IN THE PROVINCIAL COURT OF NOVA SCOTIA
**Citation:** R. v. Steven Robert Benjamin, 2003 NSPC 62

**Date:** 20031218
**Docket:** 1316816
**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Steven Robert Benjamin

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| **Judge:** | The Honourable Judge Alan T. Tufts |
| **Heard:** | December 4, 2003 in Kentville, Nova Scotia |
| **Written Decision:** | May 11, 2004 |
| **Counsel:** | Darrell I. Carmichael, for the Crown<br>Chris Manning for the Defence |

**By the Court (orally):**

[1] The Defendant here is charged under s. 253(a) and (b) of the **Criminal Code**. The Crown conceded at the prior date that there was not sufficient evidence to sustain a conviction under s. 253(a) and that charge was accordingly dismissed.

[2] The central issues in the remaining charge are whether the police were required to give a so-called "Prosper warning" and whether the defendant adequately waived his right to counsel.

[3] The facts are undisputed. The police were called to a noise complaint at the south end of Canaan Avenue at Alice Drive near Kentville, Nova Scotia. Although there was no disturbance when they arrived the police noticed the defendant near an automobile and had suspicions he had been drinking. The police had told him not to drive and then left. They were parked nearby to write up their report when the defendant came by and failed to properly stop at a stop sign. As a result the defendant was stopped by the police. He was dealt with as a suspected impaired driver. He was properly advised of his right to counsel and taken to the police detachment. He indicated he wanted

to call a lawyer. He said he wanted to call his father to obtain a telephone number. The police arranged the call.

[4] Constable Greening contacted the defendant's father and then left the defendant in a closed-door room to talk to his father. The defendant emerged three minutes later. When he did the defendant said he was going to "take the f***ing breathalyzer and whatever happens, happens." (expletive deleted) Constable Greening then asked the defendant if he wanted to speak to a lawyer and the defendant replied, "No, I'll take the f***ing breathalyzer, if I pass, I pass." (expletive deleted). Constable Greening thereafter turned the defendant over to the breath technician and breath samples were taken and analyzed.

[5] The defence relies on **R. v. Prosper** 33 C.R. (4th) 85 and in particular Chief Justice Lamer's remarks under Summary of Principles at para. 50, which says:

> In addition, once a detainee asserts his or her right to counsel and is duly diligent in exercising it, thereby triggering the obligation on the police to hold off, the standard required to constitute effective waiver of this right will be high. Upon the detainee doing something which suggests he or she has changed his or her

> mind and no longer wishes to speak to a lawyer, police will be required to advise the detainee of his or her right to a reasonable opportunity to contact counsel and of their obligation during this time not to elicit incriminating evidence from the detainee.

[6] The defence argues that the defendant wanted to speak to a lawyer. He called his father to get a number. He obviously did not speak to a lawyer. The Crown concedes this. Accordingly the defence submits that the officer, knowing the defendant did not speak to a lawyer was obliged to advise him first of his right to a reasonable opportunity to contact counsel and secondly of the police obligation during this time not to elicit incriminating evidence.

[7] The defence argues that because the defendant here was not told about the obligation to hold off, his Charter rights were breached. However, if one examines **R. v. Prosper** further at para. 43, Chief Justice Lamer says this:

> In circumstances where a detainee has asserted his or her right to counsel and has been reasonably diligent in exercising it, yet has been unable to reach a lawyer because duty counsel is unavailable at the time of detention, courts must ensure that the *Charter*-protected right to counsel is not too easily waived. Indeed, I find that an additional informational obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he or she has changed his or her mind and no longer wants legal advice. At this point,

> police will be required to tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity. This additional informational requirement on police ensures that a detainee who persists in wanting to waive the right to counsel will know what it is that he or she is actually giving up.

[8] It appears that before a "Prosper warning" is required a defendant must be reasonably diligent in exercising his or her rights. In **R. v. Mood**, [2002] N.S.J. No. 25 the defendant attempted to contact counsel of choice who was unavailable. The defendant declined to call duty counsel and agreed to provide breath samples. The defendant there argued that a "Prosper warning" was required. The Nova Scotia Supreme Court held that there are two pre-conditions before a "Prosper warning" is required: No. 1, the detainee must be reasonably diligent in the exercise of their right to counsel and No. 2, the detainee has been unable to reach a lawyer because duty counsel is unavailable at the time of detention. The court found in **R. v. Mood**, *supra* that neither pre-condition was met and a "Prosper warning" was not required.

