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R. v. Preeper

Between
Regina, and
Leonard Bruce Preeper

[1984] B.C.J. No. 2729

British Columbia Provincial Court
Smith Prov. Ct. J.

Judgment: July 3, 1984.

Counsel:

M. Barbour, for the Crown, respondent.
P. Allik-Petersenn, for the accused.

¶ 1 **SMITH PROV. CT. J.**:— Can Mr. Preeper who paid a voluntary penalty some time ago for driving a motor vehicle without a subsisting driver's licence now be punished for the same driving on a charge of driving a motor vehicle on a highway knowing he was suspended from so doing? That is the issue in this case.

FACTS

¶ 2 The following facts are admitted:

(1) The accused drove a motor vehicle on May 15, 1983;
(2) The police issued a traffic ticket to the accused on May 15, 1983, alleging that he drove a motor vehicle without a subsisting driver's licence, contrary to s. 23(1) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288;
(3) The accused paid the indicated $35 penalty;
(4) Subsequently an information was sworn on September 15, 1983, alleging that the accused drove a motor vehicle on a highway knowing that he was suspended from so doing, contrary to the Motor Vehicle Act (s. 88).
(5) The same act of driving underlies both charges.

THE ISSUES

¶ 3 Defence counsel submits:

(1) The plea of autrefois convict applies;
(2) The rights of the accused guaranteed under s. 11(b) ("to be tried within a reasonable time") and 11(h) ("if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again") of the Canadian Charter of Rights and Freedoms have been violated and this should result in an aquittal; and,
(3) A conviction of driving while suspended contrary to s. 88 of the Motor Vehicle Act would be contrary to the rule against multiple convictions as set out in Kienapple v. R., [1975] 1 S.C.R. 729.

EFFECT OF PAYING VOLUNTARY PENALTY

¶ 4 The defence submissions are founded, to a large extent, on the premise that the accused was convicted on the drive without a valid driver's licence charge. If the accused was not convicted of this offence then the defences based on the common law principle that a man should not be convicted twice for the same matter would fail. I will commence, then, by considering whether payment of the voluntary penalty resulted in a "conviction" (a finding of guilt followed by a sentence).

¶ 5 Section 121 of the Motor Vehicle Act reads in part:

> "(8) Where a notice on the traffic ticket summons or notice indicates the pecuniary penalty for the commission of the offence charged in it, a person to whom a traffic ticket summons or notice is delivered . . ., instead of appearing before a justice at the time and place specified in the traffic ticket summons or notice, and whether or not the information has then been sworn to, may
>
> (a) attend voluntarily before a justice as directed on the summons or notice, plead guilty to the offence described in it and pay the fine specified in the notice; or
> (b) cause to be delivered in accordance with a notice in that connection appearing on the summons or notice the fine specified in the notice, and the person shall then be deemed to have pleaded guilty to the offence described in the notice and to have paid the fine imposed for the commission of the offence; [The underlining is mine.]
>
> . . .
>
> (9) Where a form of traffic ticket is prescribed . . . the Provincial Court may, subject to the provisions of this Act and the Offence Act, fix pecuniary penalties to be indicated on the form of traffic ticket."

¶ 6 I conclude, on a plain reading of this section, that when he paid the $35 fine the accused was convicted of the offence of driving without a subsisting driver's licence. It should be noted that the indicated penalty is not fixed by statute but by the Provincial Court. The $35 indicated penalty, then is not a reflection of the Legislature's view of the seriousness of the offence. For that view one must look at the penalties provided for in s. 4 of the Offence Act, R.S.B.C. 1979, c. 305: a fine of not more than $2,000 or to imprisonment for not more than six months or to both.

RES JUDICATA

¶ 7 I will deal first with the last defence submission.

¶ 8 The policy underlying the principle in our criminal law that no man should be punished twice for the same cause was stated by Rand J. (dissenting) of the Supreme Court of Canada in Cullen v. R., [1949] S.C.R. 658, as follows:

> "At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice forthe same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical power of the community to a test which may mean the loss of his liberty or his life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy."

¶ 9 In Kienapple v. R., supra, **Laskin J.** (as he then was) said, speaking for the majority (at p. 7 C.R.N.S.):

> "In my view, the term res judicata best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences."

