IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

LAWRENCE FRANCIS

Transcript of a Ruling on a Voir Dire held before The Honourable Justice J.Z. Vertes, sitting in Inuvik, in the Northwest Territories, on the 30th day of January, A.D. 2001.

APPEARANCES:

Ms. B. Schmaltz: Counsel for the Crown

Mr. J. MacFarlane: Counsel for the Defendant

(Charged under s. 271 of the Criminal Code)

THE COURT: In this case, the accused has challenged the admissibility of a hair sample seized by the police.

There is no question that the police seizure of a bodily substance for investigative purposes is subject to the requirements of Section 8 of the *Charter* which provides protection against unreasonable search and seizure. In this case the Crown contends that the accused consented to the seizure. The test in such circumstances, as established in *R. v. Borden* (1994), 92 C.C.C. (3d) 404 (S.C.C.), is that the Crown must establish on a balance of probabilities that the consent was voluntary and informed; that is to say, the accused must have possessed a requisite informational foundation for a meaningful choice to be made. One of the more significant questions in that analysis is whether the accused was aware of the consequences of relinquishing his right to be secure from what would otherwise be an unlawful seizure. This is the principal argument advanced on behalf of the accused in this case: he did not understand the consequences of consenting. It is not disputed in this case that without consent the police could not obtain the sample and the police had no other way of obtaining it since they did not have grounds to justify a warrant. But, as also noted in *Borden*, the degree of awareness of the consequences of the waiver

of the Section 8 right required of an accused in a given case will depend on its particular facts.

The focus of this inquiry must be on the form signed by the accused. I am prepared to accept that he was not detained at the time. I am also satisfied on the evidence that he had the requisite mental awareness; in other words, I accept that he was sober. The real issue is whether the accused should have been told by Constable Steinhammer that he had the right to consult counsel and that the results of the analysis may be used in evidence against him or whether it was sufficient to simply allow the accused to ascertain those things from the form.

Much of the discussion during the submissions related to the question of whether the police had a duty at all to advise the accused of his right to counsel. He was, after all, merely a suspect and not under detention at the time. Crown counsel argued, in reliance on the *R. v. Wills* (1992), 70 C.C.C. (3d) 529 (Ont. C.A.), that the right to counsel is triggered by a detention or arrest only.

Section 10(b) of the *Charter* imposes a positive obligation on the police to inform a person, on detention or arrest, of their right to consult counsel. But that does not mean that this same obligation does not apply in some other circumstances.

For example, and by way of analogy, in the *R. v.*

Lewis (1998), 122 C.C.C. (3d) 481 (Ont. C.A.), it was noted that there was no "duty" on the police to inform a person of the right to refuse to consent to a search. A failure to do so will not amount to a Section 8 violation automatically since Section 8, unlike Section 10(b) of the *Charter*, does not impose informational obligations on the police. But the failure to so advise a person may be a highly significant factor in determining whether the purported consent was indeed an informed one. I quote from the *Lewis* decision:

> "In my view, the police are not under a 'duty' to advise a person of the right to refuse to consent to a search in the sense that the failure to do so will amount to a violation of s. 8. Unlike s. 10(b) of the *Charter*, s. 8 does not contain an informational component. The failure to advise a person of the right to refuse to consent to a search may, however, lead to a violation of s. 8 where the police conduct can be justified only on the basis of an informed consent. It is well established that a person cannot give an effective consent to a search unless the person is aware of their right to refuse to consent to that search...If the police do not tell a person of the right to refuse to give a consent to a search, the police run the very real risk that any apparent consent given will be found to be no consent at all for the purposes of s. 8...Where the police do not inform a person of the right to refuse to consent to a search, it is certainly open to a trial judge to conclude that the person was unaware of the right to refuse and could not, therefore, give an informed consent."

Similar to the example from *Lewis*, while there

may be no *Charter* obligation on the police to advise a person of his option to consult counsel (in the absence of detention or arrest), that advice and the person's decision to exercise or relinquish that option may also be significant factors in the consideration of whether the consent was truly an informed one. I say this because, first, a person has the right not to be compelled to incriminate himself at the investigation phase even if he is only a suspect. This right includes both the right to remain silent and the right to be free from unlawful seizure of bodily samples. Second, once the person is placed in jeopardy, such as by the potential use of incriminating evidence against him, then there is a need for information as to his rights and options. And I need only quote from the *Wills* case where it discusses the stringent test applied for waiver of a constitutional right such as the protection afforded by Section 8 of the *Charter*. This is from the *Wills* decision and I quote:

> "When one consents to the police taking something that they otherwise have no right to take, one relinquishes one's right to be left alone by the state and removes the reasonableness barrier imposed by s. 8 of the *Charter*. The force of the consent given must be commensurate with the significant effect which it produces.
>
> The Supreme Court of Canada has applied a stringent waiver test where the Crown contends that an accused has yielded a

