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R. v. Pincivero

Between
Regina, and
Pincivero

[2000] O.J. No. 3602
Court File No. M1713/00

Ontario Superior Court of Justice
Durno J.

September 21, 2000.
(32 paras.)

Counsel:

Murray Devos, for the appellant/Crown.
Howard Borenstein, for the respondent.

¶ 1 **DURNO J.** (endorsement):— Constable Lloyd saw the appellant driving at 3:27 a.m. and believed he was speeding around 75 to 80 k/hr in a 60 k/hr zone. The officer tried to pace Mr. Pincivero to obtain an accurate speed but was unable to do so as the appellant turned onto another street. P.C. Lloyd pulled him over "to caution him in regards to speeding, to tell him to slow down," and "to promote public safety for all travelling on the highway." He knew he could not charge a driver with speeding in the absence of an accurate speed.

¶ 2 The officer said it was possible he was concerned the driver may have been drinking because his experience told him in the early morning hours there were many factors in identifying vehicles with the operator possibly under the influence of alcohol. One of those factors was speeding. The possibility of an impaired driver did not occur to him at first. The main reason for the stop was for speeding.

¶ 3 On speaking with the appellant the officer detected an odour of alcohol from his breath. Following Mr. Pincevero's admission to consuming "a couple" the officer had the appellant provide a sample into a screening device which registered a `fail.' He was arrested and taken to the station where he provided samples in excess of the legal limit.

¶ 4 At the close of the Crown's case, and without prior notice, the defence sought to exclude the breath readings relying on breaches of sections 8 and 9 of the Charter of Rights and Freedoms. After adjourning the case for several weeks and permitting the investigating officer to be recalled by the Crown, the trial judge found a breach of section 9 and excluded the readings under s. 24(2). With the consent of both counsel His Honour did not give a ruling on the section 8 application.

¶ 5 The appeal raises the following issues:

a) was the appellant arbitrarily detained when the officer stopped him to warn him about speeding?
b) was the appellant arbitrarily detained if the officer stopped him to investigate whether or not he had been drinking?

c) did the trial judge err in permitting the applicant to raise the Charter issues in the absence of notice pursuant to the Rules?

d) If there is to be a new trial, should it be before the same trial judge, continuing with the s. 8 ruling?

Reasons for Judgment

¶ 6 The trial judge relied upon the Saskatchewan Queen's Bench judgment in R. v. Rost [1999] S.J. No. 132 which held if the officer did not stop the vehicle to check for sobriety, the license or insurance coverage of the driver, ownership or mechanical fitness of the car the stop was not authorized by provincial legislation. That case relied on the Supreme Court of Canada's judgment in R. v. Mellenthin (1992), 76 C.C.C. (3d) 481. His Honour concluded the detention was arbitrary.

¶ 7 His Honour found officers were not permitted to stop vehicles on a hunch to investigate whether or not the driver had been drinking.

Analysis

¶ 8 The Court of Appeal judgment in Brown v. Durham Regional Police Force (1998), 131 C.C.C. (3d) 1 provides a framework for examining alleged violations of s. 9 of the Charter. Doherty J.A. wrote:

> In determining whether that detention was arbitrary, it is helpful to consider first whether the detention was authorized by law. While under the jurisprudence from this and other provinces not all unlawful detentions are necessarily arbitrary, the absence of lawful authority for a detention is at least strongly suggestive of arbitrariness and will be crucial if s. 1 of the Charter is breached.
> A finding that a detention is authorized by law does not end the s. 9 inquiry. As Chief Justice Lamer observed in R. v. Latimer (1997), 112 C.C.C. (3d) 193 at 204, a lawful detention may be arbitrary if the law authorizing that detention is arbitrary. If the law is arbitrary, then s. 1 of the Charter must be addressed.

Was the Detention Authorized By Law?

¶ 9 Section 9 of the Charter states:

> Everyone has the right not to be arbitrarily detained or imprisoned.

¶ 10 Section 216(1) of the Highway Traffic Act states:

> A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signaled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

¶ 11 In this section I will only examine the "speeding" basis for the stop. While Mr. Borenstein argued on the appeal that the officer's grounds for stopping the appellant were "beyond nebulous" in that he was acting on "a feeling" Mr. Pincevero was speeding, the trial judge proceeded on the basis the stop was to warn about speeding. The officer said twice in evidence that it was not that the appellant "appeared" to be speeding, he was speeding. In the absence of a finding of credibility against the officer there was a reasonable basis upon which the trial judge could proceed as he did - accepting the officer stopped the appellant because he was speeding, albeit at an unspecified speed. As will be examined later, on this finding there was "articulable cause" for the detention as that phrase is used in dealing with s. 216(1).

