

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R.v. Gray, 2005 NSPC 67

Date: 20051219

Docket: 1498473, 1498474

Registry: Kentville

Between:

Her Majesty the Queen

v.

Patricia Helen Gray

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Judge: The Honourable Judge Alan T. Tufts

Heard: November 10, 2005 in Kentville, Nova Scotia

Written Decision: April 6, 2006

Subject: **Breathalyzer; s. 254 (5), 253(a) CC;
Admissibility of results of approved screening device**

Summary: **The defendant in this case attended the police detachment in Berwick, NS on March 3, 2003 on her own to make a delivery to the RCMP office. The officer noticed a strong odour of alcohol coming from the defendant and watched her when she left the office. She noticed her driving her car and about to leave the parking lot and intercepted her at that time.**

After being read the usual approved screening device demand the defendant made four unsuccessful attempts to blow into the device. She was not given her complete “rights to counsel” pursuant to s. 10(b) of the Charter. She indicated to the officer that she had asthma and was unable to blow into the device adequately. She did not have her inhaler with her.

The officer then took the defendant by car to a rural area outside of Berwick to her home and went into the house and retrieved the inhaler for the defendant. Once she used the inhaler she was able to blow into the device and provided a fail reading. She was then arrested, read the breathalyzer demand and Charter rights and taken to New Minas, where she provided a breathalyzer sample.

Issue: Whether the breath sample was provided “forthwith” pursuant to s. 254(2) of the Criminal Code. The Supreme Court of Canada's decision in *R. v. Woods* is applicable.

Result: The necessity of attending at the defendant's residence to obtain her inhaler and the time required to achieve this was outside the scope of s. 254 and the constitutional limits for it. The defendant's obligation was limited to provide the sample forthwith. She could not be demanded to provide a sample beyond this limitation under this subsection therefore the officer could not require a breath sample to be taken.

This resulted in a breach of the defendant's s. 9 and s. 8 Charter rights and the fail result from the approved screening device is excluded from evidence pursuant to s. 24(2) as well as the breathalyzer certificate. No admissible evidence for the s. 253(b) charge and insufficient evidence for the s. 253(a) charge. Found not guilty on both counts.

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