At p. 8 he continued:

> "The relevant inquiry so far as res judicata is concerned is whether the same cause or matter (rather than the same cause or offence) is comprehended by two or more offences."

¶ 10 Professor Atrens in Criminal Procedure: Canadian Law and Practice (1981), at p. XII-271 said:

> "What the case law demonstrates most clearly is that what constitutes the same cause or matter for the purpose of the Kienapple rule, depends to a large extent on the circumstances of the individual case. There is no test of universal application that will solve all Kienapple problems. The most useful approach to the solution of those problems, therefore, is to analyze the jurisprudence to identify the factors that are most likely to attract the rule in Kienapple. The important factors are the following:
>
> (1) The evil against which each offence is directed is the same, or as is sometimes said, the gravamen of the offence is the same.
> (2) The victim of each offence is the same.
> (3) Only one act or omission of the accused in involved.
> (4) The offences share common elements.
>
> No factor is decisive in all cases. Seldom will all factors be present. But the more factors present, the stronger is the argument that the offences arise out of the same cause or matter."

¶ 11 In this case the "victim" is the "public" so factor two in Professor Atren's analysis would not be relevant (see Atrens at p. XII-276), or alternatively, the victim (the "public") of each offence is the same. As one act of driving is involved for both offences charged, factor three is self-evident. I will, therefore, proceed to analyze the remaining two factors: Is the evil aimed at by the two counts the same and do the counts share common elements?

¶ 12 I should comment before proceeding, that from my reading of the cases, there is an overlap between these two factors and so I do not try to strictly separate them in the following analysis. Elements have usually been looked at as the "'legal' elements of the offences described in the charge or in the enactment creating the offence" (Atrens, supra, at pp. XII-276-280) but in R. v. Hagenlocher, [1982] 2 S.C.R. 551, and in R. v. Allison (1983), 33 C.R. (3d) 333, cases I will examine shortly, it is the factual basis or factual elements that are emphasized.

Evil Aimed At

¶ 13 I found two cases dealing with a related set of charges to the charges facing the accused in this case. They were decided before the Supreme Court of Canada case of Kienapple.

¶ 14 In those cases, R. v. DeVries, [1964] 2 C.C.C. 203, and R. v. Barry (1972), 10 C.C.C. (2d) 355, the accused were charged with driving without a licence (a provincial offence) on the one hand, and with driving while disqualified or while suspended (a Criminal Code offence) on the other. The Courts in question held that res judicata did not apply. In R. v. DeVries Reville Co. Ct. J., said, at pp. 210-11:

> ". . . under s. 13(1) of the Highway Traffic Act, the Crown must prove that the accused drove a vehicle on a highway in Ontario, but need only prove that at the time he did so, he did not hold an operator's licence for any reason which may or may not include disqualification or prohibition, while under s. 225(3)(d) of the Criminal Code, the Crown need only prove the accused drove a vehicle somewhere in Canada, either on or off the highway, but must prove the accused was at the time he drove specifically disqualified or prohibited from driving. It is

> obvious that the purposes of the two offences are quite different and distinct; that of s. 13(1) of the Highway Traffic Act is to control the driving and operating of vehicles on highways in Ontario, whereas that of s. 225(3)(d) of the Criminal Code of Canada is to enforce the penalties of disqualification and prohibition, and the penalties imposed under the respective statutes reflect the varying seriousness of the respective offences.
> In the instant case, the one fact vital to support a conviction on the later charge against this respondent under s. 225(3)(d) is that he was disqualified or prohibited from driving at the time he drove. This was clearly not established in the former 'trial', as the accused merely pleaded gulty (and that by mail) to driving a motor vehicle on a highway in Ontario while he did not hold an operator's licence to do so."

¶ 15 The Barry case followed the reasoning in DeVries. These cases are distinguishable from the case before me.

¶ 16 In the case before me, both counts function "to control the driving and operating of vehicles on highways" in British Columbia; in DeVries one offence was Canada wide, the other limited to Ontario highways.

