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

Judge:	The Honourable Judge Alan T. Tufts
Heard:	November 10, 2005, in Kentville, Nova Scotia
Written decision:	April 6, 2006
Charge:	253(b) CC 253(a) CC
Counsel:	Darrell I. Carmichael, for the Crown Curtis Palmer, for the defence

By the Court (orally):

[1] The defendant is charged under s. 253(a) and 253(b) of the **Criminal Code**. The primary issue in this proceeding is whether the result of the approved screening device can be admitted into evidence in order to show that the arresting officer had reasonable and probable grounds to give the breathalyser demand. The specific issue is 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**, 2005 SCC 42 is applicable.

FACTS

[2] The facts are somewhat novel. The defendant had attended the Berwick detachment of the R.C.M.Police on March 3, 2003. She was there, interestingly enough, to drop off a teddy bear as a donation to a program promoted by the police. Constable Nesbit dealt with her and while doing so noticed a strong odour of alcohol on her breath. After the defendant left the detachment, Constable Nesbit became curious about how the defendant was travelling so he followed her outside and noticed her driving her car and about to leave the parking lot. He intercepted her and asked her to come back to the detachment. He again noticed a strong smell of alcohol. He advised her that she was being detained and advised her regarding duty counsel. He testified he explained this in "layman's" terms. He did not read from a card. While he told her there was a 1-800 number she could call he did not provide this. He did not provide the usual and complete right to counsel. This was approximately 9:29 a.m.

[3] He placed her in an interview room and then attended to another person who was in the detachment. At 9:45 a.m. he read the usual approved screening device demand from a card. He then presented the defendant with an approved screening device and she made four unsuccessful attempts to blow into the device. This occurred during a period from 9:45 a.m. to 9:56 a.m. She told the officer that she had asthma. It appeared she was trying to blow but simply could not supply sufficient air to activate the instrument. The officer then asked if she wanted to get her inhaler, which she indicated she did. The officer then took the defendant in his car to Windemere, a rural area outside of Berwick about three kilometres from town.

[4] Constable Nesbit and the defendant both went into the residence, that is her residence; went into the defendant's kitchen, diningroom and bedroom looking for

the inhaler. The inhaler was eventually located in the defendant's bathroom. The defendant then used the puffer or inhaler on three separate occasions, activating it a number of times on each occasion. She then was taken to the police car which was still at her residence, where she was now able to provide a sample for the approved screening device testing. She provided an F', or fail, reading. The approved screening device test was completed at 10:28 a.m.

[5] As a result of the fail result the defendant was arrested for impaired driving, a breathalyzer demand was made at 10:33 a.m. and her complete **Charter** rights given at 10:34 a.m. It was then she was then taken to New Minas detachment of the RCMPolice, not Berwick, for the breathalyzer test which was completed and a Certificate of Analysis was produced and tendered at trial. The defence objects to its admission.

DEFENCE POSITION

[6] The defence argues that the defendant was detained at the moment that she was stopped in the parking lot at 9:29 a.m. Because the breath sample was not provided until 10:28 a.m., almost an hour later, the defence submits the defendant was not “demanded to provide” a sample “forthwith” as required by s. 254(2) of the **Criminal Code** and accordingly the defence argues the sample was obtained outside the constitutionally prescribed or protected limit and should therefore be excluded under s. 24(2) of the **Charter**. Specifically the defence argues that the defendant's rights under s. 8, 9 and 10 were violated. The defence relies specifically on **R. v. Woods**, *supra*.

CROWN POSITION

[7] The Crown argues that Constable Nesbit found the defendant operating a motor vehicle and had reasonable suspicion that she had alcohol in her body because of the strong odour. Constable Nesbit had proper grounds to give the approved screening device demand and gave that demand “forthwith” at the detachment approximately fifteen minutes after the defendant was operating her motor vehicle. The Crown argues that the rights to counsel were not required at that point. It also argues that the approved screening device was available and the demand was properly and promptly made to provide the sample “forthwith”. The Crown argues that the police did everything possible to this point at least to allow the defendant to provide a sample “forthwith”. More particularly the Crown argues

that the demand was made to provide the sample forthwith. The Crown argues that any delay was not unwarranted in that the delay which allowed the sample to be provided did not result from any action or inaction on the part of the police. The Crown argues that the delay was necessitated to allow the defendant to get her puffer so that she could comply with a legal request to provide a sample and while the eventual providing of the sample may not have been forthwith there was in fact a demand to provide the sample forthwith and the police had the means to receive the sample within the constitutionally accepted limit.

