IN THE PROVINCIAL COURT FOR THE PROVINCE OF NOVA SCOTIA
Cite as R. v. Boyce, 2004 NSPC 33

Date: 20040604
Docket: 1228438-9
2004 NSPC 33

CANADA
PROVINCE OF NOVA SCOTIA

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

VERSUS

SHAWN EDWARD BOYCE

DECISION

HEARD BEFORE:	The Honourable Associate Chief Judge R. Brian Gibson, J.P.C.
PLACE HEARD:	Dartmouth, Nova Scotia
CHARGES:	Section 253(b) & 253(a) of the Criminal Code.
COUNSEL:	Dennis Theman, Senior Crown Attorney Catherine Lunn Jeffrey Moors & Nicole Godbout, for the Defence

[1] The accused, Shawn Edward Boyce, is before this Court charged with committing offences contrary to Section 253(a) and Section 253(b) of the **Criminal Code of Canada**. These two charges arose from events on July 19, 2002. The accused alleges that he was arbitrarily detained and that thereby his Section 9 **Charter** right was violated. If the Court finds that there was a Section 9 **Charter** breach, he seeks an order pursuant to Section 24(2) of the **Charter** excluding the evidence that was acquired from him by the police subsequent to his initial detention.

[2] When the *viva voce* evidence in respect of this **Charter** application was adduced, I made preliminary oral findings of fact on the record. At that time I also stated that I wanted to further review those facts and the evidence leaving open the possibility of some modification or refinement to those oral findings of fact and possibly making further findings of fact. Those preliminary findings of fact were made to assist the parties relative to what were expected to be further proceedings in relation to the significance of Section 17 of the **Off Highway Vehicles Act** to the alleged arbitrary detention, including the constitutionality of that provision if this Court found that there was a random detention.

[3] In summary, the facts relevant to this **Charter** application are as follows. At or about 10:30 p.m. on the 19th day of April, 2002, the accused was operating an "off highway vehicle" being an all terrain vehicle (ATV) on a recreational trail, formerly an abandoned railway line near Pinehill Drive in an area at or near Gaetz Brook, Halifax County, Nova Scotia. My oral findings with respect to time and place were somewhat erroneous when I referred therein to the time as approximately 10 p.m. and the place as being Musquodoboit Harbour. The accused was proceeding at a slow speed of approximately one to two kilometres per hour towards Pinehill Drive where the trail came near and perhaps intersected with that street. He was observed by two RCMP officers who were patrolling in that area in a police cruiser. Constable Pelletier, the driver of the police cruiser, pulled his vehicle in front of the ATV operated by the accused, thus blocking any further forward motion of the ATV.

[4] The ATV was not on the street or highway at the point where it was stopped. It was, however, close to the boundary of Pinehill Drive. In accordance with the definition of "highway" found in the **Motor Vehicle Act** which includes, among other things, a street, I hereinafter refer to Pinehill Drive as a highway.

[5] There was no basis for any belief that the accused had committed or was committing any offence when the police cruiser pulled in front of his ATV. The police did not testify to having any such belief. Constable MacKinnon, who was with Constable Pelletier, testified, however, that the operation of ATV's on the highway in this area was a concern for the police and the public thereby resulting in complaints and the police "catching" ATV's on the highway.

[6] Constable Pelletier exited his vehicle, approached the accused, and engaged him verbally. Constable Pelletier believed that the accused was about to operate his ATV on the highway. The purpose of blocking any forward movement of the ATV and engaging the accused in conversation was to direct him with respect to his obligation not to operate the ATV on the highway in a manner that would contravene Section 12 of the **Off Highway Vehicles Act**. Constable Pelletier first asked where the accused was going to which question he responded that he was going up the road to his home. That response prompted the constable to advise the accused that he wasn't allowed to drive on the road.

[7] The actions of the police by blocking the movement of the ATV with their police cruiser, followed by Constable Pelletier's approach on foot toward the accused, constituted a "direction" under the provision of Section 17 of the **Off Highway Vehicles Act**. Section 17 provides:

> "A person shall stop an off-highway vehicle on direction of a peace officer."

