R. v. Rowe, [2017] O.J. No. 5782

Ontario Judgments

Ontario Court of Justice

G.P. ***Renwick*** J.

Heard: October 17, 2017.

Judgment: October 18, 2017.

Brampton Court File No.: 3111 998 2016-10305

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Between Her Majesty the Queen, and Dwayne Rowe

(33 paras.)

Counsel

P. Quilty, counsel for the Crown.

M. ***Engel***, counsel for the defendant, Dwayne Rowe.

RULING ON *CHARTER* APPLICATION

G.P. *RENWICK* J.

INTRODUCTION

1 Dwayne Rowe is charged with driving a motor vehicle while having an excess blood alcohol concentration on 12 August 2016. The defendant brought an application alleging breaches of s. 7, 8, and 10(b) of the *Charter*.[1] It was agreed by the parties that the evidence could be taken on both the *Charter* application and the trial proper at the same time.

2 The prosecutor called the investigating officer, Constable Dane Pallett, as its sole witness. The defendant testified on the *Charter* application. No other witnesses testified. Upon hearing all of the evidence the Applicant abandoned the s. 8 *Charter* argument.

3 The sole issue for consideration is whether the Applicant has established that the police failed to facilitate his right to counsel. Secondary to this issue was raised the question of whether there is an obligation on the part of the state to audio record all of the interactions between the Applicant and the

police and the disadvantage a lack of a proper record imposes upon the individual in applications such as the one before the Court.

ANALYSIS

4 While the Crown carries the ultimate burden of proof in the trial (proof of the charge beyond a reasonable doubt), the Applicant carries the burden to establish a violation of the *Charter* on a balance of probabilities.

Credibility Issues

5 This Application is an old-fashioned credibility contest. The officer testified that the Applicant did not have any particular counsel he wished to contact and as a result, he readily availed himself of the opportunity to speak to duty counsel. The Applicant acknowledges that he spoke with duty counsel, but he asserts that he made it clear to the arresting officer and the booking officer that he wanted to speak to his wife to arrange a lawyer with expertise in this area of the law. Unlike in cases involving guilt or innocence, or the admissibility of a statement to a person in authority, or the proof of aggravating facts during sentencing, I do not find that the principles re-iterated in *R.* v. *W.(D.)*[2] have any applicability to the determination of this Application.[3]

6 As is always the case, I note that I can accept some, none, or all of what a witness says as truthful, and this remains so regardless of the role of the witness in the proceedings. I start from no preconceptions about the infallibility or inherent credibility of any particular type of witness, nor any notions of unreliability or suspicion of any person about whom an allegation is made.

7 In considering the overall credibility of the witnesses, I will consider the following:

- general character of the witness;
- motive to fabricate; and
- evidential value.

As well, I will consider the overall reliability of the witnesses, in terms of the following:

- ability to observe;
- memory; and
- presentation.

The Evidence of Constable Dane Pallett

8 At the time of their interaction, this witness was a six and one-half year member of the Peel Regional Police. There was no evidence adduced, nor any questions asked to cast even the slightest shadow upon this witness' general character. As a starting point, I have no reason to suspect that Constable Pallett was less than completely truthful.

9 Constable Pallett did not appear to know this Applicant from any other occasion prior to the night in question. In cross-examination, the witness was asked whether there is any police policy that speaks to his involvement as both the arresting officer and the qualified technician. The suggestion was that it may be better practise to separate the investigator who demands the provision of a breath sample from the technician who receives it. The officer was candid that he was the only available qualified technician and I do not find that this gives him any additional motive to fabricate his evidence. Moreover, it was never suggested that the officer had a motive, or indeed, ever fabricated his evidence. Rather, the success of the Application relied upon the imprecision of the officer's recollections and notes with respect to whether or not the Applicant sought to call his wife to facilitate his right to counsel. I do not find that Constable Pallett had any motive to fabricate his evidence.

10 The evidential value of the officer's evidence is high. He had a detailed and precise manner of testifying, without an over-reliance upon his notes. He clearly knew the limits of his authority, the requirements to test and how to operate both the approved screening device and the approved instrument, he was aware of the requirements of the *Charter* respecting the right to counsel, and he testified to all of these things in a compelling and believable manner. This witness was precise in everything he did that night, and how he testified about it before me. Constable Pallett was self-aware of his failure to note the exact response to his question about whether the Applicant requested to speak with Duty Counsel. However, there is no dispute among the parties that the Applicant indicated a desire to speak to Duty Counsel, nor is there any issue that Constable Pallett facilitated this.

11 In terms of the reliability of this witness, he was in a good position to make the observations that he made. His memory of the events was good. The officer testified in a fair and balanced manner and readily accepted that there are better ways of doing things, without undermining his evidence.

