

From: Martin Minuk
To: Don Slough
Date: 9/20/07 11:12 am
Subject: Re: R. V. Zenk
Attachments: Memo to Don Slough & Brian Kaplan.doc

CC: Brian Kaplan
Gentlemen

Attached please find the memo Don asked that I provide.

Marty

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Memorandum

To: Don Slough / Brian Kaplan
From: Martin S. Minuk
Re: R. v. Zenk - Prosecution
Date: September 20, 2007

You have asked that I provide information on the following:

A. WHO DID THE INVESTIGATION OF THE OFFENDER AND WHO DID THE INVESTIGATION OF THE INVESTIGATION? WHAT WAS TRAMLEY'S ROLE?

1. Summary of Scene Investigation of Zenk

1. The scene investigation was conducted by the East Paul Police. The attending officers were Harry Bakema (Chief of Police), Ken Graham and Jason Woychuk. They attended the scene at or near 7:10 am. These officers at no time made an ASD (roadside) or breathalyzer demand of Mr. Zenk.
2. At approximately 7:38 am Norm Carter, now Chief of the East St. Paul Police Dept., received a call at his residence from dispatch informing him of the accident. He arrived at the station at approximately 8:00 am.
3. He had no details of the accident at all beyond the fact that an accident had occurred.
4. Woychuk conveyed Zenk who was at that time not under arrest for any offence to the detachment.
5. At 8:12 am Woychuk arrived at the detachment and told Carter that Zenk was the driver.
6. At 8:18 am Carter places Zenk under arrest for impaired cause bodily harm and impaired cause death. Until this point Zenk was not under arrest, given an ASD or breathalyzer demand or charter warnings.
7. At 8:21 Carter read the blood demand which appears not to have been required by reason of there being no evidence to satisfy the s. 254(3) CC

- 2 -

requirements that Zenk was incapable of blowing or that it was impracticable to take a breath sample. This inappropriate demand was not pursued by Carter who did 44 minutes later read the breath demand. That fact clearly establishes that the blood demand was inappropriate in the circumstances.

8. At 9:05 at Carter's request Woychuk brings Zenk to the breathalyzer room.
9. At 9:07 Carter makes breathalyzer demand.
10. At 9:08 Carter reads refusal.

2. The investigation of the investigation

1. I brought my concerns to the attention of Mr. Kaplan who immediately facilitated the process with the RCMP.
2. The request for the investigation was forwarded by Mike Horn ADM to Asst. Commissioner Madill on May 5, 2006.
3. I attended a meeting at the RCMP "d" Division Headquarters on May 15, 2005, where I detailed all of my concerns and why I believed that Mr. Bakema should be investigated for obstruct justice and the accident re-investigated.
4. The investigation was conducted by Cpl. Kathy Kennet and Cpl. Todd Doyle of the RCMP "D" Division under the direction of Staff Sergeant Kathy King.

3. Tramley

1. I do not know who he is and had never heard of him until he was identified in the media after the initial sentencing hearing.
2. From the media I know he was retained by the Municipality to report confidentially on the operations of the East St. Paul Police force not long after the pornography viewing by officers came to light.

B. COULD YOU PROVIDE A SUMMARY OF THE EVIDENCE OF IMPAIRMENT?

1. Short of saying there was no evidence of impairment which was reliable, the investigation did reveal that Mr. Zenk was at Brannigan's and later at the home of Sean Black, a WPS member, before the accident.
2. WPS Professional Standards members interviewed the officers who were with Mr. Zenk.
3. After reviewing all of the statements not one officer could recall what it was that Mr. Zenk had to drink. Some officers themselves reported their impairment was such that they did not remember much of the evening.

- 3 -

4. No officer stated that they believed Mr. Zenk to be impaired or observed that he was impaired or came to any conclusion he was impaired.
5. The best evidence was that he might have had a drink, but what and when was not discernable. In short, the WPS interviews would not support any conclusion that Zenk was even remotely impaired.
6. At the scene an ambulance attendant stated he noted the smell of alcohol but no witness described behaviour consistent with impairment, even though Zenk was permitted by attending officers to walk around the area without police supervision.

C. COULD YOU PROVIDE A SUMMARY OF THE ADMISSIBILITY PROBLEMS WITH THE REFUSAL?

1. The East St. Paul Police attending the scene did not, if they did form the opinion that Mr. Zenk was impaired, follow correct code procedure and read to Mr. Zenk the ASD (handheld device) demand or breathalyzer demand.
2. No demand was made of Mr. Zenk "forthwith".
3. If the demand was not made at the scene by officers in attendance, the only reason they have to justify this conduct is that they did not form an impression of impairment. However I do say that the reason I pressed for the RCMP inquiry relates to what was not done at the scene.
4. The investigation and demand by Carter some 2 hours after the collision would not have withstood the requirements set out in:
 - i. *R. v. Cote* (1991) 70 C.C.C.(3d) 280 (Ont.C.A.)
 - ii. *R. v. Woods* [2005] S.C.R. 205
5. The Carter demand would simply not withstand the challenge that it was not made "forthwith" and his "grounds" for making a demand some 2 hours after the accident with limited knowledge would also not be sustainable.
6. In short, the failure to make a demand at the scene, if there was grounds upon which to make the demand, was horribly fatal to any prosecution and severely compromised the alcohol factor, if it existed at all. To the disadvantage of the Crown, the actions of the East St. Paul Police did nothing to contradict and moreover assisted in corroborating the WPS officers who stated Mr. Zenk was not impaired.

