CITATION: R. v. [redacted] M[redacted], [redacted]
COURT FILE NO.: [redacted]
DATE: 2011/05/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HER MAJESTY THE QUEEN	)	Jason Pilon, Counsel for the Respondent
Respondent	)	
– and –	)	
[redacted] M[redacted]	)	Michael D. Edelson and Solomon Friedman, Counsel for the Appellant
Appellant	)	
	)	**HEARD:** May 11th, 2011

REASONS FOR JUDGMENT – SUMMARY CONVICTION APPEAL, ON APPEAL FROM A CONVICTION UNDER SECTION 253(B) C.C.C.

PELLETIER, J.

[1] [redacted] M[redacted] appeals his conviction on a charge of having the care or control of his car at a time when his blood alcohol level exceeded the legal limit. It is his view that the evidence accepted by the trial judge does not support that conclusion. For the reasons that follow, the appeal is allowed and an acquittal is entered.

THE FACTS

[2] On March 30th, 2009, Mr. M[redacted] drove to a cemetery in South [redacted] to visit his parents' gravesite. It would have been his father's birthday. He repaired a solar light that

illuminated the tombs, and sat in his car drinking beer until the police arrived shortly after 7:00 the next morning. Mr. M[redacted] was in the driver's seat. He had started the car on a few occasions to keep warm. When the police arrived, Mr. M[redacted] had the keys in his shirt pocket. He was arrested for care or control of his car after failing the screening device test and later gave breath samples that revealed a blood alcohol level of 116 milligrams of alcohol in 100 millilitres of blood.

THE TRIAL

[3] Counsel for Mr. M[redacted] at trial made it clear that the only issue was whether Mr. M[redacted] had the care or control of his car when the police arrived. Mr. M[redacted] testified. His evidence was that he had no intentions of driving, that he was using his car as "a den, a room", that he would wait until the next morning to walk to a friend's house nearby and arrange for a ride. He was cross-examined vigorously on whether he might change his mind and drive away, and was adamant that he would not, citing his 1985 drunk driving conviction as a particular reason for not driving that night.

THE DECISION AT TRIAL

[4] The trial judge believed Mr. M[redacted]. Without distinguishing any particular part of his testimony, the trial judge found Mr. M[redacted] to be a credible witness. His evidence that he did not intend to drive was accepted and served to rebut the presumption that he was in care or control of his car as a result of being observed in the driver's seat, (section 258(1)(a) C.C.). The trial judge also accepted the trial Crown's very reasonable concession that the evidence could not establish that Mr. M[redacted] was impaired by

alcohol. An acquittal was entered at trial on the charge under section 253(a) of the *Criminal Code*. The Court however registered a conviction on the section 253(b) charge citing, as discussed below, three reasons to conclude that Mr. M[redacted] had the care or control of his car.

THE LAW

[5] Care or control of a motor vehicle is not an expression defined by the *Criminal Code*.

[6] "Care" has been interpreted to mean custody, responsibility, charge, safekeeping, preservation, oversight, protection or attention; *R. v. Henley* [1963] 3 C.C.C. 360 (N.S. Co. Ct.), *R. v. Price* (1978) 40 C.C.C. (2d) 378 (N.B.C.A.), *R. v. Slessor* [1970] 2 C.C.C. 247 (Ont. C.A.).

[7] "Control" has been interpreted to mean having within one's reach the means of operating the vehicle, the fact of controlling or checking and diverting action, domination, command, superintendence, restraining influence or management; *R. v. Price* supra, *R.v. Slessor* supra.

[8] These definitions have been approved in the seminal decision of *R. v. Toews* [1985] S.C.J. No. 63 (S.C.C.). *Toews* also established that an element of risk must be created before the offense of care or control can exist. Stated otherwise, any amount of care or control over a vehicle is only sanctioned if there exists a co-incidental risk; *R. v. Wren* [2000] O.J. No. 756 (Ont. C.A.), *R. v. Mallery* [2008] N.B.J. 72 (N.B.C.A.).

[9] While an intention to drive is not an essential element to the offense of care or control (*R. v. Ford* [1982] S.C.J. No. 4 (S.C.C.)), a proven intention to drive certainly creates a risk in a subject who is impaired or has an excessive blood alcohol ratio; *R. v. Ruest* [2009] O.J. No. 5108 (Ont. C.A.), *R. v. Cadieux* [2004] O.J. No. 197 (Ont. C.A.).