[8] Finally the Crown argues that even if there was a **Charter** violation that the Court should not exclude the fail result because of these unique circumstances and principally because of the officer's good faith and that any delay was for the "benefit" of the defendant in the sense that it was done to allow her to properly blow into an approved screening device as she was legally required to do.

THE APPLICABLE LAW

[9] The application of s. 254(4) has been recently examined by the Supreme Court of Canada in **R. v. Woods**, which I alluded to earlier. This case considered the meaning of "forthwith" as it appears in that section and in a constitutional context. Beginning at para. 28, Fish, J. says as follows:

> [28] But neither prosecutorial discretion nor the right of any person, detained or not, to volunteer self-incriminating evidence warrants extension of a statutory scheme beyond the constitutional boundaries within which it was meant to operate: see, for example, R. v. Thomsen, [1988] 1 S.C.R. 640; R. v. Grant, [1991] 3 S.C.R. 139, at p. 150; R. v. Bernshaw, [1995] 1 S.C.R. 254, at paras. 72-75.
>
> [29] The "forthwith" requirement of s. 254(2) of the Criminal Code is inextricably linked to its constitutional integrity. It addresses the issues of unreasonable search and seizure, arbitrary detention and the infringement of the right to counsel, notwithstanding ss. 8, 9 and 10 of the Charter. In interpreting the "forthwith" requirement, this Court must bear in mind not only Parliament's choice of language, but also Parliament''s intention to strike a balance in the Code between the public interest in eradicating driver impairment and the need to safeguard individual Charter rights.

> [30] As earlier explained, Parliament enacted a two-step legislative scheme in s. 254(2) and (3) of the Criminal Code to combat the menace of impaired driving. At the first stage, s. 254(2) authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to provide breath samples for testing on an ASD. These screening tests, at or near the roadside, determine whether more conclusive testing is warranted. They necessarily interfere with rights and freedoms guaranteed by the Charter, but only in a manner that is reasonably necessary to protect the public''s interest in keeping impaired drivers off the road.

and further at para. 44:

> [44] The "forthwith" requirement in s. 254(2) appears to me, however, to connote a prompt demand by the peace officer, and an immediate response by the person to whom that demand is addressed. To accept as compliance ""forthwith"" the furnishing of a breath sample more than an hour after being arrested for having failed to comply is in my view a semantic stretch beyond literal bounds and constitutional limits.

He continues at para. 45:

> ...Drivers upon whom ASD demands are made are bound by s. 254(2) to comply immediately —— and not later, at a time of their choosing, when they have decided to *stop refusing*!

ANALYSIS

[10] In my opinion the Supreme Court of Canada in these passages recognized that detention by the police for less than "reasonable and probable grounds" raises issues of arbitrary detention and possible violation of s. 9 of the **Charter**. Of course, any detention triggers the obligation to provide the suspect with his/her s. 10(b) **Charter** rights. Requiring individuals to provide breath samples outside the properly prescribed limits of legal authority for such requirement may violate s. 8 of the **Charter**. The "forthwith" required component of s. 254(4) necessarily makes the provision of s. 10(b) rights impossible, however s. 254(4) has been recognized as a reasonable limit prescribed by law for the purposes of s. 1 of the **Charter**.

[11] Therefore, relief by the police of providing the s. 10(b) rights which is otherwise necessitated by s. 254 is justified and it is accepted that the police are not obliged to advise suspects of their **Charter** rights provided the demand to provide a breath sample is in accordance with s. 254. Also for the same reason in my opinion, a detention based on reasonable suspicion is also justified as a reasonable prescribed legal limit notwithstanding it may violate s. 9 of the **Charter**.

