PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Miller, 2011 NSPC 97

Date: 20111222
Docket: 2132864, 2132865
Registry: Kentville

Between:

Her Majesty The Queen

v.

Isaac Freeman Miller

Judge:	The Honourable Judge Alan T. Tufts
Heard:	February 2, 2011, in Kentville, Nova Scotia
Written decision:	December 22, 2011
Charge:	s. 253(1)(b) CC, s. 253(1)(a) CC
Counsel:	James Fyfe, for the Crown Chris Manning, for the Defence

By the Court: (orally)

INTRODUCTION

[1] The Defendant is charged under s. 253(1)(a) and (b) of the *Criminal Code*. The s. 253(1)(a) charge was not argued and in any event, the evidence would not support a conviction.

[2] The real focus here is whether the s. 253(1)(b) charge can be proven and the only issue is whether each of the breath samples was received as soon as practicable after the alleged offence as required by s. 258(1)(c) of the *Criminal Code*.

[3] Because the Crown relies on the presumption of identity the Crown must prove that both of the samples were received as soon as practicable as well as proving that the first sample was received within two hours of the alleged offence.

[4] In this case, it is clear that the first sample was received well within the two hour period, that just leaves the other criteria.

THE FACTS

[5] Cst. Sehl was attached to the impaired driving unit but on this evening - November 29, 2009 - he was assisting the Kentville Police Service regarding a suspicious person complaint. The practice for Cst. Sehl - and I gather with other members of his unit - is that when impaired drivers are detained the local police provide the breath technician if required and he, as the investigating officer, would not do this, *i.e.*, be the breath technician. It is not clear why this is the case, although the Crown argued that is was reasonable to have such a practice. I could speculate but I believe it would not be appropriate to do that. There was no evidence as to the reason for this practice.

[6] Returning to the facts then, Cst. Sehl stopped the defendant at 2:20 am. He had determined that the car the defendant was driving was possibly connected to the another complaint. He smelled alcohol coming from the defendant , performed an ASD test and then arrested the defendant at 2:27 am and gave him his *Charter* rights. At 2:28, he gave the standard breath demand. The defendant was cuffed

and placed in the police car. Because the defendant did not own the car, Cst. Sehl felt it imprudent to leave the car. He called and waited for a tow truck. Cst. Sehl left with the defendant for the Kentville Police Service at 2:39 am, after the tow truck arrived. They arrived at the police station at 2:42 am. The defendant was asked again about a lawyer and decided to speak to counsel. Duty counsel was contacted and the defendant spoke to counsel. Cst. Sehl made no notes about when or how long the defendant spoke to counsel. He agreed it was possibly "about 10 minutes." He also agreed on cross-examination that he waited from approximately 2:50 a.m. to 3:18 a.m. for the Kentville Police Service to arrive, after the defendant spoke to Counsel.

[7] Cst. Sehl did say he did not call the Kentville Police Service to supply a breath technician until after the defendant finished speaking to counsel. He was never questioned about this, nor asked why he would not have arranged for the breath technician sooner - after the demand had been made because he knew then clearly, that a breath technician was required. In any event, Cst. Sehl became aware that the Kentville Police Service would not be providing a breath technician.

[8] Cst. Sehl is a breath technician, therefore at 3:15 a.m., Cst. Sehl concluded that "time was moving along" and being concerned about the timing issue and the realization that the Kentville Police Service were not arriving, that he would assume this role. He advised the defendant of that. Cst. Sehl testified that the other officers became busy, apparently lodging other individuals relative to the other complaint matter. This is why the breath technician did not arrive earlier. The first breath test was concluded at 3:34 am and the second at 3:52 am.

[9] To summarize, the total time from when the defendant was in care or control of the vehicle until the first breath test was from 2:20 am to 3:34 am , a period of one hour and 14 minutes. Waiting for the tow truck took 11 minutes; from the arrival at the police station, until the first sample was taken was from 2:42 am to 3:34 am, 52 minutes. The time spent waiting for the Kentville Police Service breath technician was from approximately 2:50 am to 3:18 am or 28 minutes, perhaps slightly less.

[10] The focus here, in my opinion, is on the last time frame, that is the approximate 28 minutes waiting for the Kentville Police Service technician. The

other time frames including the waiting for the tow truck are all in my opinion, unremarkable. This is not a case of unexplained delays.

DEFENCE POSITION

[11] The defendant argues that the samples were not taken as soon as practicable. He argues that the test is, whether the tests were conducted within any reasonably prompt time and that the two hour outside limit does not fetter the test to be applied.

[12] The defendant relies on *R. v. Trempe*, [1992] N.S.J. No.601, a decision of Justice Haliburton of the Nova Scotia Supreme Court. He was acting as a Summary Offence Appeal Court Judge.