¶ 17 Here, following DeVries, it could be argued that as an essential factor in the drive while suspended charge is the suspension, a factor that is not present in the drive without a subsisting driver's licence charge, a different social interest is protected (and a different evil aimed at). To a certain extent this is true, but in a broad sense, the social interest for both charges is to regulate who drives. A person who is not physically fit to drive, for example, is precluded from obtaining a licence or if he has a licence he may be prohibited from driving.

¶ 18 Before examining the charges facing the accused in more detail, I will consider, with a view to the evil aimed at, three cases which illustrate how Courts dealt with different charges. In some cases this aspect is articulated. In some cases it is not.

¶ 19 In R. v. Timonen (1979), 52 C.C.C. (2d) 319, the charges were possession of stolen property and possession of an unregistered restricted weapon. The Ontario Court of Appeal held that an accused could be convicted on both charges. There the charges were designed to protect different social interests. As Martin J.A., said at p. 320:

> "Although the offences charged in counts 1 and 2 contain some common physical elements, it cannot be said that the elements which make up the two offences are the same or substantially the same. The two offences were created to protect different social interests. The offence charged in count 1 is an offence against property. The offence charged in count 2 was created to control the possession of restricted weapons in the interest of the general security or public safety. On the charge contained in count 2, if the weapon falls within the prohibited description under s. 89 of the Code it is immaterial whether or not it was otherwise lawfully possessed."

¶ 20 In R. v. Miles (1890), 24 Q.B.D. 423, a case cited with apparent approval by Laskin J. (as he then was) in Kienapple, the wounding charge and the common assault charge differed to a certain extent as in the wounding charge there is the added factor of wounding, but the rule against multiple convictions for the same delict applied to prevent a conviction again on the same matter. In the Miles case both offences are aimed at protecting against violence.

¶ 21 In R. v. Pinkerton (1979), 46 C.C.C. (2d) 284, a decision of the British Columbia Court of Appeal, the Court held that the accused could be convicted of both common assault and breach of probation (fail to keep the peace and be of good behaviour) arising out of the same incident. The Court held that the charges "do not have the same, or substantially the same, elements, nor can they be viewed reasonably as alternative charges". And "the provisions of ss. 663, 664 and 666 justify the conclusion that Parliament has given 'a clear indication' that 'multiple convictions are envisaged'". It could be said that the social interests of enforcing probation orders and of protecting against assaults differ.

¶ 22 I will now analyze the two sections the accused has been charged with to see if the evil aimed at is the same.

¶ 23 The relevant portion of s. 88 of the Motor Vehicle Act reads:

> "88.(1) A person who drives a motor vehicle on a highway or industrial road knowing that
>
> (a) he is prohibited from driving a motor vehicle under section 84, 85, 86 or 214
>
> . . .
>
> commits an offence . . ."

¶ 24 For a first offence under s. 88 of the Motor Vehicle Act the maximum penalty is the same as for driving without a subsisting driver's licence, but the minimum penalty is a fine of not less than $300 and imprisonment for seven days. On subsequent convictions under s. 88 the minimum imprisonment is 14 days; the maximum 1 year. The fines do not change for subsequent convictions. There is no minimum penalty for driving without a subsisting driver's licence; the maximum is a fine of $2,000 or six months' imprisonment or both (s. 4 of the Offence Act).

¶ 25 Because of the minimum penalties in s. 88, I conclude that it is the more serious of the two offences with which the accused has been charged.

¶ 26 Section 82 of the Motor Vehicle Act provides that where a person is prohibited from driving "his driver's licence and his right to apply for or obtain a driver's licence are deemed to be suspended." Thus although the accused here is charged with driving knowing he was suspended from driving, he could be convicted if he drove knowing he was prohibited from driving.

¶ 27 The reasons for not issuing a driver's licence on the one hand and for suspending a driver's licence under s. 88 of the Motor Vehicle Act on the other hand have parallels.

¶ 28 A person who does not pay his examination fee will not be licensed (s. 24), or if he is licensed, he may be prohibited from driving (s. 85(a)). Thus, on the one hand a person may be refused a driver's licence; on the other hand a person may be prohibited from driving; but in both cases the reason for the action is the nonpayment of the examination fee.

