COURT FILE No.: St. Catharines
DATE: 2013.03.26

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

MATTHEW DUNCAN

Before Justice Fergus ODonnell
Heard on 27 July and 23 October, 2012
Oral decision rendered on 23 October, 2012
Reasons for Judgment released on 26 March, 2013

Ms. C. Lapointe ..... for the Crown
Matthew Duncan ..... on his own behalf

ODonnell, J.:

Overview

1. "You should get out of town", the man said.
2. And so began the journey that resulted in my path intersecting with Matthew Duncan's path. And thence to these reasons, with a slight detour through territory that might have confused Lewis Carroll.
3. I suppose that I should clarify that there was no menace in the man's directive to me to get out of town. He was a friend and a colleague in two careers. His suggestion had been that he and I should change positions for a fortnight, giving him exposure to the realities of the northern reaches of Toronto, while I would

enjoy a similar change of environment in the more sylvan environs of Niagara Region. I might even see a few plays in the evenings, he pointed out.

4. And thus I came to meet Mr. Duncan.
5. At heart, Mr. Duncan's case was unremarkable. A minor alleged *Highway Traffic Act* offence led to a police-citizen interaction in the parking lot of Mr. Duncan's apartment building in the wee hours of the morning. A request that Mr. Duncan produce his licence led to an alleged refusal, which led to an attempt to arrest him, which led to a struggle, which was captured on a very poor quality video taken on a mobile phone, at the end of which Mr. Duncan found himself being placed under arrest for allegedly assaulting a police officer. Nothing unusual in all that. The bread and butter of provincial court.
6. Of course, I hadn't counted on the freemen on the land.
7. Mr. Duncan was self-represented. Other than a mildly annoying disinclination on his part to stand when addressing the court (although he did stand when questioning witnesses), he was a rather pleasant young man. Unfortunately, he was a rather pleasant young man whose mind was filled with what my late father would have called "notions".[1]
8. It has been said that, given enough time, ten thousand monkeys with typewriters[2] would probably eventually replicate the collected works of William Shakespeare.[3]

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[1] I should point out that Mr. Duncan preferred not to be called Mr. Duncan but rather Matthew. There was some mumbo-jumbo about the natural person and the administrator and that one of them might have been Mr. Duncan and one might have been Matthew and one, but not both, of them might have been the person speaking to me in court (while seated). However, when I read the "affidavit of truth" presented to me by Mr. Duncan, I noticed that it had been sworn by someone whose first name was clearly "Matthew" and whose second name looked very much like "Duncan" and certainly began with a "D" and a "u". Since Mr. Duncan agreed that the affidavit had been sworn by him and accepted my proposition that there is no "D" and no "u" in the name Matthew, I continued to refer to him as Mr. Duncan through the proceedings.

[2] For readers under the age of thirty or so, the "typewriter" was a mechanical device used for creating documents that pre-dated the computer and lacked some of the computer's more annoying characteristics, in particular the computer's facilitation of "cutting and pasting", which is undoubtedly one of the four horsemen of the modern apocalypse and which has cost many trees their lives and many lawyers and judges their eyesight.

Sadly, when human beings are let loose with computers and internet[4] access, their work product does not necessarily compare favourably to the aforementioned monkeys with typewriters.[5]

9. Thus it was that the trial began with Mr. Duncan objecting to us proceeding on the basis that I had no jurisdiction over him. Mr. Duncan provided me with an "affidavit of truth", a rather substantial volume that appeared to me to be the result of somebody doing a Google search for terms like "jurisdiction" and the like and then cobbling them together in such a way that it makes James Joyce's *Ulysses* look like an easy read. This hodgepodge of irrelevancies relied upon by Mr. Duncan was one of the misbegotten fruits of the internet. Finding it was a waste of Mr. Duncan's time; printing it was a waste of trees and my reading it was a waste of my time and public money. With that volume as his starting point, Mr. Duncan spent some time explaining to me that I had no jurisdiction to try him, that he was not a citizen of the province or the country, that he was not a person as defined by my definitions, that there was no contract between him and me to

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[3] "William Shakespeare" was a sixteenth century English poet and playwright of some skill. He is remarkable insofar as he and Joseph Conrad are among the very few English-language authors of particular merit who were not either Irish or Scottish.

