

SUPREME COURT OF QUEENSLAND

CITATION: *Cook v Commissioner of Police* [2012] QCA 118

PARTIES: **COOK, John Robert**
(applicant)
v
COMMISSIONER OF POLICE
(respondent)

FILE NO/S: CA No 327 of 2011
DC No 1037 of 2011

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 4 May 2012

DELIVERED AT: Brisbane

HEARING DATE: 12 April 2012

JUDGES: Holmes and Fraser JJA, A Lyons J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **The application for leave to appeal is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL –
PROCEDURE – NOTICES OF APPEAL – TIME FOR
APPEAL AND EXTENSION THEREOF – where the
applicant was convicted and fined for driving without
a driver’s licence while disqualified due to accrual of demerit
points – where demerit points are allocated automatically on
the day of the offence – where the applicant contends mistake
of fact relating to the cancellation of his licence – where the
applicant seeks leave to appeal a refusal of an extension of
time within which to appeal to the District Court – whether
the applicant has any prospect of showing the District Court
judge erred – whether s 24 of the *Criminal Code* 1899 was
raised on the evidence

Criminal Code 1899 (Qld), s 22(1), s 24(1)
State Penalties Enforcement Act 1999 (Qld), s 104(2),
s 105(3)
Transport Operations (Road Use Management) Act 1995
(Qld)
*Transport Operations (Road Use Management – Driver
Licensing) Regulation* 1999 (Qld), s 23, s 25
*Transport Operations (Road Use Management – Driver
Licensing) Regulation* 2010 (Qld), s 75, s 79

McCaskie v Bagby, unreported, Supreme Court of Western Australia, No 1534, 18 April 1975, cited
Ottobrino v Espinoza (1995) 14 WAR 373, cited
Wroblewski v Starling [1987] WAR 233, cited

COUNSEL: The applicant appeared on his own behalf
 D C Boyle for the respondent

SOLICITORS: The applicant appeared on his own behalf
 Director of Public Prosecutions (Queensland) for the respondent

- [1] **HOLMES JA:** The applicant was convicted of one charge of driving a motor vehicle on a road without a licence, having been disqualified from holding one by the allocation of demerit points. He did not dispute in the summary hearing that he was the driver of the vehicle pulled over by a traffic police officer on the day in question (16 September 2009) and that his licence had in fact had been suspended. His contention was, instead, that his evidence raised an honest and reasonable, although mistaken, belief on his part that he was the holder of a valid licence, which the prosecution had failed to exclude. Having delayed some months before applying to the District Court, he was refused an extension of time within which to appeal that conviction and the sentence imposed (a fine and disqualification); the learned judge concluded that he had no prospect of success in relation to either. He now seeks leave to appeal that decision only as it concerns the refusal of an extension of time to appeal against conviction.

Licence suspension

- [2] In the summary hearing, a certificate issued under the evidentiary provisions of the *Transport Operations (Road Use Management Act) 1995* and admitted into evidence showed that the applicant's authority to drive had been suspended, firstly, by a State Penalties Enforcement Registry (SPER) suspension on 5 February 2009¹ and, subsequently, on 5 August 2009 by a three month demerit point suspension, notice of the suspension having been given to the applicant by mail to his last known address. It is not clear from the evidence whether the SPER suspension remained in effect at the time of the offence; in any event, that suspension was not relied on for the purposes of the charge.
- [3] At the time of the applicant's unlicensed driving, the *Transport Operations (Road Use Management - Driver Licensing) Regulation 1999* provided for the allocation and recording of demerit points for particular offences, the relevant provisions being s 23 and s 25.² Section 23(3) provides for the allocation of demerit points in accordance with schedule 3 to the Regulation. (Under schedule 3, speeding offences attract between one and eight demerit points, depending on the extent by which the speed exceeds the relevant speed limit.) Section 23(4) deems demerit points to have been allocated on the day the offence was committed. Under

¹ Section 104(2) of the *State Penalties Enforcement Act 1999* permits the registrar to suspend the driver licence of a debtor who has failed to make payment; under s 105(3) the licence remains suspended until the amount outstanding is discharged.

