Case Name:

R. v. [redacted]

Between
Her Majesty the Queen, and
[redacted]

[2012] O.J. No. 6684

Ontario Court of Justice
Peterborough, Ontario

J.R. Morgan J.

Heard: March 23, 2012.
Oral judgment: March 23, 2012.

(18 paras.)

Counsel:

K.Eberhard A. Stastny, Counsel for the Crown.

A. Stastny, Counsel for Mr. [redacted]

REASONS FOR JUDGMENT

1 J.R. MORGAN J. (orally):--[redacted] was charged with an offence contrary to Section 145(3) of the *Criminal Code*, breaching his recognizance by being bound to comply with the condition of the recognizance directed by the said Justice, fail without lawful excuse to comply with that condition to wit; not to operate or occupy the driver's seat of a motor vehicle.

2 The incident is alleged to have occurred on the 10th of November of 2010. Crown elected to proceed summarily. The trial was commenced on the 1st of February of 2012. Judgment was reserved to today. Mr. Stastny, on behalf of the accused, essentially admitted all of the Crown facts, which were as follows:

3 On the 10th of November of 2010, at about 8:10 in the morning, Mr. was the operator of a motor vehicle that was traveling at a high rate of speed that struck an oncoming motor vehicle, resulting in a head on collision. Both vehicles sustained significant damage. Mr. was in fact trapped in the driver's seat of his motor vehicle and subsequently was air-lifted to Sunnybrook for treatment. Mr. testified in his own defence that in March of 2010 he was charged with impaired driving. He was released from custody, given a 90 day driver's licence suspension. I believe this occurred in Newmarket. Then about a month later, on the 17th of April of 2010, he was again charged and he was released after a bail hearing the following morning, with the admonition by the officer that was releasing him that his licence was further suspended as an administrative driver's licence suspension for 90 days. Mr. clearly recalled the officer telling him that words to the effect, "This will not be too difficult for you because it's just an extra 30 days."

4 Mr. testified that when he was in court he was released on bail that he was not paying close attention to the conditions of the bail. He testified at page four of his evidence, line 15,

> "I was not payin' that close attention.
>
> I had a hard time understanding the judge at the time. He had an awful heavy accent, the judge, and I believe it was Oshawa that was on, uh, monitor.
>
> They had me locked up."

5 He was shown the recognizance and he recalled the condition about not to operate a motor vehicle or to occupy the driver's seat and he testified that he did acknowledge those conditions in open court. He further testified that some time later, in July, he received his driver's licence in the mail. He was concerned about the fact that the licence had been received in the mail and that he wondered if he was going to be able to drive. Accordingly, he telephoned the Ministry of Transportation on three separate occasions and was advised that according to their records, Mr. was able to drive. Mr. said the answer he received from the Ministry of Transportation was, "We issued you a licence and as far as we are concerned, you are good to drive." Accordingly, Mr. began driving his motor vehicle and then got into the accident on the 10th of November.

6 In cross-examination, Mr. was asked about his reliance on the words of the officer that suspended his licence under the administrative driver's licence suspension and the fact that he checked with the Ministry of Transportation concerning the validity of the licence that he received in the mail. At page 13 of his evidence:

> "Question: But you knew at the time of your release that you were not to occupy - not to operate or occupy the driver's seat of the motor vehicle, correct, when you were released?

Answer: Until I got my licence back.

Question: No, there's nothing on that piece of paper that says until you got your licence back is there?

Answer: Why would he have told me that?"

7 Making reference I believe to what the officer told him.

"Question: There's nothing on that Judicial Interim Release form that says you're not to occupy or drive a motor vehicle - to occupy the driver's seat or drive a motor vehicle until you get your driver's licence back, correct?

Answer: That's the way I understood it.

Question: I'm going to ask you to look at the Exhibit Number one again, okay?

Answer: I don't understand forms and reading very well, but what would ya' like me to do here?"

8 It was manifestly obvious that the words, "While your licence is under suspension", were not on the judicial interim release order. Further, in crossexamination, Mr. [redacted] made the comment, "I apologize for my stupidity." And further he said, and this is at page 14, "But I was going by what the officer told me, so I assumed." And further, "That's why I called the Ministry to double check. Doesn't the court - the Ministry - work together that way?"

9 A further question and answer that's illuminating. In cross-examination, page 11,

"Question: And I'm going to suggest to you that you didn't call the Ministry of the Attorney General. In other words, you didn't call a court office, did you?

Answer: I - I wouldn't know where to call or why that - why I would do that.

Question: Well, in the blue pages, not only is there - are there numbers for the Ministry of Transport, but there are also numbers for Ministry of the Attorney

General Court Offices.

Answer: The Attorney General is for your health card, isn't it?"

