ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

SHAWN CASSISTA

**********

# P R O C E E D I N G S  A T  T R I A L

BEFORE THE HONOURABLE MR. JUSTICE J. BOVARD
AT BRAMPTON, ONTARIO, ON DECEMBER 20, 2013

**********

APPEARANCES:

M. Morris, Esq. — Counsel for the Crown

T. Hicks, Esq. — Counsel for the accused

**********

ONTARIO COURT OF JUSTICE

# TABLE OF CONTENTS




TRANSCRIPT ORDERED: March 31, 2015

TRANSCRIPT COMPLETED: April 8, 2015

ORDERING PARTY NOTIFIED: April 8, 2015

THE COURT: Okay, let's hear from Mr. Hicks and Mr. Morris then.
MR. MORRIS: Thank you, Your Honour, and that's on the matter of Mr. Cassista.
THE COURT: Yes.
MR. HICKS: Yes, thank you, Your Honour. Mr. Cassista is before you. Tom Hicks appearing.
THE COURT: Yes. Go ahead.
MR. HICKS: Thank you. I am ready to make submissions.
THE COURT: Okay then.
MR. HICKS: Your Honour, I had provided you with some case law on the last occasion, and there are just a couple of the cases I will refer to. So the first one is *Regina v. Hickey*, H-I-C-K-E-Y, from the Ontario Court of Appeal, from 2004. It just -- it's a brief endorsement that confirms that the act of resisting arrest without an assault does not make out the offence.

So my client acknowledges pulling away, and if Your Honour's finding of fact is that that's all he did, then, of course, it's my submission that the offence has not been made out.

And on that point, I will now conduct a, hopefully, brief review of the evidence. The officer's evidence includes testimony that, as well as pulling away, my client pushed him twice. The officer demonstrated that this

was a push to his shoulders with the open hands of my client on each shoulder, one on each shoulder, and that he was moved backwards, perhaps more than three feet.

In cross-examination, he was asked, you know,

> "Was it the first push or the second push that pushed you back,"

and he was unable to articulate that.

Respectfully, Your Honour, there are, from the defence perspective, concerns raised by the officer's evidence, concerns as to its reliability.

First off, the officer acknowledges the distances travelled on Lakeshore was something short of 200 meters, and yet, even though it's not in his notes, this was all canvassed in cross-examination, he estimates that my client's speed was upwards of 80 to 100 kilometers an hour in that brief distance, followed by a hard right turn.

My client was in a 2001 minivan, Your Honour, with a total of five adults in it. Getting up to a speed of 80 kilometers an hour and back down to 0 is getting into souped-up race car type of performance, and I ask you to find that on a common-sense analysis of that evidence, it is just not possible. I am not asking you to take judicial notice, but that

is not what happened, Your Honour.

He then describes a hard right turn, and my client, and the two witnesses who testified, said there was no such thing. My client turned right. And that all jives with my client's evidence that he came out of this establishment, he went along Lakeshore, and turned right onto that road to come to a stop, to make a deposit at the bank machine, which is located there, and I ask you to accept there is a bank machine there. So he wasn't trying to avoid anybody, he was just going to a bank machine.

Then we get into the next part that is troubling, respectfully, Your Honour. The officer has my client coming out of his vehicle and starting to run, as if trying to evade the officer. My client says he is coming out of his vehicle and starting to walk towards the bank machine when the officer yells for him, so he stops, and then walks back to the officer.

Then we have this interaction where the officer says that my client is yelling at him, claiming that he is a free man, et cetera. That all is denied by my client, and is denied by the witnesses who were there, who say that, if anything, it was the officer who was being aggressive, and my

client was trying to just simply avoid the situation and calm things down.

Finally, we get into the physical interaction where the officer arrests my client, and I will come back to whether it's a valid arrest, and that is a very important issue from the defence perspective.

My client acknowledges that at least once, and I believe he said two times, he pulls away from the officer, as the officer tries to take hold of him just to avoid the arrest, essentially saying to the officer,

"What are you doing? I'm not drunk."

He acknowledges that there was the resistance, and what I would call a passive non-assaultive resistance of pulling away. This does not make out the offence.

The officer goes further and states that he -- that my client pushed him twice. Well, we have three witnesses called by the defence, who say that did not happen. Granted, these are my client and two of his friends who were in the car, but they were people who were interviewed by the police, who gave statements to the police, and were here as a result of subpoenas. I don't think there is any issue that those summons were issued by the Crown, and not called by the Crown.

