

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. A.W.H. 2016 NSPC 65

**Date:** November 17, 2016

**Docket:** 8015595, 8015596

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

A. W. H.

**DECISION ON ABUSE OF PROCESS APPLICATION**

**Restriction on Publication: Section 486.4 of the *Criminal Code***

**Editorial Notice:** Identifying information has been removed from this electronic version of the judgment.

**Judge:** The Honourable Judge Anne S. Derrick

**Heard:** November 3, 2016

**Decision:** November 17, 2016

**Charges:** Sections 151, 271 of the *Criminal Code*

**Counsel:** Rick Woodburn, for the Crown

Brad Sarson, for A. H.

**By the Court:**

*Introduction*

[1] On September 19, 2016, A.H. was arrested by D/Cst. Nancy Wagner on charges of sexual assault and sexual interference involving G.M. It is being alleged that the offences occurred in 2015 when G.M. was three years old.

[2] When he was arrested, Mr. H. was in custody awaiting trial on breach charges in relation to a Long Term Supervision Order. His trial was scheduled to start on September 20.

[3] Mr. H. alleges that he has been subject to an abuse of process due to D/Cst. Wagner's handling of the investigation of the sexual offence charges. He says that what happened to him is analogous to "gating", the holding off on charging someone until the eve of their release from custody to ensure they are kept behind bars. He submits the only remedy for the violation of his *Charter* rights is a stay of those charges.

*The Circumstances of Mr. H.'s Remand to Custody and His Arrest on the Sexual Offence Charges*

[4] On August 30, 2001, Mr. H. received a three year prison sentence to be followed by a ten year Long Term Supervision Order. As a result of a sentence imposed in 2005, the expiry date of the Order was fixed as February 24, 2016.

[5] In February 2015, while Mr. H. was still subject to the terms of the Long Term Supervision Order, the Correctional Service of Canada suspended his parole. He was arrested on charges of breaching the Order and consented to his remand. He elected Provincial Court, pleaded not guilty to the breach charges and obtained trial dates of September 20 through 23 and October 4, 2016.

*The Investigation of the Sexual Offence Charges*

[6] Mr. H.'s essential complaint is that D/Cst. Wagner, having decided he should be charged with sexual offences in relation to G.M. failed to conclude her investigation in a timely fashion. Mr. H. submits that D/Cst. Wagner could have had him charged in February 2016 once she decided, on the basis of G.M.'s disclosure to her of sexual touching, that charges should be laid. Mr. H. says D/Cst. Wagner took her time with the investigation because he was in custody and because of that, she saw no urgency to move the matter along.

[7] D/Cst. Wagner was the only witness who testified on the *voir dire*. She rejected the suggestion that she had only moved to charge Mr. H. once he was about to go on trial for the breach charges. She says a number of reasons explain why Mr. H. was not charged sooner: investigative steps she wanted to take before doing so, other file priorities, time spent away from the file while she was on authorized leaves, and review of the file by her supervisors. She detailed these factors in her testimony.

[8] D/Cst. Wagner, a 19 year member of the R.C.M.P. and assigned to the Sexual Assault Integrated Team, had begun investigating Mr. H. on the sexual offence charges in February 2016. She interviewed G.M. on February 11 and during that interview G.M. made a disclosure of sexual touching by Mr. H..

[9] D/Cst. Wagner then became aware there had been an investigation in relation to Mr. H. in February 2015. He had been in a relationship with G.M.'s mother, M.M. Her two children, G.M. and N.M., were interviewed for the February investigation. G.M. made no disclosures at that time.

[10] D/Cst. Wagner testified that she regarded the February 2015 file as material to her investigation because G.M. had been interviewed. She reviewed the file in its entirety, including the videotaped statements of G.M. and N.M.

[11] The February 2015 investigation had led to the charges against Mr. H. for breaching his Long Term Supervision Order by having contact with children. On March 17, 2016, D/Cst. Wagner queried Mr. H. on the Justice Enterprise Information Network (JEIN) and discovered he was in custody. She understood that Mr. H. was going to be released in May. (Although not in evidence formally, there is no dispute that D/Cst. Wagner's General Occurrence Report which was excerpted in Mr. Sarson's brief indicated that JEIN showed Mr. H. as having an Early Release Date of May 24, 2016.)

[12] D/Cst. Wagner testified that by the time she queried JEIN, she had formed the intention to lay a charge against Mr. H. in relation to G.M.'s disclosure. She wanted to speak to him; it was her standard investigative practice to try and speak to a suspect to see what he might have to say.

