IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Slaunwhite, 2012 NSPC 103

Date: 2012/11/27
Docket:2242519, 2242520
Registry: Halifax

Her Majesty the Queen

v.

Kathleen Marie Slaunwhite

Judge:	The Honourable Judge Marc C. Chisholm
Heard:	November 27, 2012, in Halifax, Nova Scotia
Charge:	CC 253(1)(a) and 254(5)
Counsel:	Darrell Martin, for the Crown Peter Planetta, for the Defence

By the Court:

The Charges

[1] The accused, Kathleen Slaunwhite is charged that she on or about the 3rd day of October, 2010 at, or near Halifax, Nova Scotia, did have the care or control of a motor vehicle while her ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(1)(a) of the Criminal Code; AND FURTHER that she at the same time and place aforesaid, did without reasonable excuse fail or refuse to comply with a demand made to her by a Peace Officer to provide forthwith such a sample of her breath necessary to enable a proper analysis of the breath to be made by means of an approved screening device, contrary to Section 254(5) of the Criminal Code.

Background

[2] The accused, Kathleen Slaunwhite had contact with the police at around 4:30 on the morning of October 3, 2010 as a result of an altercation involving her, her boyfriend, and three men. The incident occurred on Brunswick St., in the downtown

area of Halifax, Nova Scotia. The officers who arrived to investigate, Csts. Bennett and Greencorn, noted that all parties at the scene, including the accused, had been drinking. One of the men who had been involved in the altercation with the accused and her boyfriend told the police that the accused had been driving the truck which was at the scene. The truck was parked in a no parking zone and partly in the lane for traffic. Officers at the scene decided to give the accused a roadside screening demand. They did not have an approved screening device (ASD) in their possession so a call was made for an ASD to be brought to the scene. In less than five minutes Cst. Peroni arrived on scene with an ASD. Neither Csts. Bennett or Greencorn were trained to operate the ASD. Cst. Peroni offered to make the demand and do the testing. Csts. Bennett and Greencorn testified that they briefed Cst. Peroni, telling him that they suspected the accused of impaired driving and they would've told him the basis of their suspicion. Cst. Peroni testified that he was told nothing other than that Csts. Bennett and Greencorn suspected the accused of impaired driving. Cst. Peroni stated that he observed a smell of alcohol on the accused's breath and that her speech was slightly slurred. He did not record these observations in his notebook. The defense urged the court not to be persuaded beyond a reasonable doubt that such observations were made. Cst. Peroni gave the accused a section 254(2) demand. There were two unsuccessful attempts to obtain a sample of her breath. It was Cst. Peroni's view that

she was not blowing properly. Cst. Peroni stated that after telling the accused that if she failed to provide a proper sample she would be charged with the offense of refusal she stated, "Fine. I refuse."

[3] The accused was immediately placed under arrest. The first count was previously dismissed.

Position of the Parties

[4] The Crown submits: that the law in relation to reasonable grounds to make a s.254(2) demand is correctly stated in **R v. Nahorniak** (2010), 256 C.C.C. (3d) 147 (Sask.C.A.); that the evidence of the witnesses presented by the crown ought to be accepted by the court; that the evidence proved that the accused was given a lawful demand pursuant to section 254(2) of the *Criminal Code of Canada* and that she intentionally refused to comply.

[5] The Defense submits: that the decision in **R v. Nahorniak** is distinguishable on its facts; and that the evidence ought not persuade the Court beyond a reasonable doubt that the demand officer had reasonable grounds to make the demand because

(a) the officer's failure to record his observations of the accused's condition ought raise a doubt as to whether he made such observations, (b) the officer did not indicate that he formed the requisite suspicion and the court ought not infer same; (c)the court ought not be satisfied that it was reasonable for the demand officer to rely upon information provided to him by other officers because those officers had not conducted a proper investigation to ascertain the reliability of that information, and (d) the extent of the information provided to the demand officer was insufficient to amount to reasonable grounds for a s.254(2) demand. The defense further submitted that the evidence failed to establish beyond a reasonable doubt that the accused intentionally refused to comply with the demand.

[6] The defense admitted the element of identification of the accused.

The Trial Evidence

Mark Pellow

[7] Mr. Pellow was one of the three men who got into an argument and later an altercation with the accused's boyfriend. He appeared to be in his mid-twenties and of average height and weight. He gave evidence that he is employed as a carpenter.

He testified that on October 2nd-3rd, 2010 he was with friends Craig Herford and Jason Theriault. They were at "The Dome", a nightclub in downtown Halifax. Mr. Pellow gave evidence that he consumed approximately 8 beer before going to The Dome and a further 4-5 beer after arriving there at approximately 12:30 am on October 3rd. He described his condition at 4:30 that morning as "feeling good" but not slurring his words or stumbling around. He stated that he recalled everything that happened.

[8] He testified that when he and his friends were at "pizza corner", he saw a man and a woman beside a truck, which was parked facing up the hill at pizza corner. He'd never seen either of them before. He said that the man was yelling and swearing at the woman and pushing her around. He and his friends were about 100 feet from the man and woman. They yelled to the man to stop. The man yelled back to them. Then the woman got in the driver's seat and the man got into the front passenger seat of the truck. The truck started up and drove off with the man in the truck still yelling at Mr. Pellow and his friends.

