



# THE UPDATE

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## IMPAIRED DRIVING - SCREENING DEVICES - PROOF THAT DEVICE IS AN "APPROVED" INSTRUMENT

*R. v. J.J.A.* - June 24, 2005 Alta. Prov. Ct. per Easton, P.C.J.:

Impaired driving trial. Reasonable grounds formed after accused blew a fail on a screening device. Only description of the device in evidence was that it was a "400D".

**Held: s. 8 breach. Certificate excluded.**

"There is clearly no indication that the roadside screening device was an approved instrument or that the instrument was named accurately by make and model". Crown must prove that reasonable grounds to make breath demand came from failure of an "approved" test: *Christian* (1988) CarswellOnt. 3161. Breath Certificate constituted derivative and conscripted evidence.

**K. McGowan** - Defence Counsel

## OBSTRUCTION - 129(A) C.C. - MENS REA - TEST TO BE APPLIED

*R. v. Lohidici* - June 28, 2005 Alta. Prov. Ct. per Dunnigan, P.C.J.:

Accused charged with obstructing a police officer. Despite numerous warnings, the accused continued to yell and bang on the window of a police cruiser where a friend of his was being detained.

**Held: Conviction entered.**

Obstruction means "making it more difficult for the police to carry out their duties": *Hinchliffe* [1955] 3 All E.R. 406. Police need not be completely thwarted in the execution of their duty. Accused's actions in the present case amounted to more than a momentary or transitory interference with the policing function. Authorities reviewed.

**K. Beyak** - Defence Counsel

## PARTIES - 21 C.C. - MERE PRESENCE AT CRIME SCENE NOT CONSTITUTING AN OFFENCE

*R. v. Sinclair* - June 27, 2005 Alta. Prov. Ct. per Semenuk, P.C.J.:

Accused charged with being a party to a mugging style robbery at an LRT station. Another person stabbed the complainant and reached for his wallet. Complainant testified that accused was present, but that he said and did nothing other than asking if he was okay.

**Held: Acquittal entered.**

No proof that accused formed any common intention to commit a crime, and he did nothing other than ask the complainant whether he was okay after being stabbed. "Mere presence at the scene of a crime is not sufficient to ground culpability": *Dunlop* (1979), 47 C.C.C. (3d) 93 (S.C.C.). Authorities reviewed.

**S. Wojcik** - Defence Counsel

**SENTENCE - KIDNAPPING - ACCUSED PLAYED MINOR ROLE IN SERIOUS OFFENCE - 5 YEARS JAIL**

**R. v. Bitterman** - June 23, 2005 Alta. Prov. Ct. per Fradsham, P.C.J.:

Accused pled guilty to offences including kidnapping and aggravated assault. Very serious case. Complainant was badly beaten, sexually assaulted, injected with potentially infected blood and had the letters "RAT" engraved on his forehead with a knife. Accused, who confessed to police, was described as a "follower" who ultimately assisted in the complainant's escape. 23 year old accused who had a robbery conviction from the USA. 279 days pre-trial custody.

**Held: 3.5 year global jail sentence.**

Totality principle mandated that global sentence not exceed 5 years before pre-trial custody credit. Authorities reviewed.

**M. Kiss** - Defence Counsel



**SENTENCE - ROBBERY - MUGGING - USUAL RANGE BEING 12-18 MONTHS JAIL**

**R. v. Oar** - June 29, 2005 Alta. C.A. per Costigan, J.A.; Macklin and Ross, J. - Trial Judge: Malin, P.C.J.:

Defence appeal from 30 month sentence, less 8 months for pre-trial custody, following robbery conviction. Mugging. 27 year old intoxicated accused grabbed complainant's jacket and asked for a smoke. Accused was seen to be holding a knife after being taken to the ground by the complainant. Complainant escaped with no injuries.

**Held: Appeal allowed. 18 month sentence imposed.**

Appropriate range of sentence in mugging cases is 12-18 months: *Saeed* [2004] A.J. No. 1350 (C.A.). Although accused had a lengthy record, the knife was not used in the mugging, and the sentence exceeded the established range.

**D. Hatch** - Defence Counsel



**UTTERING THREATS - 264.1(1)(A) C.C. - ACCUSED NEED NOT INTEND TO CARRY OUT THREAT**

**R. v. McKinnon** - June 27, 2005 Alta. Prov. Ct. per Lamoureux, P.C.J.:

Accused charged with several offences including uttering threats. Accused told an arresting police officer: "I will grab that gun and blow your f... head off".

**Held: Convictions entered.**

Accused need not intend to carry out threat: *LeBlanc* [1989] 1 S.C.R. 1583. Officer took the threat seriously given the accused's combative mood. Viewed objectively by a reasonable person, the words conveyed a threat of serious bodily harm.

**J. Blumer** - Defence Counsel



*Anderson Dawson Knisely Stevens & Shaigec*  
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4  
Tel: (780)424-9058 Fax: (780) 425-0172  
[www.adkscrimlaw.com](http://www.adkscrimlaw.com)