[13] At the end of April, D/Cst. Wagner reviewed G.M.'s February 2015 interview. It confirmed her understanding that G.M. had made no disclosure of sexual touching by Mr. H. at that time. According to her General Occurrence Report she completed the Crown Sheet on April 30.

[14] On May 3, D/Cst. Wagner made arrangements through the Northeast Correctional Centre to see Mr. H. on May 5. She learned then that Mr. H. was going to be remaining in custody until at least September 20.

[15] D/Cst. Wagner brought her own video recording equipment to the interview with Mr. H. as she was not sure what would be available at the jail for an on-camera interview. Mr. H. had only been told he had "a professional visitor" so she explained to him who she was, why she was there and what she was investigating. She told him her intention was to lay a charge against him in relation to G.M.'s disclosure in February 2016. She read him his rights. He indicated he did not wish to contact a lawyer. In response to his inquiry, she described the nature of G.M.'s allegations which Mr. H. denied. She told him she understood he was in custody for some time and that a pick-up order would be obtained to bring him to court.

[16] In response to Mr. H.'s denials, D/Cst. Wagner offered to arrange for a polygraph examination which he expressed an interest in taking. It was her recommendation that he speak to legal counsel in order to make an informed decision about undergoing the test. She told him the results of a polygraph were not admissible in court.

[17] D/Cst. Wagner advised Mr. H. that she was going off on leave and gave him her business card so he or his lawyer could contact her about the polygraph. She told him she knew he was going to be in court in the third week of September and that she was hoping to "compel him prior to that."

[18] D/Cst. Wagner's General Occurrence Report indicates that on July 4, 2016, she noted the following: "Writer believes the investigation is complete and will review same to prepare for charges as suspect is in custody at provincial facility." On July 18 she wrote: "Writer completed Crown Brief, witness list and can says of all involved members. As [...] H. is currently in custody a pick up order will be required."

[19] When D/Cst. Wagner contacted the Court Section about what they required to have Mr. H. transported to court she was told that Sheriffs Services, who would be doing the transport, needed three weeks' notice. Her General Occurrence Report indicates this conversation occurred on July 20.

[20] Due to her seniority and accumulated overtime, D/Cst. Wagner had a considerable amount of leave during the time she was conducting the investigation into G.M.'s allegations. Between March 4 and August 8, 2016 she was off work on six leaves of seven to fourteen days each. Although she had told Mr. H. on May 5 that she expected to be around over the summer, in August she decided to take some vacation.

[21] In accordance with protocol D/Cst. Wagner provided her investigative file to a supervisor for review. Although she was initially directed on August 17 to lay an additional sexual assault charge against Mr. H. relating to N.M., a discussion between supervisors led to this direction being rescinded.

[22] On August 30, D/Cst. Wagner's file was routed to the Court Section. She was advised that Mr. H. was going to be at court on September 19 as a result of a pick-up order relating to the charges arising out of her investigation. She was directed to attend at the courthouse and arrest him as he had never been arrested on the new charges. She testified that she had not realized it was necessary for her to do that.

*D/Cst. Wagner's Responses to the Allegation that Arresting Mr. H. on September 19 was an Abuse of Process*

[23] D/Cst. Wagner was questioned closely about whether she would have arrested Mr. H. sooner had he not been in custody. She said no and was unwavering on this point. She testified that there were no victim safety considerations in February 2016 when she first determined that Mr. H. should be charged with sexual offences in relation to G.M. The sexual touching was alleged to have occurred in the period of October 2013 to October 2014 while Mr. H. was in a relationship with M.M. When he was arrested in February 2016 and charged with breaching his Long Term Supervision Order that was no longer the case. It was not relevant to D/Cst. Wagner that Mr. H. was on a Long Term Supervision Order. She testified that she was aware of Mr. H.'s related criminal record but this

would also not have caused her to arrest him earlier in her investigation had he been on the street. On cross-examination by Mr. Sarson she noted there was no risk to G.M. She was a child in the care of her parent with no contact with Mr. H..

[24] D/Cst. Wagner testified that she doesn't like to "put the cart before the horse." She wanted to do a thorough review of the February 2015 file before she spoke to Mr. H. and that her leaves and the review of her investigation by supervisors between May and August led to Mr. H. being arrested on the new charges when he was. She rejected the suggestion that there was a connection between Mr. H.'s September 20 court date and his arrest by her on September 19. In her words: "I did not wait until September to charge him."