² The 1999 Regulation has since been repealed and replaced by the *Transport Operations (Road Use Management - Driver Licensing) Regulation 2010*, SL No. 206. It contains provisions, s 75 and s 79, in identical terms to s 23 and s 25 of the 1999 Regulation.

s 23(2)(c), the chief executive may record the demerit points allocated on the driver's traffic history.

- [4] Section 25 of the Regulation provides, inter alia, that when 12 or more demerit points are recorded within a three year period on the traffic history of the holder of a Queensland open driver's licence, certain consequences follow. The licence-holder must be given a notice requiring him to choose between suspension of his licence and agreeing to be of good behaviour while driving for a year. In the absence of notification of such a choice, the licence is suspended for the "requisite suspension period" as defined by schedule 7 of the Regulation;³ the minimum such period is three months.

Honest and reasonable but mistaken belief

- [5] Section 24(1) of the *Criminal Code* 1899 provides:

"(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

The provision must be read with s 22(1) of the *Criminal Code*, which encapsulates the common law principle that ignorance of the law affords no excuse. In this case, the only live issues before the Magistrate were whether the evidence raised the possibility that the applicant drove his car unlicensed under an honest and reasonable, but mistaken, belief of fact that he was the holder of a valid driver's licence, and if so, whether the prosecution had excluded that possibility.

- [6] The sequence of events concerning the applicant's accrual of demerit points and the suspension of his licence emerged through his own evidence and through his cross-examination of the traffic police officer who had intercepted him. In 2008, the applicant received a letter from Queensland Transport advising him that he had accumulated nine demerit points against his licence. The earliest of the relevant traffic offences had occurred on 26 August 2006. In April 2009 (within a three year period from the first offence) the applicant's brother-in-law borrowed his car and committed a speeding offence, attracting another four demerit points. Although the relevant infringement notice was sent to the applicant's residence, he had been unable, for reasons it is unnecessary to explore here, to gain access to his home for a period of about nine months. He saw the infringement notice for the first time on a visit to his house at the beginning of September 2009.
- [7] When he saw the infringement notice, the applicant said, he realised that he would have to pay a fine, but did not appreciate that his licence might be suspended. He agreed that he was aware that infringement notices meant that demerit points had been accrued. However, he said:

"But as I spoke - as in the conversation there recorded with [the traffic police officer], I thought that when I renewed my licence, it actually cleared my points. And that was why I wasn't too worried, I just thought I had to pay the - I thought Joel's got this fine, in my car, and I've just got to pay all this money out. But I had no concept that it'd had actually - demerit point suspended me."

³ Which finds its equivalent in schedule 9 of the 2010 Regulation.

The applicant went on to explain that he had renewed his licence since receiving the letter advising of the accrual of nine demerit points, and believed that renewing the licence expunged any demerit points accumulated.

- [8] In mid-August 2009, the applicant had advised the Department of Transport that he was living at a different address. In early September, he received a notice from SPER which advised him that he had an outstanding fine. The letter was not put into evidence; the prosecution did not object to the applicant's giving secondary evidence of its contents or to the Magistrate's acting on that evidence. In the circumstances, this court should similarly proceed on the basis that the applicant's account of what the letter said is accurate. That account varied slightly, but not significantly, in the telling. In his (recorded) encounter with the traffic police officer, the applicant said it was "a warning that [he] would be suspended if [he] didn't contact them". In evidence, he said that the letter identified the amount owed "and that [he] needed to make – take urgent action to get – to fix it up or there was risk of [his] licence being suspended." When the police officer pulled him over, as the recording showed, he initially assumed that the officer's inquiry related to that letter and the failure to pay outstanding fines, rather than having anything to do with the loss of demerit points.