[4] The "internet", also known as the "world-wide web" is a bi-polar electronic Leviathan that has erupted on the world scene in the past two decades. In its benevolent manifestations, it has enormously increased and expedited access to useful information of all sorts, increased global awareness of myriad events, facilitated family and commercial communication across national boundaries in the blink of an eye and helped topple dictators; it is probably fair to say that its advent is of no less significance than the invention of the printing press. However, just as the printing press has been put to odious use from time to time, the internet has its own Jekyll and Hyde nature: it is a near certainty that future generations will look back at these decades, obsessed as we are with the twin behemoths of "reality" television and the "ooh, look at me, I must tell the world what I had for breakfast" narcissism of social media and at the billions of hours thus lost to a near psychotropic electronic escape from any useful pursuit and wonder if Aldous Huxley only got a few details wrong in *Brave New World.* For the purposes of this case, the relevance of the internet is its un-policed "garbage in/garbage out" potential and its free-market-of-ideas potential to lure in otherwise pleasant and unsuspecting folk with all manner of absurdity and silliness.

[5] Lest anyone misunderstand me, this is by no means intended to compare Mr. Duncan to a monkey. As I have noted, Mr. Duncan seemed a decent fellow who expressed himself well (other than when rambling a bit too long about jurisdiction, as noted herein) and whose principal shortcomings appeared to be too much free time with internet access and too little discernment in whose example he followed. The reference to monkeys with typewriters is intended solely to point out that technological "advances" are sometimes used to such ends that one wonders if perhaps the Luddites didn't have a point.

give me status to sit in judgment over him and so on. As I have said, Mr. Duncan struck me as a perfectly pleasant young man, but on this issue he seemed a bit obtuse. I suppose that if perfectly pleasant young men weren't led astray from time to time by drugs, alcohol, broken hearts or rubbish on the internet, then the dockets of provincial court wouldn't be quite as plump as they usually are.

The Evidence

10. After much to-ing and fro-ing about jurisdiction, either Mr. Duncan or Matthew or his administrator (I never was quite sure which, they were all talking through the same corporeal form) entered a plea of "not guilty" on Mr. Duncan's behalf and we proceeded to the evidence.

11. The Crown's first witness was Constable Paul Eles, a relatively junior member of the Niagara Regional Police Service and the alleged victim of the assault to resist arrest. Constable Eles testified that on the night of 1-2 December, 2011, he and his partner, Constable Pilkington, were on uniformed patrol in Grimsby at 2:48 a.m. when they saw a car driven by Mr. Duncan make a right turn onto Slessor Boulevard in Grimsby without signalling the turn. The car then pulled into the parking lot of an apartment building on Slessor, where Mr. Duncan lived, and the police car pulled in after Mr. Duncan's car. Mr. Duncan and Constable Eles got out of their cars and Constable Eles asked Mr. Duncan for his identification, specifically a driver's licence. Later, in response to a rather leading question on a highly material point, Constable Eles said that he also asked for even a verbal identification. He said that he and Constable Pilkington repeatedly asked for identification and warned Mr. Duncan that he would be arrested if he failed to do so.

12. At some point in this interaction, Constable Eles said that Mr. Duncan pulled out a red binder and told Constable Eles that he would be giving him a fee schedule. He told the officers that they had no jurisdiction over him and accordingly had no authority to arrest him. Constable Eles then told him that he was under arrest for failure to identify under the *Highway Traffic Act*. Mr. Duncan then allegedly pulled away from Constable Eles's effort to grab his arm and started walking towards the apartment building. Constable Eles repeatedly told him to put his hands behind his back and stop resisting arrest, but Mr. Duncan put his hands to his front instead. A struggle ensued with Mr. Duncan ultimately being subdued and handcuffed about five minutes after being told he was under arrest.
13. Constable Eles described the alleged assault on him thus: he had tried to ground Mr. Duncan by grabbing his left leg. While he was bent over for that purpose, he felt a pull and push on his back. At this point, Mr. Duncan was off to Constable Eles's right and Constable Pilkington was to the right of Mr. Duncan. Later, when they were up by a fence near the back door of the building, Mr. Duncan was swinging his arms. Mr. Duncan ignored a warning by Constable Pilkington that he would be "Tasered" and he was, in due course, "Tasered", taken to ground and handcuffed.
14. In cross-examination, Constable Eles said that he and his partner were directly behind Mr. Duncan when he failed to signal.
15. Constable Shane Secord is an officer with the NRPS technological crime unit. He led in evidence a YouTube video of the interaction between Mr. Duncan and the police that Constable Pilkington had brought to his attention. Given the darkness, the video was of very poor quality and not particularly helpful.

