

*Case Name:*

**R. v.** [REDACTED]

**Between  
Her Majesty the Queen, and**

[REDACTED]

[2017] O.J. No. 3835

Ontario Court of Justice

**R. Khawly J.**

Heard: June 1, 2017.

Oral judgment: June 1, 2017.

(28 paras.)

**Counsel:**

P. Campbell, Counsel for the Federal Crown.

A. Stastny, Counsel for [REDACTED]

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**REASONS FOR JUDGMENT**

**1** R. KHAWLY J. (orally):-- [REDACTED] is facing three charges. However, given Mr. Stastny's position for the defence, both he and Mr. Campbell, who represents the Crown, agreed that he could be arraigned only the count of possession of heroin for the purpose of trafficking. The other two charges, the evidence is to apply, but Mr. Stastny has advised that he has instructions that his client would enter guilty pleas on those. They involve a small amount of heroin and cocaine that were found on his person upon arrest. Therefore, the most serious charge, given the nature of the substance and the weight involved, was some 43.97 grams; [REDACTED] will be facing serious consequences if he were found guilty of that charge.

**2** This is a trial. As part of the process, there's a *Charter* application and in support, which would

be available even without the *Charter*, is a *Voir Dire* to the effect of the voluntariness of a statement that he gave to an officer. That statement, the defence concedes, would be the death knell of a defence on the charge upon which [REDACTED] was arraigned, if that statement is found to be voluntary.

3 In turn, Mr. Campbell advised the Court that if the statement is found to be involuntary and therefore cannot be part of the evidence, that given the circumstances of the number of individuals that were located in the house where that heroin was found, that the Crown would be in an untenable position to prove this case beyond a reasonable doubt against [REDACTED]. Therefore, this trial hinges on the statement.

4 There's also a position taken by the defence (he doesn't call it in the alternative) but his position is that even if that failed, he has an argument to make under section 10(b) of the *Charter*, even though I've already telegraphed to him, he would have a fairly substantial road to cover on that one. Nonetheless, I see his position on one aspect of that, which is the knowledge that was imparted to [REDACTED] at the front end of a search warrant being executed at his residence. Nonetheless, I will not consider this at this point.

5 Both counsel are in agreement that I should make a decision on the statement because only if unsuccessful would he argue the alternative.

6 Cases have been provided to me. The most interesting parts of them, is that they all support a proposition that has been the jurisprudence even prior to the *Charter*. It's nothing new, particularly in so-called *quid pro quo* situations where someone says I want you to do this for me and I'll do this for you. Understanding that context is vital. It is not necessary for there to be a clear confirmation that there was a *quid pro quo*. The circumstances surrounding how the statement was given by the defendant very much informs his state of mind. His state of mind is vital; would a reasonable person standing in his position find that there was some kind of inducement being offered? When one speaks of context, it is vital for the trier of fact, to determine, not necessarily the accuracy as much as whether the Court is getting the full flavour leading up to how the statement was given. In fairness, in this case, I'm having much difficulty in getting the full picture.

7 The Crown, trying to satisfy its onus, called witnesses, all police officers. The defence chose not to call any evidence on the *Voir Dire*, as it is his right, and puts the onus on the Crown to prove beyond a reasonable doubt that the statement was voluntary.

8 The evidence called by the Crown, is cumbersome. Some officers were armed with certain information that were not communicated to one and all. Beyond that it is not that I disbelieve any of the officers. I have no reason to. I found that they tried to be as open and as candid as possible, although in some sensitive areas, one officer in particular was somewhat hesitant in providing the Court with a full picture. I'm not sure I got it. Regardless of the veracity of the officers, however, the reliability of the evidence is the concern.

