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R. v. Vitellaro, 2025 ONCJ 200

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ONTARIO COURT OF JUSTICE

CITATION: *R. v. Vitellaro*, 2025 ONCJ 200
DATE: 2025·04·11
NEWMARKET

2025 ONCJ 200 (CanLII)

B E T W E E N :

HIS MAJESTY THE KING

— AND —

RAYMOND VITELLARO

JUDGMENT
Evidence Heard: February 10,11, April 11, 2025.
Delivered: April 11, 2025

Ms. Tharziha Ganeshamoorthy ..... counsel for the Crown
Mr. Raymond Vitellaro ..... defendant

KENKEL J.:

Introduction

[1] Mr. Chelliah was driving his wife and his 87-year-old mother-in-law south-bound on Warden Avenue when a Black Audi crossed the centre line and hit his vehicle head-on. The Audi then continued and hit two other oncoming vehicles. All three persons in Mr. Chelliah's car were taken to hospital with serious injuries. All three collisions were captured on Mr. Chelliah's forward and rear dash camera videos.

[2] Mr. Vitellaro was the driver of the black Audi. He is charged with Impaired Operation s 320.14(1)(a), Dangerous Operation s 320.13 and Refusing to provide a bodily sample s 320.15(1).

[3] During the trial Mr. Vitellaro identified a *Charter* issue – whether his right to counsel was breached when he wasn't able to speak to his counsel of choice.

That issue was addressed in the evidence and the Crown called the witness involved. The Crown and the court both monitored the evidence for other potential *Charter* issues throughout the trial.

[4] On the third day of trial, Mr. Vitellaro brought an application alleging a further right to counsel breach and a breach of his right to a trial within a reasonable time. The court did not permit the right to counsel breach allegation to be expanded as the Crown had closed its case and the counsel of choice issue had been fully canvassed in the first two days. The *Charter* s 11(b) breach was added to the issues to be considered.

Right to Counsel

[5] P.C. Korte advised Mr. Vitellaro he was under arrest for impaired operation at 1948h. He was being assessed in the ambulance at the time. Constable Wong read Mr. Vitellaro his right to counsel advice at 1958h. He explained that he delayed providing that advice until the two EMS personnel in the ambulance completed their medical evaluation.

[6] Mr. Vitellaro asked to speak with a particular lawyer, Ms. Rishma Gupta. He provided P.C. Wong with the phone number for her office. P.C. Wong asked a road Sergeant to attend the hospital with a cellphone to provide access to counsel there, but Mr. Vitellaro was assessed and released quickly by the attending physician.

[7] They left the hospital and arrived at 5 District shortly afterwards. After booking, Mr. Vitellaro was placed in a cell and P.C. Wong called counsel of choice at 2102h. He called twice as there was no answer. There was no information provided by that office for after-hours contact, so the officer left call-back information on the voicemail. At 2115h P.C. Wong placed a second call to counsel, again leaving call-back information. At 2120h there was still no response. P.C. Wong spoke with Mr. Vitellaro and advised him that his lawyer had not called back. Constable Wong advised Mr. Vitellaro that a duty counsel lawyer was available. Mr. Vitellaro said he'd like to speak with that lawyer. By 2128h counsel of choice had still not called back so P.C. Wong placed a call to duty counsel. Mr. Vitellaro spoke with the duty counsel lawyer from 2147h to 2158h.

[8] Mr. Vitellaro testified that he was told by PC Wong that, "it's duty counsel or nothing" and he agreed to speak to that lawyer as it was his only choice.

[9] The delay in providing the right to counsel advice was reasonably explained by the need to complete the medical assessment. Constable Wong properly waited until the accused was in a position to receive and understand that advice.

[10] Mr. Vitellaro said, "that night was a blur to me". Even at the station the events are a blur. He does not now remember going to the hospital or being seen

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by a doctor. He was able to identify his counsel of choice at the station. When asked about the conversation with PC Wong at 2120h where he was told that his lawyer was not responding he said “Honestly I can’t answer that because I don’t remember that part”. Given his state at the time and his present lack of recollection I find his evidence that PC Wong told him it was “duty counsel or nothing” to be unreliable and inconsistent with the credible evidence of that officer who was sober and acting in a professional capacity. Mr. Vitellaro said he became angry when he was told duty counsel was his only choice, but on the cell video that was played there was no such apparent reaction. The audio which the Crown says is conclusive on this issue was recorded from the booking desk and wasn’t loud enough to permit cross-examination so was not considered.

