Indexed as:

R. v. Dhillon

Between
Her Majesty the Queen, respondent, and
Baljits Dhillon and Shavoljub Pavlovic, moving parties
(defendants)

[1997] O.J. No. 6018

Ontario Court of Justice (Provincial Division)
Etobicoke, Ontario
Quon J.P.

Heard: April 3, 1997.
Judgment: July 17, 1997.
(17 pp.)

Criminal law — Jurisdiction — Objection to jurisdiction — Procedural errors, effect of — Loss or suspension of jurisdiction — Compelling appearance, detention and release — Appearance and appearance notice — Procedure — Irregularities, curing of.

Motions by two accused to quash certificates of offence based on defective notices of trial. The notices of trial sent to each accused failed to disclose the place or address of the courthouse where their trials were to be held. In addition, one of the notices gave the trial date as April 3, 1996 rather than April 3, 1997. The certificates of offence and the offence notices issued to both accused contained the address of the Provincial Court. The agent of one accused and the second accused in person appeared at that Court on April 3, 1997. On behalf of both accused it was argued that the defects in the notice of trial rendered the certificates of offence invalid and caused the Court to lose jurisdiction over the offences.

HELD: Motions dismissed. The notices of trial were defective in that they failed to disclose the place of trial. However, because the address of the Court having jurisdiction appeared on the offence notices, the accused were notified of the address of the Court. As the accused appeared at the appropriate courthouse, they attorned to the Court's jurisdiction. The certificates of offence were valid and there was no loss of jurisdiction. The incorrect date on one of the notices was an obvious clerical error and not a defect going to jurisdiction. It was cured by the accused's appearance on the correct date.

Cases Considered and Referred to

R. v. Arnold (1982), 39 O.R. (2d) 9 (O.H.C.) per Osler J.
R. v. Bayes [1991] O.J. No. 2830 (Ont. Ct.(Prov. Div.)) per Roberts Prov. J. at Brampton.
R. v. Bagg [1991] O.J. No. 344 (Ont. Ct. (Prov. Div.)), per Payne J.
R. v. Callahan (1983), 21 M.V.R. 127 (Ont. H.C.), per Smith J.
R. v. Dealwis (July 17, 1995) (Ont. Ct. (Prov. Div.))
R. v. Gougeon et al (1981), 55 C.C.C. (2d) 218 (Ont. C.A.)
Grice v. The Queen (1957), 26 C.R. 318 (Ont. S.C.), per Ferguson J.
R. v. Harnish (1979), 49 C.C.C. (2d) 190 (N.S.C.A.), per MacKeigan C.J.N.S.
R. v. Matsuba (1982), 17 M.V.R. 221 (O.H.C.) per Eberle J.
R. v. Naylor, (1978), 42 C.C.C. (2d) 12 (Ont. C.A.)
R. v. Vrooman (1886), 3 Man L.R. 509.

Statutes, Regulations and Rules Cited:

Compulsory Automobile Insurance Act.
Courts of Justice Act.
Highway Traffic Act.
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 5.1(3), 5.1(5), 29(1), 29(2).

Counsel:

I. Bulmer, agent for respondent.
C. Hodgson, agent for applicant Pavlovic.
R. Walia, agent for applicant Dhillon.

QUON J.P.: —

1. INTRODUCTION

¶ 1 This is my ruling on motions brought by two separate defendants. As both motions are similar in nature, I shall render my ruling on both motions concurrently. Both defendants, Baljits Dhillon and Shavoljub Pavlovic, made pre-trial motions on April 3, 1997, seeking an order from this Court to quash their certificates of offence based on defective Notices of Trial. The court address or location where the trials were to be held was not given or stated on the Notices of Trial sent to both defendants. The issue the court has to decide is whether this omission or defect on the Notices of Trial have caused the certificates of offence to be invalid or whether the defect results in the court losing jurisdiction over the offences. Furthermore, one of the defendant Pavlovic's Notices of Trial has the scheduled date of trial set at a date preceding the actual offence date.