[9] Mr. Pellow and his friends walked up the hill from pizza corner to Brunswick St., which was just a couple of blocks. Once there, they saw the same truck, which was then parked on Brunswick St. The woman was still in the driver's seat and the

male in the front passenger's seat yelling at her. Mr. Pellow and his friends went to the passenger side of the truck and knocked on the window. They argued with the man inside and challenged him to come out. Mr. Pellow said that somehow the window broke. Then the man got out and got into a fight with Jason Theriault. The woman got out and started hitting Mr. Herford. Mr. Herford pushed her and she went down. Mr. Pellow said there was a lot of screaming. He heard a police siren so he left the area.

[10] He testified that he was away "ten minutes...at least". He called his friend Craig by cell phone. After talking to Craig he decided to return to the area which he did. When he got back, the police were present and trying to get a breath sample from the woman, the driver. It was his impression that she wasn't cooperating.

[11] He identified the accused, Ms. Kathleen Slaunwhite as the woman whom he'd seen driving the truck.

[12] Mr. Pellow stated that the entire incident, from when he first saw the couple at pizza corner until the police were attempting to obtain a breath sample from her was "not very long", 20-30 minutes.

[13] He estimated Craig Herford to be 6'5" tall and 350 pounds. He disagreed with a defense suggestion that Craig pulled the woman's hair or threw her to the ground. He acknowledged having heard the woman saying to the police that she wanted Craig charged with assaulting her and Craig saying that he wanted the woman charged with assaulting him. He denied a defense suggestion that this affected his evidence regarding what he observed.

[14] The Court found Mr. Pellow's evidence clear, detailed and consistent with each telling of it. He appeared slightly frustrated by some of defense counsel's suggestions and questions. The evidence disclosed no motive for Mr. Pellow to lie. Ms. Slaunwhite and her boyfriend were unknown to him prior to that night and, according to Mr. Pellow's evidence, which the Court accepts, he and his friends were trying to come to her assistance. The Court considered the significant amount of alcohol Mr. Pellow consumed that night. In spite of his consumption of alcohol he demonstrated clear and substantial recollection of the incident. Cst. Greencorn's evidence was that, while Mr. Pellow had been drinking, he did not appear intoxicated and his speech was fine and he was coherent. The Court found his evidence both credible and reliable. The Court accepted his evidence.

Cst. Jeff Bennett

[15] Cst. Bennett stated that he was a peace officer, a member of the Halifax Regional Police Service, so employed for approximately six years and was on duty on the morning of October 3, 2010.

[16] He testified that at around 4:30 am, October 3, 2010 he and his partner, Cst. Greencorn, came upon a scene of a possible assault near the Molson building at 1650 Brunswick St., Halifax, NS. He said it was near the "Palace" a well known downtown nightclub. He said that there were four very excited people in the vicinity of a truck which was parked at that location. A woman, later identified as Ms. Slaunwhite was just getting up off the curb. She and the others approached he and his partner. The four were separated. He spoke with two persons who identified themselves as Craig Herford and Jason Theriault. His partner spoke with Ms. Slaunwhite and the man with her, Jeff Kehoe.

[17] Cst. Bennett testified that Mr. Herford was quite calm, the calmest of the four people present. There was a smell of alcohol on his breath indicating he had been drinking. His eyes were quite glossy. Cst. Bennett testified that he had no difficulty understanding Mr. Herford. Cst. Bennett disagreed with defense counsel's suggestion

that Mr. Herford appeared “bombed”. Cst. Bennett stated that Mr. Theriault provided no information. He was intoxicated but talked fine.

[18] The Crown sought to introduce information obtained from Mr. Herford for the purpose of establishing grounds for a subsequent demand pursuant to section 254(2). The defense did not object to the introduction of the evidence for that purpose. The evidence was considered for that purpose only.

[19] Cst. Bennett testified that Mr. Herford told him that he and his friends approached the truck because of yelling and screaming from within the truck. Mr. Herford told him that the woman, Ms. Slaunwhite was in the driver’s seat and her male companion was in the front passenger seat. He and his friends had words with the male. The passenger door window got broken. Mr. Herford didn’t know how that happened. The man got out of the truck and got into a fight with Jason Theriault. Ms. Slaunwhite then got out of the truck and confronted him.

[20] Cst. Bennett did not agree with a suggestion by defense counsel that he had a concern regarding Mr. Herford’s truthfulness, arising from Mr. Herford’s claim that he did not know how the passenger window of the truck was broken or Mr. Herford’s intoxication. Cst. Bennett testified that Mr. Herford was forthcoming and admitted

he banged on the truck window and pushed Ms. Slaunwhite. He believed the information provided by Mr. Herford, in particular, that the accused had been the driver of the truck.

[21] Cst. Bennett testified that the truck appeared randomly parked. It was well off the curb and partly in the travel lane for traffic. He noted that the passenger side door of the truck was open and the window thereof broken.

[22] After speaking with Mr. Herford and Mr. Theriault he went to confer with his partner. He testified that he told Cst. Greencorn that he'd been advised that Ms. Slaunwhite had been driving the truck. He stated that Cst. Greencorn told him that he'd smelled liquor on Ms. Slaunwhite's breath. A decision was made to give a s.254(2) demand to Ms. Slaunwhite.