16. Constable Pilkington also testified. He generally confirmed Constable Eles's description of the events surrounding Mr. Duncan's stop and the requests for identification. However, Constable Pilkington's description of Mr. Duncan's allegedly assaultive behaviour went beyond that described by Constable Eles. By Constable Pilkington's telling, early on Mr. Duncan tried to push both him and Constable Eles and was kicking at both of them. Then, when Constable Eles was bent over to grab Mr. Duncan's leg, Constable Pilkington had a better viewing angle and, understandably, could actually see Mr. Duncan grabbing Constable Eles's body armour from behind. Constable Pilkington responded by grabbing Mr. Duncan off Constable Pilkington and they all continued their dance towards the back door of Mr. Duncan's apartment building. Constable Pilkington said that Mr. Duncan tried to grab his Taser, but Constable Pilkington kept him away from it and Mr. Duncan continued resisting. According to Constable Pilkington, Mr. Duncan then got away from him and Constable Eles and Constable Pilkington moved in behind Mr. Duncan. From that perspective, Constable Pilkington saw Mr. Duncan kicking towards Constable Eles and had his fist raised in the air in a "hay maker" position and swung it at Constable Eles. In response to this, Constable Pilkington said that he drew his Taser, removed the barbed cartridge and stunned Mr. Duncan with direct contact between the shoulder blades. This caused Mr. Duncan to go to ground, whereupon he was cuffed, although, according to Constable Pilkington he continued to struggle after being handcuffed.

17. It will be noted that there are some discrepancies between the versions of Constables Eles and Pilkington. Constable Pilkington makes no reference to warning Mr. Duncan about the use of the Taser. Constable Pilkington refers to

substantially more assaultive behaviour than Constable Eles, including the raised "hay maker" towards Constable Eles, who Constable Pilkington believed was actually face on to Mr. Duncan at the time of this significant punching motion. These are arguably not trivial discrepancies, although they may reflect the inherent differences in two people seeing the same event from different perspectives.

18. Constable Pilkington specifically testified that the reason for the traffic stop, which led to the demand to identify, which led to the arrest for failure to identify was the failure to signal the right-hand turn.

19. We did not finish Mr. Duncan's trial on the first day. As I left court that day and contemplated returning in the autumn to finish the trial, it occurred to me that I would have to write rather a lot to address the various procedural issues raised by Mr. Duncan in his tome and his verbal arguments. Now, don't get me wrong about this; I'd be happy to write until the cows came home about matters of substance relating to the guilt or innocence of the defendant and the liberty interests of a citizen *vis a vis* the constabulary, but the idea of having to disentangle all of the palaver, nonsense and gobbledygook in the document Mr. Duncan presented to me was not particularly appealing.

The Gods Are Kind

20. There is an ancient proverb to the effect that "those whom the gods would destroy, they first make mad". The prospect of disentangling Mr. Duncan's adopted argument and his volume of internet-derived gibberish made me wonder if, for some reason, the gods had me in their cross-hairs. This concern, however, was dissipated in mid-September, 2012 when the gods made their benevolent nature clear.