¶ 2 Although the Notices of Trial are deficient in not disclosing the place or actual address of the Court where both defendants' trials were to be held, nonetheless, the defendant Dhillon and the defendant Pavlovic by agent, appeared in court on April 3, 1997, the date as indicated on 3 of the 4 Notices of Trial at issue before me. For the defendant Pavlovic, one of his Notices of Trial states the date for trial as April 3, 1996 (a year that pre-existed the date of the motion) - a defect the defendant also relies on in his motion to quash the certificate.

¶ 3 The issues of whether the defendants' appearances in court cure the defect or defects on the Notices of Trial and whether there has been attornment to the jurisdiction of the court must also be considered.

2. FACTS

R. v. Dhillon

¶ 4 The defendant Dhillon has two charges under the Highway Traffic Act and was sent a separate Notice of Trial for each charge. Both Notices of Trial informed the defendant Dhillon that the trials would be held on April 3, 1997 at 7:00 p.m. Both Notices state: Your trial will be held on the date and time above at the Ontario Court (Provincial Division) shown. Both Notices state it was issued at "Metro West" on October 23, 1996. The Notices of Trial sent to the defendant Dhillon failed to disclose to the defendant the location or address of the courthouse where the trials were to be held.

¶ 5 However, both Certificates of Offence and their corresponding Offence Notices issued to the defendant Dhillon contain the address of the Ontario Court (Provincial Division) at 80 The East Mall, Etobicoke, Ontario and is stated on the front face of the Certificates and Offence Notices.

¶ 6 The defendant Dhillon did not make arrangements to confer with a Provincial Prosecutor at a First Attendance appointment, but filed a Notice of Intention to Appear with the Court located at 80 The East Mall in Etobicoke.

¶ 7 The defendant Dhillon appeared with his agent, Mr. R. Walia before me on April 3, 1997 at 80 The East Mall.

¶ 8 The defendant Dhillon's Certificates of Offence were present in the Court and his name and charges were listed on the court's docket.

R. v. Pavlovic

¶ 9 The defendant Pavlovic also has two charges, one under the Highway Traffic Act and one under the Compulsory Automobile Insurance Act. He was also sent a separate Notice of Trial for each charge. The Notice of Trial for the charge of fail to surrender insurance card informed the defendant Pavlovic that the trial would be held on April 3, 1997 at 7:00 p.m. The Notice of Trial for the disobey stop sign charge informed him that the trial would be held on April 3, 1996 at 7:00 p.m. This 1996 date precedes the offence date of July 20, 1996. Both Notices of Trial state: Your trial will be held on the date and time above at the Ontario Court (Provincial Division) shown. Both Notices state it was issued at "Metro West" on September 11, 1996. Also, both Notices of Trial sent to the defendant Pavlovic failed to disclose to the defendant the location or address of the courthouse where the trials were to be held.

¶ 10 As well, both Certificates of Offence and their corresponding Offence Notices issued to the defendant Pavlovic have the address of the Ontario Court (Provincial Division) at 80 The East Mall, Etobicoke, Ontario stated on the front face of the Certificates and Offence Notices.

¶ 11 The defendant Pavlovic made arrangements to confer with a Provincial Prosecutor at a First Attendance appointment. The defendant was sent a First Attendance Notice for both charges confirming that a first attendance appointment had been scheduled for September 10, 1996 at 2:45 p.m. at the Court House located at 80 The East Mall in Etobicoke. The defendant appeared at the First Attendance appointment and filed a Notice of Intention to Appear.

¶ 12 The defendant Pavlovic did not appear personally before me on April 3, 1997 but Mr. Hodgson, his agent, did appear before me on that date.

¶ 13 The defendant Pavlovic's Certificates of Offence were present in the Court and his name and charges were listed on the court's docket.

3. ISSUES

¶ 14 Does non-compliance with subsection 5.1(5) of the Provincial Offences Act invalidate the certificate of offence or result in a loss of jurisdiction over the offence?

4. ANALYSIS OF FACTS AND LAW

¶ 15 Subsection 5.1(5) of the Provincial Offences Act, R.S.O. 1990, c. P.33, directs the clerk of the court to inform the defendant of the time and place of the trial if the defendant files a notice of intention to appear [my emphasis below]:

> 5.1 (5) If a defendant files a notice of intention to appear under subsection (3), the clerk of the court shall inform the defendant and the prosecutor of the time and place of the trial.

