

CITATION: *Police v Tucker* [2007] NTMC 045

PARTIES: STEVEN PAUL NORRIS

v

WAYNE TUCKER

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Katherine

FILE NO(s): 20706482

DELIVERED ON: 30 July 2007

DELIVERED AT: Darwin Via Video Conference to Katherine

HEARING DATE(s): 4 July 2007

JUDGMENT OF: Ms Melanie Little

**CATCHWORDS:**

Domestic Violence Act – allegation of breach of domestic violence order – meaning of expression under the influence of liquor – whether defendant was under the influence of liquor

**REPRESENTATION:**

*Counsel:*

Complainant: Mr Walsh  
Defendant: Mr Baker

*Solicitors:*

Complainant: Summary Prosecutions  
Defendant: NTLAC

Judgment category classification:

Judgment ID number: [2007] NTMC 045

Number of paragraphs: 21

IN THE COURT OF SUMMARY JURISDICTION  
AT KATHERINE IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20706482

[2007] NTMC 045

BETWEEN:

**STEVEN PAUL NORRIS**  
Complainant

AND:

**WAYNE TUCKER**  
Defendant

REASONS FOR DECISION

(Delivered 30 July 2007)

Ms LITTLE SM:

1. The defendant is charged with breaching a restraining order on 6 March 2007 pursuant to s 10 *Domestic Violence Act*. He has pleaded not guilty and a hearing was conducted. Prosecution bears the onus of proof with respect to each and every element of the offence and if they do not prove the elements of the offence beyond reasonable doubt the defendant is entitled to be found not guilty. All evidence has been taken into account and I now summarise the evidence.
2. The first witness called was Bennan Rossiter from the Katherine Police Station. He has been a police officer for four and a half years. On 6 March 2007 he was on duty on night shift with Constable Milligan. A call was received by Constable Milligan from Beryl Tucker. That call was at 12.45am. A check was undertaken with respect to a current Domestic Violence Order with Beryl Tucker as the named person and the defendant being Wayne Tucker. He was shown a Domestic Violence Order which became Exhibit P1. The clauses in P1 as follows:

The Court hereby orders that for twelve months the defendant be restrained and

1. Must not assault or threaten to assault Beryl Kate Tucker directly or indirectly.
2. Must not cause or threaten to cause damage to property in the possession of Beryl Kate Tucker.
3. Must not act in a provocative or offensive manner towards the aggrieved person Beryl Kate Tucker.
4. Must not approach or remain at any place where Beryl Kate Tucker is residing, working or visiting whilst under the influence of liquor or any other substance.

3. The order is dated 16 February 2007 and is to be in force to 16 February 2008. The defendant in these proceedings, Wayne Tucker, is the defendant named in the restraining order. P1 also includes an unattested declaration of service dated 16 February 2007 serving the order on Wayne Tucker on that date.

4. The police went to 28 Heron Crescent and saw Mr Tucker at that address. The officer knew Mr Tucker having had numerous dealings previously with him. Mr Tucker was sitting inside the yard by the gate. The officer asked what happened and asked his name. The defendant said that there had been a bit of trouble and his missus had been carrying on. Some enquiries were made and the officer ascertained the defendant had been drinking. He had made checks and Mr Tucker was not to be near Beryl Tucker after he was under the influence of alcohol. Mr Tucker said that he had had a few beers and the officer asked him to submit to a breath analysis. Mr Tucker appeared intoxicated and he noted that he had glassy eyes and had a strong smell of alcohol. He also noted that his language was slightly slurred. He has seen many people intoxicated previously. Mr Tucker voluntarily submitted to the breath analysis and a positive alcohol reading test was obtained. He had no recollection of the actual reading but could recall it was positive. The breath analysis reading only confirmed his belief that Mr

Tucker was intoxicated. He arrested Mr Tucker. He was cautioned and a tape was undertaken in the Police Cells at 1.41am on 6 March 2007. That tape was played to the Court and was called a section 140 tape. That became Exhibit P2. I now summarise the material in the tape.

5. The defendant was cautioned at the beginning of the tape. He was then asked how he felt, whether he felt drunk or sober. The defendant said "I am fairly sober". He could understand what was being said by the police officer. He said he received the Domestic Violence Order three weeks before and it related to his wife Beryl Tucker. The order was instigated by the police. He complied for a few weeks. His wife works and he does not work at the moment. His wife likes a drink after work. This time he had a couple with her and then they started to disagree. The condition is that he is not to drink alcohol. He had half a dozen maybe eight drinks. They were Toohey's New. He was asked why he breached the order and he replied that his wife wanted to have a drink and she did not feel right if she was drinking on her own and so he had a couple with her. He said he was breaching the order and he had done the wrong thing. That was the end of the tape.
6. The officer was then cross-examined. He was asked whether he had made a mistake when he had read the terms of the order. He said it was possible that he had made a mistake in reading the terms of the order. He said that he believed paragraphs three and four had been breached, that had been the basis of the arrest. It was put that in his statutory declaration of 6 March 2007 it had been stated the defendant was arrested as he had been consuming alcohol not because he was intoxicated. The witness said he formed the view that the defendant had been drinking and the breath analysis test shows whether it is positive or negative. It was put that the defendant had been arrested as the police officer had thought that he could not drink any alcohol as opposed to being intoxicated. The officer agreed that he may have misworded his statement. His observations were that the defendant was under the influence of alcohol. He agreed that parts of his statement were