[23] Cst. Greencorn also advised Cst. Bennett that Ms. Slaunwhite had made a complaint of assault by Mr. Herford. Cst. Bennett advised that Mr. Herford had accused Ms. Slaunwhite of assaulting him. Ms. Slaunwhite was complaining of injuries so a call was made for an ambulance. When the ambulance arrived Ms. Slaunwhite went with an attendant to be examined.

[24] Cst. Bennett testified to observing a scrape mark, like road rash, on Ms. Slaunwhite's right arm, marks on her biceps and a slight bump on the back of her head. He further described her as excited, upset, speaking quickly with a smell of alcohol on her breath. He did not recall her being unsteady on her feet or slurring her words.

[25] Cst. Bennett testified that, prior to the ASD demand, the accused and Mr. Kehoe both denied driving the truck after approximately 11:00 pm on October 2nd, 2010. They stated that the truck was parked on Brunswick Street at that time. Cst. Bennett testified that this was discussed with Csts. Greencorn and Peroni. He testified that the information was not believed because of the location of the truck on Brunswick Street, an area frequented by the police and the truck randomly parked in a no parking zone and partly in the lane for traffic. The reason for rejecting this information was reasonable and accepted by the Court.

[26] After Ms. Slaunwhite was seen by the ambulance attendant Cst. Bennett testified that he spoke to her. He asked for her version of the incident. He advised her that they had been told that she had been driving the vehicle, the truck.

[27] Cst. Bennett called for an approved screening device (ASD) to be brought to the scene. He did not note the time of his call. He testified that the ASD arrived on scene within a few minutes, having been brought by Cst. Peroni.

[28] Cst. Bennett testified that both he and Cst. Greencorn spoke with Cst. Peroni upon his arrival and briefed him. Neither he nor Cst. Greencorn were qualified to operate the ASD brought to the scene. Cst. Peroni agreed to do so. Cst. Bennett testified that he would've told Cst. Peroni that Ms. Slaunwhite, whom they pointed out to Cst. Peroni, had been identified as the driver and was suspected of impaired driving. Cst. Bennett stated he told Cst. Peroni that he'd smelled alcohol on Ms. Slaunwhite's breath.

[29] Cst. Bennett testified that the parties were advised that if they wished to pursue a complaint of assault they could lay a private prosecution. Further, because no one, including Mr. Kehoe could say how the passenger door window had been broken, a charge of property damage would not be laid by the police.

[30] Cst. Bennett testified to having contact with Mark Pellow, near the end of the incident, after the section 254(2) demand had been made. He stated that Mr. Pellow agreed to give a statement. Cst. Bennett stated that, while Mr. Pellow had been

drinking, he did not appear intoxicated. He detected a low to moderate smell of alcohol on his breath. His speech was fine and he was coherent.

[31] The Court found the evidence of Cst. Bennett clear and logical and consistent with other evidence which the Court found credible. The Court accepted his evidence.

Cst. George Greencorn

[32] Cst. Greencorn testified that he was a peace officer and a member of the Halifax Regional Police Service since October 2008 and that he was on duty on the morning of October 3, 2010.

[33] At approximately 4:30am on that date, he and his partner Cst. Bennett were on Brunswick St, Halifax, Nova Scotia. October 3rd, 2010 was on the weekend and the downtown area around Brunswick St. was busy with lots of traffic.

[34] He testified that he observed a grey truck in the road. The truck was in a no parking zone, clearly so marked. It was quite a distance from the curb with the driver's side tires in the driving lane for traffic. He said that because of its position it stood out "pretty bad". It would've been ticketed and towed if noticed being there

by the police. There was no ticket on it. He stated that he recalled having been by the area several times earlier that night and the truck was not there. He said the area is patrolled frequently by the police.

[35] Cst. Greencorn testified to having observed a female on the ground and a number of quite agitated males in the area of the truck, located at 1663 Brunswick St. He and his partner stopped at that location and got out of their police car. The parties approached them all trying to say what had happened and all appearing to be "very agitated" and "intoxicated". The parties were separated. He spoke with the woman who had been on the ground, identified as Kathleen Slaunwhite and her male friend Jeff Kehoe.

[36] Ms. Slaunwhite alleged that when she tried to break up a fight between Mr. Kehoe and Mr. Theriault she was assaulted by Mr. Herford. She alleged that Mr. Herford had punched her in the face. She said that her jaw was sore. He observed that she had a little "road rash" on one arm, no marks on her face, and a bruise on her right arm/bicep. Later in his evidence he indicated that Cst. Bennett observed a slight bump on the back of her head. As a result of her complaint of injuries he called for an ambulance to attend the scene. When the ambulance arrived Ms. Slaunwhite was seen by an attendant.

[37] Cst. Greencorn testified that he observed the passenger side front window of the truck to be broken. When speaking with the persons present no one provided any information as to how it got broken nor who broke it. Mr. Herford and Mr. Theriault admitted banging on it.