Subsection 3 states:

> 5.1 (3) A defendant who is served with an offence notice may give notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter by attending in person or by agent at the court office specified in the offence notice at the time or times specified in the offence notice and filing a notice of intention to appear with the clerk of the court.

¶ 16 Both defendants filed Notices of Intention to Appear at the court office located at 80 The East Mall, as indicated on their Offence Notices, by appearing personally or by agent at the court office. Subsequent to the filing of the Intentions to Appear, the clerk of the court issued Notices of Trial to both defendants.

¶ 17 Territorial jurisdiction under the Provincial Offences Act is governed by subsection 29(1):

> 29. (1) Subject to subsection (2), a proceeding may be heard and determined by the Ontario Court (Provincial Division) sitting in the county or district in which the offence occurred.
>
> (2) A proceeding in respect of an offence may be heard and determined in a county or district that adjoins that in which the offence occurred if,
>
> (a) the court holds sittings in a place reasonably proximate to the place where the offence occurred; and
> (b) the place of sitting referred to in clause (a) is named in the summons or offence notice.

¶ 18 Both defendants' charges are alleged to have occurred in the City of Etobicoke, therefore I find that this Court is the proper forum to try the charges. From the Notices of Intention executed and filed by both defendants at the court located at 80 The East Mall, it cannot be said that both defendants were unaware of the courthouse located at 80 The East Mall, nor can it be said that both defendants have never had any contact with the 80 The East Mall courthouse, the court having jurisdiction over the Certificates of Offence.

¶ 19 The actual form used for a Notice of Trial is governed by Regulation 950 (Proceedings Commenced by Certificate of Offence), R.R.O. 1990. Subsection 4.1 of Regulation 950 states:

> A notice of trial under Part I of the Act shall be in Form 8.

¶ 20 The Notices of Trial, in the cases at bar, conform to the last regulation amending Regulation 950 in respect of the layout and content of Form 8. Ontario Regulation 786/94 made on October 27, 1994 [filed on December 16, 1994] is the last regulation passed amending the form to be used for the Notice of Trial. The Notices of Trial before me fulfill the form requirements of Regulation 786/94.

¶ 21 Form 8 allows the clerk of the court to insert the address of the court having jurisdiction, in the space provided on the form. In the instant cases, the clerk of the court failed to insert the court address in the space provided for on the form.

¶ 22 Therefore, in both cases at bar, the Notices of Trial are defective and fail to disclose to both defendants the "place of the trial" as required under subsection 5.1(5). The question then, is whether this defect invalidates the Certificates of Offence, or results in a loss of jurisdiction over the offences.

¶ 23 A Notice of Trial is a procedural document that informs the defendant of the time and place of the trial. Relative to a Certificate of Offence or an Offence Notice, as a court document, a Notice of Trial is of less stature and has a secondary role in the proceeding. A Notice of Trial fulfills its purpose if a defendant appears at the time and place for the trial as stated on the Notice. It is not a judicial command to appear, nor is it analogous to a summons issued by a police officer that requires confirmation from a judicial officer.

¶ 24 In R. v. Matsuba (1982), 17 M.V.R. 221 (O.H.C.), Eberle J. found the Certificate of Offence was defective in that it failed to name the Provincial Offences Court of the Judicial District of York as required by subsection 3(1) of the Provincial Offences Act. However, Eberle J. held the defect did not go to jurisdiction and therefore did not render the certificate a nullity.

¶ 25 Eberle J. also stated:

> I venture the view that the omission of the name of the Court, required by s. 3(1) is not, in the ordinary case, likely to have prejudiced or misled defendant; at least not in a manner which could not be cured by an adjournment if requested.

¶ 26 In the instant cases, the Certificates of Offence are not defective. Instead, the defects are found in the Notices of Trial. As I stated previously, Notices of Trial do not have the same stature or importance as a Certificate of Offence or an Offence Notice.