The clear intention conveyed, despite the absence of any utterances, was that the accused should stop his ATV. The police, at this point, assumed control over the accused's movement. A failure by the accused to comply would have had legal consequences. Section 18 of the **Off Highway Vehicles Act** describes the violation of any provision of the Act or regulations to be an offence. I conclude that the accused was detained by virtue of the aforesaid police actions and the obligation imposed upon him by Section 17 of the **Off Highway Vehicles Act**.

[8] During the initial conversation with the accused, Constable Pelletier made observations and received information from the accused which caused Constable Pelletier to suspect that the accused had consumed alcohol. The police therefore assumed further control over the accused's movement by directing that he get off

his ATV and sit in the back seat of the police cruiser after that initial conversation. The initial detention therefore quite quickly turned into a criminal investigation leading to a formal arrest of the accused and the Section 253(a) and Section 253(b) charges on July 19, 2002. Had the initial detention not occurred with the resulting verbal exchange, it appears unlikely that the Section 253(a) and (b) charges would have arisen.

ARBITRARY DETENTION ISSUE

Was the Accused Arbitrarily Detained?

[9] Section 9 of the **Charter** provides:

> "Everyone has the right not to be arbitrarily detained or imprisoned."

[10] Section 17 of the **Off Highway Vehicles Act** compelled the accused to stop in accordance with the direction from the peace officers. Conversely, I conclude that Section 17 granted the peace officers authority to stop the accused and thereby detain him. The issue to be resolved is whether the peace officers, in addition to the aforesaid statutory authority, had an articulable cause to initially detain the accused or whether the reason for the detention fell short of articulable cause

thereby rendering the detention to be random. A random detention would be arbitrary. Such finding would require a further analysis to determine whether Section 17 of the **Off Highway Vehicles Act**, authorizing a random detention, is a reasonable limit of the Section 9 **Charter** right according to the provisions of Section 1 of the **Charter**. A finding that there was articulable cause for the detention would lead me to conclude that the detention was not arbitrary and therefore not a breach of the Section 9 **Charter** right.

[11] The Crown and the accused hold opposite views as to whether the evidence supports a finding that the peace officers in this case had articulable cause to detain the accused. Counsel for the accused advances the position, citing the decision in R. v. Dedman (1981) 59 C.C.C. (2d) 97, that the police power to detain is limited to those situations where there are reasonable grounds to arrest an individual. Counsel for the accused further submits that if the standard for articulable cause is something less than reasonable grounds to arrest, a belief that an offence is about to be committed falls short of what is required to support a finding of articulable cause.

[12] The decision of the Supreme Court of Canada in R. v. Wilson (1990) 56 C.C.C. (3d) 142 makes it clear that circumstances amounting to something less than reasonable grounds to support an arrest may be sufficient to constitute articulable cause. The decision of R. v. Simpson (1993) 20 C.R. 1 (Ont.C.A.) provides a helpful review of various case authorities relating to the analysis that the Court should conduct to determine whether the police, in a particular situation, had articulable cause to justify a detention.

[13] The case authorities do not prescribe a precise definition of what will constitute articulable cause. The case authorities, however, do provide some direction and guidance. They do make it clear that the determination as to whether articulable cause for a detention exists is to be based upon the extent of objectively discernible facts. The case authorities also set out a number of factors that ought to be considered in determining whether or not there is articulable cause justifying a detention.

[14] The context within which the detention occurred and the purpose for the detention are two relevant factors to be considered. By context, I mean whether the activity in question was a regulated activity or whether it is activity which

might be regarded as a fundamental liberty. This is a conclusion I derive from the decisions in R. v. Ladouceur (1990) 56 C.C.C. (3d) 22, R. v. Simpson (supra) and R. v. Wilson (supra). In R. v. Ladouceur, Cory, J., writing for the majority of the Supreme Court, stated at paragraph 29:

> "The random stop at issue in Dedman was conducted in 1980, one year before s. 189a(1) of the Highway Traffic Act was enacted and two years before the Charter came into effect. Both the majority and minority judgments held that the police officer had no statutory authority to conduct a random stop. Le Dain, J., writing for the majority, held, however, that common law authority for the random stops conducted under the R.I.D.E. program could be derived from the general [page 1274] duties of police officers on the basis of the test laid down in R. v. Waterfield, [1963] 3 All E.R. 659. Le Dain J. Noted at pp. 34-35:
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> > In applying the Waterfield test to the random stop of a motor vehicle for the purpose contemplated by the R.I.D.E. program, it is convenient to refer to the right to circulate in a motor vehicle on the public highway as a "liberty" ... In assessing the interference with this right by a random vehicle stop, one must bear in mind, however, that the right is not a fundamental liberty like the ordinary right of movement of the individual, but a licensed activity that is subject to regulation and control for the protection of life and property."

See also R. v. Simpson (supra) at para. 56 at page 20 where the court stated in relation to the facts in that case:

> "In applying the analytical technique developed in *Dedman*, supra, it is apparent that many of the factors relied on there have no application to this case. The appellant's liberty interest interfered with in this case was not the qualified right to drive a motor vehicle but what Le Dain J. Referred to at p. 35 S.C.R., p. 121 C.C.C. [p. 220 C.R.] as "the fundamental liberty to move about in society without governmental interference."

[15] When I refer to the purpose for the detention as a relevant factor, I mean whether the reason for the detention pertained to an activity regulated by the legislation or was for some other unrelated reason, such as was the case in R. v. Simpson (supra). In that case the police relied on the authority found in S.216 of the **Highway Traffic Act** to detain an individual operating a motor vehicle. However, the detention occurred in relation to an investigation of drug trafficking activity, not the operation of a motor vehicle. The detention of the individual relative thereto was based on a "hunch" that he might be involved in the suspected criminal activity being investigated. The authority in Section 216 of the **Highway Traffic Act** was found to be an insufficient basis for the detention because the stop did not pertain to that Act.

[16] The Court ought to also consider whether the detention occurred in an adversarial or non-adversarial setting. See R. v. Simpson (supra) at paras. 57 to 61. If the detention of an individual occurs in an adversarial setting involving an effort by the police to determine whether that individual is involved in criminal activity being investigated by the police, the articulable cause for the detention requires "a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity

under investigation". The standard appears to be lower in relation to non-adversarial settings pertaining to regulated activities.

[17] In addition, the Court should consider the justifiability of the officer's conduct which depends on a number of factors as set out in R. v. Simpson at page 20:

> "...including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference. The "totality of the circumstances" approach is similar to that found in the American jurisprudence referrable to the constitutionality of investigative stops."

[18] The decision in R. v. Simpson (supra) and the various case authorities cited therein also make it clear that reasonable grounds for arrest is not the standard to be applied with respect to a finding of articulable cause, particularly where it pertains to activity regulated by provincial legislation.

[19] The articulable cause, found to be sufficient to justify the subsequent detention of the appellant in R. v. Wilson (supra), was mere suspicion. However, such suspicion was not that the occupants of the targeted vehicle had or were about

to commit an offence. The Court appears to have been influenced by the fact that the detaining officer was stopping a motor vehicle and was authorized by legislation to do so. Beyond that authoritative context, what is noteworthy is that the circumstances within which the driving activity was taking place were ultimately determinative of the finding that there was articulable cause to stop the vehicle and therefore not a random stop. The Supreme Court further suggested that the circumstances constituting articulable cause might well vary between rural settings and downtown areas in large cities. Time of day, lack of information to identify the vehicle and the location of the driving activity appear to have been relevant factors in the Wilson case. The decision in R. v. Wilson appears to be authority that a finding of articulable cause will depend upon the context and circumstances in which each detention occurs. Specifically the Supreme Court in R. v. Wilson, when finding that there was articulable cause for the detention in that case, stated at para 13:

> "Second, in this case the stopping of the appellant was not random, but was based on the fact that the appellant was driving away from a hotel shortly after the closing time for the bar and that the vehicle and its occupants were unknown to the police officer. While these facts might not form grounds for stopping a vehicle in downtown Edmonton or Toronto, they merit consideration in the setting of a rural community. In a case such as this, where the police offer grounds for stopping a motorist that are reasonable and can be clearly expressed (the articulable cause referred to in the American authorities), the stop should not be regarded as random. As a result, although the appellant was detained, the

> detention was not arbitrary in this case and the stop did not violate s. 9 of the Charter."

