

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R.v. White, 2007 NSPC 61

Date: November 5, 2007

Docket: 1745142

1745143

Registry: Halifax

Between:

Her Majesty the Queen

v.

Leanne Marie White

Judge: The Honourable Judge Marc C. Chisholm

Heard: October 3 and October 11, 2007, in Halifax, Nova Scotia

Decision: November 5, 2007

Charge: **253(b); 253(a) Criminal Code**

Counsel: Christopher Nicholson, for the Crown
Stan MacDonald, for the Defence

By the Court:

Introduction

[1] The defendant, Leanne Marie White, is charged with offences of driving a motor vehicle while impaired and while her blood alcohol level was over .08. Counsel proceeded to trial on the impaired driving count only. On that charge the sole issue is whether the crown has proven beyond a reasonable doubt that the defendant's ability to operate a motor vehicle was impaired by alcohol or a drug.

Relevant Law

[2] Prior to 1994, to establish impaired driving the crown was required to prove "a marked departure from the norm". In 1994, in **R. v Stellato** (1994), 31 C.R. (4th) 61 the Supreme Court of Canada rejected the "marked departure from the norm" standard. At p. 132 the Court stated:

"If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offense has been made out."

[3] In **R v Andrews** (1996), 46 C.R. (4th) 74 the Alberta Court of Appeal interpreted the **Stellato**, (supra) decision, stating, at page 83:

“The ratio of the judgment in *Stellato* is that it is not necessary for the crown to establish a marked degree of impairment of the accused’s ability to drive; rather, any degree of impairment of that ability, if proved beyond a reasonable doubt, will sustain a conviction. That is what the Supreme Court of Canada approved, not that a slight degree of impairment is to be equated to a slight degree of impairment of one’s ability to drive.” In *R v MacDonald*, [1998] N.S.J. No. 179 the Nova Scotia Court of Appeal adopted the Alberta Court of Appeal decision in *Andrews*.

Issue

[4] Has the Crown proved beyond a reasonable doubt that the defendant’s ability to operate a motor vehicle was impaired by alcohol or a drug to any degree?

Evidence

[5] I have reviewed and considered all of the evidence presented by the crown and the defense. I will be highlighting portions of the evidence to explain my findings and decision.

[6] The Crown called Mr. Carl Csunyoscka. Mr. Csunyoscka is an employee of a pizza shop in the west end of the city of Halifax, Nova Scotia and was working there at the time of the alleged offense on February 10, 2007. Mr. Csunyoscka testified that sometime after midnight on the day in question he saw the defendant walk into the

shop with a male companion. Ms. White and her companion were strangers to Mr. Csunynoscka. He stated that they were both staggering. Ms. White had a car remote in her hand and was playing with it. He could see lights going on and off on a car outside and hear the car's horn. They ordered food and sat at a table. They remained in the shop for 10-15 minutes. During that time the defendant's male companion put his head down on the table where they sat. He did not detect any odor from the defendant or her companion but was never closer than five feet from them. As they left he observed them staggering. He said that they appeared disoriented and had trouble locating their car in the parking lot.

[7] He said that the shop often receives customers who stop in to get food in the early am after a night on the town. Based upon his observations he assumed the defendant and her companion were drunk. He directed his fellow employee Mr. Ehler to get the license plate, follow them and call the police.

[8] He observed the defendant driving the car out of the parking lot. He noted nothing unusual about her driving. He said that a taxi parked in front of the shop restricting his view outside. He stated that the defendant stopped at the stop sign in the parking area.

[9] Mr. Csunynoscka was unaware of the fact that the defendant is deaf. He never heard her speak. At no time did he testify to observing the defendant or her companion communicating by American sign language.

[10] Mr. Csunynoscka was a credible witness.

[11] The Crown called Mr. Ehler. Mr. Ehler has been employed at the same pizza shop as Mr. Csunynoscka for twelve years. He testified to seeing the defendant and her male companion enter the pizza shop on the early morning of February 10, 2007. Both were strangers to him. They ordered food, sat at a table and waited for their food. The man laid his head down on the table while waiting for the food. When the food was ready they picked it up and walked out. They were in the store for 5-6 minutes, maybe longer.

[12] Mr. Ehler testified that the defendant was very unsteady on her feet, staggering. She didn't stumble. She didn't walk straight. Her walk was side to side. He did not smell alcohol on her breath but was never that close to her. He heard her speak. In his view her speech was slurred. At the time he was unaware that she was deaf. He found that out later. Even knowing that she is deaf he felt her speech "wasn't right". While

Ms. White was at the pizza shop there was no evidence of Mr. Ehler seeing her use sign language. He watched her and her companion leave the shop. He observed her with a vehicle remote control in her hand which she was playing with. He testified that she and her companion had difficulty locating their vehicle in the parking lot.