¶ 12 In Rost, the case relied upon by the trial judge, an officer saw the accused approach an intersection and accelerate from it at a speed that appeared somewhat higher than one would expect although the officer had no means of determining the speed. While it was described as "out of the ordinary," there was no suggestion the car

was going in excess of the speed limit. As the car approached the officer's the driver flicked between his high and low beam lights. Matheson J. concluded the Supreme Court of Canada judgment in Mellenthin clearly stated the extent of police powers as follows:

> ... The programs are justified as a means aimed at reducing the terrible toll of death and injury so often occasioned by impaired drivers or dangerous vehicles. The primary aim of the program is thus to check for sobriety, licences, ownership, insurance and the mechanical fitness of cars. The police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search. (emphasis added)

¶ 13 In following Rost the trial judge accepted the list of areas cited in Mellenthin was exhaustive of police authority to stop under s. 216 of the Highway Traffic Act. Since stopping to warn was not a check for sobriety, licences, ownership insurance or mechanical fitness of cars it was not authorized by law.

¶ 14 Mellenthin and Ladouceur (1990), 56 C.C.C. (3d) 22 dealt with random stopping of vehicles. Mellenthin dealt with random stops as part of police stop check programs as indicated in the quotation above. The stop in this case and that in Rost were not random stops as part of programs. They were selective stops based on articulated reasons. In R. v. Simpson (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) Doherty J.A. held:

> ... the "check-stop" cases decide only that stops made for the purposes of enforcing driving-related laws and promoting the safe use of motor vehicles are authorized by s. 216(1) of the Highway Traffic Act, even where those stops are random. These cases do not declare that all stops which assist the police in the performance of any of their duties are authorized by s. 216(1) of the Highway Traffic Act.

¶ 15 After noting Ladouceur, Hufsky, [1988] 1 S.C.R. 621, and Mellenthin all dealt with random "spot checks," Doherty J.A. found Cory J. in Mellenthin "emphatically set the limits for "such stops." (emphasis added) Checking for sobriety, licences, ownership, insurance and mechanical fitness are the permissible aims for "such stops" - random stops as part of police programs. The Supreme Court of Canada cases relied upon do not similarly restrict selective stops. The trial judge erred in relying on Rost, supra, which interpreted Mellenthin as setting the criteria for all stops under s. 216(1) instead of the limited type of stops the case addressed.

¶ 16 The inquiry should have focused on whether the officer was acting in the execution of his duties under the Highway Traffic Act. Was the basis for this selective stop, road safety concerns? If it was the stop was authorized by law by a section which has been found not to violate section 1 of the Charter.

¶ 17 In Ladouceur, Cory J. summarized the findings in Husfky and Regina v. Dedman (1985), 20 C.C.C. (3d) 97. The equivalent predecessor of s. 216 was found to authorize officer's absolute discretion to stop motorists if in the lawful execution of their duties.

¶ 18 Was P.C. Lloyd in the lawful execution of his duties? Enforcing highway laws is not restricted to charging drivers with offences. Enforcement can be obtained with warnings either where the officer has grounds and decides not to charge or where the officer cannot charge even though he had reasonable grounds for believing the appellant was speeding. The officer was going 60 k/hr and Mr. Pincevero was accelerating away from him.

¶ 19 In Brown, Doherty J.A. found s. 216 authorized stopping vehicles for "what may broadly be described as highway regulation and safety purposes." The detention authorized by the section is circumscribed by its purpose. His Lordship also noted:

> The Supreme Court of Canada held that the equivalent predecessor section to s. 216(1) of the HTA did authorize arbitrary detentions in that it allowed random stops without any basis that the person or vehicle stopped was in contravention of any law.

> The holding in Ladouceur makes it unnecessary to distinguish between arbitrary and non-arbitrary stops under s. 216(1) when a s. 9 claim is made. Both are constitutional. That is not to say, that all stops made under s. 216(1) are arbitrary and rendered constitutional only by the saving provision in s. 1 of the Charter. A stop made under s. 216(1) will not result in an arbitrary detention if the decision to stop is made pursuant to some standard or standards which promote the legislative purpose underlying the statutory authorization to stop. R. v. Jones (1986), 28 C.C.C. (3d) 513. If the police exercise their power to stop and detain under s. 216(1) based on criteria which are relevant to highway safety concerns, they do not act arbitrarily. Those criteria are sometimes referred to as "articulable cause".
> When articulable cause is used in reference to a stop under s. 216(1), it may refer to a stop flowing from a reasonable suspicion that a driver is violating some law pertaining to highway regulation and safety. (emphasis added)

¶ 20 In Brown, supra, the trial judge accepted that the selective stops were to "investigate contraventions of the Highway Traffic Act, and Compulsory Automobile Insurance Act" and to the concerns that some persons driving to and from the party could be under the influence of alcohol and other drugs. Doherty J.A. found the finding that highway safety concerns were one of the purposes behind the stops was a reasonable finding of fact.

¶ 21 P.C. Lloyd was acting in the execution of his duties and properly relying upon s. 216(1). His reason was one which would promote the legislative purpose underlying the statutory authority to stop. The power to stop was exercised on criteria which were clearly relevant to highway safety concerns. His articulable cause flowed from a reasonable suspicion the appellant was violating a law pertaining to highway regulation and safety - speeding.

¶ 22 The trial judge erred in finding a breach of s. 9 when the officer stopped the appellant to warn him.

Was the appellant arbitrarily detained if the officer stopped him to determine if he had been drinking?