12 In cross-examination, Constable Pallet acknowledged that the Applicant may have expressed a desire to call his wife, but he denied that any such request was for the purpose of facilitating contact with a preferred counsel. The officer was clear that if the Applicant had asked to call his wife, or anyone, to facilitate a call to a lawyer, he has done that in the past and he would have done that in this case. He explained that the absence of notes with respect to things said at the police station followed from his understanding of the clear responses he had from the Applicant respecting his rights to counsel. According to Constable Pallett, the Applicant clearly indicated at the roadside that he did not have any particular lawyer he wanted to call and he had only ever expressed the desire to speak with duty counsel.

13 Applicant's counsel asked Constable Pallett about the lack of audio recording at the police station and the officer fairly acknowledged that it becomes a "he said, she said" situation where there are disagreements about what was said. Constable Pallett was then cross-examined about his knowledge that the booking process was not audio recorded:

> Q. And obviously you would have known when you're taking Mr. Rowe to the police station that there's no audio recording in the booking and there could be no record as to what he might say on the issue of wanting to speak to a lawyer, right?
>
> A. Well, I knew that; I wasn't, I should say I wasn't mindful of it, in the sense of it wouldn't matter to me if it was recorded or not, because I know I'm taking the steps that I need to. In

every investigation I do, like I, if somebody said to me at the end of the investigation, "oh by the way we put in microphones this morning," I go, "oh, great." Like, it wouldn't have changed my, "oh shoot, like, maybe I should go back," like you know, rethink how this went down. No, no. I acknowledge that I perform my investigations as if I am being recorded, audio or video.

Q. But, the point I'm trying to make, officer, is that knowing that there would be no future recording, that would emphasize the need to take clearer, and fuller, verbatim notes, referable to an accused's interest in exercising the right to counsel at the roadside?

A. Ah, well, I, I'm tryin ah, think how to word this. Um, I would agree in a situation where the subject, not Mr. Rowe for example, where they're presenting some hesitation or difficulty with their choice, um, or they've suggested somebody else other than duty counsel. When I have somebody with such as Mr. Rowe, who was cooperative, up-front, presented zero issues to me, whatsoever, um, when he indicated to my recollection that he wanted duty counsel, I didn't foresee it as gonna be an issue here at Court that, I didn't write down verbatim, like I did make the mistake of not writing down his verbatim response, but, like I'm surprised that this is a topic of discussion today, because I didn't really see it as an issue that would be brought up, because I was confident in what took place. And then, hence why the lack of extensive notes or any notes of the conversation in the booking area, if that answers your question.

[The Court did not assign paragraph number 14.]

15 The officer went on to explain why he believed that the Applicant wanted to speak to duty counsel. He detailed that the pre-printed form of questions he asked concerning the right to counsel has a space to include who is sought and their contact number. Officer Pallett offered the following rationale because the form is silent if the answer to the question "do you have a specific lawyer you would like to contact" is "no:"

> ...So, because of that, I write specifically, Mr. Rowe's response, which was "no." So, I take it upon myself to open, write in brackets, because that's my question to him, "duty counsel?" because I'm asking the question. And, again, normally, I guess, 99 times out of one hundred, I would write the subject's response beside that. In this case, I failed to do that, but I'm 100% certain that's what Mr. Rowe wanted and that's why I have no further discussion in my notes, or at the station, regarding that.

16 Counsel for the Applicant suggested that Constable Pallett's evidence improperly equates the right to speak to one's counsel of choice with the opportunity to speak with duty counsel. I reject this submission for two reasons. First, the officer's evidence was unequivocal that he would want to speak to his own lawyer if he were charged and he acknowledged that this would be the case for the Applicant. This example demonstrated his understanding of the value of the right to counsel of one's choice. Second, I do not characterize the officer's understanding of the likely advice that might be given by any particular lawyer as equating the right to speak to duty counsel with speaking to one's own lawyer. The officer expressed his confidence in the ability of duty counsel to adequately convey the Applicant's rights *in the absence of counsel of choice*, but he did not equate duty counsel with the right to counsel of choice. He clearly said:

> Well if the subject, if the person has counsel of choice, that surpasses anything else. I don't provide duty counsel if somebody has counsel of choice. At the end of the day though, if I was to say, without infringing on somebody's rights, will it make a difference if they talk to you, or they talk to 'Mr. fresh out of law school that's doing duty counsel,' I mean, I think you're probably gonna get the same, relatively same advice, "just don't say anything." I mean, I imagine that's what they tell ya. [Emphasis mine]

These answers were plausible, reasonable, and credible, and on their face, they appeared to be truthful.

The Evidence of Dwayne Rowe

17 I do not start my analysis of the Applicant's evidence from the position that the defendant is more or less likely to fabricate his evidence than any other person (including police witnesses) just because he is on trial.