[11] Mr. Vitellaro’s concern that the cell video evidence was altered and was a “CGI deepfake” when compared with an original version on one of three USB copies turned out to be a non-issue. All three versions of the cell video were found to be consistent by the Crown and the accused when they compared them over a break.

[12] P.C. Wong made reasonable efforts to reach Mr. Vitellaro’s lawyer. Counsel who are available to provide after-hours advice typically provide contact information at their office number. Other offices have messages saying they are not able to provide after-hours advice. The lack of any information about after-hours contact results in uncertainty for persons waiting in custody.

[13] In this case the police were right to wait a reasonable time and make several attempts on the chance that counsel might respond. When there was no response, it was reasonable for Constable Wong to remind Mr. Vitellaro that one of his options was to speak with a duty counsel lawyer who was available to give advice.

[14] If Mr. Vitellaro was not satisfied with that offer and wanted to contact another lawyer, he knew the police would help him. He chose to speak to the lawyer immediately available and P.C. Wong contacted duty counsel at his request. Mr. Vitellaro spoke with that lawyer and he made no complaint about the legal advice received. There’s no evidence of a s 10(b) breach.

Dangerous Operation

[15] The credible direct evidence of Ms. Westacott and consistent circumstantial evidence showed that Mr. Vitellaro was the driver of the Audi involved in all three collisions. He admitted that in his testimony.

[16] The credible evidence of Mr. Chelliah and reliable confirmation from his dash camera videos show that Mr. Vitellaro drove his Audi at a fast speed as he approached an intersection. He then drove into oncoming lanes, directly into Mr. Chelliah’s vehicle and continued on hitting two other cars. Mr. Vitellaro described

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the contact with Mr. Chelliah's car as a "clip" in questions he put to the witnesses, but Mr. Chelliah's credible evidence and the dash cam video shows he was hit head-on. The slight angle to the contact was caused by Mr. Chelliah's reaction to the approaching Audi as he turned slightly immediately before contact. The significant momentum of the vehicle caused it to continue past the first collision into two further collisions.

[17] The Crown is required to prove the prohibited act – that the accused was driving in a manner that was dangerous to the public, viewed on an objective standard, having regard to all of the circumstances including the nature, condition and use of the place and the amount of traffic that was there. It is the manner of driving, not its consequences that matters – *R v Kelly,* 2025 ONCA 92 at par 52.

[18] The Crown must also prove the required intent – that the accused's driving was a marked departure from the standard of care that a reasonable person would observe in the circumstances – *R v Kelly* at para 52.

[19] Mr. Vitellaro worked a 14-hour shift ending that morning. He went home but was called out to see a friend. He was returning from his friend's at the time of this incident. He testified that he bought a bag of Cheetos at a gas station on the way home. He did not open the Cheetos there. He decided to open the bag with his teeth and one hand while driving as he approached the intersection. Somehow the bag of Cheetos exploded, causing dust to go into his face. He had bought the spicy kind of Cheetos so that affected his allergies and caused him to sneeze. The sneeze caused him to lose control of his car. He doesn't remember anything about the collisions as he couldn't even see what was happening.

[20] Mr. Vitellaro's evidence gives no reason for a bag of Cheetos to explode in his face with such force that it triggered allergies or a sneezing reaction and blinded him to the point where he could not see. There's no evidence such a thing is even possible. Even if a bag could explode as he said, that does not explain why he would react to that by turning left into oncoming traffic instead of trying to slow down. It's not plain why he would buy a bag of "spicy Cheetos" if the dust from that product triggers his allergies. I accept that he distracted himself while driving with the Cheetos as he said. The photograph he took upon retrieval of his car shows Cheetos scattered on the floor. It's plain though that they ended up there as a result of the three collisions. Mr. Vitellaro's testimony as to the cause of the crash was not credible.

[21] Mr. Vitellaro was not sure when his long work shift ended. He said he was exhausted. He has no recollection of the circumstances of the various collisions. His memory of the events after the collision is also suspect as he said "that night is a blur". He doesn't remember significant events like going to the hospital in an ambulance. I find his recollection about the events leading up to the collision to be unreliable.

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[22] The video evidence shows Mr. Vitellaro was driving faster than the traffic around him. He drove at speed towards an intersection on a major roadway. He then drove across the centre line directly into Mr. Chelliah's vehicle. His speed was such that his vehicle continued on and hit two further cars.