[13] Mr. Ehler formed the opinion that the defendant was quite inebriated.

[14] When he saw that they were going to drive he called the police. He did not recall Mr. Csunyoscka directing him to call the police. He got into his car and followed the defendant, whom he stated was driving the vehicle. He remained on his cell phone talking to the police as he followed the defendant. He testified that she backed out of her parking spot and drove through the parking lot at a normal speed and in the proper lane. He testified that she did not stop at the stop sign in the parking lot. He stated that she turned out of the parking lot onto Willett St. She drove normally on Willett St. a short distance, then turning right onto Sheradon Place. She did not signal before turning onto Sheradon Place. She entered the parking lot for townhouses at 62 Sheradon and parked in a parking spot. In parking, she pulled into the spot at an angle then backed up and pulled straight into the spot. He estimated the drive took no more than 4-5 minutes. He had difficulty estimating the distance in km, eventually

guesstimating 1.7 km. He observed the defendant and her companion exit the motor vehicle and proceed up some stairs, about 15 steps, and to the door of one of the townhouses. She was very unsteady as she proceeded from the car to the townhouse. He waited there for some time watching the defendant trying to get into the townhouse with her keys before the police arrived. When the officer arrived he told him what he'd observed and pointed out the defendant who was still at the door. He gave the officer a paper on which he'd written the license plate number of the car the defendant had driven. He followed the officer to the area of the townhouse door and observed his interaction with the defendant. He testified that the defendant dropped her keys while the officer was present. He felt the defendant's eyes were very heavy looking.

[15] Mr. Ehler was a very credible witness. His evidence and the evidence of Mr. Csunynoscka are very consistent. The differences, in my view, are completely understandable given the passage of time and different opportunities of each to observe. I find the difference in relation to whether Mr. Csunynoscka directed Mr. Ehler to call the police to be of no significance. In relation to whether or not the defendant stopped at a stop sign in the parking lot of the pizza shop I accept the evidence of Mr. Ehler. Mr. Ehler was in a better position to observe Ms. White's driving and was intent on observing closely and communicating his observations to

the police. Mr. Csunyoscka , on the other hand, was back in the pizza shop with his view partially blocked by a taxi parked in front of the shop.

[16] The Crown called Sgt. Paul Robertson. Sgt. Robertson was dispatched at 1:30 am to meet Mr. Ehler at 62 Sheradon Place. He proceeded to that location and met Mr. Ehler. Mr. Ehler gave him information about what he'd seen. Mr. Ehler pointed to the car driven by the defendant and gave him a paper, exhibit #1 bearing the license plate number of that vehicle. Mr. Ehler directed him to the defendant who was up a flight of stairs at a townhouse door with a male companion. He proceeded there. He observed the defendant who matched the description given to him by Mr. Ehler.

[17] He testified that the defendant was trying to use the keys to enter the townhouse but was being unsuccessful. He initially said she appeared to be fumbling with the keys. Later he stated that there was a key in the key hole but she couldn't seem to "get it together" to open the door. He did not see her drop her keys and would have noted that if it happened. Upon his approach both persons started talking. He couldn't understand what Ms. White was saying. The male, identified as Sonny Gallant, was, according to Sgt. Robertson, drunk. Sgt. Robertson communicated with the defendant through Mr. Gallant who used American sign language to communicate with her. Sgt.

Robertson explained why he was there.

[18] Sgt. Robertson testified that he observed a strong smell of alcohol on Ms. White's breath. He stated that she was unsteady on her feet, that she was swaying. While he could not understand her speech, recognizing that she was deaf he did not view her manner of speech as a sign of impairment. Nevertheless, he formed the opinion that Ms. White was impaired by alcohol and, through Mr. Gallant, he gave her a demand to provide breath samples.

[19] He also tried to communicate to her that she was under arrest for impaired driving and to inform her of her rights regarding counsel. He testified that she appeared to understand and wanted to speak with a lawyer.

[20] Sgt. Robertson testified that while proceeding to the police car Ms. White appeared unsteady on her feet. He said that there was a sway to her walk. He walked down the stairs near the townhouse in front of her, seeming to suggest that this was a protective measure, in case she lost her balance, which she didn't. She was transported to the police station where she exited the police vehicle, walked into the station, up a few stairs without assistance or apparent difficulty. He introduced a

videotape of the booking area of the police dept. depicting Ms. White's movement there on the morning in question. The videotape was played in court. I further reviewed the tape in the course of coming to my decision.