¶ 29 A person who does not pay his motor vehicle insurance may be refused his driver's licence (s. 24.1). A licensed person who does not pay an unsatisfied judgment "caused by or arising out of the person's ownership, operation or use of a motor vehicle" may be prohibited from driving (s. 84). Thus, on the one hand a person may be refused a driver's licence; on the other hand a person may be prohibited from driving; but in both cases the reason for the action is financial.

¶ 30 The Superintendent must be satisfied of a person's fitness and ability to drive before he issues a driver's licence (s. 24); if he considers a person unable or unfit to drive a motor vehicle the Superintendent may prohibit a person from driving. Thus, on the one hand a person may be refused a driver's licence; on the other hand a person may be prohibited from driving; but in both cases, the reason for the action is the Superintendent's assessment of the person's ability and fitness to drive.

¶ 31 A person could drive without trying to obtain a driver's licence and be convicted of driving without a subsisting driver's licence. The sections mentioned in the above analysis would not be brought directly into play. Nevertheless, some of the same policy considerations that would apply on a conviction of a person who drove after being refused a driver's licence would apply to this conviction. For example, the conviction in both could reflect the positive social interest in having the Superintendent regulate drivers so only persons who are fit and able to drive are licensed to drive. There are, in the two sections under which the accused has been charged, significant parallels in the evil aimed at.

¶ 32 In R. v. Konechny, [1984] 2 W.W.R. 481, MacDonald J.A. of the British Columbia Court of Appeal said:

> "Looking now at s. 88.1, along with s. 40 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1979, c. 204, it is apparent that the objective of the legislation is to ensure that persons who know that their driver's licence has been suspended under specified sections (resulting as well in suspension of their certificates of insurance) shall not drive."

¶ 33 It could also be said that the objective of the legislation requiring a driver to have a subsisting driver's licence is to ensure that persons who know that they do not have a driver's licence shall not drive. The reasons for suspension and for not issuing a driver's licence are substantially the same.

¶ 34 I should point out that s. 94 of the Motor Vehicle Act makes it an offence to drive while prohibited by Court order or by operation of law. In this case I specifically limit my analysis to s. 88 and express no opinion on s. 94.

Common Elements

¶ 35 I will now examine whether the two offences the accused is charged with share common elements.

¶ 36 A recent decision from the Supreme Court of Canada, R. v. Hagenlocher, supra places more emphasis on the factual elements of a case than many Courts have in the past. I have not found a case where the British Columbia Court of Appeal has considered Hagenlocher.

¶ 37 In Hagenlocher v. R., [1982] 1 W.W.R. 410, the majority of the Manitoba Court of Appeal held that the accused oculd not be convicted of manslaughter and with unlawfully setting fire to a substance which was likely to cause a building to catch fire, Huband J.A., delivering the majority judgment, said, at p. 417:

> "In the present case, the accused entered a vacant room in the hotel. He poured some vodka on bedclothing on a bed, and then proceeded to light the bedclothing with a match. The resulting fire caused considerable property damage to the hotel and hotel chattels, and led to the death of Joseph Sponarski by asphyxiation due to smoke. While there were two offences, there was but a single act. In my view, this is a proper case for the application of the Kienapple principle.
> It is correct to note that in the instant case the single delict gave rise to complaints emerging from two sources - the hotel, and the estate of the victim of asphyxiation. The principle that there cannot be multiple convictions for a single criminal act cannot be deflected on the basis that there is more than one complainant."

¶ 38 The Supreme Court of Canada was "of the opinion that the conclusions reached by the majority of the Manitoba Court of Appeal in applying the Kienapple principle were correct": 70 C.C.C. (2d) 41.

¶ 39 In his reasons for the majority of the Manitoba Court of Appeal, Husband J.A. disapproved of the following remarks of Culliton C.J.S. in R. v. Wildeman, [1978] at 480, 42 C.C.C. (2d) 360:

> "In my view it is only when the two charges arising out of the same circumstances, can be said to be alternative to one another so that the conviction on both would result in the accused being twice convicted for the same offence, that the principle in Kienapple applies. If the offences cannot be said to be so alternative to one another, convictions may be registered in respect to a number of charges although they arise out of the same incident. When Kienapple is so construed its application is limited and can be applied without difficulty and confusion."

