IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. McCulloch, 2004 NSPC 3

Date: 20031103
Docket: 1262625
Registry: Kentville

Between:

Her Majesty the Queen

Informant

v.

Ricky Dale McCulloch

Defendant

Judge:	The Honourable Judge Alan T. Tufts
Written Decision Released:	January 15, 2004
Counsel:	William Fergusson, Q.C., for the Informant Robert G. Cragg, for the Defendant

By the Court (orally):

[1] This is the matter of Regina v. McCulloch. The defendant is charged with one count under s. 254(5) of the **Criminal Code**. It is alleged that he refused to supply a breath sample pursuant to a breathalyzer demand made pursuant to s. 254(3) of the **Criminal Code**.

[2] The defence raises two issues. First, the defence argues that the investigating officer did not have reasonable and probable grounds to give the breathalyzer demand and consequently the demand which was given was not proper and accordingly the defendant was not legally required to comply with such a demand.

[3] Secondly, the defence argues that the Crown failed to identify the defendant as the person who was stopped on the day in question and who was operating the subject motor vehicle.

[4] I will deal with the first issue. Defence argues that the Crown failed to show that the roadside screening device into which the defendant blew was approved and consequently the "failed" result cannot be considered. The defendant submitted a number of authorities which the defence maintains supports this position. Most, if not all of these authorities were not applicable. Many dealt with charges of refusing or failure to comply with a demand relative to a roadside screening device. Different considerations apply there and the law related to that issue is not directly relevant here. Consequently it will not be necessary to analyze those cases.

[5] The only case submitted was *R. v. Rose*, (1993) 47 M.V.R. (2d) 96 which relied on *R. v. Kosa* [1992] O.J. No. 2594. These cases in fact did not support the defendant's position, however those cases were not factually similar and consequently while there are some applicable principles they are not really that helpful.

[6] The real issue is whether the officer had reasonable and probably grounds to give the demand. Did she have reasonable and probable grounds to believe that the defendant, as a result of the consumption of alcohol, committed, or within the previous three hours, committed an offence under s. 253 of the **Criminal Code**. There must be a subjective as well as an objective basis for this belief. The only possible evidence to support this conclusion by the officer is the odour of alcohol from the defendant, which she observed, and the "failed" result on the "roadside screening device."

[7] The odour of alcohol here itself is not sufficient to support a proper demand, in my opinion. The "failed" result after a "properly conducted" roadside test normally alone will be sufficient to support the required grounds - *R. v. Bernshaw*, [1995] 1 S.C.R. 254 (S.C.C.).

[8] Here there was no evidence that the roadside screening device referred to by the officer and into which the defendant blew and produced a failed result was approved for use under the Criminal Code, although the officer did testify that from her training in the unit she learned that a "fail" result was a good indication that the subject would be over the legal limit for blood alcohol.

[9] There were no other signs of impairment or alcohol consumption noted by the officer who was in the defendant's company for some considerable period of time.

[10] In my opinion it is not clear what kind or type of device the officer was using as a roadside screening device. There is no proof it was an approved one under the Criminal Code and while her training may have suggested that certain conclusions could be drawn from a "fail" result there is no evidence that the device she used was the same one she used here or that the training instruction related to an approved instrument.

[11] While her evidence in this regard is not without any weight it is not sufficient in my opinion without more to found a proper basis for giving the

demand. Had she referred to an approved instrument or described the model number or better, described her training and use of the subject instrument this would have added and strengthened the import of her evidence.

[12] Equally, had there been other evidence of impairment which coupled with her evidence about the failed result on a device which she understood meant “over the legal limit” this may have supported the requisite grounds for giving the demand. No other such evidence was present here.

[13] I am not satisfied that the objective grounds for giving the demand existed. Accordingly, the demand was not properly made and the defendant cannot be properly convicted of refusing such a demand.

[14] I will now deal briefly with the second issue. The officer could not identify the defendant in court. She did testify she matched his identity with the picture on his driver's license, but the picture or the license was not in evidence. The defendant was, however, present in court.

[15] There was no evidence that this defendant was the operator of the subject vehicle and this is fatal, in my opinion, to the Crown's case. I would like to add, however, for the record, that the man identified by the officer was sitting next to the defendant - one seat away. They were brothers and look remarkably similar except one had longer hair and a moustache - that is the man identified by the officer, and the other had shorter hair which appeared to me to be neatly cropped, as if it had recently been cut. He was clean shaven.

[16] The officer specifically referred to the man's moustache while identifying him as the defendant. It was not clear, however, whether this was because the man operating the motor vehicle in question also had a moustache or she was just using this feature to distinguish one gentleman from the other in court.

[17] This man who was identified testified he was not involved in the events in question. Clearly there is no evidence as to who the actual person was other than he had a driver's license containing the name of the defendant.

[18] I must say that the circumstances of these men sitting in court in the way described are very suspicious. Regrettably the man who testified was not cross-examined regarding them, which is understandable given that this obviously came as a complete surprise to the Crown. Perhaps a fuller examination of him may have disclosed the circumstances and explained them more fully.

[19] In the result, however, the defendant is found not guilty.

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ALAN T. TUFTS, J.P.C.