[21] The videotape begins at 2:12 am. with Ms. White walking into the booking area. Her walk into the area appears normal. There appears to be a slight correction of her balance near the door. She is taken to a smaller room where she is seated. There is nothing unusual in her movements to the room. For much of the remainder of the tape she is seated. While seated there is no loss of balance. Later in the videotape, at approximately 3:16 am., while standing, she leans forward on one leg to look out a window without any loss of her balance.

[22] Sgt. Robertson noted that Ms. White's clothes were orderly and neat. He noted nothing unusual in terms of her eyes. She was polite and cooperative. She provided her documents as requested without difficulty. Sgt. Robertson estimated the distance between the pizza shop and 62 Sheradon Place as half a km at most. I accept his estimate of the distance rather than the guesstimate of Mr. Ehler.

[23] Sgt. Robertson was a credible witness. His evidence differed from that of Mr. Ehler on a few points. As to the defendant's eyes, given Sgt. Robertson's evidence I'm not convinced there was anything particularly unusual about them. As to the dropping of the keys, while I am inclined to believe Mr. Ehler that it happened, possibly before the officer arrived, I'm not certain that it did. I have no doubt that she was fumbling and had difficulty with the keys over an extended period of minutes. As to the defendant's speech, because she is deaf it may be difficult for a person unfamiliar with her speech to assess the extent, if any, to which her speech was other than normal for her on the morning. As Mr. Ehler was not familiar with her usual speech I, as did Sgt. Robertson, placed no weight on his belief that her speech "wasn't right".

[24] The Crown called Cst. Shawn Flynn. Cst. Flynn was the technician who took samples of Ms. Flynn's breath on the morning of February 10, 2007. When he met Ms. White she was seated in the breath testing room. He observed her for a fifteen minute period and then took breath samples from her. He stated that there was no verbal communicate with Ms. White. He noted a slight redness of her eyes. He did not recall whether there was a smell of alcohol on her breath. He suggested the smell of alcohol on her breath "probably wasn't unusually strong". He testified that he had no note of the smell of alcohol on her breath but only makes such a note if the smell

of alcohol was extreme.

[25] Cst. Flynn's evidence was not "unusually strong". While credible, it was evident he had little recall of his interaction with Ms. White. Therefore, where his evidence differed from the evidence of the other witnesses I accept the evidence of the other witnesses. His evidence regarding Ms. White's eyes is consistent with my finding.

[26] The defense called Mr. Roger Hanrahan . Mr. Hanrahan has known the defendant and Mr. Gallant for several years. He lives at 62 Sheradon Place. He testified that on February 10, 2007, the defendant and Sonny Gallant were living together at 62 Sheradon Place.

[27] Mr. Hanrahan stated that the parking spaces for tenants at 62 Sheradon Place are difficult to get into because they are close together and there is limited room to maneuver. He said it is common for tenants to turn into a space on an angle, back up and then pull in straight.

[28] Mr. Hanrahan was a credible witness and I accept his evidence. Having said that, there was no evidence before me as to the location of the parking spot used by Ms. White on the evening in question and whether there was limited room to maneuver into that spot. Mr. Ehler, who observed her driving stated that she didn't have a problem parking. Therefore, I'm not satisfied that there was anything unusual about the manner in which Ms. White parked her motor vehicle.

[29] The defense called Mr. Michael Perrier. Mr. Perrier is a successful businessman in the Halifax community. He is deaf. He has communicated by sign language since childhood. He has known Ms. White and Sonny Gallant for some time.

[30] He testified that when deaf people are communicating while walking they will move their body to ensure that they are in a position so the other person with whom they are communicating can see them. This may involve some side to side movement. If communicating with a person who is intoxicated this may necessitate even more side to side movement as the intoxicated person may be unsteady. He stated that if the conversation is animated there is often more body movement during communication.

[31] Mr. Perrier testified that he has observed that lots of deaf people have balance problems at night. He did not indicate whether he'd ever noted Ms. White having a balance problem at night. There is no evidence before me that Ms. White has such a problem.

[32] I found Mr. Perrier's evidence credible. In relation to the charges against Ms. White I place no weight on his observation that some deaf persons appear to experience balance problems at night as there is no evidence that Ms. White experiences such a problem.