[25] D/Cst. Wagner acknowledged on cross-examination that she knew no court process could take place until charges are laid. She testified that she takes her job very seriously and is mindful of the rights of accused persons. She said she had never heard of "gating" until it was explained to her by the Crown in preparing for this application.

[26] It was put to D/Cst. Wagner by Mr. Sarson on cross-examination that there was nothing she did after the interview on February 11 with G.M. that had any bearing on when Mr. H. could be charged. Although she wanted to interview Mr. H. and interviewing a suspect was a routine step she took in her investigations, D/Cst. Wagner acknowledged that she had already determined before the interview that Mr. H. should be charged. She agreed with Mr. Sarson that she had told Mr. H. he was her "last spoke in the wheel." However she disagreed with the suggestion that what she did after interviewing G.M. on February 11 were unnecessary steps in her investigation.

[27] D/Cst. Wagner testified that she wanted to fully review the February 2015 file and listen to all the statements taken then in their entirety. She knew the February investigation was going to be relevant to the charge that would be laid against Mr. H.. She wanted to talk to Mr. H. for the same reason she always tries to speak to a suspect: she could glean information that she didn't have. She agreed with Mr. Sarson's suggestion that this could include getting a confession and she said, it helps her "to see if [her] evidence lines up." She testified that she

has been surprised before in an interview with a suspect although that doesn't happen often.

[28] Mr. H. was the last person D/Cst. Wagner had to speak to in relation to the file. After meeting with him she never heard anything further about the polygraph. She testified that this had no bearing on when Mr. H. was charged. She had just wanted him to have the opportunity to take a polygraph test prior to being charged as she had never had anyone undergo a polygraph after charges were laid. She did not put the file aside and wait to hear about whether Mr. H. wanted to proceed with being polygraphed.

[29] D/Cst. Wagner testified that her investigation is complete when the file goes to the Court Section. She had no further contact with Mr. H.. He was not informed by her that he would be charged on September 19. They met again very briefly at the courthouse on that date when D/Cst. Wagner attended there to arrest him on the charges relating to G.M. The Information indicates the charges were laid on September 6, 2016.

*D/Cst. Wagner's Work Load and How She Manages Her Files*

[30] D/Cst. Wagner's investigation of the G.M. allegations was one of about 25 to 30 files she handles at any given time. She works Monday to Thursdays from 7 a.m. to 5 p.m. daily investigating sexual offences against children and adults.

[31] The nature of D/Cst. Wagner's files mean that they take "quite a bit of time", usually between 10 to 40 hours per investigation. She has to set priorities amongst her files and does so considering such factors as the safety of the public and the complainants, whether the case concerns historical sexual abuse allegations, and the age of the file. The Sexual Assault Integrated Team of which she is a member partners with the Department of Community Services and, in any investigation where DCS is involved, the schedules of the Department's representatives have to be accommodated. D/Cst. Wagner noted that during an investigation a file may become a priority for some reason. She testified that sometimes files are not done in as timely a manner as she would like but she tries to keep all her files up-to-date. It was her evidence that, "Everyone's file is important."

*Abuse of Process in the Context of the Laying of Charges*

[32] It is Mr. Sarson's submission that Mr. H.'s arrest on September 19 derailed the proceedings in relation to his breach charges. Mr. H. was poised to plead guilty and proceed to sentencing on those charges. Once charged with sexual assault and sexual interference in relation to G.M., Mr. H. went ahead with the guilty pleas on the breach charges but adjourned sentencing until December in order to have his trial on the G.M. charges proceed first.

[33] Mr. Sarson analogizes the effects on Mr. H. of being charged with the new offences to "gating". "Gating" has been used as a mechanism for ensuring that a prisoner on the verge of gaining his liberty does not get released. "The justification for the practice, speaking generally, is a perceived danger to the prisoner or the public if the prisoner were released." (*R. v. Moore*, [1983] O.J. No. 228 (H.C.J.), paragraph 2) Mr. Sarson provided some cases where the process associated with charges was delayed, such as the "mothballing" of a warrant for an earlier charge and then effecting an arrest under it as the prisoner was released upon the expiration of all sentences (*Regina v. Parisien*, [1971] B.C.J. No. 649 (C.A.)) and the delaying of investigation or charging because the individual was not being released. (*R. v. Duncan*, [1999] O.J. No. 1977 (O.C.J.), paragraph 27)

[34] It is Mr. Sarson's submission that the *Charter* does not tolerate the laying of charges according to a timeline that serves the convenience of the police. He points to *R. v. Cardinal*, [1985] A.J. No. 1099 where the Alberta Court of Appeal criticized the decision of Calgary police to delay the arrest of Mr. Cardinal on new charges until he relocated from a British Columbia jail to Calgary on parole. This led the Court to uphold the trial judge's decision to stay the charges with these comments: "...if the people of Canada want to put somebody on charge in a criminal case, their *Charter* does not permit them to do so at their convenience." (paragraph 8)

[35] The relief being sought by Mr. H. – a stay of proceedings – has been imposed in cases where the delay in charging has been found to have been improperly motivated or negligent. (*R. v. Duncan*, [1999] O.J. No. 1977 (O.C.J.); *R. v. Lima*, [2016] O.J. No. 1580 (O.C.J.))