[38] While Ms. Slaunwhite was being attended to by an EHS attendant he spoke with Cst. Bennett. They shared information. The versions of the event they'd received differed. Ms. Slaunwhite and Mr. Herford had each made a complaint of assault against the other. The officers decided not to pursue any assault charge. They advised those parties of their right to pursue a private complaint of assault.

[39] Cst. Greencorn testified that there was insufficient information to warrant a charge in relation to the broken window of the truck.

[40] Cst. Greencorn testified that Cst. Bennett told him that Ms. Slaunwhite had been identified as the driver of the truck at the scene.

[41] Cst. Greencorn stated that he told Cst. Bennett that he observed a smell of alcohol on the breath of Ms. Slaunwhite and that her speech was slurred and that her eyes were blood-shot and glossy.

[42] Cst. Greencorn testified that he felt that he had grounds to make a section 254(2) demand. Cst. Bennett made a call to have an approved screening device (ASD) brought to the scene. According to Cst. Greencorn in “easily under five minutes” Cst. Peroni arrived on the scene with an ASD.

[43] Cst. Greencorn testified that he and Cst. Bennett met with Cst. Peroni and relayed to him the information known to them. Cst. Greencorn stated that he told Cst. Peroni of the signs of impairment he’d noted and that either he or Cst. Bennett told him of the information they’d received of her having been operating the vehicle. Cst. Greencorn testified that after the ASD demand was made to the accused both she and Mr. Kehoe stated that the truck had been parked on Brunswick St. in the late evening of October 2, 2010 and not driven since then. Cst. Greencorn didn’t indicate which officers were present for that discussion. As previously stated, the Court found that the information provided by the accused and Mr. Kehoe was not believed and the explanation for rejecting that information was reasonable.

[44] Cst. Greencorn testified that, at that time, he was not qualified to operate the ASD that had been brought to the scene. He is now qualified to do so.

[45] Cst. Greencorn testified that he introduced Cst. Peroni to Ms. Slaunwhite and remained with them while Cst. Peroni gave the ASD demand and attempted to obtain a sample of her breath. He testified that Cst. Peroni explained the testing process to Ms. Slaunwhite and on two occasions attempted to obtain a sample of her breath. On each occasion a sample was not received. After a further explanation by Cst. Peroni and a further explanation of the consequences of refusing to provide a proper sample of her breath, Cst. Greencorn testified that Ms. Slaunwhite stated that she refused.

[46] On cross-examination Cst. Greencorn testified that Jeff Kehoe was the most intoxicated person present and the loudest and most aggressive. He stated that Mr. Kehoe was told multiple times to back off but he continued to interrupt and "add fuel to the fire". He stated that Mr. Herford, while intoxicated, was the calmest and easiest to talk to.

[47] Cst. Greencorn testified that the differences in the information provided by Mr. Herford and others did not cause him to doubt or have any concern for the truthfulness or accuracy of the information provided by Mr. Herford.

[48] The Court accepted Cst. Greencorn's evidence that he believed the information provided by Cst. Bennett that Mr. Herford identified the accused as the driver of the motor vehicle at the scene. Further, taking into consideration all of the information known to Cst. Greencorn including his subsequent rejection of the information provided by the accused and Mr. Kehoe, the Court found his acceptance of that information, without further investigation, objectively reasonable.

[49] Cst. Greencorn agreed that in his notes he had written that he observed Ms. Slaunwhite to have an odor of alcohol on her breath, bloodshot eyes and rambling speech. In his evidence he maintained that her eyes were bloodshot and glossy and that her speech was slurred. He said his notes were his cues to aid his memory and he didn't write everything down. He said that there was a lot going on at the time. He also stated that he considered rambling speech similar to slurred speech and that it was a sign of impairment.

[50] The Court found the evidence of Cst. Greencorn clear, logical and consistent with other evidence which the Court found credible. The Court found his rationale for rejecting the information provided by the accused and Mr. Kehoe about the time of her driving the motor vehicle to be reasonable. The Court accepted his evidence.

Cst. Brian Peroni

[51] Cst. Peroni testified that he became a member of the Halifax Regional Police Service in June, 2010. Cst. Peroni, a peace officer, was on duty on the morning of October 3, 2010.

[52] Cst. Peroni testified that in March, 2010 he was qualified to operate the Alcotest 7410 GLC, which he referred to as an approved screening device (ASD).

[53] Cst. Peroni testified that at 5:08 am on October 3, 2010 he was at the Halifax Regional Police station at 1975 Gottingen St. and heard a radio transmission from Cst. Bennett requesting an ASD be brought to his location on Brunswick St., three blocks from the police station. Cst. Peroni radioed in response that he would do so. He obtained an ASD (Alcotest 7410 GLC) from his Sergeant's office and proceeded to the scene on Brunswick St. He testified that he arrived at 5:10 am.

