IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Hennigar, 2009 NSPC 42

Date: 20090909
Docket: 1970399
Registry: Bridgewater

Between:

R.

v.

Brady Hennigar

Judge:	The Honourable Judge Anne E. Crawford
Heard:	September 1, 2009, in Bridgewater, Nova Scotia
Charge:	s. 253(1)(b) of the *Criminal Code* of Canada
Counsel:	Ms. Leigh-Ann Bryson, for the Crown Mr. Robert Cragg, for the defence

By the Court:

[1] Mr. Hennigar is charged under *Criminal Code* s. 253 (1)(b) with driving with a blood alcohol level over the legal limit.

FACTS

[2] Constable Garth Stevenson of the RCMP was the only witness in this case.

[3] He testified that on October 10, 2008 he responded to two separate complaints received from members of the motoring public regarding the erratic driving of an empty green pulp truck on the 103 highway west bound in the area of Chester Basin, Lunenburg County, Nova Scotia.

[4] As Cst. Stevenson responded, he received further information that the truck had turned off the 103 at Exit 9 and was last seen heading south on Route 12 in Chester Basin. Cst. Stevenson went off the 103 to Route 3 to intercept the truck if it turned off Highway 12 onto that road. As the time frame of the events from here on is crucial to the defence arguments, I will provide a detailed chronology of these events, drawn from both direct and cross-examination, and where the defence indicated a different chronology I will give reasons for my conclusions as to the sequence and timing of contested events.

[5] At 4:20 p.m. Cst. Stevenson arrived at the intersection of Routes 3 and 12 in Chester Basin, turned north on Route 12, and within a quarter kilometer of the intersection he found a green pulp truck parked facing south across from the Credit Union building.

[6] He approached the driver's door and saw a man seated in the driver's seat conversing with another man who was standing outside the truck. There was no one else in the truck. Cst. Stevenson touched the truck tires and hood and found both to be warm, indicating that the truck had recently been driven. He hoisted himself onto the truck's running board and spoke to the defendant, who was seated in the driver's seat.

[7] Cst. Stevenson told him about the complaints he was investigating, and the defendant volunteered that he had been parked where he was for about 10 minutes

before the officer's arrival. I therefore conclude that the defendant's last time of driving was between 4:10 and 4:15 p.m.

[8] Cst. Stevenson asked the defendant if he had had any problems driving on the 103, and the defendant replied that he had not.

[9] Cst. Stevenson noted a smell of liquor coming from the interior of the truck cab and a slight slur in the defendant's voice, and, feeling unsafe standing high off the ground against the door of the truck and needing further particulars from the defendant regarding the truck's expired inspection sticker and other documents, Cst. Stevenson asked the defendant to come back with him to the police vehicle.

[10] The defendant complied and was seated in the rear seat of the police vehicle. In the police vehicle Cst. Stevenson had a better view of the defendant and noticed that his eyes appeared to be red and that there was an odour of liquor on the defendant's breath. Cst. Stevenson stated that based on the odour of liquor, the slight slur and the red eyes he had a suspicion "to give me grounds for the demand." He decided to make the approved screening device demand. From the time of the reading of that demand, I conclude that the defendant's latest time of care and control of his truck was in or about 4:41 p.m.

[11] At 4:42 Cst. Stevenson read the approved screening device demand to the defendant, who said he understood it and agreed to provide a breath sample. He was successful on his second try and the result was a "fail".

[12] At 4:52 Cst Stevenson read the breath demand, at 4:53 the right to counsel, including right to duty counsel and to apply for legal aid and the defendant declined to call a lawyer.

[13] At 4:57 the police warning was read and the defendant indicated he understood. The defendant asked if he could get some personal effects, including money, from his truck, and Cst. Stevenson accompanied him back to the truck to do so. Cst. Stevenson asked the defendant to hand him the truck keys which were sitting on the dash, and the defendant complied.

[14] At 5:04 they left the scene in Chester Basin, arriving at 5:12 at the Chester RCMP detachment, with no stops en route.

[15] At 5:16 in the detachment the defendant asked to use the bathroom and was allowed to do so.

[16] Cst. Stevenson testified that at 5:18 he took the defendant to an interview/phone room where he informally told the defendant again of his right to call a lawyer, gave him a phone book and a phone and asked if he wanted to call a lawyer. The defendant again declined and by 5:25, the officer testified, he and the defendant were in the data master room.

[17] Counsel for the defence closely cross-examined Cst. Stevenson as to the time when he and the defendant arrived in the data master room. It is clear that the officer's notes stated that at 5:18 p.m. the defendant was given his right to counsel again and that both his handwritten notes and his computer notes state it was done in the breath test room. However, Cst. Stevenson was adamant on the witness stand that he gave the defendant his right to counsel and an opportunity to use the phone in an interview room, not the breath test room, and that it was only after declining to contact counsel that he was taken to the data master room – although it was only a matter of a couple of minutes difference as the defendant declined immediately.