The officer testifies that he advised my client he was under arrest for impaired, and this is the most troubling aspect of the officer's evidence from the defence perspective. He indicates that he advised my client he was under arrest for impaired, and then further advised him he was under arrest for assault resist police, and then they are in the police car.

Your Honour, as was canvassed in cross-examination, the officer then proceeds to fill out a form. Now, on this form there are some sections with boxes that can be checked off. Two of those sections have to deal with dealing with what happened in the arrest, and then later what charges are being formally laid.

Then there is a section for free-form notes. All of this, Your Honour, is within the context of my client's evidence, which I ask you to accept, that he was never told at the road-side he was under arrest for resisting arrest, assault resist arrest, and that only was told to him much later at the Station when the officer came back and said,

> "Not only are you not being charged with over 80 because you blew under, but you are not being charged with impaired."

And I ask Your Honour to consider that there may be an aspect of having been overruled by the Staff Sergeant on that issue, because the officer said he certainly put in a good word for why he thought the impaired should go forward. It was only at that point, according to my client, that he was told he was being charged with assault resist for the very first time that night, and that is consistent with the officer's notes, Your Honour, in the free-form note-making portion of his notes. The officer mentions the impaired arrest. He mentions all of the things that happened. He does not write down on the continuous narrative notes that he also charged my client at the road-side with assault resist.

Then we move to the two sections that were canvassed in cross-examination, these check-box sections, and I will deal with the second one he did, I will deal with that first.

The charges eventually laid at the police station, and there is a time entry, and the officer confirmed in cross-examination that he is dealing with this section after the Staff Sergeant has told him there is no impaired, no over 80, and he has checked off "Other." This is obviously a form designed for drinking and driving arrests, and so

assault resist isn't one of the pre-printed choices. And there is no check of "Impaired," no check-mark beside "Over 80," there is a check in "Other," and he has filled in "Assault resist arrest," or words to that effect.

But then we move back to the section about what happened at the road-side, "Details of arrest," again, canvassed in cross-examination. Check-mark box choices include "Impaired, over 80, refuse, dangerous," et cetera, and then "Other," just like the one he dealt with later. The officer acknowledged that the time entry was accurate, 29 minutes after the hour, which is 2 minutes after he is in the car with my client, apparently just having told my client he is under arrest for impaired driving and assault resist. He has checked of "Impaired," the officer has. He has not checked off "Other" and filled in "Failed to --" or sorry, "Assault resist arrest." Your Honour, I submit that that is extremely important evidence in analyzing the reliability and the credibility of the officer's evidence that, number one, he did, in fact, tell my client he was under arrest for impaired -- for assault resist at the road-side, and, more importantly, number two, that he had it in his mind to do so, and there was any basis to do so at the

road-side. I am not asking Your Honour, necessarily, to make this finding of fact. It is not necessary when we are applying the *W.D.* test of beyond a reasonable doubt, but it is the defence intention that the officer laid the assault resist arrest charge much later only after finding out that the impaired charge wasn't going about my -- going against my client at the Station, and that there was no hint of there being such a charge until that time, which of course would undermine the foundation of the Crown charge.

So for all of those reasons, what I would refer to as the frailty in the reliability of the officer's evidence, I ask you to find that there were no pushes by my client at the road-side.

One thing I will also mention, Your Honour, is this issue about when my client mentioned that he is a free man, et cetera; as he said very clearly, when he was being cross-examined, he does believe that. He did state that the Station. He denies saying it at the road-side, certainly yelling it at the officer at the road-side, and being confrontational. Whatever else happened that night, Your Honour, my client says,

> "I believe that, but I'm not going to argue it with officers at the time. That's something I do in court later."

And he did comply later at the Station with the demand to provide samples. He was compliant, and I submit that bodes well, the fact that he did comply with his explanation that this "free man" belief, however you want to refer to it, is not something that he throws in officer's faces in a moment of confrontation. It is something if asked about, he will state, perhaps he will assert it in frustration later at the Station, but he will still comply.

So I ask you to find to the extent that I anticipate my friend is going to suggest this "free-man" belief fuelled an assaultive behaviour, that that is not the way my client deals with that.