10 Now, Mr. [redacted] for the accused, relying on a judgment of the Superior Court of Justice, sitting in summary conviction appeal, R.v. Rundle, 2008 Carswell Ont. 202, argues that Mr. Simser was acting out of a mistake of fact, that he did believe that when his licence was returned to him that meant that he was then able to drive, such hat the Crown has failed to prove the *mens rea* of the offence and accordingly, the accused should be found not guilty. Mr. Stastny also brought to my attention the judgment of the Ontario Court of Appeal, R.v. Legere, 1995, 95, C.C.C. (3rd), 555, dealing with Crown proving *mens rea* through carelessness, or failure to take precautions that a reasonable person would take. Mr. Stastny's argument is that in proving the *mens rea*, the court needs to consider if, using a modified objective test to assess, whether or not Mr. Simser understood that he was prohibited from operating a motor vehicle by reason of the bail order and not just the order of the administrative driver's licence suspension. Mr. Stastny says that his client is an unsophisticated man who has been a truck driver for 25 years. He has a grade ten education and he was - he took reasonable steps that were consistent with his understanding of the court system when he got his licence back. Accordingly, on the 10th of November of 2010 when he was operating the motor vehicle, he was doing that under a mistake of fact that he was able to operate a motor vehicle.

11 The Crown's argument is that the accused signed the document. He acknowledged that he was aware of that condition when he left the courtroom and that the Crown has met the burden of proof of establishing not only the *actus reus*, but the *mens rea*. Those are the facts. Those are the arguments of counsel.

12 How does the Crown prove the *mens rea*? How does the Crown prove that when the accused was operating his motor vehicle he knew that he was in breach of his bail order because he was operating a motor vehicle and he was occupying the driver's seat of the motor vehicle? It seems to me that this issue can be approached from three different points of view; the mistake of fact viewpoint argued by Mr. Stastny is that his client was acting on a mistake of fact, and using the language set out in Rundle, that he had a flawed perception of the facts. Rundle cites at paragraph ten, Ewanchuk, 131 C.C.C. (3rd) 481, as well as Pappajohn (1980) 2 S.C.R. 120, and quotes Dickson, J. from Pappajohn,

> "Mistake is a defence...where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defense. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the actus reus of the offence."

13 This is where Mr. Stastny invites consideration of the modified objective view of the accused's

actions.

14 I have carefully considered the evidence of Mr. [redacted], including the cross-examination. On the one hand he's an adult man who has been able to work for 25 years as a truck driver; able apparently to read road signs and negotiate crossing the border and dealing with paperwork that is part of operating a truck. At the same time there is a simple *naivete* to his crossexamination. His thought that perhaps the Ministry of the Attorney General was where you get your health card. His apology for being stupid. is belief that if he called this telephone number and got an answer that said he could drive, that meant he could drive. I am persuaded by Mr. Stastny's argument that he was operating with a flawed perception of the facts, and the Crown has failed to prove the *mens rea.*

15 There are two other approaches to the proof of the *mens rea*, and I needn't consider them here because I've already made my judgment, but I thought it was helpful to consider was he careless? He was negligent. He ought to have known. That defence is addressed in Legere in paragraph 32 where the court adopts the argument of the counsel appearing before the appeal - and this is quoted at paragraph 32,

> "Mr. Trotter for the Crown acknowledged that the offence of failing to comply with a condition of a recognizance is a true criminal offence requiring proof of *mens rea* and that mere carelessness, or failure to take the precautions that a reasonable person would take will not support a conviction."

16 There is a nuanced approach here. Not only was Mr. [redacted] licence suspended under the provisions of the *Highway Traffic Act* for 90 days, but a condition of his bail was that he not operate a motor vehicle. I am persuaded that Mr. [redacted], if he was careless, that's all that he was, and that the Crown is unable to prove the *mens rea* based on his negligence or carelessness.

17 The third consideration would be was Mr. [redacted] willfully blind? This is addressed in a Court of Appeal judgment, R.V. Smith, (2008) O.J. No. 465 at paragraph five, the judgment of the Ontario Court of Appeal dealing with this very issue. The doctrine of willful blindness does not apply to prove knowledge. This is the quote from Smith,

> "Wilful blindness requires more than a failure to make inquires where those inquiries could have been made and reasonably should have been made by the accused. Wilful blindness requires a finding that the accused, knowing he had reason to suspect that a certain state of affairs existed, deliberately declined to make the inquiries necessary to confirm that state of affairs, preferring to remain ignorant of the true state of affairs. This is a subjective statement of mind and justifies the imposition of criminal culpability."

18 Against that standard, again, the Crown fails to prove the *mens rea*. Accordingly, the accused will be found not guilty. You are free to leave, Mr. [redacted]