9 Having set up the background of this matter, let's look into some particulars. [REDACTED] is suspected of dealing drugs to the point where there is a search warrant being applied for his residence. The day that the search warrant is being applied for, in fact, within hours of an officer being advised (Officer White) that the search warrant is being completed to be submitted to a justice of the peace, he sets up at [REDACTED] residence. [REDACTED] exits. He follows him. He believes he then sees [REDACTED] in a hand-to-hand transaction with someone. He arrived at a similar conclusion the day before when he made certain observations of [REDACTED]. Therefore, with the search warrant being about to be executed, he arrests him. This was roughly around 10:20 p.m. He arrests him for a rather generic charge that would not inform the defendant of what he is really facing as he arrests him for trafficking in a controlled substance. That's not good enough. One must advise the defendant what he's being arrested for but that's neither here nor there. It becomes crystal clear to the officer later on, and as confirmed by his "road boss", (the person who is actually in charge of setting up and executing the search warrant) that unless he has the front end of the transaction he cannot be charged with anything. But this takes place following detention and arrest.

10 Subsequently, however, the officer does get better grounds, but that is somewhat problematic because he gets those grounds based on what was a rather premature arrest. What happened was that once [REDACTED] became convinced that Officer Wright was in fact, an officer, to make things I gather easier on himself, he advises the officer that he has drugs in his underwear. Sure enough, the officer allows him to go into his underwear and out comes those two small amounts of narcotics, one heroin, one cocaine, which I previously mentioned are part of two other charges. So, the officer, at that time, arrests him for possession because they are very small amounts. It sounds like, almost at the same time, he's telling Officer White, look, I have information, which seems to be suggestive that what he's really saying is, "hey, look, I need a *quid pro quo* here." "I'll give the information, but I want those charges to go away." Implicitly, that is what is really being suggested. The officer, as a search warrant is about to be executed is concerned that this may alert anyone of that possibility so he tells him, hey, don't say anything at this point. The officer is smartly trying to get him off the street at which point the road boss, police Officer Chalmers arrives on the scene. He put him in Chalmers' automobile, takes him away from the scene and they call uniformed officers to transport him. This is about 22:45, some 25 minutes after the initial detention.

11 I'm not clear when the officer learns this vital piece of information, but he tells us at some point, Chalmers tells him that [REDACTED] told her that there were drugs in the house, their location in the ceiling in the basement by a black pipe. What we do know is that the warrant was executed at 2:22 and despite that information, Officer White tells us it took him a good 20 minutes to locate them. As I said earlier, the weight is not negligible, rather to the contrary. Heroin, almost 44 grams, is almost two ounces of heroin.

12 When pressed in cross-examination, he said regardless of everything he would have arrested him because there was a search warrant about to be executed. Fair ball, but if that were the case, then it was mandatory, from my perspective, for the officer to advise him, I'm arresting you because we're about to effect a search warrant of your residence. He was entitled to know that. The officer

added that there was a secondary reason, which is that reasonable probable grounds that he was dealing with drugs, based on his observations the day before and that night. I've already discussed that aspect. Nonetheless, if those were his two grounds, in my view, it was necessary for him to advise him of the full reasons of the arrest. One is that the officer had reasonable probable grounds he is dealing in drugs, but two, that they are about to descend upon his house. This was not done. When pressed also on that point, he said, well, I didn't tell him about the search warrant initially as I wanted him out of the area. Well, okay, I accept that, but once you get him out of the area before transport officers arrive, he should have been told that because then, he is in a protective area where he cannot do anything because he's in the back of a cruiser. Windows are shut, I assume. So, he can't even yell out and even if he can, not much could be heard, I don't think. But if he does, he's out of the area so even if much can be heard, so what? There's no reason not to advise him then of the search warrant as Officer White tells us that it was one of the two reasons he arrested him. An officer must tell someone he's detaining and then arresting, the reasons for the detention and the arrest.