[10] Similarly, depending on the circumstances, the accidental or unintentional setting of a motor vehicle in motion is a risk that the care or control provisions are aimed at preventing; *R. v. Thomson* (1940) 75 C.C.C. 141 (N.S.C.A.), *R. v. Toews* supra, *R. v. Hanneman* [2001] O.J. No. 1686 (S.C.J.), *R. v. Lockerby* [1999] N.S.J. 349 (N.S.C.A.). The subject may not intend to drive, however, the use being made of the vehicle can create a risk that the vehicle may be engaged or otherwise expose persons or property to harm.

[11] A further risk can exist if it can be reasonably concluded that the subject, without an intention to drive, and without creating a situation of accidental or unintentional risk, *would* have a change of mind and decide to drive. Cases recognizing risk based on this probability invariably involve, understandably, persons in advanced states of intoxication; *R. v. Pelletier* [2000] O.J. No. 848 (C.A.), *R. v. Pilon* [1998] O.J. No. 4755 (Ont. C.A.), *R. v. Hein* [1999] N.S.J. No. 421 (N.S.S.C.), *R. v. Rousseau* (1997) 121 C.C.C. (3d) 571 (Que.C.A.), *R. v. Cadieux*, supra.

[12] As the Crown astutely points out in the present appeal, subjects falling into this category are among the few persons who can, depending on the circumstances, commit a criminal offense while unconscious. They are nonetheless targeted by the care or control provisions and the jurisprudence in this area because they are a substantial risk – persons,

usually "sleeping it off", who possess both the means to engage the vehicle and particularly clouded judgment. The "change of mind" cases, as mentioned, universally involve persons displaying obvious signs of impairment. It is significant that, quite often, these individuals have not completely given up the intention to drive. They simply chose to wait until they feel that they can. It is because of their condition that their judgment cannot be trusted.

[13] Whether through the intention to drive, the risk of accidentally engaging the vehicle, or the probability that the subject will have a change of mind due to the degree of intoxication, care or control requires a risk.

ANALYSIS

[14] Mr. M[redacted] was found not guilty of care of control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol. He was nonetheless convicted of care or control of a motor vehicle with an excessive blood alcohol content. The risk identified at trial, argued by counsel, and used by the trial judge to base the conviction was that Mr. M[redacted] was "well positioned in a moment to engage the motor vehicle". The trial judge however accepted Mr. M[redacted]'s evidence that he did not intend to drive and that he had a firm plan for returning home with a friend later in the morning.

[15] Recognizing the scope of review in the present appeal, which is limited to examining whether the conviction is unreasonable and not supported by the evidence (*R. v. Burns* [1994] S.C.J. No. 30 (S.C.C.), *R. v. Biniaris* [2000] S.C.J. No. 16 (S.C.C.)), I have concluded that the trial judge's factual findings did not permit for the conclusion that Mr.

M[redacted] *would* experience a change of mind and operate his car. The trial judge's combined findings that Mr. M[redacted] did not meet the definition of "impaired" (*R. v. Stellato)* (1994) 90 C.C.C. (3d) 160 (S.C.C.), that he did not intend to drive, and that he had a firm plan for returning home without driving does not allow for the conclusion that he *would* change his mind as a result of judgment clouded by alcohol consumption. The factual findings demonstrate the opposite.

[16] In finding Mr. M[redacted] to be in care or control, the trial judge cited three points: "given his position in the vehicle, his manipulation of the keys over time, and a state of overconsumption and possible impairment; there existed, in my view, the risk to which this section is specifically addressed."

[17] The risk identified in the present case was the risk that Mr. M[redacted] *would* change his mind and drive. Finding that such a risk existed based on "a state of overconsumption and possible impairment" is, in my most deferential view, a misstatement of the legal standard established by "change of mind" care or control cases, and a mistreatment of the findings of fact as made by the trial judge. The trial judge concluded that it could not be proven that Mr. M[redacted] exhibited any degree of impairment. A conviction based on an alcohol induced risk of deciding to drive is therefore not supported by the evidence in this case.

[18] As a result, the conviction cannot be seen as reasonable and must be set aside. An acquittal is entered.

Justice Robert Pelletier

Released: May 16th, 2011

CITATION: [redacted] M[redacted] 2011 ONSC 3001
COURT FILE NO.: 09-A130
DATE: 2011/05/16

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

Respondent

– and –

[redacted] M[redacted]

Appellant

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