¶ 27 In R. v. Arnold (1982), 39 O.R. (2d) 9 (O.H.C.) per Osler J., the defendant was charged with a provincial offence and issued with a certificate of offence which identified the court where the trials would be held. The address was stated, but the Provincial Offences Court referred to on the Certificate did not state the county or district to which the court belonged. The trial justice of the peace declared the certificate a nullity for failing to name the court as "the Provincial Offences Court of the Judicial District of Waterloo". The trial justice of the peace also found she had no jurisdiction to amend the certificate. The Crown then sought an order by way of mandamus. Osler J. granted the application and found that although a section of the Provincial Offences Act was not complied with and as such, the Justice of the Peace had no right to proceed with a trial based on the defective certificate of offence, the defect did not go to jurisdiction as opposed to a procedural defect. Osler J., therefore, determined that the Justice of the Peace failed to exercise her jurisdiction when she refused to consider whether or not to amend the certificate.

¶ 28 Osler J. in his judgment also referred to the purposes of a Certificate of Offence [my emphasis below]:

> The purpose of a certificate of offence is not only to advise an accused of the offence with which he is charged, but also of the court by which he is to be tried. If he is to be afforded an opportunity of raising all possible defences, which must include a defence based on the absence of territorial jurisdiction, that opportunity can only be given him if he is aware of the identity of the court before which he appears.

¶ 29 Osler J. also found that procedural defects do not invalidate the certificate of offence or result in loss of jurisdiction where the accused appears before **the court**:

> I am not, however, convinced that the defect was in a matter going to jurisdiction and I find it hard to distinguish the situation on principle from that discussed in R. v. Naylor (1978), 42 C.C.C. (2d) 12, at 19 where procedural defects had occurred but the accused had in fact presented himself before the court and the defects were held not to invalidate the information or result in loss of jurisdiction over the offence.

¶ 30 The Justice of the Peace in Dealwis at the trial stage had gone behind the Notice of Trial and ruled that the procedure under section 5.1 of the Provincial Offences Act had not been complied with, in that the defendant had not personally or by agent delivered his Notice of Intention to Appear at the court office having jurisdiction - the defendant had mailed the Notice to the court instead. On appeal, the court found the Notice of Trial was proper on its face. It also found the Crown and the defendant had both appeared and did not make issue with the defective procedure. The court also concluded that even if the Notice of Trial was improperly issued, the defective procedure did not render the Certificate of Offence a nullity. The Court also found that the defendant and the Crown had attorned to the jurisdiction of the court.

¶ 31 In contrast to the above cases, there are situations in which the absence of an court address does affect the validity of a certificate of offence. In R. v. Bagg [1991] O.J. No. 344 (Ont. Ct. (Prov. Div.)), Payne J. refers to a decision of His Honour Judge Downie in which an information was quashed for not telling on the face of the information where the Provincial Offences Court was located which had jurisdiction over the information. In addition, the address of the court to respond to was not stated on the back of the offence notice, which referred to the various options available to the defendant.

> "His Honour Judge Downie in quashing the ticket ruled as follows:

> "I think the information ought to be quashed in this case. The Defendant I think is entitled upon getting the ticket to know where they are supposed to go to deal with it, and I say nothing about the lack of information on the back of the ticket, but the one the front of the ticket seems to me is a defect that vitiates the proceeding, so on the Paulter matter, all right, I have endorsed this as follows: Appeal allowed, information quashed due to insufficient information on face of offence notice portion of ticket, not telling where Provincial Offences Court is, see Exhibit One."

[The Court did not assign paragraph number 32 to the judgment.]

¶ 33 Payne J., on the other hand, did not consider the information in the appeal before him to be invalid, as the address of the court for notification purposes was indicated on the back of the offence notice. Payne J. distinguished the situation before him from Judge Downie's ruling. Payne J. noted in the fact situation before him that there was a court address to respond to on the back of the offence notice, although absent on the front. In Downie J.'s ruling, the certificate was invalid because there was no address present on the front or the back of the offence notice. As there was an address of the court for the defendant to respond to, Payne J. determined that the certificate was not invalid. From Downie J. and Payne J.'s rulings, it can be concluded that if the offence notice is completely absent of a court address, then the Certificate of Offence would be invalid.

