R. v. Von Pasecky, [2005] O.J. No. 6475

Ontario Judgments

Ontario Court of Justice
Brampton, Ontario
J.E. Allen J.
Heard: May 2, 2005.
Oral judgment: May 2, 2005.

[2005] O.J. No. 6475

Between Her Majesty the Queen, and Michael Von Pasecky

(16 paras.)

Case Summary

Charges: s. 253(a) Criminal Code of Canada -- s. 253(b) Criminal Code of Canada

Counsel

D. Allison, Ms., Counsel for the Crown.

S. Reid, Esq., Counsel for Mr. von Pasecky.

RULING

J.E. ALLEN J. (orally)

1 Well in this case the initial questions to be asked include the overall length of delay. In this case it is a little more than 16 months and that is certainly sufficient to attract the 11(b) analysis. There's been no waiver. Prejudice is a sort of unusual thing in the sense that the conventional type of prejudice about restrictions on movement or things that flow from bail conditions aren't there. Nothing about lost job opportunities or that sort of thing but there is some prejudice of a sort of unusual type.

2 The parties are *ad idem* as to what periods of time are to be considered in what way. This case was unusual because for the first two court appearances the police apparently failed to swear an information and have it before the court when the accused turned up, so there's two days of prejudice right there, two days off work and showing up in court wondering what is going on and there is a period of, I think everyone agrees, about 50 days in there from the February 12th appearance to the time that there is actually an information before the court in April which is

not systemic delay, it is the police not getting the information sworn, it is negligence or whatever you want to call it, confusion. It is unfortunate that it happened twice. So that period of time is not systemic delay, it is delay that is attributable to the less than acceptable compliance of their obligations on the part of the police.

3 We then have what I would find as continuing normal intake. One could question the wisdom of requiring judicial pretrials in simple drinking and driving cases which very, very rarely resolve. Once the accused determines to have a trial, generally the accused does have a trial, unlike a lot of other cases. Whatever the wisdom is of requiring those judicial pretrials, that's what we do, that's part of the intake period. Then we have just about eight months on the nose of classic institutional delay, the time from set date to the first trial date.

4 That is an acceptable length of delay if all other things go as planned. It's at the threshold of the range in which stays may be considered, but it's generally considered a constitutional and safe period of time.

5 Then although ordered in a timely fashion, the transcripts necessary for the accused to assert his 11(b) rights are not ready and the Crown concedes that the delay that follows from that is systemic rather than that of the defence. I think really if you do order your transcripts in a timely fashion, the fact that you want to reserve the right to insist on your 11(b) rights, does not drop the required period of time to get those transcripts at the feet of the defence. It is a difficult area to analyze.

6 We then have a second trial date where the police once again get things messed up and get double booked and that case gets adjourned and then there's a delay of not much more than a week from the first trial date to the - or pardon me, from the second trial date to today's date.

7 The prejudice in this case is of an odd sort.

8 Usually when you are charged with a criminal offence you don't have to worry about the police messing up in terms of getting the necessary documentation in front of the court and you don't have to worry about them showing up to re-arrest you and to solve jurisdictional problems of their own making at your workplace, as happened in his case. It's not the normal type of prejudice that flows from delay but it's certainly something that's associated with delay and it's an extremely aggravating factor to consider and it again creates prejudice in the sense of you're facing a simple drinking and driving charge and you've got to wonder what's going to happen next. The customary discomfort or apprehension that people have from the delay in these cases and simply the mere fact of being charged is I think is enormously aggravated by the failure of the police to get the information before the court. Then there is this nothing less than outrageous purported arrest of the accused at his workplace. This man has been cooperating. He's been showing up in court as required and in fact has appeared as I understand it, as required in a misguided attempt to recover jurisdiction which hasn't been lost, having given him an appearance notice I guess and two summonses, all of which he's complied with. The police then go out and arrest him. Very unfortunate and very high handed behavior on their part and although the analysis of how it fits into the delay situation is a bit complex, it's clearly part and parcel of his experience and coming on the heels of the failure to get the documentation to court is extremely aggravating.

9 So then we end up I think by agreement with 13 months of delay and what this case really demonstrates is the folly of functioning at the limits of reasonable delay as your starting point. The eight month period from the set date to the first trial date is at the edge of what is constitutionally acceptable, gets into the range, the beginning of the range in which the question may arise and as soon as you go beyond it for whatever reason, the prosecution is in jeopardy.

10 I've spoken at length in other cases about the folly of having these delays, both in terms of the quality of trials that you get and in terms of the administrative confusion that inevitably results.

11 You cannot try more cases with a big inventory, in fact you can try fewer because of the uncertainty it creates.

12 In this case the core institutional delay is at the border of what's acceptable, the delay that precedes it and to a lesser extent the delay that follows it are more aggravating, particularly the 50 days that the accused spent wandering around while the police got around to putting an information before the court is an extremely aggravating period of time.

13 It is an unusual case, but given the passage of time and the treatment of the accused at the hands of the police, I really have no hesitation in finding that the accused has not been tried within a reasonable time and that the appropriate remedy is always, in these cases is a stay.

14 MR. REID: Thank you very much, Your Honour.

15 THE COURT: Thank you.

16 MR. REID: I thank my friend.