[23] Driving at a fast speed towards an intersection where other traffic was present while distracting himself created a situation of risk. Crossing the centre line and driving into several oncoming vehicles was plainly dangerous to the public.

[24] Mr. Vitellaro drove in a "exhausted" condition, he persisted even though his drowsiness was pronounced and eventually caused him to lose consciousness. Prior to the crash he distracted himself from his driving task while travelling at speed towards a busy intersection. I find his driving as a whole to the point where he lost consciousness showed a marked departure from the standard of care that a reasonable person would apply in those circumstances.

Refuse

[25] P.C. Lam was the Evaluating Officer for the drug recognition examination. Regulation SOR/2008-196 requires that an evaluating officer be a Drug Recognition Expert (DRE) accredited by the International Association of Chiefs of Police. Proof of Constable Lam's certification was marked as Exhibit #3.

[26] Constable Lam conducted the tests and procedures prescribed in that same regulation. Mr. Vitellaro performed poorly on the divided attention tests which test mental focus and physical ability. Mr. Vitellaro's responses were delayed and slow. His movements were slow. He swayed back and forth while standing. He performed poorly on all of the physical tests. When asked to walk on a line one foot in front of the other he was off balance and took multiple attempts to take even one step. Contrary to instruction he held out his arms in a T fashion to try to gain balance but that didn't help. He missed every heel to toe step and repeatedly fell to the side. When asked to raise one leg and hold it he lost his balance after a second. The longest he could hold a foot off the ground before losing his balance was 3 seconds out of 30 requested. Mr. Vitellaro performed poorly on all physical tests. He was cooperative, but generally unable to follow simple instructions. Constable Lam's evidence is supported by the video and audio record of the full DRE evaluation.

[27] Constable Lam took into account Mr. Vitellaro's statement that he had a past hip injury. The officer did not see any signs of pain during the movements and attempted movements. On the contrary at one point Mr. Vitellaro stretched on his own by bending forward with both hands and touching his toes then returning upright. That was not part of the test but early in the process showed the officer Mr. Vitellaro had physical ability and flexibility. Balance and mental focus were the issues during the physical tests.

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[28] P.C. Lam considered the results of the DRE evaluation and information about the crash and the accused as provided by the officers who attended the scene. P.C. Wong told him that during transport the accused was in a very lethargic state, slow to respond. At one point his body slumped forward, and it appeared he passed out in the cruiser. Mr. Vitellaro also "nodded off" while his blood pressure was being taken during the DRE test. Considering all of the evidence available to the officer including the points listed above, Constable Lam formed reasonable grounds to believe that Mr. Vitellaro's ability to operate a conveyance was impaired by a narcotic analgesic. That conclusion was objectively reasonable. Mr. Vitellaro's statements to the officer (after speaking to counsel, during the DRE examination) about increased suboxone use (a medication that includes a form of opiate) that day was further evidence consistent with the officer's conclusion and available to confirm grounds - s 320.31(9).

[29] The belief that Mr. Vitellaro's ability to operate a conveyance was impaired by one of the types of drugs listed in s 320.28(5) provided reasonable grounds for the demand under s 320.28(4)(a) requiring Mr. Vitellaro to provide a urine sample for analysis to ascertain the presence of a listed drug.

[30] Mr. Vitellaro refused outright to provide the sample. PC Lam patiently explained the basis for the demand and the legal requirement that the accused perform the test. He also explained the consequences of refusal including the further criminal charge, provincial suspension and criminal prohibition. He repeated those explanations several times.

[31] Constable Lam asked Mr. Vitellaro why he was refusing. The accused referred to past legal advice given to him by his lawyer, not by the duty counsel lawyer he spoke to that night. Constable Lam explained that the law changed three years earlier in 2018 and prior legal advice might not be current. Despite that warning Mr. Vitellaro continued to refuse.

[32] At trial Mr. Vitellaro gave a different reason. He testified that he heard an officer in the station say that if he's on medication he's "wasted" and shouldn't be driving. At that time he decided to refuse any demand. In cross-examination he said that the statement he referred to was made not at the time of refusal but at booking by someone not in that room. He could not recall if it was a male or female police officer.