incorrect. It was put that there was no slurred speech audible on the section 140 tape. The officer replied that the call to the house was made at 12.45 and the tape was made an hour later. He agreed he could not point to slurred speech on the section 140 tape. It was put to him that the defendant was not intoxicated at the time of arrest. That was denied and the witness stated that he formed the opinion that the man was intoxicated. He agreed that this had not been put into his statement. In re-examination he said that when he left the Katherine Police Station he intended to establish what had happened between the parties and to see if there was a breach of a restraining order.

7. The next witness called was Aaron Milligan from the Katherine Police Station. On 6 March 2007 at approximately 12.45am he received a call from a person who said she was Beryl Tucker. He formed the opinion that the woman required urgent assistance. He did a name check on the identification and there were alert checks on the police system. There was a Domestic Violence Order in place. The order was in terms of no assault, no damage or not be in the presence of a person while intoxicated. He was despatched to the location of 28 Heron Crescent with Officer Rossiter. A man was sitting in the driveway and the police spoke to him. The man was sitting one to two metres away from the officer when they spoke to him. The man identified himself as Wayne Tucker. That person was the defendant in a Domestic Violence Order. He was asked if he had had a drink and he said he had had some alcohol. Mr Tucker said he had had an argument with his partner. He did not say how many drinks he had had. Mr Tucker stated that when his wife had come back from work they had been drinking. The witness observed that the man appeared intoxicated. The man smelt of alcohol, he had difficulty choosing his words and his speech was slightly impaired. There was some slurring of words. The witness had not dealt with this man before. His partner asked the man to do a hand held breath analysis and a positive reading for alcohol was obtained. Mr Tucker was arrested and placed into the car. Upon speaking to the man at the

residence he admitted he had been consuming liquor and the man appeared intoxicated. The man was arrested. He did not speak to Beryl Tucker. He stayed with the defendant whilst his partner spoke with Ms Tucker. She has not made a complaint.

8. In cross-examination he agreed he had prepared his statement when the matter was fresh in his mind. He was asked why he had not mentioned the defendant being intoxicated in his statement and he said "I have no idea". He pointed out that he did set out in the statement that the breath analysis reading was positive and he indicated that would show a possibility of alcohol being consumed. He stated it must not have seemed relevant to make the comments about the observations regarding the consumption of alcohol in his statement. In hindsight he agreed that it is important to put these observations in his statement. He was not able to comment on how the defendant's judgment was impaired. From his observations the defendant had been consuming alcohol and the breath analysis test had confirmed that. He was not present at the section 140 tape and had not asked the defendant how many drinks he had had. After training he had been on the road since approximately February 2007, approximately one month before this incident. In re-examination he said that the breath analysis gives an accurate reading and is a presumptive indicator of alcohol. That was the case for the prosecution. There was a case to answer and the defendant was called.
9. The defendant gave evidence that he lives at 28 Heron Crescent and is a boiler maker. On 6 March 2007 he was at that house with his wife Beryl and their children. They have been together for nineteen years. There is currently a Domestic Violence Order in place. On 6 March 2007 he had been drinking Toohey's new beer. His wife was drinking with him. He had six cans of beer that day commencing at 6.00pm. They had tea at 7.00pm, having a big meal including potatoes and vegetables. Then he had a couple more beers after his meal. He had consumed six cans before the police arrived. He has a long history of drinking and a normal drinking session

would involve twelve to fifteen cans of beer. He would feel ok after twelve to fifteen cans of beer and considered he would still be coherent at that stage. A big drink up would be up to twenty cans of beer. He considers himself an experienced drinker and six cans would not have much effect on him at all. He was sitting outside as he had been told to sit outside if they were having an argument. On this occasion they had had a disagreement but he had not threatened his wife. He did tell the police how much he had had to drink. He was nervous when being questioned. He was not affected by alcohol. He had no trouble speaking or walking. He believed he was not allowed to drink alcohol at all under the domestic violence order.