**13** So, from the get go, I'm having difficulty with this case and looming equally as large is that when one is speaking of state of mind and voluntariness, the Court needs to know what information is being given and being processed by the maker of the statement? In any event, the Officer tells us again, I'm not clear on when that occurred, that he wanted the charges to go away and he wanted to cooperate. That was Officer White's conclusion, based on the statements [REDACTED] was making, except I have no clear confirmation of what those statements were. For instance, was it, "hey, I want to ingratiate myself with you so I'm going to cooperate and tell you what I know." "Will you consider then not charging me?" Or was it, "hey, you confirm to me you're not going to charge me and I'll give you information." I don't know how Officer White arrived at that conclusion because I don't know what was said by [REDACTED]. In other words, the Officer's notes are not that fulsome and therefore, not that reliable, in that area. Officer White then says that Chalmers told the defendant, at that point, that his rights are being suspended as there is a search warrant being executed. When asked if he has notes on that, he does not. Asked, why he would not put such an important piece of information in his notes, he said, "I did not make that decision." He then added "I'd only been in that unit for 30 days so I would not have known prior to my arrest of him that his rights would be suspended due to the search warrant, nor did I advise the transport officers, who then arrive on the scene, that his rights were being suspended." Now, the problem with his recollection on that point is there's a conflict between him telling us when [REDACTED] was told that there's a search warrant being executed and when Chalmers tells us that he told [REDACTED] when his rights were being suspended. Her version is much later, not at the scene, but when he's already in one of the interview rooms at the police station.

**14** Equally of conflict in terms of the evidence, is Officer White's comment, that he told the transport officers clearly as they're about to transport [REDACTED] to the police station, not to turn on the car camera. Well, if he told them that, either the officers did not accede to his request as we have video of what occurred in the cruiser or somehow, it was missed or not communicated. The problem is, it is the Crown's evidence. So, I don't know which one to really hinge upon, but I can

say this, the key officer involved in the transport, Officer Rose, is adamant this was never communicated to him. It is not in his notes and it is something he would've put in his notes, he says. He has no recollection of it. Then he opened the door slightly and said, well, it could be a possibility. Given the more fulsome notes of Officer Rose and given that he seems to be a cautious officer, and particularly, his comments to [REDACTED] as they relate to rights to counsel, I'll be surprised that if this had been communicated to him, he would not have noted it in his notes.

**15** Equally troubling, is that when Officer White did have a conversation with him at the Sally Port, I do not know what the conversation was about. All I do know is that the cameras are indeed turned off then, at the Sally Port at 23:10. They were not turned back on again until 23:50. Neither officer can assist us on how long the conversation was between Officer White and [REDACTED]. All they can tell us is that Officer White was leaning into the car, seemingly in a conversation with Mr. [REDACTED] as they themselves have moved away to give them privacy. What is that conversation and how long was it? That's vital for this Court to know. Why is it vital? Because the Court would be informed as to what may have been operating in [REDACTED] mind by the time Chalmers would have spoken to him later on. Was Officer White simply telling him, "hey man, I know you want to cooperate, but all bets are off. We cannot do anything for you." Or was it, "hey, depending what you say, we might be able to help you or depending what you say, we might be able to get you released." That is one of the things [REDACTED] was also concerned about and that was clearly reflected in the video. That was his refrain, not only on the car video, but also at parade. Not that "I can provide information, but can I get out?" I'm hampered by this lack of evidence. The Court is entitled to know what transpired. Where are the notes; how long was it; what were the questions, if any; what were the responses, if any; who started the conversation? Was it Constable White who took it upon himself to tell the officers to turn off the camera? I don't know, but it does sure sound, it was triggered by Officer White to want to have this conversation with him. Now, was it because [REDACTED] was insistent that he wanted to speak with White? I don't know. I mean this case is becoming like Swiss cheese. There's so many holes everywhere. I don't know which ones to land on and that's even before I get to Chalmers' interaction with [REDACTED]