[18] After reviewing my notes and listening again to the officer's testimony on these points, I am satisfied that the defendant was given his right to counsel at 5:18 and was in the data master room at 5:25, ready to begin the test procedure. I do not see that anything turns on where the opportunity to consult counsel was given – only the time that it took to do that, which on the evidence before me I am satisfied took seven minutes from 5:18 to 5:25.

[19] Cst. Stevenson's notes state: "1725: solution changed". On the stand he stated that he began the test procedure for the defendant and then realized from the tag on the data master instrument that the solution was due to be changed that day. He described the process of changing the solution, waiting for the instrument to heat back up to operating temperature and then running the supervisory test to ensure that the instrument was operating properly after the change. Unfortunately, when the instrument was supposed to print out a paper confirmation, the paper jammed. He then had to open the instrument again, remove the paper jam, inspect the printer and then insert a new ticket and print off a new supervisory test report. He said that it took twenty or twenty-five minutes to do all this, during which time the defendant was

present with him in the data master room. It is apparent from Cst. Stevenson's oral evidence that the twenty or twenty-five minute procedure could not have been accomplished by or before 5:25 p.m. The only reasonable inference to be drawn is that Cst. Stevenson began that procedure at 5:25 p.m. and concluded it 20 or 25 minutes later at 5:45 or 5:50 p.m.

[20] This conclusion is supported by the next timed notation in Cst. Stevenson's notes: 5:54 p.m. when Cst. Stevenson again tried to obtain breath samples from the defendant. This time, although the defendant appeared to be blowing, Cst. Stevenson did not hear the audible tone the data master emits when it is receiving a sample.

[21] He told the defendant to blow, and when the defendant protested that he was blowing, Cst. Stevenson took the tube, inserted a new mouthpiece and tried himself. Again, there was no audible tone. Once again, Cst Stevenson had to stop the procedure, open up the machine and look for the cause of the trouble. He found that the connection between the tube and the receptacle inside the machine had parted and he reconnected it.

[22] He re-entered the defendant's data on the instrument and waited for it to set itself up for the first sample.

[23] The first successful sample was taken at 6:03, and at 6:23 the second sample was received. Both showed readings of 120 milligrams of alcohol in 100 millilitres of blood.

[24] Cst. Stevenson prepared the Certificate of Qualified Technician and served it with the usual supporting documentation on the defendant, who was released to his wife and mother.

ISSUES

[25] The defence raises five issues:

> (1) Did Cst. Stevenson have the required grounds to make the approved screening device demand?

(2) Was the ASD demand made "forthwith" as required under s. 254(2)?

(3) Was the device used properly identified?

(4) Were the data master samples taken "as soon as practicable" as required under s.254(3)(a) ?

(5) If any of the foregoing questions are answered in the affirmative, should the results of the breath tests be excluded under s. 24(2) of the *Charter*?

1. Grounds for the ASD demand

[26] The defence argues that there is no evidence before the court that the police officer "reasonably suspect[ed] that [the defendant] ha[d] alcohol in [the defendant's] body".

[27] Although the officer did not quote those words verbatim from s. 254(2) of the *Criminal Code*, he did say, as I quoted above, that, based on the odour of liquor, the slight slur and the red eyes he had a suspicion "to give me grounds for the demand." In my opinion these words are sufficient to establish that the officer reasonably suspected that the defendant had alcohol in his body.

2. "Forthwith"

[28] The argument on this issue is that 22 minutes elapsed from the police officer's approach to the truck to the time of the ASD demand, and that he should have made the demand immediately when he noticed an odour of alcohol coming from the truck.

[29] In part this argument is based on a misapprehension of the time involved. The defence argument starts the clock running at 4:20 p.m. But that was the moment when the officer turned the corner from Route 3 onto Route 12. He then drove a quarter kilometer, parked his police car, approached the truck, felt the tires and hood and jumped up on the running board to speak to the driver. The officer noticed that the truck's inspection sticker was expired. He had a brief conversation with the driver which he estimated lasted less than a minute before the driver admitted that he had

been on the 103 highway 10 or so minutes before. The officer then asked him for his licence and noticed an odour of liquor coming from the interior of the truck and a "slight slur" in the defendant's voice. He asked the defendant for his other documents and asked him to come back to the police car, where the officer discovered that the truck registration was also expired. As the defendant provided the documents, the officer noted an odour of alcohol on the defendant's breath and that his eyes appeared red.