¶ 34 Furthermore, Morden J.A. in R. v. Gougeon et al (1981) 55 C.C.C. (2d) 218 (Ont. C.A.), at page 227 states:

> and no notice at all may be jurisdictional error: R v. Vrooman, (1886), 3 Man L.R. 509

¶ 35 There has been a judgment that found a defective Notice of Trial to be jurisdictional error. In R. v. Bayes [1991] O.J. No. 2830 (Ont. Ct.(Prov. Div.)), Roberts J. held there was a lack of jurisdiction because of a defect on a Notice of Trial. Roberts J. stated:

> I find that indeed that is a sufficient ground, there being lack of jurisdiction, the Judicial District of Peel not being in existence at the time that the Notice of Trial was issued and as a result, the appeal will be allowed and an acquittal entered and the fine and the costs will be refunded if they had been previously paid.

¶ 36 Roberts J., on appeal, found that the court lacked jurisdiction as the Notice of Trial, which stated that the jurisdiction was that of "The Judicial District of Peel", was inappropriate, as the Judicial District of Peel did not exist at the time the Notice of Trial was issued, as a result of changes in the Courts of Justice Act.

¶ 37 Based on the facts and the cases I have cited, I find that both defendants were notified of the address of the court having jurisdiction over the offences, due to the court address stated on the offence notice and by their appearance to file Notices of Intention to Appear at the court having jurisdiction. It therefore, can not be said that both defendants did not have notice of the court having responsibility for the offences. The absence of the court address on the Notices of Trial at bar do not affect the jurisdiction of the Court to try the offences nor does the omission of the address on the Notices make the Certificates invalid.

Appearance and Attornment

¶ 38 In R. v. Gougeon et al (1981) 55 C.C.C. (2d) 218 (Ont. C.A.), Morden J.A., at page 229 held:

> The argument is also made that if an accused is not obliged to appear by reason of a defect in process, why should he not be entitled to appear solely to make this point and to obtain the Court's declaration on it in his favour. I appreciate the apparent logic of this submission but it appears to me that it overlooks one of the basic functions of process and that is to bring the accused before the Court. If this purpose is accomplished, and the objection is not based on jurisdictional grounds, the balance of policy considerations is in favour of holding that the Court does have jurisdiction, regardless of protest.

¶ 39 Unless the defect argued directly affects the court's jurisdiction to try a matter, defects in the procedure by which the accused is brought to court or attends court does not affect the Court's jurisdiction, whether the accused appears to lodge an objection or not.

¶ 40 In R. v. Callahan, (1983), 21 M.V.R. 127 (Ont. H.C.), per Smith J., the Offence Notice issued to the defendant was defective in that it failed to specify the Provincial Offences Court in which the proceedings had commenced. Smith J. at page 129 held [my emphasis below]:

> I hold that he did attorn by attending at the appropriate office and setting a trial date. He could not do so without pleading and he, in fact, did enter a plea of not guilty. The notice was clearly defective but in form only. The applicant was not misled as evidenced by the fact that he attended at the appropriate office. There was an address on the face of the notice.

Smith J. also stated the defect did not go to jurisdiction.

¶ 41 In R. v. Harnish, (1979), 49 C.C.C. (2d) 190 (N.S.S.C.(Appeal Div.)), per MacKeigan for the court states at page 191:

> Any minor objections to jurisdiction falling short of complete nullity of the information were in our opinion in any event waived by the appearance of counsel for the appellant before the Magistrate to object to jurisdiction. The criminal law of Canada does not recognize in this context a conditional appearance or an appearance under protest.

Amicus Curiae

¶ 42 In a situation in which a person appears and declares himself to be amicus curiae and not an agent of the defendant - usually to avoid attorning to the jurisdiction of the court - especially since an appearance is generally considered to be attornment to the jurisdiction of the court, it has been decided by R. v. Grice, (1957), 26 C.R. 318 (Ont. S.C.), per Ferguson J., that a person cannot take advantage of an amicus curiae declaration to avoid attorning to the court's jurisdiction. At page 322, Ferguson J. states:

> I am of the opinion that when counsel has been instructed by a client, the client is bound by the effect of the counsel's appearance. He cannot after instructions divorce himself from his client and appear under the guise of amicus curiae.

¶ 43 Therefore appearance by counsel under the guise of amicus curiae to challenge a deficiency in procedure or defective documents is sufficient to eliminate the defect.

