PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. DeRoach*, 2021 NSPC 44

Date: 20211119
Docket: 8458892, 8458893
Registry: Kentville

Between:

Her Majesty the Queen

v.

M. DeRoach

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	September 28, 2021 in Kentville, Nova Scotia
Decision	November 19, 2021
Counsel:	Nathan McLean, for the Crown Tim A. Peacock, for the Defendant

Section 9 *Charter* Application: Arbitrary detention

By the Court:

Introduction:

[1] Ms. DeRoach applies for exclusion of her breathalyzer readings at trial due to a breach of s. 9 of the *Charter*.

[2] She claims an arbitrary detention arose when a police officer stopped her vehicle after watching her stumble before leaving a parking lot. The Crown says the stop was authorized by provincial highway legislation and the common law.

Decision:

[3] I find the officer had grounds to stop Ms. DeRoach's vehicle based on her slight stumble before driving, and in any event the stop did not require such a foundation. The officer's testimony that the stop was aimed at checking sobriety was sufficient to render it lawful. These are my reasons for reaching this conclusion, but first my findings of fact.

Evidence:

[4] The evidence led on the *voir dire* will be incorporated into the trial by consent of the parties. The Crown called one witness, Cst. Thomas, the arresting officer. The applicant did not call evidence but entered by consent an exhibit containing a number of photographs taken in the relevant area during evening hours.

The Evidence of Cst. Thomas:

[5] On August 2, 2020 at approximately 12:30 am, Cst. Thomas was seated in his marked police cruiser in a Wolfville parking lot bordered by Main Street and a local restaurant. He testified that his car was parked 6-7 car lengths back from the road thereby creating a vantage point from which he could observe both passing vehicles and people walking on the sidewalk.

[6] He explained that, traditionally, a Saturday night in Wolfville sees student drinking, bars letting out after midnight, and he has issued tickets for public intoxication. On cross-examination he was unmoved from this view despite it being August.

[7] Cst. Thomas testified that he saw a man and a woman standing at the corner of the parking lot near the restaurant. The woman, later identified as Ms. DeRoach,

left her companion, and walked in Cst. Thomas' general direction toward a parked car. He assumed she might be collecting something before returning to the man.

[8] Cst. Thomas says the short distance she walked was either on the sidewalk or the asphalt parking lot, the surface of which was described as "fairly smooth". Cst. Thomas was prepared to accept the suggestions put to him by defence counsel that Ms. DeRoach's car was parked adjacent to the sidewalk and, after reviewing the applicant's photographs of the area, that the surface may not have been completely smooth.

[9] Cst. Thomas described Ms. DeRoach's manner of walking as slightly off balance and a "slight stumble" or "little stagger" attracted his attention. On cross-examination he agreed she was not wildly off balance and the stumble happened only once.

[10] When she reached her car, the officer's view was obscured somewhat by other vehicles. He saw the car door open, the interior dome light come on, and watched as she drove out of the parking lot.

[11] Thinking that she, "may have been drinking", he activated his cruiser lights and followed her vehicle a very short distance before she stopped her vehicle.

[12] Asked why he conducted the stop, Cst. Thomas explained, “It’s a safety thing, wanted to be sure not impaired”.

[13] For the purpose of the *voir dire*, defence counsel argued an arbitrary detention was complete at this point. Since the evidence on the *voir dire* will be incorporated into the trial, it is useful to continue with a short summary of Cst. Smith’s additional testimony.

[14] Cst. Thomas approached Ms. DeRoach’s vehicle, she rolled down her window and he noted a smell of alcohol coming from her breath. The “damp and coolish” weather conditions enhanced his ability to detect that odour. He asked Ms. DeRoach to accompany him for an ASD demand, she did so, took the test, “registered a fail”, and was taken to the RCMP detachment where she provided samples of her breath to a breathalyzer technician.

Assessing Cst. Thomas’ testimony:

[15] In assessing Cst. Thomas’ testimony I have considered his general capacity to observe what he described and to remember and report what he perceived, as well as his ability to accurately testify to his recollection.

[16] I have also considered whether he was trying to tell the truth and whether he was sincere, candid, biased, or evasive.

[17] I found Cst. Thomas a reliable historian of his brief contact with Ms. DeRoach. He was in a good position to observe her and develop a concern that she may have been drinking. His initial view of her walking was unobstructed, and his fair concession that he did not see her at the car only served to enhance his credibility.

[18] The distance she travelled was short and the defence photographs show a nearby streetlight and well-lit area that certainly would have enhanced the officer's ability to observe Ms. DeRoach. I should also add, the Court is extremely familiar with this area of Wolfville.

[19] While Cst. Thomas' opportunity to observe was brief, he had already taken note of Ms. DeRoach standing with a male companion and was, as a result, fully engaged in watching her even before she started to walk. His candid testimony, about guessing as to her intention to retrieve something in her car, demonstrated that his focus was fixed on Ms. DeRoach and nothing else.

[20] Once she put the car in motion, the slight stumble led to his decision to stop her vehicle to assess sobriety. This was a concern available to him given his observation.

[21] There was no evidence or hint of an improper reason for the officer's engagement with Ms. DeRoach. He was not targeting her due to any identifiable characteristics, instead sobriety was clearly his stated concern given the area, time of day, proximity to bars, familiarity with drinking patterns in the area, and the stumble he witnessed before she drove her vehicle.

[22] I am entitled to accept some, none, or all of Cst. Thomas' testimony. After consideration, I accept it all as both reliable and credible.