> constitutional right in the course of a police investigation. According to that doctrine, the onus is on the Crown to demonstrate that the accused decided to relinquish his or her constitutional right with full knowledge of the existence of the right and appreciation of the consequence of waiving that right...
>
> The high waiver standard established in these cases is predicated on the need to ensure the fair treatment of individuals who come in contact with the police throughout the criminal process. That process includes the trial and the investigative stage. In fact, it is probably more important to insist on a high waiver standard in the investigative stage where there is no neutral judicial arbiter or structured setting to control the process, and sometimes no counsel to advise the individual of his or her rights.
>
> The exercise of a right to choose presupposes a voluntary informed decision to pick one course of conduct over another. Knowledge of the various options and an appreciation of the potential consequences of the choices made are essential to the making of a valid and effective choice."

And so, yes, the failure to advise a suspect of his right to consult counsel may not automatically vitiate consent if there is no detention or arrest, but it may very well result in a finding that the person was unaware of his options because he did not have enough information available to him to make an informed choice.

In this case, as in *Wills*, there is no doubt that on the facts the accused agreed to the taking of the sample. The question is whether this was an effective

consent in law.

The accused, as Crown counsel pointed out, knew that he could refuse to give a sample because he had refused before. But was this only because he did not want to give a blood sample? He exhibited no hesitancy in his willingness to provide a hair sample, once Constable Steinhammer gave him that option, since he started yanking his own hair out. He was ready to sign the consent form without even reading it.

So what can one make of all that? The accused knew he was still a suspect, but he was told that the other two suspects had given samples and had already been eliminated. This was his opportunity to provide a sample as well. The only reasonable context in which to consider that proposal was in the context of the possibility of his being eliminated as well. Nothing was said expressly about the one big risk confronting him, that incriminating evidence will be used against him. The only reference to that is to be found in the consent form:

> "The DNA analysis of the samples I give may be used in evidence if myself or anyone else is charged with an offence."

In the context of how the request for the sample was made, that being the reference to tests eliminating suspects, I do not think this one sentence is sufficient to truly inform the accused of the consequences of consenting. Perhaps if the constable

had specifically said this or even satisfied himself that the accused understood what he had signed, then I would have no concerns. But this was not done. Nor was there any advice given to the accused that he could consult a lawyer before making his decision. I note that the consent form assumes that the subject has already been advised of his right to obtain immediate legal advice and has already been given the opportunity to consult counsel. So obviously the RCMP consider this to be an important safeguard since this is a pre-printed form and there is no reference to it applying only to persons in detention or under arrest. I, too, consider it an important safeguard.

One might also argue, if one were so inclined, that the consent form is false or at least confusing. It says that the accused was given an opportunity to consult counsel and that he was advised of certain rights. On the evidence it was clear he was not. I think it strange logic to think that the accused would have, if he fully understood what was written, taken it to have been the advice being given. He was simply not told these things. And if this form is to be used in the future, then these things should either be done or the form should be modified.

So now we are down to the crucial question. Is it enough that the accused read the form and signed it? Can we assume, in the absence of evidence one way

or the other, that he understood it? Initially I was of the view that in the absence of evidence from the accused to the effect that he did not understand it, then it would be pure speculation to hold otherwise. While the burden of persuasion is on the Crown, there may be times when there is an evidentiary burden thrust upon an accused. All I have is the evidence of the constable to the effect that the accused said he could read English and that he saw the accused's eyes move. So he concluded that the accused had read the form, but he made no inquiry, even a simple one, as to whether the accused understood what he had read.

Again I must put this in context. The accused had just been released from the drunk tank; he was asked to go into an interview room; he was told about the other suspects who had been eliminated through testing; and the investigation was for something that allegedly occurred some six months earlier. The actions of the accused in yanking his hair out and signing the form without reading it may have been indicators of his desire simply to get things over with and get out of the detachment, or it could have been signs that he was oblivious to his rights, all of which should have put Constable Steinhammer on his guard. As the *Wills* case also noted, one must distinguish between true consent and mere acquiescence and compliance.

The only time the accused was told he could consult a lawyer in conjunction with the request for a sample was over four months earlier and that was by another officer. Constable Steinhammer, when he asked the accused to sign the consent form, was sufficiently concerned about the accused's comprehension of English to ask him specifically if he could read English. I can understand that and I commend that since I can see that the accused appears to be a relatively young aboriginal male. Yet the Constable neither went over the form with the accused nor inquired as to his understanding of it. I am not satisfied that the accused comprehended the significance of signing the form.

In view of the totality of the evidence, I am not persuaded on a balance of probabilities that the accused gave an informed consent to the seizure of his hair sample. The sample is therefore inadmissible being, as conceded by Crown counsel, conscriptive evidence. The results of the testing are immaterial to this analysis. It goes without saying, however, that the test results are also inadmissible.

.....

Certified Pursuant to Rule 723
of the Rules of Court

Jane Romanowich, CSR(A)
Court Reporter