[30] It is clear from the officer's testimony that he did not form the requisite suspicion as to alcohol in the defendant's body until he had the defendant in the back seat of the police vehicle. Nor could he have done so. An odour of alcohol coming from the truck is not the same as an odour of alcohol from the driver's breath.

[31] I find that the "delay" in giving the demand is explained as the time required to investigate and establish the reasonable suspicion required to ground the demand and that both the demand and test were conducted "forthwith", as defined in *R. v. Bernshaw* (1995), 95 C.C.C. (3d) 193) and cases following it.

3. Identification of Device

[32] The defence argues that the police officer did not state which of two possible models of the device he named was used in the test. I find that this argument can be answered briefly in that the officer clearly stated that the device was "an approved screening device." In the absence of any evidence to the contrary, that is sufficient to deal with this issue.

4. "As soon as practicable"

[33] The defence argument here is two-fold: (a) there was unexplained delay at the scene and (b) there was unacceptable delay in the conduct of the test.

(a) unexplained delay at the scene

[34] The defence claims that there are 10 unexplained minutes from 4:42, the time of the approved screening device demand, to 4:52 the time of the breath sample demand. However, I find that this time is adequately accounted for by the officer's explanation of how the approved screening device test would be done, the first failed

attempt, the second successful attempt, the officer's explanation to the defendant of what the failure meant, and his formal arrest of the defendant at 4:51.

[35] Similarly, the defence points to the twelve minutes which elapsed between the reading of the breath demand at 4:52 to departure from the scene at 5:04 as an unexplained delay.

[36] The police officer testified that during that time the defendant was given his right to counsel and to immediate legal advice, including four telephone numbers, asked if he wanted to call a lawyer, declined to call a lawyer, was given his right to apply for Legal Aid and the police warning or right to silence. The defendant then asked for and was allowed an opportunity to collect personal items, including money, from his truck.

[37] I find that all of the time between 4:42 and 5:04 p.m. is adequately accounted for and that there was no unreasonable delay here.

(a) unacceptable delay at the police office

[38] As stated above, counsel for the defence closely cross-examined Cst. Stevenson regarding an inconsistency between his notes and his testimony as to where the defendant was placed at 5:18 p.m.

[39] Cst Stevenson was forthright and honest in his evidence and was not shaken by the contradiction between his notes and his testimony. He maintained his testimony that the defendant was taken briefly to the interview room, where he declined to call a lawyer and was then taken to the data master room. As I stated above, nothing turns on where the offer and refusal to contact counsel took place and in the face of Cst. Stevenson's clear recollection of what took place, I am satisfied that the minutes between 5:18 and 5:25 are adequately accounted for by what he says occurred.

[40] As to the time that elapsed between 5:25 p.m. when, as stated above, Cst. Stevenson began the breath test procedure and 6:03 p.m. when the first sample was taken, the defence argument was not so much that the time was unaccounted for, but that this delay could have been avoided by proper maintenance procedures. Counsel argued that this was not the same as an unforeseen breakdown, necessitating

immediate repair and that his client should not have suffered the delay caused by the lack of foresight of the police in making sure that the solution was changed in a timely way on a routine basis. He analogized to decisions under s. 254(2) of the *Code*, where even a few minutes wait for an approved screening device to arrive has been held to invalidate the approved screening device demand.

[41] However, there are two crucial differences between the ASD test and the breath test. The first is the wording of the sections themselves. S. 254(2) of the *Code* requires that the ASD test be given "forthwith", whereas s. 254(3) requires that the breath test be given "forthwith or as soon as practicable". The second and more important distinction flows from that wording and the *Charter* rights of the subject. The ASD demand is given and must be complied with before the subject has any opportunity to consult counsel; the breath test cannot be commenced until the subject has been given an opportunity to contact counsel and has done so or declined to do so.

[42] I find that in all the circumstances here, including the necessity of changing the solution, the paper jam in the machine, and the disconnected tube, the breath tests were conducted "as soon as practicable".

5. Exclusion under s. 24 (2) of the *Charter*

[43] Having answered all four questions above in the negative, it is unnecessary to consider the effect of *Charter* s. 24(2). However, I would remind counsel of the effect of the recent Supreme Court of Canada decision in *R. v. Grant*, 2009 SCC 32 which revised the analysis which must be conducted under s. 24(2) to the effect that unless the conduct of the police amounted to an egregious violation of the defendant's *Charter* rights, breath samples under s. 254(3) will, in future, likely be admissible despite minor *Charter* breaches.

CONCLUSION

[44] Having found that all elements of the offence under s. 253(1)(b) have been established by the Crown and having found no breaches of the defendant's *Charter* rights, I find that the defendant is guilty as charged.