18 Mr. Rowe is a 47 year old married man, with three children, who has no criminal record, nor any prior involvement with the police. He is the owner of a company which produces television programming. I have no reason to suspect there is anything about his character that would detract from his truthfulness as a witness.

19 The evidential value of the Applicant's evidence is high. It has the potential to prove that the police infringed his *Charter* rights, which the prosecution admits will have a terminal effect for this prosecution. Mr. Rowe's evidence was somewhat imprecise, but I begin the analysis by recognizing that this quality may be an artefact of his inexperience as a witness, rather than an overt sign of untruthfulness.

20 As a starting point, I am troubled by several aspects of the Applicant's evidence. Not the least of which, is that it suffers from some degree of implausibility. If the Applicant's evidence is believed, then the investigating officer, with whom the Applicant had no difficulties, was accurate in recording all of his responses of their discussion about the right to counsel, except for the single mention at the police station that Mr. Rowe wanted to call his wife to arrange to speak to a particular lawyer. What is troubling about this is the fact that the officer clearly recognized that he had a duty to contact a third-party to facilitate contact with counsel, he understood the significance between asking to speak to one's own counsel versus speaking with duty counsel, he has contacted brothers and other people to obtain the numbers of chosen counsel for other defendants in the past, and there is no apparent reason for the officer to have neglected this duty in this case, to have omitted in his notes the request by Mr. Rowe to call his wife for this specific purpose, and to have lied about all of this under oath. That said, I acknowledge that the binary nature of a credibility contest is somewhat artificial in this context and there may be other explanations to account for the apparent incompatibility of the two versions of events.

21 Like the officer, Mr. Rowe was in an excellent position to remember the events in question. However, his memory was subject to the following influences:

i. he had consumed at least two litres of 8% alcohol in the preceding 9 hours (his blood alcohol concentration, or BAC, was measured to be in excess of 180 milligrams of alcohol in 100

millilitres of blood moments after he claims to have asked the officer to call his wife to obtain a lawyer);

ii. he admitted that he was nervous in dealing with the officer; and

iii. he was in an unfamiliar environment, where it is unlikely that he would have appreciated the importance of trying to remember every word he used, and to whom he spoke at various times.

I find that these influences would likely have affected Mr. Rowe's ability to recall specific details of the conversation about which he would have had no reason to know the significance. In terms of the precision of his memory, Mr. Rowe has provided no explanation in his evidence for why he is certain of what he told the police.

22 Respecting the delivery of his testimony, the Applicant was hesitant, soft-spoken at times, and he lacked specificity about what he said and when. I note that Mr. Rowe was decidedly unhelpful during the following exchange in cross-examination:

Q. Do you ah, you recall Constable Pallett reading you your rights to counsel at the roadside? Um, and you heard what he said your responses were to those questions. For instance, the first response was "I understand," "yes sir," "yes," "yeah," "yeah," and then finally "no." Do you agree that those are what you said to him?

A. I agree based on that I'm a respectful person, and I wouldn't have been belligerent, if that's a suitable answer.

Q. Do you agree that Constable Pallett correctly recorded your verbatim responses to what he was asking you, when he was giving you your rights to counsel?

A. I believe he believed what he wrote. I have a great deal of respect for him, he treated me well.

This was a simple question to answer: had the officer accurately noted the responses to his questions at the roadside. Despite that it was asked two different ways, Mr. Rowe was evasive on this point.

23 In terms of his consistency, there appears to be at least one inconsistency in Mr. Rowe's version of events. During the examination in chief the Applicant said that he was not sure that he told the police that he wanted to call his wife to arrange a call to a particular lawyer at the roadside. He testified that he could not swear to this under oath. However, in cross-examination, he became certain on this critical point:

Q. And in fact, I take it, you did understand your rights to counsel. You did understand what he was reading to you at the roadside?

A. Yeah, yes.

Q. And you did indicate that you wished to call a lawyer, when he asked you?

A. Yes. Right away.

Q. And you did tell him, that, did you tell him when he asked you if you had a specific lawyer that you wanted to contact, was your answer "no?"

A. No my answer was, "I don't have a lawyer in mind that specializes in this kind of charge. I would like to call my wife to get somebody who specializes in this." Because I did not feel that I was intoxicated at the time, and I knew I would be fighting this.

24 These areas of his testimony and others, cause me to question the accuracy of Mr. Rowe's evidence. To be sure, I do not for a moment believe that the Applicant was trying to mislead the Court, but because his evidence lacked some of the hallmarks of reliability, I cannot safely rely upon the Applicant's evidence to refute the evidence of Constable Pallett, whose evidence I completely believe.

25 Can this application succeed even if I find that Mr. Rowe failed to mention to Constable Pallett that he wanted to reach his wife to contact a lawyer for him? The Applicant testified that he also asked the booking officer to contact his wife for this purpose. There was no evidence lead by the prosecutor to respond to this evidence. This is some evidence, which if believed, would tip the scales in favour of establishing the s. 10(b) *Charter* violation on a balance of probabilities.