5. CONCLUSION

¶ 44 Both defendants' Notices of Trial are defective in that the place of trial was not given on the face of the Notices, as required by subsection 5.1(5) of the Provincial Offences Act, R.S.O. 1990, c. P.33. In order for the court clerk to issue a Notice of Trial, a defendant had to have appeared personally or by agent at the courthouse having jurisdiction to file a Notice of Intention to Appear. As both defendants before me filed Notices of Intention to Appear at the courthouse located at 80 The East Mall, I find that both defendants have attorned to the Court's jurisdiction. The address 80 The East Mall was stated on the Offence Notices given to both defendants. The court gains jurisdiction when a defendant appears at the proper court to file a Notice of Intention to Appear.

¶ 45 Therefore, it cannot be said that both defendants did not have notice of nor contact with the court located at 80 The East Mall, the court having jurisdiction over their Certificates of Offence. Furthermore, the Defendant Pavlovic attended at 80 The East Mall for a First Attendance Appointment with a prosecutor.

¶ 46 The defect on these Notices of Trial are procedural defects. Thus, the omission of the court address on the Notices of Trial does not render the Certificates of Offence a nullity or result in a loss of jurisdiction. Notices of Trial do not enjoy the same stature as a Certificate of Offence or an Offence Notice. There would only be a

jurisdictional question if it appeared that the court at 80 The East Mall was not the proper court to try the offences or the court named in the Notice of Trial did not exist at the time the Notice was issued.

¶ 47 In addition, both defendants personally or by agent appeared before me on the date of the scheduled trials. I find their attendance before me to be attornment to the Court's jurisdiction. This action or attornment to the court's jurisdiction, if taken by itself, would have cured the defect found on each Notice of Trial. The purpose of the Notices of Trial were to inform both defendants of the time and the place for their trials. The fact that both defendants appeared for their trials, especially when their Certificates were in court and their names on the court docket, indicates that the issue of the place for trial is moot. As the purpose of the Notice is to inform the defendant of the time and place of the trial, the fact the defendant appears at the trial is, ipso facto, accomplished.

¶ 48 In regards to the defendant Pavlovic's other ground for quashing the Certificate, I conclude the incorrect date for trial on the Notice of Trial was an obvious clerical error and not a defect going to the court's jurisdiction. The defendant Pavlovic's appearance by agent also cures the obvious and simple clerical mistake. The scheduled trial date precedes the date of the offence and is obvious that the clerk of the court did not intend to set a trial date that had already past. One of the defendant Pavlovic's Notice of Trial did contain the correct date for trial, and it is obvious the clerk meant for the defendant to appear for trial also on the same date. Thus, Pavlovic's agent's appearance before me on April 3, 1997 cures the defect on the Notice of Trial containing the incorrect date.

¶ 49 Finally, I cannot find there would be any prejudice to both defendants' ability to make full answer and defence, or that they have been mislead. The defendants appeared personally or by agent at the proper court at the time scheduled for their trials. In sum, non-compliance with the procedure mandated in subsection 5.1 of the Provincial Offences Act, which requires the clerk of the court to notify the defendant of the place for trial, does not invalidate the Certificates of Offence before me, nor does it result in a loss of jurisdiction over the offences.

6. ORDER

¶ 50 The motion by the defendant Dhillon to quash both of his certificates of offence is dismissed. The motion by the defendant Pavlovic to quash both of his certificates of offence is dismissed.

QUON J.P.

* * * * *

¶ 51 Appendix A

Cases Considered and Referred to

R. v. Arnold (1982), 39 O.R. (2d) 9 (O.H.C.) per Osler J.
R. v. Bayes [1991] O.J. No. 2830 (Ont. Ct.(Prov. Div.)) per Roberts Prov. J. at Brampton.
R. v. Bagg [1991] O.J. No. 344 (Ont. Ct. (Prov. Div.)), per Payne J.
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Grice v. The Queen (1957), 26 C.R. 318 (Ont. S.C.), per Ferguson J.
R. v. Harnish (1979), 49 C.C.C. (2d) 190 (N.S.C.A.), per MacKeigan C.J.N.S.
R. v. Matsuba (1982), 17 M.V.R. 221 (O.H.C.) per Eberle J.
R. v. Naylor, (1978), 42 C.C.C. (2d) 12 (Ont. C.A.)
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