Also, he went into the police car voluntar -- or, sorry, submitted to going into the police car once the other officers were there. I submit that that is good evidence that my client was never being aggressive towards the officer in the first place, before the other officers arrived.

Your Honour, I won't take nearly as long on the second point, which is the issue of whether or not it was a lawful arrest, and there are three cases I refer to. The first is *Plummer* (ph), from the Court of Appeal in 2006, the second *Griaznov*, G-R-I-A-Z-N-O-V, a

2009 decision, where your brother Justice Bourque, of the Ontario Court, and *Haughton*, H-A-U-G-H-T-O-N, your brother Justice Sheppard of the Ontario Court, in 2001.

What this says, Your Honour, is that there has to be a lawful arrest occurring, otherwise an accused is lawfully entitled to resist the assault that that arrest becomes in law if it is not lawful. And so as long as the response, in essence it is almost a self-defence type analysis. And so the Crown must prove, on a balance of probabilities, the arrest was lawful.

*Plummer* is a case, Your Honour, that dealt with an arrest for a Highway Traffic Act infraction of not identifying himself, which the court later found had not been a lawful arrest.

In *Griaznov*, and this is the case I particularly ask Your Honour to consider, and I hope will find somewhat persuasive, your brother Justice Bourque was dealing with an impaired, over 80 arrest, where there is mention of actually putting a police officer in -- a female police officer in a head-lock, and I believe that that is a finding of fact that that occurred, the arrest continues, the person blows over 80, ends up blowing somewhere between 75 and 155 milligrams, or,

sorry, excuse me, blows over, and then those results are later dealt with by a toxicologist, but the over 80 and the impaired proceed, and there is a s.8 and -- a Charter Application, and it is found that on a balance of probabilities, it was not a lawful arrest for impaired. So the police proceeded with the charges.

In this case, Your Honour, you have the frailties of the evidence, of the observations of my client by the officer. You have my client's assertion that he was not showing signs of impairment. There is no expert testimony about the readings, but you have extremely low readings, well under 80, that do not result in an over 80 offence, and certainly bodes well for my client's assertion that he was not showing signs of impairment. And then most importantly, you have the police themselves deciding that night the impaired shouldn't proceed. We are in a much better position, Your Honour, on this whether there are reasonable or probably grounds analysis than was the defendant in *Griaznov*, where the charges at least proceeded. The police, by their decision, and, you know, this as an entity, the police, by its decision not to proceed with the impaired, in my submission, have gone a long way to assisting the defence in the argument that on a balance of probabilities, Your

Honour cannot be comfortable that this was a lawful arrest. If the impaired or the over 80 had proceeded, then there would have been a s.8 before the court. Obviously it didn't, so there is no Charter Application here. However, Your Honour, may, and I submit should, still enter into the reasonable and probable grounds analysis on the impaired arrest, given what happens later on the over 80, and the Staff Sergeant overruling on the issue, and saying,

> "We are not proceeding with the impaired."

Your Honour still should enter into the reasonable and probably grounds analysis to determine whether this was a lawful arrest at all, and I submit that it was not.

So those two points, again, Your Honour, number one, I submit -- or, number two, I submit that it was not a lawful arrest, and should you find, as a finding of fact, that my client did push the officer twice, then if that does prima facie satisfy the test of assault resist, it was an unlawful arrest, therefore my client was being assaulted, and therefore it was not unlawful for him to resist in that manner. But more fundamentally, Your Honour, I ask you to accept, given the frailties in the officer's evidence, given the defence evidence, that there was no assault, and for those two

reasons I ask you to acquit.

THE COURT: Thank you, Mr. Hicks. Mr. Morris?

MR. MORRIS: Your Honour, just very briefly; first of all, my friend's last point, it is not, with the greatest of respect, for a court to consider, or analyze, or inquire on its own why other charges were not before the court. I think we know that the arrest was made, and we know, from the officer, that the Staff Sergeant said,

"This matter is not going further."

That is all the evidence we have. We don't know what's in the Staff Sergeant's mind. We don't know what the reason is. We don't know anything. And to take it any further than that is -- has to be going to speculation. My friend is inviting the court to speculate, and to speculate to his client's credit, and it is just, in my respectful submission, not an appropriate route of analysis to embark on.