[36] In *Duncan*, the Ontario Court of Justice was highly critical of the decision by police to delay charging until closer to Mr. Duncan's release date. The Court found that because Mr. Duncan was in custody with no imminent release date, "there was no urgency to investigate or charge." (*paragraph 27*) The treatment of Mr. Duncan was condemned by the Court and described as "a deliberate decision to in effect marginalize a mentally disabled prisoner in the context of the criminal proceedings." (*paragraph 28*) The Court concluded that it was "an exceptional case, indeed, the 'clearest of cases' [with] conspicuous evidence of improper motives and bad faith..." (*paragraph 30*)

[37] In *R. v. Lima*, [2016] O.J. No. 1580, the Ontario Court of Justice found the case "...more than anything, reflects a casual, cavalier approach to the investigation, warrant application, and charging process." (*paragraph 39*) The Court characterized the investigation of Mr. Lima, who was in custody on outstanding matters, as "haphazard and negligent" and found that the police officer's approach to the investigation was "...essentially, [Mr. Lima] wasn't going anywhere and I knew where he was. Charging him could wait." (*paragraphs 34 and 22*) The investigating officer confirmed that he had grounds to arrest Mr. Lima on January 6, 2015 but chose not to. (*paragraph 21*)

[38] As a result of not advancing the investigation against Mr. Lima in a timely fashion, relevant video surveillance footage was erased. The Court accepted that Mr. Lima's section 7 *Charter* rights had been violated but declined to enter a stay. (*paragraph 66*)

[39] The Court in *Lima* referred to another case provided by Mr. Sarson, *R. v. Ferris*, [2010] B.C.J. No. 2968 (P.C.) with the following comments:

"41 Our case is distinguishable from Ferris. In Ferris you have a judicial conclusion that a pre-charge delay is sufficiently explained, and reasonable, because an established pre-charge approval process was followed. In the case before me, there is no formal, established process being followed. It was sheer negligence; which in turn led to the destruction of evidence. One might say we are talking about two different things -- the stand alone decision to wait and charge someone who is in

custody on other matters, and the lack of timely investigative follow-up respecting evidence. And while these are indeed two different issues, there is an intersection here, because it is both the charge-timing decision and lackadaisical investigation, which leads to the loss of evidence.”

[40] In *Ferris*, the British Columbia Provincial Court dealt with a police investigation that began with Mr. Ferris’ arrest on April 8, 2009, at the scene of a marijuana “grow op” and ended with charges being laid against him on April 6, 2010. During the time the police were conducting the investigation into the “grow op”, Mr. Ferris was in New Brunswick for trial on a previous charge of aggravated assault. When that case ended in a mistrial, Mr. Ferris was arrested in June 2009 on a B.C. Canada-wide warrant for drugs and weapons offences relating to the “grow op”.

[41] The Court in *Ferris* was satisfied that nothing done “by the police or Crown...was unnecessary or unwarranted.” (*paragraph 109*) The Court found that “the procedure the police used in this case...relating both to their investigation and to seeking charge approval is what they typically do in the ordinary course of their business relating to grow operation prosecutions.” (*paragraph 143*) The conduct of the investigation was not found to have been an abuse of process. The Court held that neither the Crown nor the police acted to “...deliberately delay or create delay so as to prejudice Mr. Ferris or deprive him of his rights...” and determined that they did not act “with some ulterior or improper motive.” (*paragraphs 192 and 193*)

#### *Abuse of Process and D/Cst. Wagner’s Investigation*

[42] As observed by the Supreme Court of Canada in *R. v. Regan*, 2002 SCC 12 the common law doctrine of abuse of process has been subsumed into the principles of the *Charter*. (*paragraph 49*) This is expressed in *R. v. O’Connor*, [1995] S.C.J. No. 98 where the Court held:

“...conducting a prosecution in a manner that contravenes the community’s basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront

of constitutional magnitude to the rights of the individual accused.” (*paragraph 63*)