[54] Cst. Peroni testified that upon arrival he spoke with Cst. Bennett and Cst. Greencorn. As neither of them were qualified to operate the ASD he volunteered to do so. He testified that they advised that they were investigating property damage, possible assaults and impaired driving. He stated that they directed his attention to

Ms. Slaunwhite, who was only a few feet away, and advised that they suspected her of operating a motor vehicle while impaired. He stated that he was not told of the officers observations regarding impairment or the source of their information to believe Ms. Slaunwhite may be impaired. He stated that he was not told anything about the time of Ms. Slaunwhite operating or being in care or control of a motor vehicle, nor which vehicle she was believed to have been operating. He also stated that he was not given any information as to how Ms. Slaunwhite was "placed in the vehicle". Furthermore, Cst. Peroni was not asked about nor did he mention being present when the accused and Mr. Kehoe claimed the truck in question was parked on Brunswick St. late in the evening of October 2, 2010 or being party to a conversation with Csts. Bennett and Greencorn when that was discussed.

[55] Cst. Peroni testified that he approached Ms. Slaunwhite and spoke with her. He stated that he detected an odor of alcoholic beverage on her breath and her speech was slightly slurred. In response to a question of what opinion he formed he testified that he observed the smell of alcohol on her breath and noted the slightly slurred speech and proceeded to give the accused the s. 254(2) demand as requested.

[56] Cst. Peroni testified that it was at 5:12 am, October 3, 2010 he read to Ms. Slaunwhite the standard section 254(2) demand, which he read to the Court. He asked

Ms. Slaunwhite if she understood. She responded that she “totally understood”. Cst. Peroni testified that his reasons for making the demand were that the other officers suspected her of impaired driving and he noted the odor of alcohol on her breath and slightly slurred speech. Cst. Peroni acknowledged that his notes of the incident did not include a reference to he having observed an odor of alcohol on her breath nor slightly slurred speech. He testified that although the event was two years ago he recalled the incident, where he stood with Ms. Slaunwhite and his observations of her. He recorded in his notes the details of his attempting to obtain a sample from her and her refusal. He did not recall Cst. Greencorn talking with Ms. Slaunwhite during the testing or Ms. Slaunwhite saying that she wasn’t driving or her asking for another chance to provide a sample. There was no evidence to establish that either of those events occurred.

[57] Cst. Peroni testified that he showed Ms. Slaunwhite the device and explained what was required of her. At 5:14 am he attempted to obtain a sample of her breath. Cst. Peroni stated that Ms. Slaunwhite failed to provide a proper sample of her breath. He stated that she put her lips on the mouthpiece, puffed her cheeks, but did not provide a proper sample by blowing into the instrument as instructed. He stated that there was no indication that she blew air into the instrument. This assessment was based upon: (1) that the tube of the instrument did not fog up as normally occurs

when air is blown through it; and (2) that the instrument did not emit a sound which it normally does when sufficient air is being blown into it. Cst. Peroni testified that she did appear to maintain a seal on the mouthpiece with her lips. This assessment was based upon the fact that he did not feel air being blown on his hand which was holding the instrument.

[58] Cst. Peroni testified that he stopped the attempt. He again explained to her what was required and explained to her again that if she failed or refused to provide a proper sample she could be charged with the offense of refusal.

[59] Cst. Peroni testified that he changed the mouthpiece on the ASD, putting on a new mouthpiece and then attempted to obtain a sample from Ms. Slaunwhite. He testified that Ms. Slaunwhite put her lips around the mouthpiece, puffed her cheeks, and the instrument made an audible sound for 1-2 seconds and then the sound stopped. Cst. Peroni testified that after the 1-2 seconds there was no evidence of any air entering the tube: (1) there was no condensation in the tube; and (2) no audible sound coming from the ASD. Cst. Peroni concluded that Ms. Slaunwhite had not provided a proper sample of her breath. He stated that he again explained to her what was required and that if she failed or refused to provide a proper sample of her breath she could be charged with the offense of refusal. Cst. Peroni testified that Ms.

Slaunwhite stated to him, “Fine. I refuse”. He testified that it was clear to him that she had refused to comply with his demand.

[60] Cst. Peroni testified that Ms. Slaunwhite was immediately placed under arrest by Cst. Greencorn, who had been present during the demand, the testing, and when Ms. Slaunwhite orally refused.

[61] Cst. Peroni testified that he conducted the standard tests on the ASD before attempting to obtain a sample from Ms. Slaunwhite. Based upon the tests he performed he expressed the view that the ASD appeared to be working properly. He also stated that he checked the mouthpieces and they were functioning properly.

[62] Cst. Peroni’s evidence was clear, precise, and logical.

[63] There was a discrepancy between his evidence and that of the other two officers regarding the extent of the information provided to him by Csts. Bennett and Greencorn.

[64] Cst. Peroni stated that Ms. Slaunwhite was pointed out to him by Csts. Greencorn and Bennett and he was told that she was suspected of impaired driving and they wanted her to be given an ASD demand.

[65] Cst. Peroni testified that he was not advised of any grounds for their suspicion.

[66] Cst. Bennett testified that Cst. Peroni was briefed. That he told Cst. Peroni of having observed a smell of alcohol on the accused's breath and he "would've" told Cst. Peroni that Mr. Herford had indicated that the accused had operated the truck.

[67] The use of the word "would've" by Cst. Bennett caused the Court to question whether Cst. Bennett was testifying about what he recalled or what he believed he would have done as standard, usual practice. This left the Court in doubt as to the reliability of his evidence on that point.

