



THE UPDATE

Issue #14 September 30, 2005

ALIBI - IMPAIRED DRIVING - WHETHER ACCUSED WAS DRIVING - ALIBI NOTICE

R. v. Whitworth - July 26, 2005
Alta. Prov. Ct. per McDonald, P.C.J.:

Impaired driving trial. Police saw accused exit from driver's door. A number of defence witnesses testified that accused was not the driver. Accused did not testify. No alibi notice given.

Held: Conviction entered.

Defence evidence disbelieved. Alibi notice ought to have been given. "The scene of the crime at the time of the crime means occupying the driver's seat at the time the driving in question was committed. Riding as a passenger in the rear seat ... would have made it impossible for the accused to have committed [the crimes] as much as it would have been impossible for the accused in *Vezeau* [1977] 2 S.C.R. 277 to have committed the crime when in another city".

B. Gourlie - Defence Counsel

CHARTER - 8- VEHICLE SEARCH - ACCUSED BREACHED RECOGNIZANCE - EVIDENCE ADMITTED

R. v. Yague - August 12, 2005
Alta. C.A. per Cote, Russell and Wittmann, J.A. - Trial Judge:
Perras, J.

Appeal from conviction on drug offences. Search following vehicle stop. Vehicle stopped due to traffic violations. Accused discovered to be in breach of recognizance, and vehicle then searched.

Held: Appeal dismissed.

Vehicle stop lawful as per *Wilson* [1990] 1 S.C.R. 1291. A vehicle search incidental to arrest is legal, and not in violation of s. 8: *Caslake* [1998] 1 S.C.R. 51. Accused had been lawfully arrested for breach of recognizance. "Once the initial stop had been lawfully made, a further search on the suspicion of illegal drugs does not taint the stop".

C. Davison - Defence Counsel

EVIDENCE - EYEWITNESS IDENTIFICATION - PHOTO LINE-UPS - PROCEDURE

R. v. Trieu - August 2, 2005 Alta. Prov. Ct. per Lamoureux, P.C.J.:

Accused charged with cocaine trafficking. Sales to an undercover officer. Accused subsequently selected by that officer from a photo line-up. Issue as to proof of identity.

Held: Convictions entered.

Photo line-up did not wholly comply with *Zurowski* 339 A.R. (C.A.) and the recommendations arising from the Sophonow inquiry. Of the photos in the line-up, it was argued that only the one selected closely resembled the previously given description of the accused by the officer. Court satisfied that the case was not one of "honest but mistaken" identification. While "some frailties" existed with respect to the line-up process, the selection of the accused was "immediate".

A. Ouellette - Defence Counsel

**IMPAIRED DRIVING -
EVIDENCE TO THE
CONTRARY - STRADDLE
CASE - TEST**

R. v. Oteruelo - August 8, 2005
Alta. Prov. Ct. per McDonald,
P.C.J.:

Impaired driving trial. Evidence to the contrary. Straddle case. Expert evidence put accused's blood-alcohol within a range of 72 - 96 mg%, depending on factors including the accused's elimination rate and time of consumption.

Held: Conviction entered.

Accused's evidence with respect to the time of last alcohol consumption not accepted. With respect to straddle cases in general, *MacDonald* (2004) A.J. No. 971 (Q.B.) accepted as a correct statement of law. "Where the accused may or may not have been above or below the legal limit ... that is not evidence to the contrary, but rather 'speculation or conjecture'". Authorities reviewed.

L. Ross - Defence Counsel

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**IMPAIRED DRIVING -
EVIDENCE TO THE
CONTRARY - STRADDLE
CASE - TEST**

R. v. Young - August 24, 2005
Alta. Prov. Ct. per Brown, P.C.J.:

Impaired driving trial. Evidence to the contrary. Straddle case. Given variation in alcohol elimination rates, accused's probable blood-alcohol concentration at time of driving ranged from 56 to 111 mg%.

Held: Acquittal entered.

MacDonald (2004) A.J. No. 971 (Q.B.) not binding. *Taylor* (1978), 44 C.C.C. (2d) 222 (Alta. C.A.) remains a correct statement of law. A range of possible blood-alcohol concentrations does nothing to displace the onus on the Crown to prove that the accused was over 80 at the time of driving. In the present case, "the tested elimination rate ... is not speculation; in my view, it amounts to credible evidence tending to show that Mr. Young was below the legal limit at the time of driving". Authorities reviewed.

J. Brunnen - Defence Counsel

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**SENTENCE - IMPAIRED
DRIVING CAUSING BODILY
HARM - 22 MONTH
CONDITIONAL SENTENCE**

R. v. Robinson - July 27, 2005 Alta.
Prov. Ct. per Wilkins, P.C.J.:

Accused pled guilty to impaired driving causing bodily harm. Accused struck a pedestrian. Injuries caused included deep cuts to the face and serious breaks to the legs. Pedestrian was hospitalized for 3 weeks. Dated record (20 years old) for impaired driving.

Held: 22 month conditional sentence imposed.

Primary sentencing aims being deterrence and denunciation. Mitigating factors included: guilty plea, and enrollment in alcohol addiction counselling. House arrest for first 12 months of sentence. 5 year driving prohibition.

N. D'Souza - Defence Counsel

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