The Magistrate's decision

- [9] The Magistrate accepted, as was inevitable, that the prosecution had established that the applicant had driven his vehicle at a time when he was not the holder of a driver's licence and at a time when he was disqualified from holding a licence because of the allocation of demerit points. He noted that the demerit points suspension was automatic, advertent to the decision of Rowland J in *Wroblewski v Starling*.⁴ The learned judge there was dealing with an appeal concerning s 24 of the *Criminal Code* (WA), which is based on and reflects s 24 of the *Criminal Code* (Qld), providing an excuse of mistake of fact. The lower court had, in the appellant's absence, suspended his licence for one month, but the subsequent notification of penalty he received had disclosed only that he had been fined. Rowland J distinguished between the circumstances of that case, in which the appellant had no reason to expect that his licence had been suspended, and cases in which the accumulation of demerit points caused an automatic cancellation. In cases of the latter kind, the driver was to be taken to know how the law operated on the facts known to him; but in the former case, the mistake was one of fact. Having regard to *Wroblewski* and a later decision to similar effect, *Ottobriano v Espinoza*,⁵ the Magistrate concluded that the applicant's mistake here was one of law rather than fact.
- [10] In any event, the Magistrate said, the combined effect of the evidence that the applicant had 12 months earlier received a notice advising that he had nine demerit points, his awareness in early September 2009 that an infringement notice had issued for a further offence of speeding, and the absence of any attempt on his behalf to check the status of his licence, was to render any belief on his part that he was the holder of a driver's licence, honest though it might have been, unreasonable. Nor was the assertion of a belief that renewal of a licence discharged demerit points reasonable. Consequently, the prosecution had negatived the operation of s 24 of the *Criminal Code*.

⁴ [1987] WAR 233.

⁵ (1995) 14 WAR 373.

The District Court judge's refusal of an extension of time

- [11] On his application to the District Court for an extension of time within which to appeal, the applicant argued that because, on his construction of s 23(2)(c) of the *Transport Operations (Road Use Management - Driver Licensing) Regulation*, the allocation of points was a matter of discretion on the part of the Chief Executive, it did not follow that his licence was automatically suspended by reason of the last speeding offence recorded against him. (That construction was flawed; in fact, under s 23(2)(c), the Chief Executive may record demerit points allocated on the licence-holder's traffic history; by virtue of s 23(3) and (4), the points are deemed allocated, in the numbers prescribed in schedule 3, from the date of the offence.) His mistake, on this argument, was not one of law, but of fact. It was reasonable, because the SPER notice he had received in early September 2009 did not indicate that his licence was suspended.
- [12] The learned judge, like the Magistrate, referred to *Wroblewski v Starling*. In particular, her Honour noted that an unreported decision referred to in *Wroblewski, McCaskie v Bagby*,⁶ paralleled the circumstances of the applicant's case. There the holder of a probationary licence had committed a traffic offence and did not attend the hearing at which it was dealt with. He was aware that he had been convicted but not that his licence had been suspended. However, licence suspension occurred automatically under the legislation where a probationary licence-holder was convicted of a traffic offence. Consequently, s 22 of the *Criminal Code* (WA) (which is to the same effect as s 22 of the *Criminal Code* (Qld)) was held to apply: the mistake involved ignorance of the law.
- [13] In the present case, her Honour concluded, the applicant's mistake was about the operation of the legislation and its effect, and was, it followed, one of law. Even if that were not so, in circumstances where the applicant had a year previously been warned that he had accumulated nine demerit points, was aware of the subsequent speeding offence and had, shortly prior to being pulled over on 16 September, been warned that he was at risk of suspension of his licence, the Magistrate's finding that it could not have been reasonable for him to believe that he held a licence was fairly open. She refused the application for an extension of time.