[9] The defence has referred the court to **R. v. Wohlberg**, [2003] S.J. No. 145. In that case the defendant tried to contact counsel of choice but failed. When the police offered to have the defendant call Legal Aid and he declined the defendant was taken to the breath technician and the tests were performed. The Saskatchewan Queen's Bench held that there was no evidence the defendant had abandoned his intention to contact counsel and his s. 10(b) rights were infringed when the officer failed to confirm his right to counsel and of the obligation to hold off. The court excluded the breath sample testing. This case seems to conflict with **R. v. Mood**.

[10] I have also considered the following authorities: **R. v. Manolescu**, [2002] A.J. No. 871. Here the defendant asked to speak to his father who was once a lawyer. After the call the defendant agreed to take the breathalyzer test. The defendant chose to take the test after speaking to his father and was not called upon to do so by the police. The court held that he was not diligent in exercising his rights. He had waived his right to counsel and a "Prosper warning" was not necessary.

[11] In **R. v. Rezansoff,** [2003] A.J. No. 407 the defendant was allowed to make a call to counsel but took only seven minutes. He was not asked if he had in fact contacted counsel. When he was asked to provide breath samples he refused. In fact, the defendant did not speak to counsel. The Alberta Queen's Bench, relying on **Prosper**, found the defendant did not waive his right to counsel. The police were obliged at the very least to determine if the defendant spoke to a lawyer.

[12] In **R. v. Mercredi,** [2001] S.J. No. 569 the defendant was advised at the roadside scene of his right to counsel. Back at the police station when asked again about counsel he declined and said no. The Saskatchewan Provincial Court held that the defendant was diligent in exercising his rights in that he could not have done anything further while he was being transported and that when he had changed his mind at the police station the “Prosper warning” ought to have been given.

[13] In **R. v. Russell** 150 C.C.C. (3d) 243 (NBCA) the defendant was given a list of lawyers to call. He asked the police to call two lawyers who were unable to be reached. The defendant then refused to provide samples but did not

expressly waive his right to counsel. The New Brunswick Court of Appeal found that a “Prosper warning” was required and the defendant's Charter rights were breached.

[14] In **R. v. Coutereille,** [1995] B.C.J. No. 2273 the accused was arrested for robbery and given his right to counsel. He asked to speak to a lawyer. He then made an incriminating statement. The Ontario Court of Appeal held that the conversation in which the statement was made amounted to a manifestation of the accused's change of mind regarding counsel. The court found that the police were obliged to give the “Prosper warning”. There the statements were made before there was any opportunity for the accused to speak to counsel.

[15] In **R. v. Maloney,** [1995] N.S.J. No. 527 the defendant called a lawyer but got no answer. However he did nothing to alert the police to this fact. He was observed by the police talking to someone and had been in the room for twenty-three minutes. The Nova Scotia Court of Appeal held, at para. 22:

> In my opinion if a detainee having been properly informed of his s. 10(b) Charter rights and if given a reasonable opportunity exercises it, fails to prove on a balance of probabilities absent exceptional circumstances reasonable diligence in exercising that right there is an obligation on the Crown to prove before resuming questioning or eliciting of incriminating evidence that the detainee waived the right that had initially been asserted. Under such circumstances the right to counsel is suspended.

The court later held that the appellant failed to satisfy the trial judge that he was reasonably diligent and accordingly a "Prosper warning" was not required.

[16] In **R. v. Lavallee,** [1999] A.J. No. 1475 the defendant contacted his ex-wife after having been advised of his right to counsel. He then told police there were too many lawyers to choose from. He was then asked if he wanted Legal Aid and he replied no. The Alberta Provincial Court found the defendant had changed his mind but was not satisfied that the officer had made sufficient enquiry to ensure the defendant was unequivocally waiving his right to counsel. The Court relied on **Prosper**. It held that there must be some inquiry to ensure the defendant is relinquishing his right fully and not under any misapprehension.

[17] In **R. v. Turney,** [2000] A.J. No. 1648 the defendant tried unsuccessfully to contact his counsel of choice. The police suggested he contact other

counsel. He declined. It was conceded he was acting with due diligence in contacting counsel. The defendant agreed to take the breathalyzer test. The Alberta Provincial Court held that the further caution and advice given the defendant after he agreed to take the test did not satisfy the requirements in **Prosper**. It found that the police requirement to advise the defendant of its obligation to hold off was not properly given and his **Charter** rights had been breached.

