CITATION: R. v. Soules, 2010 ONSC 1014
COURT FILE NO.: CR-09-0034-AP (Belleville)
DATE: 2010-02-11

ONTARIO

SUPERIOR COURT OF JUSTICE

(East Region)

2010 ONSC 1014 (CanLII)

BETWEEN:		
HER MAJESTY THE QUEEN	Appellant	Paul Layefsky, for the Crown
– and –		
STEPHEN SOULES	Respondent	Alan D. Gold, for the Respondent
		HEARD: January 28, 2010 at Belleville

TAUSENDFREUND J.

On Appeal from the Judgment of the Honourable Mr. Justice G. Griffin dated July 17, 2009

[1] This is an appeal by the Crown from the acquittal of the respondent by the Honourable Mr. Justice Griffin of the Ontario Court of Justice at Belleville, Ontario on July 17, 2009. The charge was as follows:

> That Stephen Soules, on or about the 6th day of September, 2008, at the City of Belleville in the East region, operated a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to section 253(b) of the *Criminal Code*.

[2] The Crown advances three grounds of appeal:

a) The learned trial judge erred in deciding that the immunity principle set out in *R. v. White*, [1999] S.C.J. No. 28 (S.C.C.) applied to compelled statements made by the respondent to the investigating officer at the scene of the accident and that the use of

these statements by the Crown at trial would be a breach of the respondent's s. 7 *Charter* rights;

b) The learned trial judge erred in his finding that the respondent's right to counsel, protected by s. 10(b) of the *Charter*, was violated as he had not been afforded a "Prosper Warning", based on *R. v. Prosper*, [1994] S.C.J. No. 72 (S.C.C.), when the respondent changed his mind and decided not to contact a lawyer; and

c) Even if the respondent's s. 7 and/or s. 10(b) rights were breached, the evidence should not have been excluded pursuant to s. 24(2) of the *Charter*.

Facts

[3] On September 6, 2009, between 10:00 a.m. and 10:25 a.m. there was an accident involving four motor vehicles. The roads were wet. Robert Wigmore was travelling southbound on North Front Street in Belleville and was in the process of turning right into a driveway of the Belleville Funeral Home. His vehicle was struck from behind by the vehicle operated by the respondent. The respondent had stopped properly behind Mr. Wigmore when the respondent's vehicle was struck from behind by the vehicle operated by David Rushlow. The force of the impact propelled the respondent's car into the Wigmore vehicle. Constable Bucci was the investigating officer and a qualified intoxilyzer technician. He arrived at about 10:30 a.m. After attending to a number of injured parties, Constable Bucci asked for the driver's licences, ownerships and insurance. He spoke to each driver individually and asked what had happened. That included a question by Constable Bucci to the respondent whether he had been the driver of one of the vehicles to which the respondent affirmed.

[4] Constable Bucci noticed that the respondent avoided talking directly to him face to face. He also noted an odour of alcohol, bloodshot and glassy eyes, and an admission by the respondent that he had consumed alcohol the previous night. Constable Bucci suspected that the respondent had alcohol in his system. At 10:58 a.m. the officer made an approved screening device (ASD) demand. The respondent registered a fail on that device. Constable Bucci arrested the respondent for operating a motor vehicle with more than 80 milligrams of alcohol in 100 millilitres of blood and advised the respondent of his right to counsel. The respondent indicated that he understood his right to counsel, that he was from Calgary and did not know whom to call but that he did wish to speak to a

2010 ONSC 1014 (CanLII)

lawyer. The respondent was transported to the police station arriving at 11:14 a.m. The respondent provided two samples of his breath into an approved instrument, one at 11:39 a.m. and the next at 12:01 p.m. with the results of 143 and 136 milligrams of alcohol respectively in 100 millilitres of blood.