21. If December 7, 1941 is a day that will live in infamy, for anyone faced with "freemen on the land"[6] or similar litigants, 18 September, 2012 is a day that will shine in virtue. On that day, Mr. Justice J.D. Rooke, the Associate Chief Justice of the Alberta Court of Queen's Bench, delivered a judgment in the matrimonial case of *Meads v. Meads* 2012 ABQB 571. Given that the judgment weighs in at a mammoth 736 paragraphs, I wonder if these litigants are perhaps more prevalent in wild rose country than they are in Ontario. Be that as it may, Justice Rooke's comprehensive judgment on what he labels "Organized Pseudolegal Commercial Argument Litigants" (of various iterations), wonderfully frees me from having to address any more effort to the jurisdictional arguments raised by Mr. Duncan. As I have said, there is a lot of patent rubbish on the internet; if Mr. Duncan wishes to while away a few hours more productively on something that actually makes sense, I commend Justice Rooke's judgment on CanLII.org to him.

22. There is no merit to Mr. Duncan's jurisdictional argument. Such arguments are a waste of the court's time and resources, a selfish and/or unthinking act of disrespect to other litigants and deserving of no further attention, energy or comment.

Has The Crown Proved The Charges Beyond A Reasonable Doubt?

23. With the distraction of the jurisdictional issue now safely off-stage, we now have the luxury of focusing on old-fashioned notions like the merits of the case.

[6] I should note that Mr. Duncan said on the second day of the trial that he did not consider himself to be a freeman on the land, although his approach did seem to share a lot in common with theirs. Nothing hinges on the application of a particular label to Mr. Duncan's litigation strategy. As is made clear in the Alberta Queen's Bench decision of *Meads v. Meads,* 2012 ABQB 571, to which I refer later, remarkably similar obstructionist litigations strategies come to court with hugely divergent labels. With his whole life ahead of him, one can only hope that Mr. Duncan will not only eschew formal adherence to that line of thinking, but will forsake all of the odds and ends and bits and pieces that accompany it and similar silliness.

Indeed, even before Justice Rooke's gift to the judiciary, when we broke at the end of the first day of the trial in July, at which point the Crown had closed its case, I suggested to the self-represented Mr. Duncan that he might want to use some of his internet skills to look at the actual issues related to the question of assault to resist arrest in the context of a *Highway Traffic Act* investigation, since it seemed to me that a defendant with counsel might be inclined to advance a non-suit motion in response to the evidence I had heard.

24. When we returned to continue the trial, before calling on Mr. Duncan to announce if he was calling a defence, I asked the Crown to comment on whether or not there was a case to meet. I asked this because it seemed to me that, whatever evidence the state *might* theoretically have possessed, the evidence *as articulated at trial*, was seriously deficient. It also seemed to me that the case was based on an incomplete understanding of the *Highway Traffic Act*, i.e. that in the words of another, more ancient, Matthew, the Crown's case was a house built upon sand. After hearing from the Crown, I dismissed the charge against Mr. Duncan with more detailed reasons to follow, these being those reasons.

25. It is self-evident that a charge of assault to resist arrest requires proof of a lawful arrest. This is not a *Charter* issue; it is a fundamental element of the offence. The requirement reflects the important fact that in a democracy agents of the state operate within limits. If an arrest is unlawful, resistance to that arrest is not unlawful. There are relatively few offences under the *Highway Traffic Act* for which the police have a power of arrest. In the present case, the purported underlying arrestable offence committed by Mr. Duncan was his failure to identify himself under the *Highway Traffic Act*. In turn, his obligation to identify himself must be based on a lawful exercise of police power, in this case under the

Highway Traffic Act. While there may be other lawful foundations for a police demand to a driver to identify himself, the only one articulated in this case was Mr. Duncan's failure to signal his right-hand turn, which would allegedly make out an offence under s. 142 of the *Highway Traffic Act*.