10. In cross-examination he said the group program called 'Peace at Home' helps you if you are having problems at home. That programme and the police tell him to walk away from a situation. He agreed there is a Domestic Violence Order and that he had been served with a copy of that order. He agreed he knew the terms of the order. He agreed he was drinking with his wife on that night. He did not believe he was under the influence of alcohol. In the tape with the police he had said he had six to eight drinks. That was under half of what he would normally drink. He had not called the police. He agreed it was probably his wife who had called the police. There had been a disagreement at the home but it was not like normal. He was not under the influence of liquor after having had six cans. He agreed that when the police arrived he had thought he was not allowed to drink at all. That was the close of the defence case.
11. Section 10 of the *Domestic Violence Act* is a strict liability offence. The matters in dispute in this matter are of very limited compass. The matters which are not contentious will be dealt with firstly. I find it proven beyond reasonable doubt that at the date of the alleged incident, 6 March 2007 the defendant Wayne Tucker was a person against whom a restraining order has been issued in accordance with the *Domestic Violence Act* and that the order was in force as at that date. The terms of the order are set out in Exhibit P1.

I find it proven beyond reasonable doubt that the defendant had been served with a copy of the order prior to 6 March 2007, namely on 16 February 2007. Service is proven by the declaration of service in Exhibit P1. I find it proven beyond reasonable doubt that the order was still in force as at 6 March 2007 – it being due to expire on 16 February 2008.

12. It is alleged that the defendant failed to comply with the terms of that order. In particular it is alleged that the defendant failed to comply with term 4 of that order namely that the defendant;

4. Must not approach or remain at any place where Beryl Kate Tucker is residing, working or visiting whilst under the influence of liquor or any other substance.

13. The first matter to be discussed with respect to clause 4 are the last four words in that clause “or any other substance”. It is almost certain that what was intended by this statement were words such as “or any other intoxicating substance” or a reference to intoxicating substances other than alcohol, such as illicit drugs. As it presently reads the defendant is not to be under the influence of any type of substance at all, which could include non-alcoholic drinks, and arguably could even include food. The final four words from clause 4 can be severed from clause 4 without rendering the rest of the clause meaningless, and consideration of the case will ignore the last four words in clause 4.
14. The defendant has admitted, after a caution, that he had been consuming beer on the night in question. When spoken to by the police on the night he said that he had consumed six to eight Toohey’s new beers. In his evidence to the Court he said he had had six cans of Toohey’s new beer. I find that Toohey’s new beer is liquor. His evidence was that he had been drinking beer from 6.00pm. He was arrested at 12.45am. The police obtained a positive reading for alcohol from the defendant’s breath analysis at that time.



15. The police gave evidence as to the observations they made as to the effect they believed the alcohol had had on the defendant as follows:

Officer Rossiter – he appeared intoxicated, the defendant had glassy eyes, he smelt strongly of alcohol and his language was slightly slurred.

Officer Milligan – he had an appearance of being intoxicated, he smelt of alcohol and had difficulty choosing his words. His speech was slightly impaired and he was slurring some words.

16. The defendant spoke on tape following a caution. He was asked “how do you feel now, are you drunk or sober” and he answered “I am fairly sober”. This was said one hour after his arrest. In his evidence he says that he was not affected by alcohol at the time he was apprehended by the police. Further he said he was not under the influence of alcohol after consuming the beers.
17. I accept there is some real confusion as to what the various parties believe the terms of the order were. The defendant himself believed that the order was that he was not to drink at all. The cross examination of Officer Rossiter was not put on the basis of the actual terms of the order but rather put on the basis that the order was that the defendant was not to be intoxicated. In fact the order was that the defendant was not to be under the influence of liquor and accordingly questions and answers which related to whether the defendant was intoxicated will be considered in light of the actual order.
18. I find it proven beyond reasonable doubt that the defendant had consumed liquor and that such consumption occurred at a place where Beryl Tucker was residing, namely 28 Heron Crescent Katherine. What does the term “whilst under the influence of liquor” in clause 4 of the domestic violence order mean ? The question of whether a person is under the influence of liquor is a question of fact. The Court looks at the totality of the evidence when considering the question. Observations can be made of the person’s

behaviour and their appearance. A person who has experience working with people under the influence of liquor may be more persuasive as a witness than a person who does not. A witness who knows what the person is like sober and after liquor may be a more persuasive witness than someone who does not know the person. Observations of behaviour and appearance can be evidence as to whether the Court can conclude that the alcohol which has been consumed has affected the faculties of the person to such an extent that they can be said to be under the influence of liquor. Readings can be obtained from scientific equipment. Evidence can also be given of the person's subjective analysis of how the alcohol has affected them. That evidence would need to be analysed taking into account that the person may have been affected by the liquor to such an extent that they did not appreciate the affect the liquor was having upon them. The fact of consuming alcohol does not lead to a conclusion that the person is therefore under the influence of liquor. From a strictly scientific point of view it may be that upon the first mouthful of liquor being consumed that there is some proof that can be obtained that the body is under the influence of liquor. In such a case the influence is likely to be of such a limited affect that it would be impossible to conclude the person was under the influence of liquor from any objective analysis of their behaviour or demeanour or possibly even by standard scientific testing. (And this will be dependant upon the strength of the liquor, some liquor is so strong that one mouthful will have an immediate observable effect).