[13] The defendant argues that the delay here is associated with the decision based on a policy to wait for the Kentville Police Service when Cst. Sehl was perfectly capable from the beginning to provide the test. Also, the defendant argues that time was extended unnecessarily when Cst. Sehl stretched the observation period when he had already had the defendant under observation for that time.

CROWN POSITION

[14] The Crown relies on *R. v. Vanderbruggen* , [2006] C.J. No. 1138 (CA), which I will refer to later.

APPLICABLE LAW

[15] "As soon as practicable" is a term that needs to be defined here. As I mentioned at the outset, the issue here is simply whether the breath samples were taken as soon as practicable. Section 258(1)(c)(ii) is part of a legislative scheme which allows the Crown to rely on a presumption, that failing evidence to the contrary, the breath samples result set out in the certificate of analysis at the time of testing is presumed to be the blood alcohol concentration at the time of care or control or operation - the so called presumption of identity.

[16] However, to rely on this presumption, the Crown must establish that each sample was taken as soon as practicable and in the case of the first sample, not later

than two hours after that time. Failure of the Crown to meet this threshold does not make the certificate inadmissible, it simply requires the Crown to prove otherwise that the blood alcohol concentration at the time of testing was the same or at least above the legal limit at the time of care or control.

[17] It is a procedural shortcut to assist the Crown in prosecuting this types offences. It is part of a series of shortcuts and procedural presumptions to make these prosecutions easier. However, certain perquisites are necessary to be met to allow these shortcuts to apply. The Crown is obliged to establish these prerequisites; the onus on the Crown is not, however in my opinion, proof beyond a reasonable doubt.

[18] The phrase "as soon as practicable" has been the subject of numerous judicial commentaries. The phrase has been held to mean "that the tests were taken within a reasonable prompt time"[1].

[19] The touch tone is whether the police acted reasonably[2]. The Court is required to look at the entire circumstances to determine whether the police acted reasonably[3]. This requirement must be applied with reason[4]. There is no requirement that the police account for every minute[5] or explain every incident[6] which occurred during the subject time frame.

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[1] *R. v. Vanderbruggen* [2006] OJ No. 1138(CA)*;R. v. Torsney* [2009] OJ No. 2638*; R. v. Burbidge* 2008 ONCA 765*; R. v. Mudry* [1979] A.J. No. 613 (CA)

[2] *R.v. Vanderbraggen, supra*

[3] *R. v. Vanderbraggen, supra*

[4] *R. v. Carter* 59 C.C.C.(2d) 45(Sask. C.A.)

[5] *R. v. Carter, supra; R. v. Seed* 38 M.V.R. (3d)44 (Ont. C.A.)*; R. v. Cambrin* [1983] 2 W.W.R. 250 (BCCA)

[6] *R. v. Vanderbraggen, supra*

[20] "As soon as practicable" does not mean as soon possible[7], nor does the test have to be taken at the earliest moment[8]. "Practicable" imports a difference according to the circumstances and means, ordinarily, that the thing must be done as soon as reasonably can be expected[9]. "Practicable" means feasible, fair and convenient and is not synonymous with "possible"[10].

[21] My colleague, Judge Jamie Campbell explained this phrase in *R. v. McKay*[11] at para. 22:

> The question is what"as soon as practicable" means. Practicable is a word more likely to be used in a legal context than in daily speech. It means that something is capable of being achieved using existing means and resources.
>
> As soon as practicable does not mean as soon as possible. It has the important element of taking into account existing resources and surrounding circumstances. It is defined having regard to the legislation involved, the context of the particular case and reasonable practical considerations.
>
> Here, the legislation contemplates a situation where time is important. It is important not only in the sense that a person should not be detained for a period that is longer than necessary but because fluctuating alcohol levels in the blood are being measured.

Further he continues at para. 48:

> When the police do provide that evidence it should show that the activities undertaken were reasonable in the circumstances and were undertaken within a reasonable time in light of the fact that time is of the essence.
>
> A vast body of case law has developed so that almost every detail of the process has been the subject of some form of judicial comment. The police in dealing with these matters must be meticulous in their attention to detail. The Crown in prosecuting them must be sure not to omit any relevant piece of information. At the same time, the practical realities of law enforcement should be acknowledged.

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[7] *R. v. Myrick* (1995) 13 M.V.R. (3d) 1 (NFLD CA)

[8] *R. v. Murdy, supra*

[9] *R. v. Mudry, supra*

[10] *R. v. Mudry, supra*

[11] 2007 NSPC 72

Judge Campbell explains in that case that there are two general categories of cases; those where there is unexplained delay and those where the delay is alleged to be not reasonable.

[22] In the past, I have commented on both such categories in two decisions; *R. v. Davidson* [12], which Mr. Manning referred to during summations and *R. v. MacInnis*[13].

[23] Police do not have to arrange themselves in order that the test be taken as soon as possible[14] and certain police procedures[15] if reasonable, which contribute to delay will not mean that the tests were not taken as soon as practicable.

