IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R.*** v. ***Rafuse,*** 2003 NSPC 053

Date: 20031103
Case No.(s): 1150829
1150830
Registry: Halifax

Between:

R.

v.

Danny Wade Rafuse

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision on Voir Dire rendered orally on November 3, 2003, in Halifax Nova Scotia
Counsel:	Christopher W. Morris, for the Crown Robert Cragg, for the Defence

BY THE COURT

Introduction

[1] Having been charged with the offences of failing to comply with a breath demand and impaired driving, the accused, Danny Wade Rafuse, has raised the constitutional issue that the police denied him the right to consult with counsel of his choice, contrary to s.10(b), ***Charter***. This voire dire was held to determine the accused's application pursuant to s.24(2), ***Charter*** to exclude any evidence obtained by the police or given by him as a result of the breach of his ***Charter*** rights.

Relevant Evidence

(a) for the Crown

[2] Following a vehicle with no headlights on, the police stopped it at 0115 hours and asked the operator, who was the accused, for the usual identifying papers. He fumbled, appeared nervous, slurred his speech and, the police detected a smell of alcohol on his breath. When he walked to the police cruiser, as directed, they noted that he also was unsteady on his feet. They arrested him for impaired driving and, at 0119 hours, gave him a breath demand and Chartered and cautioned him.

[3] On arrival at the police station and at 0127 hours, when in the holding cell, the accused informed the police that he wanted to speak to his own lawyer, Robert Cragg. The police attempted, from a number listed in the available phone book that was in the holding cell and which was accessible to the accused, to call Mr. Cragg but was unsuccessful. The officer informed the accused of his attempt in obtaining his lawyer of choice and, as a result, he would call the duty counsel for him. After speaking to duty counsel, between 0136 hours and 0144 hours, the accused informed the officer that duty counsel advised him that he, the duty counsel, would attempt to contact Mr. Cragg and that he would wait for his lawyer to call him.

[4] The officer contacted duty counsel to determine the status as informed by the accused and duty counsel advised that he, the duty counsel, could not guarantee that he could contact Mr. Cragg and that he had so informed the accused. The officer informed the accused of this conversation and also noted that the accused was thumbing through the phone book, indicating that he wanted to speak to Mr. Cragg, but was making no attempts to use the phone as he was advised and permitted to do. However, at 0153 hours and still with no call from his lawyer, a qualified breathalyzer technician, who was called in to perform the tests, informed the accused that time was running and that he, the accused, needed to make a decision. Also, he had a reasonable time to contact his lawyer of choice, but, that they could not wait forever. Again, the accused was left alone but the police observed that, although

he had the phone book and access to the telephone, he was making no attempts to use the telephone.

[5] As a result, at 0215 hours the police requested the accused to provide a sample of his breath for analysis and he responded that he would not do so. They charged him, completed the necessary paper work and released him.

(b) For the accused

[6] The accused was operating a motor vehicle in which he was not familiar with its control functions concerning the lights. As he had been drinking beers earlier, he was nervous when he realized that the police were following him. When he stopped and rolled his window down and the police asked him for his papers he fumbled, admitted to them that he had consumed two beers and that he would like to call his lawyer, Mr. Cragg. At the police station, the phone book was in disarray with some pages missing and he found his lawyer's telephone number in the Yellow Pages. The number, when dialed, turned out to be the office number and he then requested, without providing it, the officer to call his lawyer's home number although thumbing through the phone book he could not find his lawyer's home telephone number. The page was missing.

[7] Unable to contact his lawyer, the police called the duty counsel for him. He spoke to duty counsel who informed him that although he could not guarantee it he, duty counsel, would attempt to contact his lawyer. He also spoke with duty counsel about his legal problem but could not recall whether he sought any specific instructions on what to do. However he recalled informing duty counsel that if he, the accused, could not get in contact with his own lawyer that he, the accused, would have to get someone else. While awaiting to see if his lawyer would indeed call him, the police advised him that he could not wait all night and that he needed to make a decision. He told them that he could not get his lawyer and again requested that they try to call his lawyer for him. He, however, did not call the directory information operator nor informed the police that pages were missing from the telephone book that was available in the waiting cell nor again requested to speak to duty counsel. Eventually, the police gave him a ticket for refusing to take the test. He however denied that he refused to take the test, was intoxicated, slurred his speech or was unsteady on his feet.