All that is before the court is an assault resist, and the officer gave evidence, and the defendant gave evidence, and two defence witnesses gave evidence. And the two defence witnesses, in my submission, were not that helpful with respect to what they saw. They were not in a position to see and hear everything. When they came out of the truck, they saw and heard material. The second

witness really didn't have any great recollection of anything, with due respect to him, so I am not sure how much he can be relied on for Your Honour.

My friend said that the Crown would likely suggest in submissions that the defendant's comments that he's a free man, and doesn't apply -- the law doesn't apply to him would be used as fuel by the Crown, I think is his word, to give a foundation for the assaultive behaviour. Absolutely, yes, and that is the reason. You heard this defendant say in the witness box that the law does not apply to him, and that is exactly what he said at the scene. That is exactly why there was this interaction. That's what the officer said.

> "The Highway Traffic Act doesn't apply to me. No laws apply to me. The Criminal Code doesn't apply to me."

And so on a common sense basis, and my friend is asking Your Honour to use common sense analysis, I ask it, as well, and I know Your Honour will ultimately do that, it's a question of which side of -- that you come down on. But using common sense, if you have a fellow that is saying,

> "The law doesn't apply to me,"

absolutely that makes sense that he would not want to be in custody under that very law that doesn't apply to him. That is the explanation for the disagreement. That is

the explanation for the struggle that was (inaudible) by the first witness. So at least he saw a struggle, and saw some interaction, that is the explanation for the officer on his own having to call for back-up, and the back-up responding pretty darn quick, and that is the explanation for the use of the OC spray. It is not just an arbitrary -- and my friend is not precluded from raising Charter issues about arbitrariness on this count, and, of course, there is nothing before Your Honour. So the explanation makes eminent sense.

On a *W.D.* analysis, the evidence of the defendant really ought not to be found to raise a reasonable doubt, in my respectful submission. The arrest, and the cases obviously, *Storey*, (ph), and I indicated to Your Honour that that's what I would be arguing, and indeed I do argue it, I have copies. I know Your Honour is well familiar with it. I don't even need to go into it, and I won't, but just I would give a copy up if Your Honour wants to refer to it. It is side-barred at one certain point.

THE COURT: Thank you.

MR. MORRIS: It is trite at this point, and well established that for an arrest to be lawful, there has to be a basis on a subjective, and an objective analysis to justify the arrest.

The officer said what he observed. He felt that was subjectively appropriate when he -- when he confronted this defendant. He makes the observation of the glossy eyes, and all the other indicia of impairment. That, coupled with the -- with the driving that he observed. Everybody was at the bar in the truck, let's not forget that.

THE COURT: Sorry, everybody was what?

MR. MORRIS: Everybody in that -- in that van was at the bar together, right, and they are all friends of the defendant, and so I submit that there is some bias towards their friend, the defendant, in their evidence.

But when the officer speaks with this defendant, he makes the indication, the observations of indicia of impairment, that coupled with where he came from, that coupled with the way he was driving, all the circumstances led to his opinion that the defendant's ability to drive was impaired by the consumption of alcohol, and he arrested him for that.

On an objective standard, there is really not much contested. There is driving, and there was a -- as I recall it, I believe there was weaving within the lane, as well, subject to correction from Your Honour's notes, but I am pretty sure, of course, impaired's are, unfortunately, very common in these

courtrooms, but I seem to recall that the officer observed some driving, in addition to the speeding off and hitting the brakes all of a sudden.

At any rate, in all of the circumstances, on a subjective basis, he found there was a basis to arrest. If you take a step back and look at the objective basis, in my respective submission, it is there, as well. We -- it is not controversial that the defendant, and everybody was coming from the bar. It is not controversial that there was some short driving, and so -- and it is also not controversial that there was some blood alcohol reading of .50. That is not very low. It is not 80, but it is certainly enough to warrant a suspension. And there was even discussion about whether or not, as I cross-examined one of the witnesses, about whether or not this defendant should be driving. And there was a conversation about a subject of a taxi came up.

So objectively, it makes, in my respectful submission, it goes together that those factors would arise in that circumstance. They are not fabricated, in other words. They are there. There is a foundation for him. It is agreed in much of it by the defendant and the witnesses.

So subjectively and objectively, this officer had the right, had a valid arrest to make.

And what is coming after that, in my respectful submission, the same response he got before,

"This law doesn't apply to me."

