

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Hayden, 2005 NSPC 19

Date: 20050601

Docket: 1375654

Registry: Bridgewater

Between:

R.

v.

Mark Kenneth Hayden
Defendant

Judge: The Honourable Judge Crawford

Heard: November 29, 2004 & April 18, 2005,
in Lunenburg, Nova Scotia

Counsel: James Fyfe, for the Crown
Alan Ferrier, for the Defence

By the Court:

[1] Mark Kenneth Hayden is charged under s. 253(b) of the Criminal Code with having care or control of a motor vehicle with a blood alcohol concentration over the legal limit.

Facts

[2] The defendant represented himself at trial. The facts of the case are as stated in an earlier Crown brief in this matter:

. . . at approximately 3:35 p.m. on October 26, 2003, Cpl. Passmore [of the R.C.M.P.] was conducting a routine motor vehicle checkpoint near Hubbards, Lunenburg County, N.S. A 1981 Dodge van driven by the accused was stopped and checked by Cpl. Passmore. The Corporal noted a strong odour of alcohol upon the accused's breath and noted also that the accused had bloodshot eyes. A demand for a roadside breath sample was made, complied with, and resulted in a "fail" reading. As a consequence of this result, coupled with his earlier observations, Cpl. Passmore decided he had sufficient grounds to arrest the accused for impaired driving and did so. Cpl. Passmore testified that he informed the accused of the reason for his arrest and then read the following to the accused from a card:

You have the right to retain and instruct counsel without delay. You have the right to apply for legal assistance without charge through the Provincial Legal Aid program.

[3] Cpl. Passmore testified later on the *voir-dire* held pursuant to my earlier decision in this matter that he then read from a second card as follows:

You have the right to retain and instruct a lawyer without delay and you also have the right to free and immediate legal advice by calling toll free 1-866-638-4889 during business hours or 1-800-300-7772 during non business hours.

[4] Cpl. Passmore said that he also explained the cards to the defendant, and asked him if he understood. The defendant said that he did. Cpl. Passmore then asked him if he wanted to call a lawyer, to which the defendant replied, "Not right now."

[5] Cpl. Passmore was closely questioned on cross-examination regarding what he read to the defendant and the order in which it was read. He replied that he read from the first card down to the part about Legal Aid and then switched to the second card, which informed the defendant of his right to immediate free legal advice from duty counsel, including the telephone numbers to call.

[6] He then read the breathalyzer demand to the defendant, who agreed to

provide breath samples.

[7] At the Tantallon R.C.M.P. detachment the defendant was asked again if he wanted to call a lawyer, but replied, "Not at this time."

[8] The two tests were conducted by Cpl. Passmore himself and he prepared and served on the defendant the Certificate of Qualified Technician and the notice of intention to produce it in court.

[9] The Certificate showed readings of 160 milligrams of alcohol in 100 millilitres of blood on both tests.

[10] The defendant testified on the *voir-dire* that he did not fully understand what was read to him, although he told the officer he did. He did not understand that "it was free, or I would have had a lawyer from the beginning; I arrived here the first time without a lawyer." He said he did not believe he would qualify for Legal Aid and did not understand that there was a difference between Legal Aid and the free and immediate legal advice available to all on arrest. But he admitted that he did not ask any questions or tell the police officer that he did not understand.

[11] On cross-examination he admitted that he told the officer he did not want a lawyer "right now" and did not tell him at any time that he had changed his mind about wanting to speak to a lawyer.

Issues

[12] The issues on this *Charter* application for the exclusion of the certificate of qualified technician are:

1. whether or not the defendant was given sufficient information in regard to the right to access free and immediate legal advice;
2. in order to decide that issue, I must make factual findings which involve the issue of credibility.

1. Findings of fact

[13] I must, of course, deal with the second issue first. The standard of credibility on this *Charter* issue is that of balance of probabilities.

[14] I accept the testimony of the officer as to what he read to the defendant and when it was read. Where there is any conflict between his evidence and that of the defendant on those facts, I prefer that of the officer to that of the defendant, whose

recollection of those aspects of the events was partial and uncertain.

[15] I therefore find that Cpl. Passmore read what he was required to read to the defendant and that the information he read complied with the informational requirements under *R. v. Brydges*, [1990] 1 S.C.R. 190, *R. v. Bartle*, [1994] 3 S.C.R. 173, and *R. v. Latimer* (1997), 112 C.C.C. (3d) 193.

2. Informational component of *Charter* s. 10(b)

[16] But the defendant says that he did not understand that he had a right to free immediate access to a lawyer; he thought that that was only for people who qualified for legal aid. And he thought that he would not qualify for legal aid. Unfortunately, he communicated none of this information to the police officer, simply telling him that he understood and that he did not want to call a lawyer "now" or "at this time."

[17] If he had asked a question that indicated his misunderstanding or if he had said that he did not understand, Cpl. Passmore would have had to explain further and take whatever steps were necessary to ensure that the defendant did understand and was making an informed decision as to getting the assistance of a lawyer. But where there was no indication from the defendant that he did not understand, in accordance with *R. v. Evans*, [1991] 1 S.C.R. 869, Cpl. Passmore was under no duty to do more.

[18] I find that the defendant was properly informed both of his right to apply for legal aid and his right to free and immediate legal advice, and that there was no breach of his s. 10(b) right to counsel.

Conclusion

[19] With the admission of the certificate of qualified technician, the Crown has established beyond reasonable doubt all elements of the breathalyzer offence, and the defendant is guilty as charged.