¶ 40 These words of Culliton C.J.S. were quoted with approval by the British Columbia Court of Appeal in R. v. Pinkerton, supra.

¶ 41 In Hagenlocher at p. 418 Huband J.A. said:

> "I find nothing in the majority judgment in Kienapple to limit its applications to the kinds of situations described by Culliton C.J.S. To so construe the Kienapple case may eliminate difficulty and confusion, but only at the possible price of permitting multiple convictions for the same criminal act. To employ the phrase used by Laskin J. in the Kienapple case itself, there should not be two or more convictions where they would be supported by the same 'elements and facts.' In the present case, the same 'elements and facts' underly [sic] both the charge of manslaughter and the charge of unlawfully setting fire to a substance."

¶ 42 The Supreme Court of Canada in agreeing with the Manitoba Court of Appeal's conclusions in Hagenlocher does not necessarily endorse what the majority there said about the above quotation from Culliton C.J.S., but I suggest the result in Hagenlocher indicates a trend toward a broader application of the Kienapple principle than has been applied by many Courts in the past.

¶ 43 Hagenlocher was applied by the Ontario Court of Appeal in R. v. Allison, supra. After examining Hagenlocher and other cases, Martin J.A., delivering judgment for the Court, said, at pp. 339-40:

> "The principle which appears to emerge from the above cases is that an act which underlies an offence, or an act which forms part of a series of connected acts which make up the factual basis of an offence resulting in a conviction, cannot be used again to constitute the factual basis of a conviction for another offence."

¶ 44 In the present case the Act which underlies the offence of driving without a subsisting driver's licence (which resulted in a conviction) is the same Act that underlies the charge of driving while suspended. As the evil aimed at in the two sections is similar, the accused cannot, in my opinion, be convicted for the second offence.

¶ 45 This case is distinguishable from cases like A.G. B.C. v. Bennewith, B.C. S.C., Kamloops Registry, October 25, 1983 (unreported), (summarized in [1984] B.C.D. Crim. Conv. 5965-01) where the charges were driving with more than .08 per cent alcohol in the blood (s. 236 of the Criminal Code) and driving while suspended (s. 88.1 of the Motor Vehicle Act) and R. v. Logeman (1978), 5 C.R. (3d) 219 where the charges were impaired driving and driving while suspended. In those cases the evil aimed at by each charge was different. As Finch J. said in Bennewith at p. 6 of the transcript: "The Code offence is directed towards driving while the accused person has a certain physical condition. The Motor Vehicle Act offence is directed towards driving while the accused has a legal status that prohibits him from so doing." In this case both offences are directed towards driving while the accused does not have the legal status to do so.

¶ 46 In R. v. Harrison (1978), 9 B.C.L.R. 199, 7 C.R. (3d) 32 (C.A.) (McFarlane, McIntyre and Lambert JJ.A.), the accused pleaded guilty to possession of a still suitable for the manufacturing of spirits. He was later charged with possession of unlawfully manufactured spirits. The Court held that the two charges contain no common element and that the accused could be convicted of both.

¶ 47 Lambert J.A., delivering judgment for the Court, explained the inconsistencies in the way Courts have stated the principle of res judicata and then analyzed how the facts of each case are considered in relation to the charges in the case. It should be noted that this case was decided before the Supreme Court of Canada issued its decision in Hagenlocher and should be read with that in mind. At p. 203 he stated:

> "In my opinion, the consistent approach demonstrated by the cases is that the particular facts of each case are considered in relation to the particular elements of the charges in that case. It is not sufficient to consider the charges and to ask whether conviction on one will involve conviction on another. It is not sufficient to consider the facts and to ask whether only one act is involved. The facts and the charges must be considered together and in their relationship to each other. The purpose of doing so is to decide the answer to the question of whether in the particular case the facts and the charges are such that conviction on the more serious charge must be taken to establish everything required for conviction on the less serious charge. If so, the principle of res judicata in criminal matters will preclude a separate conviction on the less serious charge. If not, it will not; but each case stands as authority only for the correctness of

> the application of the principle on the particular facts of that case. The application of the principle where one or both of the charges involves a continuous state of facts or state of being, as in this case and the Côté case, supra, may well present different aspects from the application of the principle where the charges involve one discrete event, as in the Kienapple case, supra."