D. WAS THERE ANY EVIDENCE TO SUPPORT A CHARGE OF DRIVE IMPAIRED CAUSING DEATH?

1. In my opinion, having regard to the actions of the East St. Paul Police, statements of the WPS members and other witnesses, not at all.

- 4 -

E. WHAT WAS THE BASIS FOR THE GUILTY PLEA TO DANGEROUS DRIVING CAUSE DEATH E.G. INADVERTENCE AS OPPOSED TO IMPAIRMENT?

1. In short yes – the best available evidence is from the RCMP traffic accident reconstructionist, Chris Blandford.
2. Chris Blandford is of the view that there was serious risk to the prosecution and an acquittal at trial was very possible. The expert indicated that a plea to dangerous driving cause death was a very good result on the available evidence and ought not to be rejected by the Crown.
3. In my phone interview he indicated at best all he could testify to was:
 - No braking evidence – Zenk did not apply brakes – therefore being unable to rule out falling asleep at the wheel.
 - No skid marks.
 - No ability to do any momentum analysis (speed) because of secondary impact.
 - What we know is that deceased vehicle had 2 brake lights on and so did vehicle in front.
 - Would have had advance warning because of the overhead lights which come on for 8 seconds before yellow light yellow light is on for 4 seconds before the red light comes on.
 - We have approximately 12 seconds where he did not brake and before red light came on.

F. WHAT WAS THE BASIS FOR THE RECOMMENDATION OF A CONDITIONAL SENTENCE?

1. The recommendations was made after a complete review of reported decisions from all Manitoba Courts from 1999 to June 2007 involving cases where the facts of the dangerous driving cause death involved alcohol and no alcohol.
2. The cases presented in the case book are:
 - R. v. Perron, 2007 MBCA 73 (Can LII)
 - R. v. Manty (C.), 2006 MBCA 25 (Can LII)
 - R. v. Eckert, 2006 MBCA 6 (Can LII)

- 5 -

- R. v. Capuska, 2005 CanLII 22806 (MB P.C.)
- R. v. Bazylewski, 2005 CanLII 50947 (MB P.C.)
- R. v. MacKenzie, 2005 CanLII 57044 (MB P.C.)
- R. v. Shave, 2005 CarswellMan 348
- R. v. Duchominsky, 2003 MBCA 19 (Can LII)
- R. v. Higgins, 2001 MBCA 177 (Can LII)
- R. v. Areco, 1999 CanLII 3799 (ON C.A.)
- R. v. MacDonald, 1999 CanLII 5083 (MB C.A.)

G. IS THE FACT THE ACCUSED WAS A MEMBER OF THE WINNIPEG POLICE SERVICE A RELEVANT FACTOR IN SENTENCING?

1. The fact that an accused is a police officer is a factor in sentencing. The weight to be given to this factor will and does vary with the circumstances of the offence as seen in the authorities submitted.
2. What will be important is whether the officer was on or off duty, was the offence an abuse of power or trust, was the officer off duty but pose to be on duty so as to abuse their position. Did the accused enter a guilty plea or was the accused convicted after trial? In short there are many factors.
3. The casebook I submitted included the following cases:

- R. v. Cusack (1978), 41 C.C.C. (2d) 289 (NSSC - Appeal Division)
- R. v. Deane, 1997 ON P.C.
- R. v. Koopman, 1999 CarswellAlta 269 (ABCA)
- R. v. Lesuk, 2000 CarswellMan 319 (Manitoba Court of Appeal)
- R. v. Jackson, 2000 BCSC 94 (CanLII)
- R. v. Spencer, 2001 CanLII 17697 (QC C.Q.)
- R. v. Pashe, 2002 CanLII 28051 (MB P.C.)
- R. v. Blackburn, 2004 CanLII 28908 (ON C.A.)

- 6 -

R. v. Tait - 2005 BCPC 273 (CanLII)
R. v. Dosanjh, 2006 BCPC 574 (CanLII)
R. v. C.(R.), 2006 CarswellOnt 7001 (Ontario Superior Court of Justice)
R. v. Auclair, 2006 QCCQ 7093 (CanLII)
R. v. Ferguson, 2006 ABCA 261 (CanLII)
Boucher v. The Queen, 1954 CanLII3 (S.C.C.)
R. v. Woods, 2005 SCC 42 (CanLII)
R. v. Bowler, 2007 MBQB 200 (CanLII)
R. v. Broekaert, 2003 MBCA 10 (CanLII)
R. v. J.W.I.B., 2003 MBCA 92 (CanLII)
R. v. Sinclair, 2004 MBCA 48 (CanLII)
R. v. McKay, 2004 MBCA 78 (CanLII)