26 Although I find it somewhat improbable that Mr. Rowe mentioned this to the booking officer and not Constable Pallett, the officer with whom he had the most interaction, and someone he says he respects, I am not prepared to outright reject this evidence without analysis.

27 The Applicant was definitive that he made the request to call his wife, because he wanted her to arrange a lawyer with some specialized knowledge that could assist him since he always intended to dispute the charge. I accept that Mr. Rowe made it known to the booking officer that he wanted to call his wife. I am satisfied on a balance of probabilities that the Applicant expressed why he wanted to call his wife to the booking officer for the following reasons:

i. There is no dispute in the evidence that Mr. Rowe always indicated a desire to speak to a lawyer, from the moment he was first given his rights to counsel at the roadside, although he did not have a particular counsel in mind;

ii. I note that there was not a great deal of distinction in the Applicant's evidence between what he said he asked of the booking officer and Constable Pallett in terms of his desire to call his wife:

Q. Is it possible that you asked to speak to your wife but didn't tell the police why you wanted to speak to your wife? You just asked them, "can I speak to my wife?"

A. No. Because on my mind at that point was you have one phone call, make it count. So, I, I'm positive I explained to him the reason why I wanted to call my wife, was to get a good, ah, lawyer.

Q. And you told this to Constable Pallett, specifically?

A. I believe I told, I'm quite certain I told it to both Constable Pallett, was his last name? And the person behind the counter.

And, as a result, I find that the Applicant is mistaken when he says he told Constable Pallett he wanted to speak to his wife to arrange to speak to an experienced lawyer. I accept that Mr. Rowe did make this request to the booking officer; and

iii. Earlier in his evidence, the Applicant said he spoke to the booking officer while Constable Pallett had left to set up the approved instrument. The evidence of Constable Pallett is that he left the Applicant from 11:17 p.m. until 11:28 p.m., which provided ample opportunity for the Applicant to have made the request of the booking officer.

28 Although I accept the officer's evidence that there was no mention of Mr. Rowe's dissatisfaction with having spoken to duty counsel, nor did the Applicant make any mention during the breath testing of any earlier request to call his wife to arrange to speak to a particular lawyer, this does not cause me to doubt Mr. Rowe's evidence on the point. Specifically, Mr. Rowe was not cross-examined why he did not make any mention of this request during the breath testing procedure.

29 I am also satisfied that Mr. Rowe's blanket request to contact his wife should have prompted the police to hold off with the breath testing given the law as stated by Mr. Justice Durno in *Kumarasamy*:

> In the vast majority of cases, once the detainee has expressed a desire to contact counsel, police must facilitate the detainee's efforts to do so: *R.* v. *Brydges* *(1990), 53 C.C.C. (3d) 330* S.C.C. This obligation includes facilitating contact with counsel of choice where a request has been made to speak to a specific counsel. This is so whether the person has counsel's number available or not. It also includes permitting a phone call to a friend or relative to obtain the name of counsel of choice.[4] [Underlining is mine.]

CONCLUSION

30 The Applicant invites me to comment on the practise of the Peel Regional Police to videotape interactions during the booking process of arrested parties without maintaining a simultaneous audio recording, as well. I agree with Justice Durno that an audio recording would be "a great assistance in terms of the rights to counsel,"[5] and it would have provided definitive proof in a case such as this. Nonetheless, I am not prepared to comment on this lack of the use of technology by our police service in the absence of an evidentiary foundation for the rationale behind the status quo.

31 Despite the faultless efforts of Constable Dane Pallett, whose evidence I found entirely credible and who's conduct was unimpeachable, both during the investigation of the matter and while testifying before the Court, I find that the Applicant has established a breach of his s. 10(b) *Charter* rights.

32 The parties have agreed that if the application succeeds, the results of the breath testing ought to be excluded from the trial proper, pursuant to s. 24(2) of the *Charter*.

33 Accordingly, in the absence of any admissible proof of Mr. Rowe's blood alcohol concentration when stopped by police on 12 August 2016, the charge is dismissed.

G.P. ***RENWICK*** J.

1 The *Canadian Charter of Rights and Freedoms,* Being Part I of the *Constitution Act, 1982,* Enacted as Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2 *[1991] S.C.J. No. 26*.

3 For a discussion of the corollaries of the rule in *W.D*. see David M. Paciocco, "Doubt about Doubt: Coping with *R.* v. *W.(D.*) and Credibility Assessment" (2017) 22 Can. Crim. L. Rev. 31, at pp. 55-57.

4 *R.* v. *Kumarasamy*, *[2002] O.J. No. 303* (S.C.J.) at para. 25.

5 *R.* v. *Theoret*, *[2013] O.J. No. 920* (S.C.J.) at para. 29.

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