[33] Mr. Vitellaro's explanation finds no support in the evidence. It is contradicted by his statements made at the time. Even if Mr. Vitellaro's present recollection were correct, it does not provide a reasonable excuse for refusing the lawful demand.

[34] The charge of refusing to provide a sample of a bodily substance pursuant to a lawful demand without lawful excuse has been proved beyond a reasonable doubt.

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Impaired Operation

[35] The details of the crashes were described in the credible evidence of Mr. Chelliah and Ms. Westacott. They were sober at the time and their evidence was confirmed by Mr. Chelliah's dash camera videos which captured the head-on collision with his car, and then the two further collisions shown in the rear-facing camera. The video record shows there was no apparent external reason for Mr. Vitellaro to cross the centre line and drive into three oncoming vehicles.

[36] Constable Korte provided credible detailed evidence with the aid of notes made on the day of the incident. She arrived at the crash scene after the fire department and EMS ambulances. She saw the circumstances of the collisions and the severe damage to all four vehicles.

[37] She spoke with Mr. Vitellaro. He was very unsteady on his feet, unable to maintain his balance. When asked for his driver's license he first provided his health card. His eyelids were 'droopy" and he moved extremely slowly. He was slow to answer questions. She did not smell alcohol on his breath. She began to consider arrest for impaired operation by drug, but she waited for the medical assessment by EMS to be completed to rule out any possible medical reason for her observations. In cross-examination she noted that Mr. Vitellaro's mental state at trial was different from the day of the incident.

[38] Constable Wong met Mr. Vitellaro at the scene and rode with him in the ambulance to the hospital. He also rode with Mr. Vitellaro in the police car from the hospital to 5 District. His recollection was assisted by detailed notes made at the time of the events. He described Mr. Vitellaro's speech at the scene as slow and very deliberate. He noted the accused's eye lids were drooping. Mr. Vitellaro was able to understand right to counsel advice in the ambulance and did identify a lawyer he wished to speak to. During the search of Mr. Vitellaro incident to arrest, P.C. Wong found blister packs of suboxone with Mr. Vitellaro's name and the prescription date of 24 July 2021, the day of the incident. After the search, Mr. Vitellaro walked very slowly and had to balance himself on the side of the EMS truck. After a brief examination in the Emergency Department of Markham Stouffville Hospital Mr. Vitellaro was released as he was not in need of any medical attention.

[39] Constable Lam conducted the Drug Recognition Evaluation as described above.

[40] Mr. Vitellaro's statements to the evaluating officer were not proved voluntary. The Crown indicated at the outset of the trial there was no issue that required a *voir dire.* Any admission of drug consumption made after right to counsel advice was provided but not proved voluntary is not admissible as evidence to prove any count and will be disregarded. Mr. Vitellaro's statements that are admissible as further support for reasonable grounds for the demand are limited to that purpose only.

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[41] Mr. Vitellaro's dangerous driving errors, lethargic and slow mental state, confusion producing documents at the roadside, slow speech and the station video evidence all show significant impairment in the mental faculties needed to safely operate a conveyance. That mental impairment was further confirmed repeatedly during DRE testing. The mental slowness and impairment is not reasonably consistent with the effects of the collisions, especially where Mr. Vitellaro was assessed and medically cleared at hospital.

[42] Mr. Vitellaro's significant physical difficulties with balance and simple movements showed impairment in the physical ability to operate a conveyance. That conclusion was also confirmed during DRE testing.

[43] Constable Lam testified that his testing led to the conclusion that the cause of Mr. Vitellaro's impairment was ingestion of a narcotic analgesic drug. He explained that the many symptoms of impairment observed were consistent with that type of drug but would not be found with other types of drugs. His conclusion is supported by P.C. Wong's seizure of suboxone from Mr. Vitellaro. Constable Lam testified that suboxone contains a narcotic analgesic. It's used in the treatment of opiate addiction.

[44] The fact of Mr. Vitellaro's refusal to comply with the demand for bodily samples is admissible evidence on this count and the court may draw an adverse inference to the accused from that evidence – s 320.31(10). I decline to do that in this case as Mr. Vitellaro's statements at the time of refusal indicated that he chose to refuse not based on advice the lawyer gave him that evening, but based on some dated legal information he obtained in relation to some other matter. Given his impaired mental state and the explanation at that time I do not find it reasonable to infer that he chose to refuse in order to avoid confirming the presence of drugs in his body.