¶ 23 While the officer put it no higher than a possibility he thought of stopping to investigate whether the appellant had been drinking, the trial judge examined this issue as if it were a secondary ground for the stop since the officer referred to the "speeding" as the main reason. His Honour concluded the officer required more than a hunch to investigate for drinking and driving.

¶ 24 When dealing with "articulable cause" to supply the legal justification for detention relying on common law police powers, the phrase means:

> ... a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigations. Simpson, supra, p.501

¶ 25 In Simpson, relied upon by the trial judge and the Roth judgment, Doherty J.A. was dealing with a detention which had no relationship to highway safety. The officer stopped to investigate a car leaving a suspected "crack house." His Lordship had rejected s. 216(1) as a basis for the stop and was considering if there was a common law justification for the detention.

¶ 26 In Brown, supra, Doherty J.A. distinguished articulable cause in relation to a common law justification for detention and in connection with stops under s. 216(1). He found "articulable cause" in the s. 216(1) context does not refer to factors which standing alone would justify interference with the liberty of the subject. Instead they refer to the reasons behind the exercise of the statutory power to detain. His Lordship described "articulable cause" in the s. 216 context as follows:

> Articulable cause exists under s. 216(1) if the police have a reason for stopping the vehicle which is legitimately connected to highway safety concerns. In this context, articulable cause is used only to distinguish between those lawful stops which are random, and therefore, arbitrary and those lawful stops which are selective and not arbitrary.

> When articulable cause is used in reference to a stop under s. 216(1), it may refer to a stop flowing from a reasonable suspicion that a driver is violating some law pertaining to highway regulation and safety. If may also refer to more generalized safety concerns as in the case of the officer who stops trucks because experience teaches that trucks are more likely to be unsafe. Since the lawfulness of the stop does not depend on the existence of articulable cause, it is unnecessary to connect that cause to a specific person, offence or investigation as long as that cause is legitimately connected to legitimate highway concerns. (emphasis added)

¶ 27 The trial judge erred in using the definition of "articulable cause" from the common law justification for detention in the s. 216(1) context. Using the s. 216(1) criteria for articulable cause the officer was in the same position as described by Doherty J. A. noted in relation to trucks. Assuming the officer had a secondary basis for stopping, to determine if the appellant had been drinking, it was justified under s. 216(1). The trial judge erred in finding there was no justification for the stop to determining if the driver had been drinking. I note as well s. 48 of the Highway Traffic Act permits an officer to stop a vehicle to determine whether or not there is evidence to justify a breath demand.

Did the trial judge err in permitting defence counsel to proceed with the Charter Application in the absence of notice?

¶ 28 The trial judge has a discretion pursuant to Rule 2.02 of the Ontario Court of Justice Rules in Criminal Proceedings to waive compliance with the Rules. The appellant is required to show an error in the exercise of the discretion. R. v. Dumont, (Ontario Court of Appeal, released Sept. 19, 2000). Absent an indication the trial judge exercised his or her discretion on an improper basis an appellate court should not interfere. His Honour determined this would be an appropriate case in which permit the argument to proceed. He found defence counsel should have been alert to the s. 9 issue but not s. 8, provided Crown Counsel with an adjournment and permitted the officer to be recalled. Given defence counsel said he was not raising any Charter issues at the outset but would advise if any arose, said nothing until the close of the Crown's case and then produced a casebook of authorities on the Charter motion, I understand how Crown Counsel could have felt ambushed. However, the Crown was permitted an adjournment and permitted to recall the officer. I cannot conclude the trial judge erred in the exercise of his discretion. Of greatest significance, as the trial proceeded there was no prejudice to the Crown. The procedure adopted did extend the length of the trial and force it to be held in installments, a practice to be avoided where possible.

Should the "new trial" be before the same trial judge?

¶ 29 The trial judge said he did not propose to give the s. 8 ruling unless counsel insisted on it. Regrettably, neither did. Had the ruling been given, as it should have been, it would have avoided delay in the final determination of this prosecution and may have avoided a re-trial. The appellant seeks to have the trial continue with the s. 8 ruling and defence if necessary. Crown Counsel agrees this would be a practical approach.

¶ 30 In virtually every case where a new trial is ordered it is before a different judge. The argument here is the trial judge has heard parts of two days of evidence and it would be more efficient to have the trial "continue". The total evidence heard comprises 42 pages of transcript. In addition the trial judge has heard the s. 8 argument. There would also be some benefit to the s. 8 ruling being given on the same evidentiary basis as the s. 9.

¶ 31 Pursuant to s. 686(4) of the Criminal Code where an appeal from an acquittal is allowed the appellate court order a new trial or in non-jury cases substitute a conviction for the offence for which the accused should have been found guilty. In the unusual circumstances of this case I am prepared to order the new trial be held before the same judge. It is anticipated that given counsels' position on this issue, all trial evidence given and all submissions heard on s. 8 at the first trial will apply to the new trial.

Conclusion

¶ 32 The appeal is allowed and a new trial ordered as a continuation before the same trial judge. The respondent is required to appear in the Ontario Court at Oakville on October 17, 2000 at 9 a.m. to set a date for the new trial.

DURNO J.

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