19. It is a question of degree. It is commonly accepted that there are indicia which, in the absence of evidence to the contrary, are indicia that a person may be under the influence of liquor. *O'Connor v Shaw* [1958] Qd R 384. The Supreme Court of Queensland stated : "It is recognised that there are indicia being certain observable abnormalities of behaviour and certain physical signs which evidence when a person who has ingested alcohol has become "influenced" by the alcohol. If there is accepted evidence of

sufficient manifestation of these indicia one is entitled to conclude (in the absence of evidence to the contrary) that the indicia are the effect of the alcohol and that the subject person, no matter what may be his tolerance to alcohol, is under its influence.” (*O’Connor v Shaw* [1958] Qd R 384 at 386). So, for example, if there was evidence that a person was slurring their words the fact that they have a speech impediment may be capable of setting aside any conclusion that the person was under the influence of alcohol. Someone who knows the person well may be able to give evidence that the slurring of the words on a particular occasion was a combination of both the speech impediment and the alcohol consumption. Each case will be assessed on the evidence before the Court. Once there is objective evidence that a person is under the influence of liquor there is no requirement for the extent that they are under the influence of liquor to be analysed for a clause such as clause 4 in this order to be breached.

20. The indicia raised by the police officers are commonly accepted indicia of someone who is under the influence of liquor. In this case the evidence of the prosecution witnesses has been challenged on the basis that they did not particularise the indicia they gave in evidence in their statements. Defence has submitted that the Court should not accept their evidence. It is not the case that because material was not put into a statement, evidence which is later given should not be accepted. Both witnesses have given evidence of their recollection of the events. They have said they can recall the behaviour and demeanour of the defendant. I accept that their recollection is as they stated in their evidence.
21. The breath analysis given by the police to the defendant is evidence that there was a positive reading for alcohol. This was set out in the statements. The breath analysis is conducted following a person breathing into the equipment. The person’s breath is what is being tested. That test is a presumptive indicator that the person has consumed alcohol. The person

may also be said to be under the influence of that alcohol, it being the breath from their body which has lead to the test being positive.

22. The defendant said to the police on the night in question that he had six to eight cans of beer. His evidence to the Court is that he had six cans of beer. In the taped recording he said “I am fairly sober”. He did not say he say he was sober. His perception was that he was ‘fairly’ sober. The defendant had been arrested and kept in custody for one hour prior to making this statement and he had no opportunity to consume any further liquor.
23. I find it proven beyond reasonable doubt that the defendant was under the influence of liquor on the night in question. Whilst it is clear that the statutory declarations prepared by the police officers were lacking detail I do not go as far to find that the evidence they have now given should be rejected on the basis of inadequate statements. They have independent recollections of the events and both witnesses were frank with the Court about the inadequacy of their statements. Their evidence is accepted as a reliable account of what they witnessed at the scene. Their observations are that the defendant showed the indicia commonly associated with someone who is under the influence of liquor. The finding made that the defendant was under the influence of liquor is not based solely upon the police observations of the defendant. This finding also made based upon the totality of the evidence including the breath analysis reading as a presumptive indicator of alcohol being in the defendants system and the statement made by the defendant one hour after his arrest.
24. The next question to be considered is whether clause 4 has been breached. There is no dispute that the location of the defendant’s arrest namely 28 Heron Crescent Katherine is also the residence of Beryl Tucker and I have found accordingly. Ms Tucker has declined to give a statement or give evidence in the matter. There is evidence before the Court that I can find that this was the place she resided and that she was at the residence of 28

Heron Crescent at a time when the defendant had been under the influence of liquor. His taped conversation with the police gives a full account of the night in question including an explanation as to how he came to be sitting outside. This part of the tape was answered without prompting or direct questioning by the police. His account goes close to making out clause 3 of the order (that he not act in a provocative or offensive manner towards Beryl Tucker) but I do not make that finding. I find it is proven beyond reasonable doubt that the defendant remained at a place namely 28 Heron Crescent where Beryl Tucker was residing whilst he was under the influence of liquor on 6 March 2007. I find that he failed to comply with clause 4 of the restraining order and find the charge as laid is proven.

Dated this 30<sup>th</sup> day of July 2007.

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**MELANIE LITTLE**  
**STIPENDIARY MAGISTRATE**