[68] Cst. Greencorn testified that he told Cst. Peroni that the accused was suspected of impaired driving, that he told Cst. Peroni of what signs of impairment he'd noted and either he or Cst. Bennett told Cst. Peroni that the accused had been identified as the driver of the truck on scene.

[69] Both Csts. Greencorn and Bennett recalled the accused and Mr. Kehoe stating that the truck had been parked on Brunswick St. hours earlier. Their evidence differed as to whether this occurred before or after the ASD demand. Cst. Peroni did not mention such a statement. He wasn't asked.

[70] The Court has no doubt that such a statement was made by the accused and Mr. Kehoe. Given the proximity of the three officers the Court finds it likely that Cst. Peroni was present when such a statement was made. However, the evidence does not establish that this statement was made before the ASD demand nor that it was part of the grounds of Cst. Peroni for his making the demand.

[71] While the Court preferred the evidence of Csts. Bennett and Greencorn to that of Cst. Peroni in relation to what Cst. Peroni was told of their information/observations, the Court was not persuaded beyond a reasonable doubt that the evidence of Csts. Bennett and Greencorn ought to be accepted because of: Cst. Peroni's evidence that he was not told any of their information/observations; Cst. Bennet's use of the word "would've"; and Cst. Greencorn's uncertainty whether it was he or Cst. Bennett who told Cst. Peroni that a witness had identified the accused as the driver of the truck on the scene.

[72] Cst. Peroni's evidence of observing a smell of alcohol on the accused's breath and a slight slurring of her words, was not recorded in his notebook. Cst. Peroni explained that he believed that the request of his fellow officer provided legal grounds for him to give the section 254(2) demand. His notes focused on his giving the accused a section 254(2) demand and the accused's words and actions in response to the demand. The Court found the officer's explanation for the lack of any note of his observations reasonable. Further, the Court found that, as stated by Csts. Bennett and Greencorn, there was a noticeable smell of alcohol on the breath of the accused. The Court accepts the evidence of Cst. Peroni that he observed that smell on her breath. As to Cst. Peroni's evidence that he noted a slight slurring of the accused's speech the Court was not satisfied beyond a reasonable doubt because of the Court's assessment of his evidence on that point, his lack of a record of having made such an observation and the inconsistent evidence of Csts. Bennett and Greencorn as to whether the accused's speech was noticeably slurred.

[73] Cst. Peroni did not testify that he suspected the accused had operated or had care or control of a motor vehicle within the preceding three hours.

[74] The Court may draw such an inference from the proven facts. The following facts are relevant: That Cst. Peroni proceeded to make a s. 254(2) demand; That Cst.

Peroni's actions would indicate he was aware of the need for promptness when dealing with an ASD demand; The location of the truck on scene, if noted by Cst. Peroni; That the investigating officers, the accused and witnesses were still on scene at 5:00 am; that the officers identified the accused as a person suspected of impaired driving and wanted her to be given an ASD demand; That Cst. Peroni had no reason to doubt the suspicion of the other officers or that they were acting in good faith in the execution of their duties.

[75] In these circumstances the Court finds that it would be reasonable to infer that Cst. Peroni formed the suspicion that the accused had been operating or in care or control of a motor vehicle within the preceding three hours.

[76] Is there any other reasonable inference that may be drawn?

[77] In addition to the circumstances above, Cst. Peroni testified that he gave the accused the ASD demand because he was asked to do so by another officer.

[78] At the time Cst. Peroni had approximately four months experience as a peace officer.

[79] He testified that he was given no information relating to grounds to suspect the accused of operating or having been in care or control of a motor vehicle within the preceding three hours.

[80] He testified he believed he was authorized to make the demand because he was requested to do so by a fellow officer.

[81] The Court finds that it is reasonable to infer from the facts that Cst. Peroni did not believe it was necessary for him to form any suspicion about the accused having operated or been in care or control of a motor vehicle within the preceding three hours and that he did not form such a suspicion.

[82] In these circumstances the Court is not persuaded that it ought draw the inference that Cst. Peroni formed a suspicion that the accused operated or was in care or control of a motor vehicle within the preceding three hours.

Findings of Fact

[83] The Court found that not all the evidence was reliable.

[84] The Court finds that the time, date and place of the alleged offense has been proven beyond a reasonable doubt.

[85] Identification of the accused was admitted.

[86] The Court finds that at 5:12 am on October 3, 2010 Cst. Peroni, a peace officer, made a properly worded demand to the accused pursuant to s. 254(2) of the Code, which the accused "totally" understood.

[87] The Court finds that after two unsuccessful attempts to obtain a sample of the accused's breath, the accused verbally, unequivocally, refused to comply with a s.254(2) demand. There was no evidence which raised any doubt on this element of the offence.

[88] The Court finds that the accused was operating and in care or control of a motor vehicle within minutes of the arrival of the police on the scene, certainly well within three hours.

[89] In relation to the issue of reasonable grounds for a s. 254(2) demand the Court found:

- That Mr. Herford told Cst. Bennett that the accused had been operating the truck at the scene and was still seated in the driver's seat of that vehicle when he and his two friends approached the vehicle on Brunswick St.;

- That Cst. Bennett believed the information given to him by Mr. Herford and that it was reasonable for Cst. Bennett to do so without further investigation;

- That Cst. Bennett relayed that information to Cst. Greencorn;

- That Cst. Greencorn accepted the information provided to him by Cst. Bennett and that as a result of that information Cst. Greencorn suspected that the accused had been the operator of the motor vehicle at the scene a short time before the police arrived and, certainly well within the preceding three hours;

- That Cst. Greencorn's suspicion is objectively reasonable.