**16** So, be it, let's move on. An officer in charge of the station, from my perspective, had the responsibility of everything that happens in that station and is entitled to know when someone's rights are being suspended. In fact, Staff Sergeant Gerry, in large measure, confirms that. Yet if his rights were indeed being suspended, neither of the transport officers knew about it, nor did he. Staff Sergeant Gerry is no stranger to the fact that in certain circumstances, rights can be suspended. He makes the final call. He likes to get that information as to why he cannot make a phone call to his lawyer. Usually, he says, it is because of concerns of hampering the investigation or a search warrant being executed. To be fair, I have difficulty with this. If the right to counsel is sacrosanct and one is entitled to speak to counsel, then one is entitled to speak with counsel to get legal advice. I'm having a lot of difficulty understanding why someone's ability to speak to a lawyer can be denied. But that's a separate point because in fairness, [REDACTED] was not even aware of that himself, apparently until later on, according to Officer Chalmers.

**17** Why am I focussing on this? Because Officer Chalmers tells us that I told the transport officers to hold his rights as a search warrant is being executed." In cross, she confirms and she made bones about it, that it was her decision to suspend his rights. She confirms it is not part of Toronto Police force policy. It was not made by a higher up, by the sergeant nor detective in charge. She said she told the transport officers that he had cocaine and heroin, to give him his rights on camera again. She also told them that there was a search warrant and no phone calls to be made because of officer safety. She said she was aware that he was using drugs that night. She was also aware that he was on methadone. Her evidence is in conflict with the transport officers. They knew nothing about the search warrant, they tell me. They knew nothing about rights being suspended and that falls back to my earlier comment, which introduced that segment, of what Staff Sergeant Gerry is entitled to know. If the transport officers don't know it, they cannot communicate it to the staff sergeant. If the staff sergeant doesn't know it, then I go back to my earlier comment, if Officer Chalmers told the transport officers then they were just not registering it or did she fail to tell them or was there some confusion? I just don't know.

**18** More interestingly, if, in fact, she said that at the scene if ██████ asked her "does there need to be a search warrant," why did she feel it mandatory to hold back confirming it? At the time, no one is there. He's in a clear environment. He cannot do any harm. He cannot telegraph any messages to anyone. Is it not his right to know that? To confirm my confusion on this, why did she feel it best to only later tell, him that "we're doing a search warrant at your house."

**19** So, let's move on now to Chalmers at the station. Again, her notes, in my view, are, on those points, rudimentary. Supposedly, she is armed with the knowledge of White believing that ██████ wants those charges to go away, that he wants to cooperate. I would assume White would have told her that. She also knows that there are two interview rooms at the police station where there is video equipment. She confirms the video equipment was working, yet she embarks on a conversation with ██████ in a mine field. The mine field sounds like White formed two separate impressions the first that he wants to cut a deal and the second that he wants to get out. In that context, would it not be prudent, if you are not going to take him to an interview room (I don't find videotaping statements necessarily vital in every case) should she not have been taking more fulsome notes? Should she not have had a witness officer with her to take the fulsome notes and to be also a witness? She didn't do that.

**20** Now, Mr. Campbell tells me, well, she had no choice. She had no chance because she had no intention of speaking with ██████ until he asked for a glass of water. I'm not so sure I accept that. The reason I'm not so sure I accept that is why then did she feel it necessary to tell him that the search warrant was being executed at his house? Sounds like she knew, at some point, she had to tell him. A glass of water or no glass of water, at some point, there would have been interaction with ██████. And beyond that, she should have been armed by now, and if not, then Officer White is simply shirking his own responsibilities to tell an officer in charge of information that is vital, such as he wants to collaborate. He wants to cut a deal. He wants to get out of here.

**21** Now, there's always a flip side to everything. The flip side, being, Chalmers' conduct informed by the fact, 'hey, I may have a good informant in my hands here. So, I don't need paper trail. I don't want a video statement. I don't want fulsome notes.' Well, if that is the case, then why execute the warrant? Why not hold back on it as a sword of Damocles hanging over [REDACTED] head until you can see what information he really has to provide and whether he would be a good informant to have. I don't have the answer. All I know is that she goes and speaks to him. When he asked for a glass of water, she gives it to him. At which point she tells him, as I said earlier, a search warrant is being executed at your house. He asks for another glass of water. Then, he starts expressing, according to her, concerns about what's going to be happening because he has a lot of people at the house, a lot of family. His wife has health issues and according to the officer, he tells her that he wanted to know if he tells Chalmers where the drugs are, would they ring the doorbell as opposed to use a battering ram to get in.