¶ 48 Here, are the facts and the charges such that conviction on the more serious will establish everything for conviction on the lesser charge? If the accused drove a motor vehicle on a highway when he was suspended from so doing, must he not also have been driving without a subsisting drivers licence? Subsist means: "to continue to be or exist as a reality or in a given state" (Webster's New World Dictionary). A driver's licence that has been suspended does not function as a driver's licence (i.e. license one to drive) or "exist as reality or in a given state". I conclude that if the accused drove a motor vehicle on a highway when he was suspended from so doing, he must have been driving without a subsisting driver's licence.

¶ 49 As the facts and the charges are such that conviction on the s. 88 charge establishes everything required for conviction on the less serious charge of driving without a subsisting driver's licence, "the principle of res judicata will preclude a separate conviction on the less serious charge."

Does Res Judicata Preclude Conviction on More Serious Charge?

¶ 50 In the present case the accused has already been convicted of the less serious charge. While the principle of res judicata applies to preclude a conviction on a less serious charge, does it apply to preclude a conviction on the more serious charge?

¶ 51 In R. v. Loyer, [1978] 2 S.C.R. 631, Laskin C.J.C. outlined the procedure for Courts to follow where an accused pleaded guilty to the less serious charge. He said:

> "if . . . the accused pleads guilty to the less serious charge, the plea should be held in abeyance pending trial on the more serious offence. If there is a finding of guilty on that charge and a conviction is entered accordingly, the plea already offered on the less serious charge should be struck out and an acquittal directed."

¶ 52 Here I have no jurisdiction to hold the conviction in abeyance, however, as the accused has not only been found guilty, but has, in effect, been sentenced.

¶ 53 If a conviction on the more serious offence bars a conviction for the less serious offence, surely the Crown cannot proceed on trial on the less serious offence and then on a conviction on that offence proceed to trial on the more serious offence.

¶ 54 Cockburn C.J. put it this way in R. v. Elrington (1861), 1 B. & S. 688 at 696, 121 E.R. 870 at 873:

> "[We] must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

¶ 55 See also R. v. Miles, supra.

¶ 56 Before I conclude, I should say, that from a practical point it should not be difficult for the authorities to implement a communication link between the Superintendent of Motor Vehicles and the police, so the policeman on patrol can get immediate information on persons who have been prohibited from driving. If a person is prohibited from driving, he should not be issued a ticket providing for a voluntary penalty for driving without a driver's licence if the authorities want to charge him with the more serious offence.

CONCLUSION

¶ 57 The accused faces a charge of driving while knowing he was suspended; he has been convicted, for the same act of driving, on a charge of driving without a subsisting driver's licence. The evil aimed at in both charges is substantially the same.

¶ 58 On his first charge he faced a maximum penalty of a $2,000 fine or six months' imprisonment or both. The Crown elected to proceed by way of a traffic ticket on which there was an indicated penalty. It could have proceeded by way of an information under the Offence Act (see s. 121 of the Motor Vehicle Act) in which case the full range of dispositions would have been open to the Court. The accused paid the voluntary penalty; he could have gone before a Court in which case the full range of dispositions would have been open.

¶ 59 When the Superintendent prohibits a person from driving, the person's driver's licence is no longer a subsisting driver's licence. Can one stroke of the Superintendent's pen prohibiting a person from driving result in two convictions for one act of driving? Surely not.

¶ 60 The facts and charges here are such that a conviction on the more serious s. 88 charge must be taken to establish everything required for a conviction on the less serious charge. The principle of res judicata precludes a conviction on both charges to protect the accused "from an undue exercise by the Crown of its power to prosecute and punish" (per Laskin J. (as he then was) in Kienapple, 26 C.R.N.S. at p. 10). As I have no power to set aside the conviction on the less serious charge, I conclude that the principle of res judicata applies to prevent a conviction on the more serious charge and accordingly, dismiss the information.

¶ 61 In light of this conclusion, I need not deal with the remaining defence submissions.

SMITH PROV. CT. J.

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