- That Cst. Greencorn observed that the accused had a smell of alcohol on her breath, that her speech was slurred and that her eyes were blood-shot and glossy;

- That Cst. Greencorn suspected the accused had alcohol in her body;

- That Cst. Greencorn subjectively believed that he had grounds to make a s.254(2) demand;

- That Cst. Greencorn's grounds to make a s.254(2) demand were objectively reasonable;

- That Csts. Bennett and Greencorn had reasonable grounds to reject and did reject the information provided by the accused and Mr. Kehoe about when the truck was driven to Brunswick St.;

- That Csts. Bennett and Greencorn advised Cst. Peroni that they suspected the accused of impaired driving and wanted her to be given an ASD demand;

- That it has not been proven beyond a reasonable doubt that either Cst. Greencorn or Cst. Bennett communicated to Cst. Peroni their observations of the accused relevant to whether she had alcohol in her body;

- That it has not been proven beyond a reasonable doubt that Cst. Peroni was told by Cst. Bennett or Cst. Greencorn that a witness (Mr. Herford) stated that the accused had been operating the motor vehicle at the scene;

- That Cst. Peroni believed that Cst. Greencorn was acting in good faith, in the execution of his duties when asking Cst. Peroni to make the ASD demand;

- That Cst. Peroni personally observed a smell of alcohol on the accused's breath;

- That Cst. Peroni did not testify that he suspected the accused had alcohol in her body;

- That the Court has drawn the inference that Cst. Peroni suspected that the accused had alcohol in her body, based upon his own observation of the smell of alcohol and the indication from Csts. Bennett and Greencorn that they suspected her of impaired driving;

- That Cst. Peroni did not state that he suspected that the accused had been operating or in care or control of a motor vehicle within the preceding three hours;

- That the Court is not satisfied beyond a reasonable doubt that it ought draw the inference that Cst. Peroni personally formed such a suspicion;

- That Cst. Greencorn was present for the demand and the testing and the verbal refusal of the accused.

Law and Analysis

[90] Section 254(2) of the Criminal Code of Canada states:

> If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a) and (b), in the case of alcohol:
>
> (a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
>
> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[91] Prior to a 2008 amendment section 254(2) specified:

> Where a peace officer reasonable suspects that a person who is operating a motor vehicle...or who has the care or control of a motor vehicle...has alcohol in the person's body, the peace officer may, by demand....

[92] This wording was interpreted to require that the demand officer have a reasonable suspicion that the accused had alcohol in their body (**R v. Lindsay** (1999), 134 C.C.C. (3d) 159 (Ont.C.A.)). The law did not require that the demand officer have a reasonable suspicion that the person to whom he was giving the section 254(2) demand was in care or control of a motor vehicle, although present care or control of a motor vehicle was an element of the offence which had to be proven by the Crown beyond a reasonable doubt (**R v. Swietorzecki**, [1995] O.J. No. 816 (Ont.C.A.); **R v. MacPherson**, [2000] O.J. No. 4777 (Ont.C.A.); **R v. Ademaj** (2003), O.J. No. 1189 (Ont.C.A.)).

[93] In the Court's view, the present wording of the requisite suspicion in section 254(2), cannot be interpreted as disjunctive. The Court finds that the currently worded provision requires the demanding peace officer's suspicion relate to both alcohol in

the motorist's body and that they operated or had care or control of a motor vehicle within the preceding three hours.

[94] In **R v. Tracey**, [2009] N.B.J. 240 (J.J. Walsh Prov. Ct. J.) His Honor Judge Walsh, at page 6, stated:

> However, on the facts of the present case, as earlier described, Officer Coughlan did have, in my opinion, the requisite "reasonable grounds to suspect" that the accused had alcohol in his body and had within the preceding three hours operated a motor vehicle.

[95] In **R v. Bernshaw** (1995), 95 C.C.C. (3d) 193 (SCC), the Supreme Court of Canada, at p.48 stated:

> S.254(3) of the Code requires that the police officer subjectively have an honest belief that the suspect has committed the offence and, objectively, there must exist reasonable grounds for this belief.

[96] The Court finds that this interpretation of the words "reasonable grounds" applies to those words in s.254(2).

[97] In deciding whether the demand officer had reasonable grounds to make the demand, a court must consider all the circumstances and evidence with respect thereto

known to him when he made the demand **R v. Shepperd**, [2009] S.C.C. 35); **R v. Wong** (2011), BCCA 13 (BCCA); **R v. Wang** (2010), ONCA 435 (Ont.C.A.)).

[98] A trial Judge is entitled to infer the necessary subjective belief on the part of the demand officer (**R v. Dietz**, [1993] A.J. 45 (Alb. C.A.)).