**22** Now, Mr. Stastny is quick on the draw on that one and he says, isn't that interesting that someone would know on a search warrant that there are two means of entry, one a soft one, one a hard one and how would [REDACTED] know this? Well, in fairness, I don't know, but I mean given social media these days, given television shows, one would have to be basically hiding under a rock not to know of the potential for a hard entry on executing a search warrant. That is an interesting aside, one that I won't place much stock on, but it's interesting.

**23** The officer then says, I read him his rights to counsel. I told him, you don't have to say anything to me, but I also will not let you speak to a lawyer at this point. Somehow in the conversation, it devolves into, I told him I have to weigh officer safety and his wife's health. Then, he tells her where the drugs are. Well, it's not that clean to me. I mean how did that come about? If I accept her evidence, he's being smart and coy and saying, look, I'm not going to give you information unless I know you're going to do a soft entry. Yet, when she tells him, I have to weigh officer safety against your wife's health, he then tells her. That's not a good poker player. Even if we accepted it went down in that manner, the officer compromised herself in terms of being potentially accused of inducement when she played the game partly. Well, I have to weigh your wife's health and officer safety. Yeah, as a reasonable person, what is being communicated to you then? Is it that, hey, I sure will welcome the information you give me, but I make you no guarantees that I'm going to do a soft entry. Fair ball, except she expanded on it. I'll weigh your wife's health. What does that mean? Would a reasonable person take it as if it doesn't matter what he says, she is going to decide on her own what is best, or is it that she's probably playing ball and in a creeping fashion, dangling inducement? Such as I'm a reasonable officer. If you tell me your wife has health issues, you're afraid for a heart attack, of course, I'm going to take that into consideration. It remains the officer had no business going there and if she did, she should have had more fulsome notes. Interestingly, when pressed in cross, she would not concede that the information provided by [REDACTED] influenced her decision. That decision turned out to be a soft entry.

**24** I'm having difficulty with that one. The reason I am is you have 11 people in the residence, according to the information she had. If officer safety is not at play when you have that many

people in the residence, I don't know what is. It is a recipe for a disaster. You need the element of surprise to get control of a residence as quickly as possible. More likely, you need ETF. It is not unheard of, when there are drugs, there are guns. It is not unheard of that when people see the police, who knows how they react. It is not unheard of when you have 11 people, it is harder to take control of the residence. Was the wife's health, the possibility of a heart attack was more crucial in the officer's deliberations than officer safety? I don't buy it. In the officer's mind, equally, if not more so, was the information he provided. It influenced the *quid pro quo*. Okay, I'll do the soft entry. That's more realistic. That's more likely. That's more logical. That's more how the world works.

**25** Then, she tells us, we decided to ring the doorbell. There's no surrounding explanation of how she arrived at that decision. Was it information she received from other officers that, hey, these people are old, we've already checked it out and there's no safety concerns. I don't know. There were indeed about 11 people in the residence. How can the Court, based on this evidence, in any manner, be convinced beyond a reasonable doubt that the information provided by [REDACTED] was free and voluntary? There is too much of an element, not only of inducement, but an element that I do not have the full story. I don't know what preceded any of this. I don't know what was discussed between White and [REDACTED] at the scene.

**26** I will not belabour the point. This case falls woefully short where the Court can be convinced beyond a reasonable doubt that the statement given by [REDACTED] which was highly incriminating was free and voluntary. The statement will not go in.

**27** MR. CAMPBELL: Yes, I invite that the charge be dismissed on count one, please.

**28** THE COURT: Sir, stand up please, the charge is dismissed on the count upon which you were arraigned.