Findings and Analysis

[8] It is clear from my reading of the recent authorities such as ***R. v. Ross*** (1989), 46 C.C.C.(3d)129 (S.C.C.), per Lamer J., at 135, ***R. v. Herman***, [2001] S.J. No.114, [2001] SKQB 100, ***R. v. Keagan***, [2003] N.J. No.89, 2003 NLSCTD 48, and ***R. v. Richfield,*** [2003] O.J. No.3230 (C.A.), that in the initial phase of detention, a detainee has the right to choose his or her own lawyer and to retain and instruct that lawyer. Further, the police must refrain

from eliciting evidence from the detainee until he or she has had a reasonable opportunity to instruct and retain counsel. Likewise, it is clear that the right to choose one's counsel is not absolute and the detainee who invoke this right must be duly diligent in exercising it or, in the proper set of circumstances, it could be suspended.

[9] Here, the only issue in question is whether the police gave the accused a reasonable opportunity to instruct and retain counsel. However, I accept and find that the police had reasonable and probable grounds for demanding a breath sample from the accused. Further, I accept and find that he was stopped at 0115 hours and transported to the police station after he was charged with the offence of impaired driving. I accept and find that he informed the police that he wished to speak to his own lawyer and, from the available telephone book, the police, at 0127 hours, dialed his lawyer's number but received a recorded message. It was the lawyer's office number. Further, I accept and find that the police provided him with a telephone book, telephone access and privacy in which to make any further attempts to call his lawyer.

[10] Noting that the accused was initially unable to contact his lawyer, the police asked the accused if he wanted to speak with duty counsel. I accept and find that although the accused spoke to duty counsel between 0136 hours and 0144 hours, he still insisted that he wanted to speak to his own lawyer. Although there is no obligation for the police to enquire whether the accused was successful in retaining and instructing counsel or whether the accused was acting on the advice of counsel, ***R. v. Fowler*** (1996), 146 Nfld. & P.E.I.R. 271 (Nfld.C.A.), here, by his phoning the duty counsel, Constable Shannon suspected that the accused still intended to hear from his own counsel.

[11] However it seems to me that at the point when the accused spoke with duty counsel from his own testimony he did discuss the situation with counsel but whether he "had retained and instructed counsel" is unclear as he was vague and noncommittal. However, he was more certain in his testimony and I accept and find that he told duty counsel that if his own lawyer could not be reached he then would settle for some other lawyer. Thus, it is reasonable to infer that when he did discuss the situation with duty counsel he did receive some advice but wanted an opportunity to weigh that advice with a lawyer whom he knew and trusted. If his lawyer could not be reached at least, he had some advice on which he could act.

[12] Notwithstanding, it seems to me that the police were unsure of the situation and wanted to be fair to the accused. They informed him at 0153 hours that they could not wait forever and intimated that he should make a decision on what he was going to do as there was a limited time in which to perform the required test. Thus, the police informed him that his time to contact his counsel of choice was to be limited and wanted him to take some action.

[13] I find it difficult to accept and find that the telephone book in the holding cells, as declared

and suggested by the accused, was in such a state of disarray with the specific page showing his lawyer's name was missing and that even though he did not inform the police of this fact, because of this deficit, the police, indirectly, prevented him from contacting his lawyer. I find that proposition to have no merit. In my view, a reasonable and diligent person who needed immediate legal advice would have at least let the police know that the telephone book was useless and did not have a current listing for his lawyer. In my view, the police would have had a duty to assist him to contact directory assistance but only if they were made aware of the difficulty that he was experiencing in obtaining a current listing for his counsel. But, he did not inform the police about the state of the phone book.

