



THE UPDATE

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CHARTER - 10(B) - WAIVER - STATEMENTS - TAINTING

R. v. Taylor - July 4, 2008 ABCA 253 per Ritter, Slatter, Rowbotham, JA - T. Judge: Johnston, PCJ:

Appeal from conviction on mischief charges. Issue regarding admissibility of statements to police. Accused waived his 10(b) rights at the commencement of the first interview. Near the end of that interview he stated: "I wanna go to a lawyer, talk to my lawyer or something." Police did not hold-off. Accused was then reinterviewed hours later, where again he waived his 10(b) rights.

Held: Appeal dismissed.

Second statement not tainted by an earlier 10(b) breach. "In considering whether a statement is tainted by an earlier Charter breach, the courts have adopted a purposive and generous approach": *Wittwer* 2008 SCC 33. However, there was no 10(b) breach in the first interview. The accused's request for counsel near the end of the first interview did not amount to a request for immediate advice.

M. Bloos- Defence Counsel

FITNESS TO STAND TRIAL - 672.32 CC - BURDEN OF PROOF

R. v. Song - July 8, 2008 ABCA 260 per Berger, Ritter, Slatter, JA - T. Judge: Burrows, J:

Appeal from murder conviction. Accused initially found unfit to stand trial. At a later fitness hearing the jury was instructed that there was a presumption in favour of fitness.

Held: Appeal allowed, new trial.

Given a previous finding that the accused was unfit, s. 672.32(2) CC governed. The jury ought to have been instructed that the onus was reversed, and that the Crown had to now prove fitness on a balance of probabilities. Further, the instruction to the jury on issues of post-offence conduct were in error, as the instructions were confined to the offence of murder. "There is ample support for the proposition that post-offence conduct may lead to an inference of consciousness of guilt, but not consciousness as to the level of culpability, that is to say, murder or manslaughter."

M. Bloos- Defence Counsel

IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

R. v. Chorney - July 17, 2008 ABPC 206 per Allen, PCJ:

Impaired driving trial. Issue regarding whether officer had reasonable grounds to arrest. Accused crossed the centre line, smelled of alcohol, had glazed eyes and some slurred speech.

Held: s. 8 breach, evidence followed arrest excluded.

Officer's evidence revealed that in general he was reluctant to use a screening device, and only used the device where he had no indicia. "When measuring the reasonable grounds the officer does not only consider evidence that incriminates the suspect but also evidence that exonerates the suspect. The officer must take into account all information available": *Golub* (1997), 117 CCC 193 (Ont CA).

R. Piche - Defence Counsel

IMPAIRED DRIVING - 10(A) - REASONS FOR DETENTION

R. v. Hazard - July 17, 2008 ABQB 440 per Shelley, J:

Appeal from acquittal on impaired driving charge. Trial judge found a breach of 10(a). Accused initially stopped for speeding. Police detected an odour of alcohol and asked accused about consumption. Approximately three minutes into the conversation a screening demand was made.

Held: Appeal allowed, new trial.

Issue being what the accused “can reasonably supposed to have understood” was being conveyed to him by the officer’s words and actions. Precise words indicating a detention for an impaired driving investigation not required: *Carrier* 2008 ABCA 134, *Herter* 2007 ABQB 756.

A. Simic - Defence Counsel

IMPAIRED DRIVING - 254(2) - REASONABLE SUSPICION

R. v. Hemery - July 10, 2008 ABPC 209 per Stevens - Guille, PCJ:

Impaired driving trial. Random stop. Slight odour of alcohol in the vehicle which was occupied by the accused and two others. Light odour of alcohol present when accused was placed in the police vehicle. Admission of consumption of one drink over four hours earlier. Screening demand made.

Held: Unlawful screening demand.

Reasonable suspicion test not met. Slight odour of alcohol could have come from being around the passengers who were drinking. “The sweeping statements of the Courts in the cases cited by the Crown that any admission of drinking satisfied the objective test of reasonableness of the officers suspicion seem to me to be patently unsupported and a misreading of *Gilroy*. Timing is a factor. An admission of drinking at some prior time could not support a reasonable suspicion of alcohol in the body ... Suspicion should not be mere speculation.”

K. Haryett - Defence Counsel

SENTENCE - GUILTY PLEA - WEIGHT TO BE AFFORDED

R. v. Nicholson - July 4, 2008 ABCA 256 per Berger, Lewis, Graesser, JA - T. Judge: Wenden, PCJ:

Defence appeal from 50 month sentence imposed following accused’s early guilty plea to charges including robbery. Sentencing judge gave less credit for the guilty plea given that the strength of the Crown’s case was described as overwhelming.

Held: Appeal allowed, sentence reduced to 38 months.

A guilty plea is mitigating because it is evidence of remorse and responsibility. “It is true that there is appellate authority both in this jurisdiction and elsewhere for the proposition that a guilty plea in the face of an overwhelming case for the Crown is deserving of less mitigating weight. We think that such pronouncements are, with respect, in error.”

A. Simic - Defence Counsel

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