[18] The next case is **R. v. Durham,** [1994] N.S.J. No. 631 a Nova Scotia Provincial Court decision. Here the defendant tried for twenty minutes to get duty counsel when he advised the police of this he was then directed by them to take the test. The Nova Scotia Provincial Court found that the "Prosper warning" was required and found that there was a **Charter** breach.

[19] Finally, in **R. v. Luong,** [2000] A.J. No. 1310 an eleven-step guideline for the law in this area is set out. This case was specifically referred to in **R. v. Mood**, *supra*, was referred to above. Here the Alberta Court of Appeal found the detainee bears the burden of showing he was diligent in exercising his rights. The court said at para. 9:

> ...It is only when a reasonable opportunity to exercise a right to counsel has been given and an accused individual has been duly diligent in exercising it, that the issue of a valid waiver, and the requirement to give a "*Prosper* warning"arises.

[20] In my opinion the obligation for the police to give the so-called "Prosper warning" arises when the detainee is unable to contact a lawyer after being duly diligent in attempting to do so and that this inability is apparent to the police given all the circumstances and at such time the detainee expressly or impliedly changes his mind regarding his or her desire to contact counsel. The two prongs of the test for a "Prosper warning" would be required at that point. The change of mind must, in my opinion, be connected to the inability to contact counsel after diligent efforts by the detainee to contact counsel has been made. **R. v. Mood** goes further, I believe, and requires the diligence to include attempts to contact duty counsel. A simple change of mind does not, in my opinion, trigger the full "Prosper warning", which Chief Justice Lamer refers to in para. 43 of that decision and later summarized at para. 50. However, this does not change the obligation for a clear and unequivocal waiver in situations where otherwise the detainee

simply wishes to waive his or her right to counsel and changes his mind regarding counsel.

[21] Many of the authorities I quoted above deal with this aspect of **Prosper**. Clearly, especially in cases where the defendant changes his or her mind, the waiver needs to be clear and the standard to show such a waiver is high. Indeed, in **Prosper**, at para. 4 Chief Justice Lamer says:

> Given the importance of the right to counsel, I would also say with respect to waiver that once a detainee asserts the right there must be a clear indication that he or she has changed his or her mind, and the burden of establishing unequivocal waiver will be on the Crown. Further, the waiver must be free and voluntary and it must not be the product of either direct or indirect compulsion. This Court has indicated on numerous occasions that the standard required for an effective waiver of the right to counsel is very high.

[22] In certain circumstances the police are obliged to make, in my opinion, some inquiries to ascertain that the defendant is clearly waiving his right to counsel and is aware of what rights he is waiving and that he is not confused or misunderstood his rights. At the same time the police are not expected to be mind readers, see **R. v. Mercredi**, *supra*, and can only react to what is apparent in the circumstances upon any assertions made by the detainee.

[23] In this case the defendant was given a full opportunity to contact counsel. He made only a three minute call to his father. He made no other calls nor asked to make any other. He made no other efforts to call counsel or requested any. It cannot be said he was unable to contact counsel after being reasonably diligent in attempting to do so. Accordingly, the "Prosper warning" is not required. Furthermore, there does not appear to be any confusion or misunderstanding about his intentions to change his mind and his waiver of his right to counsel, nor any misunderstanding regarding his right to counsel. In fact Constable Greening did clarify with the defendant, as I believe he was obliged to do, whether the defendant still wanted to speak to a lawyer. I am satisfied the defendant was clear and unequivocal in his waiver. Clearly the exact wording of the announcements as described by Constable Greening, including the use of the expletive I indicated, used on two occasions, confirm my resolve in coming to this conclusion. The defendant was properly advised of his right to counsel previously and in my opinion was aware of the rights that he was waiving. What occurred or what was said during the conversation with his father is unknown and it cannot be

speculated on at this point, in my opinion. Certainly he gave no indication to Constable Greening that he was either unable to contact counsel or was confused or misunderstood the opportunity given to him to contact counsel, nor was it apparent to Constable Greening that such misunderstanding or confusion existed.

[24] In short, the “Prosper warning” is not required. The defendant waived his rights clearly and unequivocally. His s. 10(b) rights were not, in my opinion, breached, the Certificate of Analysis is admissible and he is found guilty of the charge under s. 253(b).

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ALAN T. TUFTS, J.P.C.