26. The problem with the Crown's case is that it is not an offence merely to make a turn or lane-change without signalling. That is not what the *Highway Traffic Act* says. Rather, the *Highway Traffic Act* provides a materially narrower offence as follows:

> **142.** (1) The driver or operator of a vehicle upon a highway before turning to the left or right at any intersection or into a private road or driveway or from one lane for traffic to another lane for traffic or to leave the roadway shall first see that the movement can be made in safety, and ***if the operation of any other vehicle may be affected by the movement shall give a signal plainly visible*** to the driver or operator of the other vehicle of the intention to make the movement. R.S.O. 1990, c. H.8, s. 142 (1) [emphasis added]

27. On the evidence led and articulated before me in Mr. Duncan's trial, there is absolutely no basis for me to conclude that the operation of any other vehicle might have been affected by Mr. Duncan's allegedly un-signalled turn. Neither officer adverted to any impact on them by the alleged failure to signal. Neither did they refer to any other vehicle being affected by it. Indeed, there is no reference whatsoever by either of them to the presence of any other vehicle anywhere close to them and no rational basis for me to conclude there even were other vehicles nearby just before 3 a.m. It is a fact of life that the *Highway Traffic Act* often serves as the gateway into many more serious criminal investigations, but it is not *carte blanche* for all purposes. Here the police purported to rely on a specific provision of the statute and they either failed to appreciate what the statute actually requires or failed to explain how the section was engaged by Mr. Duncan's alleged behaviour that night. As I have said

earlier, there may be other provisions in the *Highway Traffic Act* that the officers could have relied upon to stop Mr. Duncan, but none was adverted to.

28. If no lawful basis for the stop has been articulated, there was no lawful basis for the demand for identification. If there was no lawful demand for identification, the arrest for the alleged "failure to identify"[7] was unlawful. If the arrest was unlawful, assuming that Mr. Duncan resisted as described, he was entitled to do so.

29. Applying the test for a non-suit, given the absence of evidence of a lawful arrest there was no evidence before me upon which a reasonable trier of fact, properly instructed could find Mr. Duncan guilty of the charge of assault to resist arrest, so I did not call upon Mr Duncan to advance a defence.

Conclusion

30. Near the beginning of his comments to me at the outset of this trial, Mr. Duncan proclaimed that he had no obligation to produce identification to the police officers. In that moment, before he continued down the *Alice in Wonderland* garden path of trusts and jurisdiction and dollar amounts and contracts and natural persons and administrators, Mr. Duncan momentarily hit upon the concept that would ultimately lead to his acquittal, albeit not by the rather circuitous and, with all due respect, silly path he wanted to go down. Applying the rather more prosaic concepts of the elements of the offence and an analysis of "who did what to whom why", the only conclusion reasonably open to me on the evidence at this trial was that the police and Crown failed entirely to articulate a lawful foundation for the attempt to arrest Mr. Duncan. The evidence before

[7] I shall leave for another day the question of whether or not Mr. Duncan did fail to identify himself. There is obviously the unclear factual question of whether or not he was properly asked to identify himself in any of the manners acceptable under the *Highway Traffic Act*: see the decision of Rosenberg, J.A. in *R. v. Plummer*, 2006 CanLII 38165. There is also the question of whether, in proffering his red binder, which both officers refused, but which contained documents identifying him, Mr. Duncan had in fact offered proof of identity.

me failed to demonstrate that the purported arrest of Mr. Duncan was lawful. A citizen is entitled to resist an arrest that is unlawful. Thus, even assuming that I were to accept the police evidence of Mr. Duncan's actions as making out the assault beyond a reasonable doubt, an issue that is not entirely free of controversy, a nonsuit and thus an acquittal is the only outcome that is lawfully open to me on the evidence before me.

31. Mr. Duncan is entitled to his acquittal and none should begrudge him it. In assessing how much of the "freeman of the land" type of philosophy that he wishes to adopt in future, a philosophy that appears to focus to an unhealthy degree on freedom from societal obligations, he might, however, wish to contemplate some more productive reading on the internet, reading which emphasises the importance of responsibilities as much as society's ongoing and sometimes exclusive fixation on rights. None of us is the centre of the universe, or, as best expressed by John Donne, "No man is an island entire of itself; every many is a piece of the continent, a part of the main." Mr. Duncan did not strike me as a fool and individual acts seldom define people, but the red binder he offered to the officers and the "affidavit of truth" he offered to me in court were regrettable descents into foolishness and Mr. Duncan would be well-advised to be more discriminating on what parts of the internet he models himself upon in the future.

Released: 26 March, 2013