

Date: 20130314
Docket: 12/64
Citation: *R. v. Whelan*, 2013 NLCA 20

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

DAVID WHELAN

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Green C.J.N.L., Rowe and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201201G3747

Appeal Heard: March 4, 2013
Judgment Rendered: March 14, 2013

Reasons for Judgment by Rowe J.A.
Concurred in by Green C.J.N.L. and Hoegg J.A.

Counsel for the Appellant: Self Represented
Counsel for the Respondent: Frances Knickle

Rowe J.A.:

[1] The appellant, David Whelan, is a taxi driver. On February 26, 2012, an RCMP constable stopped him on the Trans-Canada Highway and gave him a speeding ticket.

[2] Mr. Whelan pleaded not guilty. A date was set for the trial. Mr. Whelan requested disclosure. This was provided to the Crown by the police, but was not provided by the Crown to Mr. Whelan before the trial date.

[3] Mr. Whelan did not appear for the trial. In his absence, the case was called, the RCMP officer testified (in accordance with the procedure outlined in *R. v. Sheppard* (1995), 130 Nfld. & P.E.I.R. 228 (Nfld. T.D.) *per* Green J.) that Mr. Whelan's car was traveling at 140 kilometres per hour or 40 kilometres per hour over the speed limit, and a conviction was entered.

[4] Mr. Whelan appealed the conviction to the Supreme Court Trial Division. There, Mr. Whelan outlined that he did not attend at the appointed time because he was awaiting disclosure and assumed the trial would not proceed until he received it. The Trial Division judge quite properly made it clear to Mr. Whelan that he had an obligation to appear in court whether or not he had received disclosure.

[5] Mr. Whelan went on to provide an explanation for his speeding, that he was being intimidated by an erratic and aggressive driver, whom he was seeking to get away from. This did not sway the Trial Division judge. He dismissed Mr. Whelan's appeal.

[6] Mr. Whelan seeks leave to appeal. As this Court recently stated in *R. v. Gosse*, 2012 NLCA 78 at para. 13:

[I]t will be only in rare circumstances that this Court will grant leave to appeal where the appellant has failed to appear for hearings in provincial court Citizens charged with a regulatory offence have a fundamental responsibility to appear at the time set for the hearing of the charges or, if that is not possible, to request that the matter be set for an alternate time.

[7] That said, it was the Crown's failure to provide disclosure that was at the root of Mr. Whelan's confusion. There is no suggestion that Mr. Whelan's mistaken assumption – arising as it did from the Crown's failure to disclose – was not *bona fide*. The Crown cannot rely on Mr. Whelan's

admittedly ill-advised decision not to appear, when its inaction precipitated Mr. Whelan's assumption. This is one of those "rare circumstances" mentioned in *Gosse* which justifies Mr. Whelan having his day in court. Leave to appeal is granted (see *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153), the appeal is allowed, the conviction is set aside and a new trial is ordered.

M. H. Rowe J.A.

I Concur: _____

J. D. Green C.J.N.L.

I Concur: _____

L. R. Hoegg J.A.