And if you can't -- if it doesn't apply to him, then why would he allow an officer to take him into custody under that very law he rejects, and that's why you get the skirmish, that's why you get the call for back-up, that's why you get the OC spray, and that's why there was a physical struggle, and a physical push, and that is what it comes down to.

So in my respectful submission, the evidence is there for a valid arrest. The officer was making notes, and to challenge and say he -- his credibility is faulted because he didn't put in a -- handwrite in another charge, I submit it doesn't, but, again, my emphasis is on what is going on at the scene, and how can -- I submit that other matters really ought not to reflect on credibility after. It is what happened at the scene. You can believe some of the evidence of a person, all of it, or none of it. What is up at the scene is the issue, and it is a valid arrest, and it is a push, in my respectful submission.

Subject to any questions, those are my submissions.

THE COURT: Thank you. Any reply?

MR. HICKS: A couple of points, Your Honour. My friend can't have it both ways. He suggests that the two witnesses were not in a position to see things, and yet he acknowledges that my -- that the skirmish was seen by Mr. [redacted].

Mr. [redacted] testified he was out of that car within 30 seconds to see what was going on, and he saw the whole interaction. He testified that he saw the skirmish, but it didn't involve my client pushing, it involved pulling away. So my friend can't have it both ways. He can't say they didn't see anything, but then say they saw enough to help his case only.

My friend said the following, Your Honour, and I wrote it down; "the objective standard, not much is contested." Everything is contested on the objective standard. The, what I submit, is the impossibility of 80 to 100 kilometers an hour, and a hard right turn thereafter, in a 200 meter distance, speeding up to and slowing down. I completely contest, my client completely contests the idea that my client was showing any signs of impairment, is completely contested, so the objective standard is completely contested.

And I believe that the way the officer made his notes, and the way he behaved, calls into question even the subjective standard, and whether this isn't something that was just tacked on later because the officer was angry that the impaired wasn't going forward.

On that point, finally, Your Honour, I am not asking Your Honour to enter into an inquiry or a speculation about what happened at the Station. The Staff Sergeant, on the officer's evidence in cross-examination, and fortunately my friend cites what the officer observed, but we also have to consider the cross-examination. He acknowledged he was overruled by the Staff Sergeant, even though he tried to -- I am paraphrasing, that he tried to convince the Staff Sergeant that the impaired should go ahead. That speaks volumes to the viability of this arrest in the first place.

THE COURT: Thank you. Okay, I am going to put it over for judgment. I am away for the last two weeks of December, and in January I have nine judgments to give already, so I cannot do it in January. And February is complicated, as well. I do not think that I have the possibility to give it until the end of February. I am sorry it is so long, but I have too many other judgments and rulings. I am out of the jurisdiction on a couple of days, as well for February. I am out of the

jurisdiction almost a week, and two weeks in February I am doing family law trials. So I am looking at the last week of February.
MR. HICKS: Is Your Honour, by chance, available on the 24th, the Monday?
THE COURT: I am. I am in Family Court that day, but if you show up right at 10:00, I can deal with it right off the bat, because usually things in Family Court do not get rolling until about 10:30.
MR. HICKS: Thank you.
THE COURT: So if that is available?
MR. MORRIS: Yeah, that's fine.
MR. HICKS: Please.
THE COURT: Is that available to you?
MR. MORRIS: Yes, sir. Yes, Your Honour, that's fine, thank you.
THE COURT: Okay, so I do not think it will be too complicated to get a criminal clerk. Can you just check and see what court I am in though? That way I can just adjourn it straight to that court.
CLERK OF THE COURT: Sorry, Your Honour, what was the date, February?
THE COURT: The 24th.
CLERK OF THE COURT: 24th, okay. Courtroom 201, Your Honour.
THE COURT: Okay, courtroom 201, 10:00 o'clock, and I will give you the judgment then.
MR. HICKS: Thank you, Your Honour.
THE COURT: Thank you very much.

MR. MORRIS: Thank you, Your Honour.

THE COURT: Thank you.

*********

FORM 2
CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

I, Arlene Gorewicz, certify that this document is a true and accurate transcript of the recording of;

Regina v. Shawn Cassista

in the Ontario Court of Justice held at

7755 Hurontario Street, Brampton taken from Recording

3111 306 20131220 100209 which has been

certified in Form 1.

April 8, 2015

ARLENE GOREWICZ