[99] If a second officer attending the scene makes the demand and administers the test he/she must form the requisite belief which can be achieved through the officer's personal observations or information communicated by others or a combination of both (See **R v. Tracy**, supra; **R v. Nahorniak** (2010), 256 C.C.C. (3d) 147 (Sask.C.A.); **R v. Telford**, (1979), 50 CCC (2nd) 322 (Alb. C.A.); **R v. Strongquill**,[1978] 5 W.W.R. 762 (Sask.C.A.)).

[100] The demand officer needn't conduct the testing but must make the decision whether the accused refused or failed to comply (**R v. Shea** (1979), 49 CCC (2d) 497 (PEI SC)(Para 97); **R v. Gietl**, [2001] B.C.J. 922 (BCSC)).

[101] In **R v. Picard**, [2008] M.J. No.275(Man.P.C.), the demand officer was one of two officers working a traffic check point. The pre-arrangement between the two officers was that the first would speak with drivers at their car window. Those whom

he suspected of having alcohol in their body were brought to the second officer who would make the s.254(2) demand and administer the test. In relation to Mr. Picard the first officer testified to having observed “sloppy” driving and detecting a smell of alcohol coming from the accused’s vehicle. He brought the accused to the second officer. The Court was not satisfied that the demand officer made any independent observations of the accused vis-a-vis alcohol, and, he did not state that information received from the first officer formed part of the grounds for his suspicion. The Court found that the Crown had failed to establish a lawful demand because even if he himself formed a suspicion that suspicion was not objectively reasonable.

[102] In **R v. Ruszkowski** (1973), 11 C.C.C. (2d) 235 (Sask.Q.B.) the demand officer relied entirely on what he was told by the arresting officer. At paragraph 8 the Court stated

> the evidence did not disclose precisely what was told to him by Cst. Paulson but whatever it was Sgt. Kurtenbach found it sufficient upon which to found a belief that the appellant had within the preceding two hours committed an offence under Code s.234

[103] This case is distinguishable from the present case. In the present case Cst. Peroni testified he was not told the grounds of the first officer(s) and proceeded on the assumption that Cst. Greencorn had the requisite grounds and he was, therefore, authorized to make an ASD demand on being asked/directed by Cst. Greencorn to do

so. Such evidence failed to establish beyond a reasonable doubt that Cst. Peroni, himself, formed the requisite suspicion that the accused had operated or been in care or control of a motor vehicle within the preceding three hours.

[104] In **R v. Nahorniak** (2010), 256 C.C.C. (3d) 147 (Sask.C.A.), after referring to the **Ruszkowski** decision, the Court stated, at p 21:

> These cases illustrate that reasonable suspicion can be achieved either by the officer's personal knowledge and observation or the communicated observations of others or a combination of both. This is so even where the officer making the demand cannot precisely articulate the information conveyed to him but there is nevertheless other testimony or evidence of what was conveyed.
>
> It is not necessary for an officer to independently investigate and verify grounds of reasonable suspicion conveyed to him as long as he subjectively believes them. For Knowles specifically, it was enough that he knew the grounds and believed them at the time he made the demand and his belief was objectively and subjectively reasonable. In this case, Knowles testified he relied on McStay's grounds but also relied on his own observations to form his reasonable suspicion. Knowles stated three reasons to suspect Nahorniak had alcohol in his body. He assumed that McStay had proper grounds and made the demand because McStay asked him. He relied on what McStay told him. Finally, he independently smelled alcohol coming from Nahorniak. Although it would have been preferable for Knowles to articulate the grounds McStay told him, his failure to do so was not fatal because McStay was able to articulate the details of what was conveyed.

[105] The present case is factually distinguishable. In the present case Cst. Peroni indicated that he was not given any information by other officers to establish grounds to suspect that the accused had operated or been in care or control of a motor vehicle within the previous three hours nor did he indicate his own observations, nor state he

formed such a suspicion. The Court declined to draw an inference that Cst. Peroni had the requisite suspicion.

[106] In **Nahorniak** the Crown argued that it was not obligated to prove that the demand officer possessed the grounds required to make the ASD demand so long as the Crown proved that the officer who requested/directed the demand be made had the requisite grounds. The Court found that it was not necessary to determine if that argument was correct. In the present case counsel did not argue this position.

Conclusions

[107] In **Ruszkowski** and in **Nahorniak** the demand officer was provided information which he accepted and, on the basis thereof, formed a subjective suspicion (belief) that the person had alcohol in the person's body and had operated or had the care or control of a motor vehicle within the preceding three hours. The fact that he, at trial, did not recall the information he'd received and rely upon to form his suspicion was not fatal where other evidence was available to establish that the grounds were reasonable. The facts of this case are different. In this case the demand officer testified he was not given any information relating to the accused operating or having care or control of a motor vehicle. The demand officer did not, himself, make any observations relevant

to whether the accused had operated or been in care of control of a motor vehicle within the preceding three hours.

[108] The evidence did not establish beyond a reasonable doubt that the demand officer formed a suspicion regarding the accused operating or having care or control of a motor vehicle within the preceding three hours.

[109] The Court finds that Cst. Peroni did not have reasonable grounds to make the ASD demand.

[110] The demand made to Ms. Slaunwhite was unlawful. She was not required to comply with the demand.

[111] The Court enters an acquittal on the s.254(5) count.