IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Barkhouse, 2005 NSPC 26

Date: 20050815
Docket: 1498175
Registry: Bridgewater

Between:

R.

v.

Philip George Barkhouse

Defendant

Judge: The Honourable Judge Crawford

Heard: June 7, 2005, in Bridgewater, Nova Scotia

Counsel: Paul Scovil, for the Crown
Robert Cragg, for the Defence

By the Court:

[1] Philip George Barkhouse is charged under section 254(5) of the *Criminal Code* with refusing an approved screening device demand.

Facts

[2] At 11:20 p.m. on December 23, 2004 Csts. Collins and Goliath attended, in separate police vehicles, at the defendant's residence in Chester Basin, Lunenburg County, Nova Scotia, in response to a 911 call regarding an out-of-control teenager at a party there. It took them a few minutes to find the location and, as they arrived, they followed another motor vehicle into the driveway. The defendant got out of the vehicle and the officers spoke with him briefly from a distance regarding the reason for their presence. He invited them into the home.

[3] The officers testified that they arrived at the residence around 11:30 p.m. and that it took five or ten minutes to deal with the original complaint and determine that it was unfounded.

[4] Their attention then shifted back to the defendant, and both officers noticed the odour of liquor on his breath, that his eyes were red or bloodshot and that he was unsteady on his feet. Cst. Collins testified that he believed that the defendant was impaired and should not have been driving. He asked the defendant to come outside with him, as there were a number of young people in the house and the officer did not think it was appropriate for the defendant's daughter and her friends to hear the conversation.

[5] At 11:45 p.m. from his card Cst. Collins read the approved screening device demand to the defendant. Cst. Goliath said that he had one in his police vehicle and said that he would go get it. But before he had time to do so, the defendant replied that he understood the demand and refused to take the test. Cst. Collins asked him again, explaining the consequences of refusal, and he again refused. Cst. Goliath said that, in all, the demand was given to him three times, and three times he refused.

[6] Cst. Collins then read the defendant his *Charter* rights and the defendant said that he wanted to call his own lawyer. Cst. Collins told him that he would not be taken into custody, but would simply be issued with documents, and the defendant then said that he would call his lawyer in the morning.

[7] Tammy Libby, the mother of one of the teenagers attending the party, testified that she arrived on the scene while the police officers were still there. She said that she was not sure of the time that she went to the defendant's house, but thought that it was sometime after midnight. When she arrived, the defendant was inside the home talking to Cst. Collins. The defendant smelled of alcohol, stumbled into the wall and his speech was slurred and incoherent. She said that there was no doubt in her mind that he was impaired.

Issues

[8] The defence raises the following issues:

1. that the demand was not made "forthwith";
2. that there was insufficient evidence that there was an approved screening device available;
3. that the officer should have given the defendant his *Charter* right to counsel before the demand was made.

1. "Forthwith"

[9] Defence argued, largely on the basis of Ms. Libby's testimony, that there was an unexplained delay of about half an hour, from the arrival of the police officers at 11:30 p.m. to sometime after midnight, before the demand was made. However, the police officers were precise that the demand was made at 11:45 p.m. and Ms. Libby was not sure of her time-frame. I find as a fact that the demand was made at 11:45 p.m.

[10] The fifteen minutes from arrival to demand is explained by the officers' dealing first with the original complaint and then with the defendant.

[11] The device was immediately available in Cst. Goliath's vehicle, but the defendant's refusal made it unnecessary to actually produce it.

[12] I find that there was no unexplained delay.

2. "Approved screening device"

[13] The officers testified that the device they had was an approved screening device. The defence argued that this was not sufficient; that the Crown should have established the make and model.

[14] The defence position is simply not good law and has not been so in Nova Scotia since at least 1981. See R. v. Delorey (1981), 43 N.S.R. (2d) 416; R. v. McCauley, [1997] N.S.J. No. 270. There is no requirement on the Crown in a case of refusal to prove that the instrument or device was approved.

3. Approved screening device demand and *Charter* rights

[15] In regard to this issue, defence counsel referred to the serial text, *Defending Drinking and Driving Cases* by Alan B. Gold (1993, Carswell) at p. 27:

> . . . In *R. v. DiRuggiero* (1998), (*sub nom. R. v. Diruggiero*) 52 C.R.R. (2d) 132 (B.C.S.C.), Drinking and Driving Law, Vol. XIII, no. 4, p. 29, the accused was entitled to be informed of his right to counsel before the approved screening demand was made. The officer already had reasonable and probable grounds for a charge of impaired driving and had made an arrest on that charge. As the accused was detained, he was entitled to be informed of his right to counsel before he was required to submit to the screening demand.

[16] Having reviewed the *Diruggiero* case, the relevant factor appears to have been that the police officer had already arrested the accused for impaired driving and then, anticipating from his unco-operative demeanour that he would likely refuse the breathalyzer demand after consulting counsel, the officer decided to take a short-cut by giving the screening demand to get an immediate refusal. Under those circumstances, the court held that, as the defendant was not given an opportunity to consult counsel upon arrest, the evidence of the refusal should not be admitted.

[17] No such bad faith action is apparent in the present case; nor was the defendant under arrest when the demand was made. As *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411 (S.C.C.) and *R. v. Redding* [1988] N.S.J. No. 121 (N.S.C.A.) establish, the approved screening device provisions of the *Criminal Code* constitute a valid *Charter* section 1 limitation on the s. 10 right to counsel. There was therefore no breach of the defendant's right to counsel in this case.

Conclusion

[18] The defendant is guilty as charged.