor of Arts in Philosophy and a Bachelor of Laws. As a graduate...

Calgary criminal lawyers Roulston Chow
www.calgarydefence.com/
Calgary criminal lawyers David Chow is Alberta's top criminal defence lawyers for impaired driving, drug offences, and violent crimes in Calgary, Alberta.

Calgary criminal lawyer Patrick Fagan - **The Criminal Defence**
www.patrickfagan.com/
Calgary criminal lawyer Patrick Fagan is one of Alberta's top criminal defence lawyers. His experience as a defence lawyer covers drug offences, impaired...

Calgary Criminal Lawyers - Wolch deWit Silverberg & Watts ...
calgarycriminaldefence.ca/
Contact us today, and put Calgary's prominent criminal and civil defence lawyers to work for you. For civil litigation matters, please visit www.silverberglegal.com...

Hersh E. Wolch - **Calgary Criminal Lawyers**
calgarycriminaldefence.ca/lawyers.html
Contact us today for your free initial consultation with one of our criminal defence lawyers, and see for yourself why we are one of the most respected firms in the...

Criminal Defence Lawyers Calgary: Let Uur DUI Lawyer Protect You
rbattinglaw.com/en/home.html
Robert J. Batting, a criminal lawyer in Calgary for the law firm, Batting, Der, has been practicing law for over 25 years. Batting, Der is a Calgary law firm with six...

[14] In short, in the manner of seconds, an accused person with access to the internet can *Google* the names of experienced top Calgary criminal defence lawyers including addresses, telephone numbers, email addresses and other educational information concerning the services they provide.

[15] The information on *Google* may be more current and more detailed than a name and a phone number in the Yellow Pages, the White Pages, 411 or the toll free number.

[16] The Court notes that police are routinely accessing the internet in order to investigate crime and to assist them in gathering evidence and data in the course and scope of their employment. It is now time for police to provide to accused persons access to the internet at the same time as they provide access to 411 and paper phone books.

[17] Every police station should have access to the internet so that accused' persons can go to the internet to access the names of lawyers that they require. This information in the virtual world must be provided concurrent with information in the real world, such as the Yellow Pages, White Pages, and 411. There are sufficient numbers of individuals born post computer age who have no understanding of the paper world who have extensive knowledge and understanding of the virtual world. These individuals must be accommodated and the only way to do that is to ensure that detainees under arrest be given the opportunity to use the internet to call a lawyer in the same way that they can use a telephone book to call a lawyer.

[18] In the current case before the Court there is no question that the accused invoked his right to counsel. The burden lies with the Crown to establish that the accused was provided a reasonable opportunity to exercise that right.

[19] The question is whether access to 411, White and Yellow Pages and the toll free number amounted to a reasonable opportunity. The question is to what is a reasonable opportunity is contextual and fact specific. The Crown says that the police do not have any duty in law to provide access to the internet for detainees when there is no specific request to access the internet. The Court disagrees. In particular case, the accused was actually directed to use the toll free number and he did so in ignorance of the potential to use other resources with which he might have been more familiar. In the Court's view, in the year 2013 police providing access to the internet is part of a detainee's reasonable opportunity to contact legal counsel. This is so even whether counsel of choice is not an issue and the accused is simply seeking general information from a source such as *Google*.

[20] S. 10(b) of the *Charter* impresses both informational and implementational duties on police who arrest or detain an individual. The informational duty was satisfied in this case. The implementational is indeed two fold as the Crown indicates in its excellent written Brief. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstance)". ***R. v. Bartle***, (1994) 92 CCC (3d) 289 (SCC), at 301. The second implementational duty is to "refrain from eliciting from the detainee until he or she has had a reasonable opportunity (again except in cases of urgency or danger)." ***R. v. Bartle****, surpra*.

[21] In this case, the Court concludes that the Crown has not met the onus of proof that lies upon it with respect to the first implementational duty on the part of police. The accused was not given a reasonable opportunity to exercise his right to access a lawyer, by failure of the police to provide concurrent access to the internet along with 411, the toll free number and the paper telephone directory. In the year 2013 it is the Court's view that all police stations must be equipped with internet access and detainees must have the same opportunities to access the internet to find a lawyer as they do to access the telephone book to find a lawyer.

[22] Accordingly, s. 10(b) *Charter* breach has been established.

[23] The Court will hear submissions under s. 24(2).

Dated at the City of Calgary, Alberta this 21st day of January, 2013.

H.A. Lamoureux
A Judge of the Provincial Court of Alberta

Appearances:

Kristyn Stevens
for the Crown

Ian Savage
for the Accused