[45] Mr. Vitellaro conceded in his testimony that suboxone can make a person drowsy. He explained that with his extended use of suboxone at the time, over 8 or 9 years, it didn't have that effect on him. He may be right that the effect of that drug was no longer pronounced, but the test is whether the Crown has proved impairment by drug even to a slight degree. Mr. Vitellaro chose to drive when he was exhausted. The evidence shows the effect of suboxone at the time in his condition was significant and ongoing well past the time of the collisions.

[46] On the whole of the evidence, the only reasonable inference is that in his exhausted state the consumption of a narcotic analgesic was a significant contributing factor to the impairment in Mr. Vitellaro's ability to safely operate his conveyance. There is no credible evidence that could reasonably leave a doubt in that regard.

Charter s 11(b) – Trial Within a Reasonable Time

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[47] Mr. Vitellaro alleged that his right to a trial within a reasonable time was breached. This information was sworn on July 29th, 2021. On January 29, 2023 the case reached the 18-month mark. I agree with Mr. Vitellaro that the delay requires examination.

[48] The information 4911-998-21-91100805 records the appearances to date and is the primary evidence Mr. Vitellaro refers to in support of his application. The information shows the first appearance was August 10th, 2021. There were 8 appearances to August 9, 2022 with nothing happening. Counsel Mr. Grossman was removed from the record on that date. Mr. Vitellaro conceded in his testimony on the *Charter* voir dire that this first year of delay was caused by the defence as he considered different strategies to deal with the charges to the point where he discharged his first lawyer.

[49] There was further delay until November 3rd, 2022, when the matter was set for trial on October 30th and 31st, 2023 with Mr. Starkman's office on record. That trial didn't take place as the defence brought an application to adjourn the trial the month prior on September 11th, 2023. The application was granted, and the defence waived s 11(b) (waived the right to complain about the delay they caused) to the next trial date.

[50] The matter was up to set a second trial date on November 8th, 2023, but Mr. Starkman brought an application to be removed as counsel which was granted. There was further delay until January 30th, 2024 when Mr. Vitellaro retained new counsel and was ready to set a second trial date. November 12th and 13th, 2024 were chosen as the dates for the second trial.

[51] On April 2nd, 2024 a defence application to vacate the second trial dates was granted. The judicial endorsement on that date notes that "any delay that results is acknowledged to be defence delay". For some unknown reason new trial dates weren't set until May 29th when February 10th and 11th, 2025 were set as the third trial dates. On December 20th, 2024, an application by counsel of record Mr. Tofilovski to be removed from the record was granted. The trial was marked to proceed on February 10th, 2025 "with or without counsel".

[52] Mr. Vitellaro testified and submitted that he did not delay the proceedings, the courts have delayed the matter. However, the record shows that almost all of the delay in this matter has been caused by the defence. Once he was ready to set a date, he was given a trial date of October 30th, 2023. We don't know if the court had earlier dates, but even if it was all institutional delay to the first trial date, the delay was less than 12 months which is well within the guidelines for this court. That trial was set during the active COVID pandemic which extended the time to trial and allowance for that factor would reduce the time attributable to institutional delay.

[53] After October 30th, 2023, all of the delay has been caused by the defence

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in circumstances of express s 11(b) waivers. Even without those waivers, it's plain that the delay that resulted is attributable only to the defence. Mr. Vitellaro chose to explain the difficulties he had with his various lawyers, but the delay arising from the discharge of three counsel to the point where he ended up representing himself cannot be attributed to the court system.

[54] There's no evidence of a breach of Mr. Vitellaro's right to a trial within a reasonable time. The application is dismissed.

Conclusion

[55] There was no evidence of the s 10(b) breach alleged by Mr. Vitellaro. The Crown called evidence to show that the arrest, search incident to arrest, DRE demand and bodily samples demand were all based on objectively reasonable grounds. Most of the delay in this case was attributable to the multiple changes in counsel and trial adjournments caused by the defence. There was no evidence of a breach of Mr. Vitellaro's *Charter* rights.

[56] The Crown has proved all three charges beyond a reasonable doubt. Mr. Vitellaro is found guilty of impaired operation of a conveyance, dangerous operation and refusing to provide a bodily sample.

[57] I invite the Crown to make submissions as to whether the two convictions for driving offences engage the rule prohibiting multiple convictions for the same delict in the circumstances of this case.

Delivered: April 11, 2025.

Justice Joseph F. Kenkel

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