[43] The Supreme Court of Canada has established that state misconduct or improper motives are not required to ground a finding of abuse of process. (*R. v. O’Connor*, [1995] S.C.J. No. 98, paragraph 79, citing Wilson, J. in *R. v. Keyowski*, [1988] 1 S.C.R. 657) This was evident in *Lima*, for example, where a “haphazard and negligent” investigation amounted to a section 7 *Charter* violation. Where it is not an individual’s right to a fair trial that are implicated by the state conduct, a residual category of abuse of process addresses:

“...the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.” (*O’Connor*, *paragraph 73*)

[44] I am satisfied an abuse of process could be made out in Mr. H.’s case if the evidence established that D/Cst. Wagner acted deliberately to ensure that the laying of charges was delayed as long as possible or if her handling of the investigation was inept and led to untimely delay.

[45] However, I find the evidence does not establish either deliberate delay or a negligent disregard for Mr. H.’s rights. I accept D/Cst. Wagner’s testimony about how she handled the investigation and why Mr. H. was not charged until September 6, 2016, when G.M.’s allegations were made on February 11, 2016. I find that D/Cst. Wagner’s investigation was not conducted in such a manner “...as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.” (*O’Connor*, *paragraph 73*) I find there has been no prejudice to Mr. H.’s right to make full answer and defence and no irreparable harm caused to the integrity of the judicial system. Like the court in *Ferris*, I find no abuse of process.

[46] D/Cst. Wagner impressed me as a credible witness who gave candid responses in explaining the course of her investigation. In assessing the progress of her investigation between the interview with G.M. and the laying of the charges,

I have to take into account the fact that this was not D/Cst. Wagner's only file and the fact that she was a member of a specialized investigative unit focusing on sexual offences. It would not be appropriate for me to second-guess her investigative decisions where there is no evidence that they were unreasonable. For example, although Mr. Sarson argued that the interview of Mr. H. on May 5 was unnecessary, there is nothing odd or unusual about a police officer deciding, as part of her investigation, to interview a suspect. Furthermore, D/Cst. Wagner's evidence indicated that she followed her customary practices in this investigation and that it was subject to protocol-driven reviews by her supervisors. I am satisfied that D/Cst. Wagner's evidence establishes she conducted her investigation of Mr. H. "by the book."

[47] I also have no basis for rejecting D/Cst. Wagner's testimony that Mr. H.'s incarceration was irrelevant to how she conducted her investigation. In his brief, Mr. Sarson submitted that, "In light of [Mr. H.'s] criminal record, Detective Constable Wagner will likely concede that the file would not have been handled in the same fashion if [he] had not already been incarcerated." However D/Cst. Wagner did not make that concession. To the contrary, she was very firm in rejecting any suggestion that had Mr. H. been "on the street" under no conditions she would have arrested him long before she did. She said, "No, I would not have arrested him if he had been on the street." As I noted in my earlier review of her evidence, D/Cst. Wagner testified that she would not have had any victim-safety concerns had Mr. H. been at liberty: the allegations in relation to G.M. dated from a time when he was in a relationship with her mother, which, by February 2016, was no longer the case.

[48] D/Cst. Wagner testified that she did not wait to arrest Mr. H. until just before he was due in court on the breach charges. The charges were laid on September 6. Mr. H. was brought to court by way of a pick-up order and arraigned on September 19 following his arrest by D/Cst. Wagner that morning.

[49] Mr. H. knew from talking to D/Cst. Wagner on May 5 that he was likely going to be charged with sexual touching of G.M. Although he could not do anything in relation to these allegations until he was formally charged, he was not ambushed. While I can understand that Mr. H., according to Mr. Sarson, would have preferred the option of dealing with the new charges before September 19,

what he would have done or been able to do as a consequence of being charged months earlier is a matter of speculation. Mr. Sarson's submissions that, but for the new charges, Mr. H. may have been sentenced on the breaches to time served is speculative. While it is less speculative that, given Mr. H.'s prior criminal record, he probably would not have obtained bail on the new charges had he sought it, there is no evidence that was a consideration in how D/Cst. Wagner conducted her investigation.

### *Conclusion*

[50] Establishing an abuse of process requires evidence that is not found in this case. The onus lies on Mr. H. to satisfy me on a balance of probabilities that the conduct of the investigation into the G.M. allegations violated his rights under section 7 of the *Charter*. Despite the very able efforts of Mr. Sarson, Mr. H. has not made out the basis for a finding of an abuse of process and his application for a stay of proceedings is dismissed.