The Law:

[23] Operators of motor vehicles in Nova Scotia are legally required to stop when directed to do so by a police officer. The power to stop is found in s. 83 of the *Motor Vehicle Act*, R.S.N.S., c. 293, s. 1. As a result, Ms. DeRoach had no choice but to stop when she saw the cruiser lights.

[24] A long line of Supreme Court of Canada case law establishes that a motorist stopped by police in such circumstances is "detained" from a *Charter* standpoint[1].

[1] *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 30; *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3, at para. 31; *R. v. Ladouceur*, 1990 CanLII 108 (SCC), [1990] 1 S.C.R. 1257, at p. 1287; *R. v. Hufsky*, 1988 CanLII 72 (SCC), [1988] 1 S.C.R. 621, at pp. 631-632; *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, at pp. 641-644

[25] In *Orbanski and Elias* the SCC clarified just when such stops are lawful at para. 41:

> It is also settled law that the police have the authority to check the sobriety of drivers. This authority was found to exist at common law in Dedman. More pertinently, it was also found in statute in *Ladouceur*, where this Court held that checking the sobriety of drivers was one of the purposes underlying the general statutory vehicle stop powers. … As the Court stated in *Ladouceur*, police officers can stop persons under such statutory power only for legal reasons — in the circumstances of that case (as here), for reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle (p. 1287).

[26] While *Ladouceur* dealt with provincial traffic legislation from other provinces, *R. v. MacLennan*, 1995 NSCA 51, which arose in this jurisdiction, put to rest any argument about the applicability of the jurisprudence with respect to this province's highway traffic legislation. At para 60:

> Police in Nova Scotia are justified in stopping vehicles at random, independently of any articulable cause or publicized enforcement program, for the purpose of controlling traffic on the highway by inspecting licensing, registration and insurance documents, the mechanical condition of vehicles, *and to detect impaired drivers.* Random stops are arbitrary detentions which infringe s. 9 of the *Charter* but which are saved by s. 1. [Emphasis added]

(See also *R. v. Cooper,* 2005 NSCA 47, at para 36 and 37.)

[27] Accordingly, whether there was a violation of Ms. DeRoach's right not to be arbitrarily detained depends on the legality of her detention. Articulable cause is not required.

[28] The evidence of Cst. Thomas is clear, he stopped Ms. DeRoach's vehicle because he thought she may have been drinking due to the slight stumble and the constellation of other factors he considered at that time and place. Perhaps initially innocuous on their own, once these factors connected to driving, they were enough to engage the sobriety check.

[29] In 1990 the Supreme Court of Canada determined when an officer has grounds to stop a vehicle, the detention is neither random nor arbitrary. (*R. v. Wilson*, [1990] 1 S.C.R. 1291). The threshold for determining what constitutes grounds for stopping a motorist for safety reasons is relatively low. (See: *R. v. Adams*, 2011 NLCA 3)

[30] Finally, it is not necessary that the officer specifically invoke the MVA during testimony, so long as his intention "satisfies the aim of the statute": See *R. v. Houben*, 2006 SKCA 129, and *R. v. Mellenthin*, [1992] 3 SCR 615. Instead, the Court can infer such a connection based on the evidence. I find Cst. Smith's evidence served to do just that, the stop was addressed at checking sobriety pursuant to the MVA and as a result was lawful.

[31] In *R v Grant*, 2009 SCC 32, at para 54 the Court reminds, "A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the

law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9."

[32] There was no argument before this Court that the MVA is arbitrary.

[33] The defence also argues that the test in *R. v. Mann* is applicable in the instant case. *Mann*, however, dealt with investigative detentions, not roadside sobriety stops. The test for investigative detention is inapplicable to roadside stops.

Reasonable Suspicion:

[34] Counsel argues Cst. Thomas required reasonable suspicion, not evident in his testimony, to stop Ms. DeRoach. Gower J. in *R. v. Rowat*, 2018 YKSC 50, at paragraph 21, addressed a similar argument – whether there is the need for reasonable suspicion versus no need. His comments are apropos, "*Ladouceur* makes it unnecessary to distinguish between arbitrary and non-arbitrary stops because both are constitutional. (para. 51)".

At paragraph 26:

> …if there is a reasonable suspicion, then the stop is not arbitrary. However, even if a stop is selective, if it is not based upon a reasonable suspicion, then by default it must be considered to be random and arbitrary. We know from *Ladouceur* that random and arbitrary stops under legislation like s. 106 of the Yukon MVA are justifiable under s. 1 of the *Charter*.

[35] With respect, reasonable suspicion to believe an offence has occurred is not required so long as an arbitrary stop complies with the aforementioned scope that includes a sobriety check. (*Ladouceur, supra*, *Mellenthin, supra, Elias, supra*)

[36] It is worth noting, drinking and driving is not in itself illegal and an officer checking for driver sobriety may or may not reach the conclusion that *Criminal Code* mandatory alcohol screening should occur; it is available to him to make that decision after the vehicle is stopped pursuant to the highway safety objective. Such stops are justifiable because they deter drivers from committing highway traffic violations.

Conclusion:

[37] I find the applicant has not established a breach of s. 9 of the *Charter* on a balance of probabilities. While Ms. DeRoach was detained, the detention was not arbitrary. Cst. Thomas exercised his authority to check sobriety pursuant to the MVA. He was not required to hold a reasonable suspicion that Ms. DeRoach was impaired. It was not necessary that the officer satisfy himself before the stop that her actions, the slight stumble, represented a marked departure from the norm. Finally, it would be legally untenable for this Court to graft a requirement for

reasonable suspicion onto the right to conduct roadside stops aimed at assessing driver sobriety.

[38] Application denied.

van der Hoek J.