



THE UPDATE

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BAIL FORFEITURE - APPEAL TO COURT OF APPEAL

R. v. Aw - 2008 ABCA 376 per Cote, JA:

Application for leave to appeal from a bail forfeiture decision from the Court of Queen's Bench. Issue as to whether or not Court of Appeal having jurisdiction to hear appeal.

Held: Leave denied.

Court having no jurisdiction to hear appeal. No section of the Criminal Code authorizes an appeal from a bail forfeiture hearing. Argument that the right to appeal came from R. 505(1) of the Rules of Court rejected. R. 505(1) concerns civil litigation only. Although Criminal Appeal Rules exist, these rules concern questions of procedure where a right to appeal exists, they do not give a right to appeal.

L. Rideout - Defence Counsel

IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

R. v. Beaudoin - 2008 ABQB 656 per Yamauchi, J:

Appeal from conviction on charge of over .08. Accused failed screening test. Arresting officer testified that the failure meant that the accused's alcohol level was above "100 milligrams percent." He could not explain what "100 milligrams percent" meant. Issue as to whether reasonable grounds existed for arrest and breath demand.

Held: Appeal dismissed.

A screening test failure alone can give rise to reasonable grounds, in the absence of the police officer expressing an opinion about what the failure meant: *Yurechuk* 1982 CarswellAlta 224 (CA). The statement in *Bernshaw* to the effect that a fail on a screening test does not per se give rise to reasonable grounds, must be read in context. *Bernshaw* involved a case of mouth alcohol, "where circumstances exist ... such that the police know that the test would yield faulty results." Authorities reviewed.

S. Prithipaul - Defence Counsel

IMPAIRED DRIVING - 10(A) - ROADSIDE DETENTION

R. v. Lund - 2008 ABCA 373 per Paperny, JA:

Defence application for leave to appeal from summary conviction judgment ordering a new trial on charge contrary to s. 253(b) CC. 10(a) Charter issue. Upon being stopped by police accused exhibited signs of impairment and was asked about alcohol consumption. Accused then taken to police vehicle, where after additional questioning he was arrested for impaired driving.

Held: Leave denied.

"In my view, the law surrounding the informational component of s. 10(a) is settled. *Carrier* 2007 ABQB 719 concluded that *Evans* [1991] 1 SCR 869 remains the law and the informational requirement of s. 10(a) can be inferred from the context or circumstances in each case. The inquiry must be whether, substantively, the accused can reasonably be supposed to have understood the basis for the investigation."

I. Savage - Defence Counsel

**JURY - RE-ELECTION -
MURDER - JUDGE ALONE**

R. v. A.C.J. - 2008 ABQB 725 per Clackson, J:

Youth charged with murder. Crown refusing to consent to re-election to judge alone. Defence application pursuant to ss. 7 and 11(d) of the Charter to dispense with Crown consent. Deceased's father had maintained a website, publishing amongst other things: the name of the youth charged, allegations regarding his criminal record and allegations of the facts surrounding the killing of his son.

Held: Application granted.

Given the serious breaches of the pre-trial non-publication laws, a fair trial could not be protected by either a challenge for cause or a change of venue. "Where there is a fair and reasonable likelihood of partiality or prejudice which cannot be overcome despite cleansing techniques ... dispensing with the jury despite Crown's opposition is appropriate as necessary to preserve the accused's right to be fairly tried": *McGregor* 134 CCC (3d) (Ont CA).

P. Royal - Defence Counsel

**SENTENCE - IMPAIRED
CAUSING DEATH - 4 YEARS**

R. v. McIlwrick - 2008 ABQB 724 per Ross, J:

Accused convicted following trial of two charges of impaired driving causing bodily harm, and two charges of impaired causing death. Impairment caused by marijuana consumption. The level of THC in the accused's blood was twice the level at which impairment to drive would be caused. Accused was a daily user of marijuana, had several serious and painful health problems, but did not have a license to possess marijuana for therapeutic use.

Held: 4 years jail.

Sentence reduced to 37 months given time in pre-trial custody. "Custodial sentences are far more common than conditional sentences for offences of this type. Many cases state the proposition that, except in exceptional circumstances, a custodial sentence is appropriate in convictions of impaired driving causing death, see *R. v. Rhyason*, 2007 ABCA 119 at paras. 31-32.

W. Tatarchuk - Defence Counsel

**SENTENCE - ROBBERY - 15
MONTHS JAIL**

R. v. Murray - 2008 ABCA 386 per Cote, Acton, Gill, JA - T Judge: Anderson, PCJ:

Crown appeal from sentence of time in custody for robbery. Facts not provided. "The sentencing judge may have thought that this was merely a technical robbery, but it was not. It was a real, substantial, robbery, and it involved an actual battery (grabbing the victim's arm). More seriously, the sentencing judge decided to reach a sentence by notionally splitting robbery into two offences: simple assault, and theft. He then adopted a sentence for each, and totalled them.

Held: Appeal allowed, 15 months jail.

Sentence reduced to 10 months given time in custody. Splitting the robbery into an assault and theft constituted an error. The splitting "ignores the plain indications in the Criminal Code (including maxima) that robbery is usually more serious than the sum of its isolated parts."

In person

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