[20] It is submitted on behalf of the Crown that the facts in this case before me are analogous to those in R. v. Wilson given that the driving activity in both cases took place at night, the reason for the detention pertained to the operation of motor vehicles in a rural community by persons unknown to the police. It is further submitted by the Crown that the facts in the case before me present a stronger basis upon which to find articulable cause because of the reasonable grounds supporting Constable Pelletier's belief that the operator of the ATV was about to drive his ATV on the highway in contravention of Section 12 of the **Off Highway Vehicles Act**. There is merit to this submission, however, I am mindful that in the case before me, the accused was operating an ATV on a recreational trail, not a car on the highway as was the case in R. v. Wilson.

[21] The operation of vehicles licensed under the **Motor Vehicle Act** is more extensively regulated than the operation of off highway vehicles pursuant to the **Off Highway Vehicles Act**. Nevertheless, permits for such vehicles are required and there are age and a number of other restrictions pertaining to the operation of

such vehicles. As with the operation of vehicles under the **Motor Vehicle Act**, I conclude there is no fundamental right or liberty to operate off highway vehicles. I infer from the case authorities and evidence before me that the operation of vehicles licensed under the **Motor Vehicle Act** is a much riskier activity than the operation of ATV's. Thus, there likely is a greater concern about public safety associated with the operation of vehicles licensed under the **Motor Vehicle Act** than that which is attributable to the operation of off highway vehicles. However, in the case before me, the belief held by Constable Pelletier concerned the possible operation of an ATV on a highway at night. This was a concern in that area. Aside from the prohibition thereof found in Section 12 of the **Off Highway Vehicles Act**, such operation, if it had occurred, would have created a risk similar to that arising from the operation of a motor vehicle licensed under the **Motor Vehicle Act**.

[22] I am mindful that the initial detention occurred in a non-adversarial setting. There was no intention to bring the force of the criminal process into operation against the accused. The purpose for the detention was to impart advice to the accused concerning the obligation to not operate his ATV on the highway. Thus, the purpose for the initial detention pertained to an activity regulated by the **Off**

Highway Vehicles Act. The detention occasioned by driving the police cruiser in front of the ATV was a reasonable action to ensure that the ATV did not enter upon the highway and to permit the peace officers to impart their advice to the accused about operating his ATV on the highway. The officers were imparting information and expressing a concern related to public safety and thus enhancing the public good. Imparting such advice and preventing the operation of the ATV on the highway likely fell both within the scope of the duty imposed on peace officers by statute and recognized at common law. The interference with the accused in this case was minimal. As observed in R. v. Simpson, different criteria may govern detentions which occur in a non-adversarial setting than those which involve the investigation of suspected criminal activity.

[23] In conclusion I find that the grounds for stopping the accused in this case were reasonable and clearly expressed thereby meeting the minimum requirement set out in R. v. Wilson. I conclude that the police had articulable cause to stop and detain the accused. This was not a random stop and therefore not an arbitrary detention. Accordingly Section 9 of the **Charter** was not violated.

[24] In anticipation of this Court finding that the detention of the accused was based on a random stop, extensive submissions together with affidavit evidence were presented and adduced respectively regarding the constitutionality of Section 17 of the **Off Highway Vehicles Act** as authority for random stops of off highway vehicles. It certainly appears that Section 17 of the **Off Highway Vehicles Act** was intended to authorize random stops. However, in light of my finding with respect to the articulable cause issue, there is no need for me to determine whether Section 17, if in fact it is authority for random stops of off highway vehicles by peace officers, is justified as such by virtue of Section 1 of the **Charter** as a reasonable limit of the Section 9 **Charter** right.

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R. Brian Gibson, J.P.C.
Associate Chief Judge