2010 ONSC 1014 (CanLII)

Analysis

[5] The question on this appeal is whether statements made by the respondent under compulsion of the *Ontario Highway Traffic Act* are inadmissible in criminal proceedings as they offend the principle against self-incrimination, as embodied in s. 7 of the *Canadian Charter of Rights and Freedoms.*

[6] Section 7 of the *Charter* is as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[7] The examination of the use in a criminal proceeding of a statement compellable under provincial legislation must start with *R. v. White*, [1999] 2 S.C.R. 417. The Supreme Court held that a statement compelled by the *B.C. Motor Vehicle Act* could not be used in a subsequent criminal proceeding against the person making that statement. The court stated at para. 71:

> ...creating an immunity against the use of an accident report in subsequent criminal proceedings is itself a balancing between society's goal of discovering the truth, on the one hand and the fundamental importance for the individual of not being compelled to self-incriminate, on the other...the grant of a use immunity permits the state to achieve the important objective of acquiring relevant information immediately, for a purpose unrelated to the investigation of specific crimes, while protecting the individual against jeopardy from the use of that information against him or her in penal proceedings at a later time.

And at para. 73:

> I have stated that a statement made under the compulsion of s. 61 of the *Motor Vehicle Act* cannot be used to incriminate the declarent in subsequent criminal proceedings.

[8] The principles established by the Supreme Court in *R. v. White* were later applied by the British Columbia Court of Appeal in *R. v. Powers*, [2006] B.C.J. No. 2650. The facts of that case are similar to the present. Mr. Powers was involved in a two vehicle accident which resulted in him leaving his car in a ditch. Upon arrival, the investigating officer asked about the identity of the driver of the car in the ditch. Mr. Powers admitted that it was he. The officer then formed the suspicion that Mr. Powers may have alcohol in his system. He made an ASD demand. This resulted in a "fail". The officer then arrested Mr. Powers and demanded that he submit to a breathalyser test. The court stated:

> 12. ...the *Provincial Motor Vehicle Act* cannot determine admissibility in a trial under the Federal *Criminal Code*. This issue of admissibility was left to be considered by the Supreme Court of Canada in *R. v. White*. The Supreme Court of Canada concluded that the use of a statement compelled by the *Motor Vehicle Act* would contravene s. 7 of the *Charter*.
>
> 13. The question on this case is whether, as the Crown contends, *White* allows for a different result in the circumstances of this case....I have concluded that it does not....the evidence was a necessary link in the chain of evidence necessary to convict Mr. Powers.

[9] Justice Wein in *R. v. DaCosta*, [2001] O.J. No. 2393 considered the admissibility of statements made by the accused which were said to have been induced by statutory compulsion under the *Ontario Highway Traffic Act*. Applying *R. v. White*, Justice Wein stated:

> 25 ...the principle of self-incrimination guaranteed by s. 7 did provide a protection against uses of information compelled by statute or otherwise.
>
> 32. ...Justice Iaocobucci went on to say that the principle against self-incrimination is strongly brought into play by numerous aspects of the context surrounding the compulsion to make an accident report, such that "a driver who makes a statement pursuant to the statutory duty [as set out in motor vehicle legislation] is entitled, at least, to use immunity in criminal proceedings in relation to the contents of that statement".
>
> 33. It was not argued, nor can it be realistically said, that anything turns on the distinction between the British Columbia legislation and the Ontario legislation in question, notwithstanding that the Ontario legislation is far less specific than the B.C. legislation concerning use immunity.

2010 ONSC 1014 (CanLII)

[10] The trial judge in his reasons stated at p. 23:

> The British Columbia Court of Appeal decision of *R. v. Powers*, 213 C.C.C. (3d) 351 makes it clear the breath results are not admissible if the accused's admission to driving and drinking the night before are made by statutory compulsion.
>
> ...
>
> I am unable to distinguish the facts of this case from the principles set out in *R. v. White* and by operation of s. 24(1). The breath results are excluded based upon the violation of Mr. Soules' right against self-incrimination provided by s. 7 of the *Charter*.

[11] In my view, the trial did not err in holding the statement of the respondent inadmissible under s. 24(1) of the *Charter*.

[12] In view of my finding, it is not necessary to consider the additional ground of appeal that the trial judge erred in his finding that the right of the respondent to counsel, protected by s. 10(b) of the *Charter* was violated as he was not provided a "Prosper Warning".

[13] The appeal is dismissed.

"Justice W.U. Tausendfreund"

Justice W.U. Tausendfreund

Released: February 11, 2010

2010 ONSC 1014 (CanLII)

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REASONS FOR JUDGMENT

Tausendfreund J.

Released: February 11, 2010