The applicant's contentions in this court

- [14] The applicant argued here that a s 24 excuse will only be negated in a licence suspension case where, on the facts known to the defendant, suspension is the automatic result of the law's operation. His point was that he did not know the necessary underlying facts. He reiterated the argument made below, that the allocation of points was a matter of discretion on the part of the Chief Executive under s 23(2)(c) of the *Transport Operations (Road Use Management - Driver Licensing) Regulation*, and he was not to know whether points had, in fact, been allocated. The infringement notice he saw in relation to the April 2009 speeding offence stated that allocation of demerit points would occur on payment of the notice. In addition, he had no means of knowing whether the notice to choose between suspension and being of good behaviour, which s 25 requires, had been issued.
- [15] The applicant relied heavily in his argument on the letter he received from SPER in early September because it referred to the risk of suspension of his licence for non-

⁶ Unreported, Supreme Court of Western Australia, No 1534, 18 April 1975.

payment of fines, but did not suggest that it had been already been suspended by reason of an accumulation of demerit points. He identified this passage from his evidence in the summary hearing as constituting evidence of his resulting mistaken belief:

So - but there was a third letter that I haven't been able to get hold of, but it just said the amount that I owed and that I needed to make - take urgent action to get - to fix it up or there was risk of my licence being suspended. And that was the - that as the one that I was most - when I got pulled over, I thought that must be the reason why.

And, he contended, his reaction to the police officer as shown in the recording the officer had made, of thinking that the interception related to that letter, showed that he had no conception that the licence had been suspended because of demerit points. In the circumstances, his belief that he still held a licence was reasonable.

Conclusions

- [16] The applicant is correct, in my view, in saying that even in an automatic cancellation case, there may be scope for mistake of fact about whether the underlying events which will give rise to cancellation have occurred. Such a mistake might arise in relation to whether conduct attracting demerit points had in fact occurred; or how the Chief Executive had actually exercised what appears to be a discretion in relation to the recording of points against a traffic history; or whether a choice to be of good behaviour rather than have the licence suspended had successfully been notified to the Chief Executive. The allocation of demerit points, however, is automatic, being legislatively deemed to occur on the day of the offence.
- [17] In this case, the applicant was made aware in 2008 that he had accumulated nine demerit points, the earliest of which occurred on 26 August 2006. In late August or early September 2009, he became aware of the infringement notice for an April 2009 speeding offence, and knew that such notices carried demerit points. He did not claim at the summary hearing, as he did in submissions here, to be in doubt about when the relevant points would be allocated, but any confusion would, in any event, have been as to a matter of law. By virtue of s 23(4), they were taken to be allocated in April 2009 when the offence was committed. Any statement on the infringement notice about when points would be allocated could not alter that legal position. Nor did the applicant profess in giving evidence to be under any mistake of fact about whether the Chief Executive had recorded the demerit points on his traffic history or whether he had given notice of a choice to agree to be of good behaviour while driving.
- [18] The only mistakes adverted to by the applicant at first instance were a general belief that his licence was not suspended, because he did not appreciate that he had accrued sufficient demerit points for that to occur, and a more specific notion that renewal of his licence meant that his demerit points would be expunged. He did not ascribe any particular belief concerning any element of the offence to his receipt of the SPER letter. The passage on which he relied, set out at para [15] above, shows, at the highest, that he had attributed the police officer's actions to that letter, rather than to the prospect that his accrued demerit points had caused suspension of his licence. The notion that renewal of a licence meant the removal of accrued demerit points was, on any view, a mistake of law. The applicant's failure to appreciate that

his demerit points had reached a point at which his licence could be suspended falls short of a positive mistake. In any event, it turns on a lack of understanding of the legal consequences of the successive offences, of which he was aware, in resulting in an accumulation of points beyond the permitted limit.

- [19] The evidence before the Magistrate simply did not raise a possibility of mistake of fact which the prosecution had to exclude. And even if one were to accept, although the applicant did not say so in the summary hearing, that the SPER letter had instilled in him a positive belief that his licence was in force, that belief could hardly have been reasonable in circumstances where, on his account, the letter said that his licence was at risk of suspension if he did not make payment, and he had not, in the week or two between its receipt and his interception by the police officer, made that payment.

Orders

- [20] Given those conclusions, I do not consider that the applicant has any prospect of showing that the learned District Court judge should have extended the time for appealing against conviction. I would refuse the application for leave to appeal. The respondent did not seek costs. Accordingly, no order should be made in that regard.
- [21] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.
- [22] **ANN LYONS J:** I agree with the reasons of Holmes JA and with the order proposed.