[24] However the two hour limit is not determinative and does not govern the analysis[16]. Even a lapse of time within the two hour period is subject to scrutiny.

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[12] *R. v. Davison* 2001 NSPC 40

[13] *R. v. McInnis* 2003 NSPC 63

[14] *R. v. Letford* [2000] OJ No. 4841 (CA)

[15] *R. v. Clarke* [1991] OJ No. 3065 (CA)*; R. v. Konechny* [1989] S.J. No. 189 (CA)

[16] *R. v. Myrick, supra*

Justice Cameron of the Saskatchewan Court of Appeal, said this best in *R. v. Tarr,*[17] albeit in decent , when he said at para. 24:

> It would have been a simple matter to draft section 258(1)(c)(ii) to refer only to one period so as to require only that the first sample be taken within two hours. However this is not the wording used in section 258(1)(c)(ii). It requires not only that the first sample be taken within two hours but it be taken as soon as practicable.

ANAYLSIS

[25] Applying these principles to the case before us: the total time between care or control and the first sample taken was one hour and 14 minutes, well within the two hour limit. Yet this is not the true measure, although I agree it can be a factor. The travel time from the scene to the police station was brief and the time to speak to counsel was also relatively brief, it appears. However, in my opinion because these time periods are short in this case does not mean the police can unreasonably delay otherwise with some notion that there is "time to spare" although I want to be clear that this is not necessarily what occurred here.

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[17] *R. v. Tarr* [1998] S.J. No. 433 (CA) at para. 24

[26] In my opinion, it is simply that if other procedures which may take longer ordinarily can be accomplished in a relatively short period of time, this does not relieve, in my opinion, the police in their obligation to act reasonably prompt and to be practicable in the circumstances. Here it is the delay in waiting for the Kentville Police Service breath technician to arrive which is at issue. Cst. Sehl was perfectly able to provide that service which is the focus. It appears he did not call the Kentville Police Service until after the defendant had finished speaking to his lawyer. Why he would not have done this immediately after the demand was made is unknown. In my opinion, it would have been practicable to do that then. The reasonable inference is that the Kentville Police Service was tied up at the time that the demand was made. The delay then was to allow the Kentville Police Service to attend and the whole delay, approximately 28 minutes, perhaps slightly less can be attributed to that reason. Was this reasonable? Was it practicable in all of the circumstances?

[27] Part of the difficulty is that it is not clear why it was necessary for the Kentville Police Service breath technician to do the test and why Cst. Sehl could not have performed this task from the beginning as he ultimately did. He simply explained that it was the practice to have the local detachment provide the breath

tech. It was not clear why and there was certainly no evidence to explain this. In *R. v. Clarke*[18], the Ontario Court of Appeal found that waiting to have another breath technician arrive based on a policy to ensure that there was objectivity and independence from the arresting officer was reasonable. The same conclusion was reached in *R. v. Koneihny*[19] where a delay necessitated in taking the suspect to another detachment to have an independent person perform the test was also considered to be reasonable. The same conclusion was reached in *R. v. McCrate*[20]. Here there is no explanation given for the practice to have, in this case, the Kentville Police Service breath technician do the test. Was it to allow Cst. Sehl to get on his way to perform his other duties? Was it to allow a person who was independent and objective to perform the test or was it for some other reason?

[28] I would have been quite willing to make a reasonable inference to find that this practice was reasonable but in my view I simply cannot do that beyond speculating because I simply do not know the reason for the practice. There are various reasons that may be behind this practice. There was no evidence to allow

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[18]*supra, note 15*

[19]*supra, note 15*

[20][1980] BCJ No. 1299 (SC)

me to make any inference here. Clearly Cst. Sehl recognized the delay was becoming problematic. Cst. Sehl may have been acting reasonably but it was the practice, in my opinion which was issue here. A practice which I am unable to conclude was reasonable given the lack of evidence. The nearly 28 minutes delay before the start of the observation period - that is the reason for the delay which was not explained in the evidence but which I cannot accept as reasonable - was attributable to this practice.

[29] In my opinion, this practice of waiting was not practicable in the circumstances. The tests in my opinion were not conducted reasonably prompt given all the circumstances. As I explained above this perquisite has to be met to enable the Crown to rely on the presumption of identity. This perquisite, in my opinion, has not been met.

[30] Accordingly, while the certificate is admissible, there is no evidence extrapolating the blood alcohol concentration at the time of testing to the time of care or control. Accordingly there is no evidence to substantiate that the defendant's alcohol concentration at the time of care or control was above the legal limit. He is found not guilty of s. 253(1)(b) charge and as I previously mentioned there is not

enough evidence to sustain a conviction on the s. 253(1)(a) charge. He is found not guilty on both counts.

A.Tufts, JPC