[14] I accept and find that the accused just thumbed aimlessly through the telephone book and made no further attempts to call anyone. Having spoken to duty counsel and given the time of day, the question really is whether he had a reasonable expectation to contact his counsel of choice or whether he had abandoned any real hope to reach counsel and was no longer serious about the efforts to reach Mr. Cragg. Thus, I think that if he were unsuccessful in contacting the lawyer of his choice and only got an answering machine and made no reasonable attempts to engage the police in assisting him to facilitate such contact, it could be asserted that he might have waived his right to counsel of choice. After all, he was sitting and not attempting to use the phone when it would have been apparent to him that neither he nor the police had his lawyer's home number. Moreover, if he, in fact still wanted to call his lawyer, he did not call directory assistance to obtain a current listing for his lawyer and he did not specifically request the police to call the operator to obtain a listing for his lawyer, if available. Thus, there was no indication then to the police that his conduct was other than malingering.

[15] At some point it seems to me, particularly when time to preserve or to obtain evidence is a critical factor, that a detainee has to make a decision on when to abandon the quest to seek the services of a preferred person for his or her legal advise when it becomes patently clear, from efforts made and in the prevailing set of circumstances, that it may not be possible to obtain his or her counsel of choice and that other counsel is available. Here, in my view, there was some urgency. The accused was stopped at 0115 hours and I accept that the test procedure would have taken forty-five minutes to complete. Therefore, in order to rely upon the statutory presumption and to obtain the breath samples as soon as practicable pursuant to s. 258 (1)(c)(ii), ***Criminal Code***, it was reasonable for the police to express some concern about the ensuing delay and to wonder whether the counsel of choice would be available within the two hours.

[16] Apart from the urgency, in the circumstances of this case, I find that, because of the nature of the charge, it is reasonable to conclude also from the context and manner of his testimony that the accused was aware that time was a factor. Further, from his observed deportment, by the police, it was reasonable for them to conclude that he either had abandoned the quest to obtain the lawyer of his choice or was not diligent in using the opportunity afforded to obtain the counsel of his choice. Likewise, I think that, in the circumstances, he must have reasoned that, from his discussions with duty counsel, there was not a reasonable expectation

of making contact with his own lawyer. Thus, I think that he was prepared to go through the motions of obtaining counsel as it is reasonable to conclude that he already must have been informed by duty counsel what was his legal position.

[17] Furthermore, I think that the police would not have been in a position to determine when a detainee, as here, who has contacted a lawyer, has, in fact, retained and instructed counsel as mere contact with a lawyer may not be enough to establish "retain and instruct counsel." It however appears, and I think that the police officer's obligation would end when contact with counsel is made and, absent any successful contact, information made known to the officer by the detainee, the officer can assume that the detainee has exercised his or her constitutional right to retain and instruct counsel. See, for example: ***Fowler,*** at para.25.

[18] Hence, when I consider both the informational and implemental duties imposed on the state by s.10(b) ***Charter***, I find that the police did inform the accused of his right to retain and instruct counsel and the availability of Legal Aid and duty counsel. Likewise, I find that the police did give the accused a reasonable opportunity to exercise his right to counsel and did refrain from eliciting evidence from him until after he had that reasonable opportunity.

[19] Therefore, when the police, at 0215 hours, demanded that he now take the test, given all the circumstances, I find that it was not unreasonable for them to surmise that Mr. Cragg would not soon become available. An hour had passed since they detained the accused and, in their estimation the test required forty-five minutes to complete and to fall within the statutory presumption period. They had no indication that counsel of choice would be available within the two hours. Initially, the accused could not contact his lawyer but had subsequently spoken to duty counsel. Even though they were prepared to wait and allow the accused more time to attempt to obtain his counsel the police observed and, I find that he did not utilize the reasonable opportunity in a reasonably diligent manner.

Conclusion

[20] *I am satisfied that the police fulfilled the duties imposed upon them by s.10(b)* ***Charter****. They* informed the accused of his right to retain and instruct counsel and the availability of Legal Aid and duty counsel. Likewise, they gave him a reasonable opportunity to exercise that right and did refrain from eliciting evidence from him until he had that reasonable opportunity. Further, I am satisfied that the accused invoked the right to counsel but I find and conclude that, in the circumstances of this case, he was not reasonably diligent in exercising that right. Consequently, for the reasons stated and on the authorities cited, I conclude that the correlative duties imposed on the police were suspended. Put another way, the police, in the circumstances, did not violate the accused s.10(b) ***Charter*** rights and the evidence obtained is admitted on the trial.