Analysis and Conclusions

[33] The defense submitted that the side to side movement of Ms. White, observed by Mr. Csunynoscka and Mr. Ehler and Sgt Robertson was for the purpose of her communicating with Mr. Gallant. In my view, there are several problems with this argument. First, there is no evidence from Mr. Ehler or Mr. Csunynoscka that Ms. White was using sign language while entering or leaving the pizza shop when they observed her side to side movement. Second, during that time at the pizza shop, according to the witnesses, Ms. White was holding and playing with a car remote

control. Mr. Perrier's use of American sign language involved the use of both hands. How could Ms. White communicate in sign while holding the car remote? And third, Sgt. Robertson noted her unsteadiness on her feet while proceeding to the police vehicle at a time when there was, on the evidence, no communication taking place. For these reasons I cannot accept the defense argument.

[34] I accept the evidence of Mr. Ehler and Mr. Csunynoscka and Sgt. Robertson that, when observed by them just before and just after driving her car, Ms. White was quite unsteady on her feet. I have considered the videotape evidence of Ms. White's movements at the police station. During much of the time Ms. White is seated. Evidence of her movements, while seated, while relevant and considered by the court provide a lesser means of assessing her balance than observations of her while on her feet. While on her feet, with one exception, she appears to maintain her balance. I've also considered the times of her movements as depicted on the videotape, some more than 90 minutes after driving. The videotape of Ms. White at the police station does not raise any doubt in my mind about the credibility and reliability of the observations of Mr. Ehler, Mr. Csunynoscka and Sgt Robertson about her unsteadiness on her feet on the morning in question. And, having considered all of the evidence I am satisfied that on the evening in question, and in particular just before and just after driving her

motor vehicle she was quite unsteady on her feet. Further, I am satisfied that the cause of her unsteadiness was her prior consumption of alcohol which I find was impairing her motor functioning.

[35] I accept the evidence of Mr. Csunynoscka and Mr. Ehler. That Ms. White was somewhat disoriented when leaving the pizza shop and had difficulty locating her car. While, in my view, it is not unusual for someone to forget where they've left their car in a parking lot, particularly older persons, in the present case, given all of the other evidence and the relatively brief time Ms. White was inside the pizza shop I have no doubt that her difficulty was due in large part to her prior consumption of alcohol which I find was impairing her mental functioning.

[36] I accept the evidence of Sgt. Robertson that there was a strong smell of alcohol on Ms. White's breath. In my view, Cst. Flynn's evidence is not inconsistent with Sgt. Robertson's evidence on this point and even if it were I found Sgt. Robertson's recall far better and more reliable than Cst. Flynn's. I do not view either Mr. Ehler or Mr. Csnyoscka's evidence of not noting a smell of alcohol as inconsistent with the observation of Sgt. Robertson as neither man was ever particularly close to Ms. White to observe.

[37] In a case of alleged impaired operation of a motor vehicle it is not unusual for the evidence to show that some of the defendant's actions and features appeared normal while others appear unusual and are referred to as signs of impairment. In each case the court must consider and weigh each piece of the evidence and determine whether, on the totality of the evidence, the allegation of impaired ability to operate a motor vehicle has been proven beyond a reasonable doubt.

[38] In the present case, there is evidence, which I accept, of Ms. White performing a number of tasks without difficulty and of several of her features, as I've detailed previously, being normal. Her manner of driving, in my view, showed some but not a marked departure from the norm.

[39] On the other hand, I accept and find that: there was a strong smell of alcohol on her breath; she was quite unsteady on her feet; when leaving the pizza shop she was somewhat disoriented and had difficulty locating her car; she did not come to a full stop at the stop sign in the parking lot of the pizza shop; she did not signal before making a right hand turn off of Willett St.; and, she fumbled with her keys and was unable to unlock the door at 62 Sheradon Place for several minutes. I find that all of these difficulties of Ms. White were due to her prior consumption of alcohol which

on the totality of the evidence I have no doubt was impairing her mental and physical functioning.

[40] In addition, Sgt Robertson gave Ms. White a breath demand because he believed she was impaired. Mr. Csunyoscka and Mr Ehler, to whom Ms. White was a stranger, were obviously so concerned by her driving in her condition that they arranged to call the police and Mr. Ehler followed her. In my view there opinion of Ms. White's condition was well founded and is consistent with that of Sgt. Robertson I have considered their opinions as part of the overall evidence.

[41] I have decided this case on the evidence presented. I have drawn no negative inference or speculated on the evidence that might have been presented by persons who had close contact with Ms. White on the early morning in question but were not called to testify.

[42] On all of the evidence I have no doubt that on the date in question Ms. White was under the influence of alcohol to the extent that it affected her physical and mental functioning. I am satisfied beyond a reasonable doubt that her ability to operate

a motor vehicle was impaired by alcohol to some degree.

[43] I find Ms. White guilty on the charge of impaired driving.

J.