[12] Another way of saying the same thing is that unless the demand to provide breath samples is made in accordance with s. 254 the detention is without legal authority and becomes arbitrary and relief against the obligation to provide the s. 10(b) **Charter** rights ends and the suspect becomes so entitled to that right. Of course the collection of the breath sample if it was not made pursuant to s. 254 and within its scope would be a violation of s. 8 of the **Charter**.

[13] What then is the scope of s. 254 and more particularly what does it mean to require the person to provide "forthwith" a sample of one's breath? The scope of s. 254 and the meaning of "forthwith" is tied to its constitutional principles.

[14] Section 254 has been the subject of considerable judicial consideration. "Forthwith" means immediacy or an immediate response, see **R. v. Woods**, *supra*, and while not every minute needs to be counted it does mean reasonably prompt. Obviously there will always be some necessary delay to facilitate the taking of the sample which would include securing the suspect or the scene and readying the instrument. However, in my opinion this procedure is intended to be for a short period of time. Let me explain my conclusions further.

[15] The authorities dealing with the meaning of "forthwith" are almost entirely decided in the context of circumstances where the motorist has not been given their rights to counsel notwithstanding delay in making demand or delay in providing a sample after a demand is made. The first in the long line of cases was **R. v. Thomson**, [1988] 1 S.C.R. 640. In that case the Supreme Court recognized that the police "detained" individuals when demands were made to provide breath samples into the what was then called the "A.L.E.R.T.". However the right to counsel which was otherwise required was not necessary because the wording of s. 234(1),

[now 254(2)], amounted to a prescribed limit of that right pursuant to s. 1 of the **Charter**.

[16] The Court found that the requirement that the sample be provided “forthwith” necessarily means that Parliament limited by law the right to counsel. This was justified because of the serious harm impaired drivers presented. Accordingly the meaning of “forthwith” became defined in the context of the right to counsel limitation and if a delay occurred which would have allowed contact with counsel and no right to counsel was given the demand was outside the scope of s. 254(2) and not valid. However in **R. v. Grant,** [1991] 3 S.C.R. 139, which was a refusal of the screening device, Lamer, C.J.C. seems to go further at para. 20 he says:

> In my opinion, the actions of the officer in this case fell outside of the ambit of s. 238(2). The demand made was not the demand authorized by s. 238(2), that Mr. Grant provide a sample of his breath "forthwith." Instead, the demand made was a demand that he provide a breath sample when the required apparatus arrived, which turned out to be half an hour later. It follows that Mr. Grant was under no obligation to comply with the police officer's demand, and did not commit the offence under s. 238(5) when he failed to do so. The context of s. 238(2) indicates no basis for departing from the ordinary, dictionary meaning of the word "forthwith" which suggests that the breath sample is to be provided immediately. Without delving into an analysis of the exact number of minutes which may pass before the demand for a breath sample falls outside of the term "forthwith", I would simply observe that where, as here, the demand is made by a police officer who is without an A.L.E.R.T. unit and the unit does not, in fact, arrive for a half hour, the provisions of s. 238(2) will not be satisfied.

although at paragraph 22 he says:

> ... This means that Mr. Grant had the constitutional right to retain and instruct counsel without delay and to be informed of that right upon his initial detention. Here, the police officer did not inform Mr. Grant of his right to counsel at either stage of the detention. ...

he concludes by noting that the defendant's s. 10(b) rights were infringed.

[17] In **R. v. Latour**, 16 C.C.C. (3d) 279 (Ont. C.A.), Charron, J.A. (as she was then), in describing the approach of the Summary Appeal Court judge said at paras. 22 and 23,

> [22] The appeal court judge rejected the argument of Crown counsel that his decision would require every police vehicle to be equipped with a roadside screening device. He held that all that is required is:
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> > 1. That the investigating officer make specific inquiries as to when if at all a screening device might be available at the scene failing which alternative arrangements might be made such as for example transporting the suspect immediately to a location where one is available; or
> >
> > 2. Giving to the accused his or her rights guaranteed under s.10(b) of the Charter.
>
> [23] In my view, the appeal court judge adopted the correct approach when he sought to define the boundaries of the word "forthwith" in terms of the constitutional scope of the legislative provision.
>
> (emphasis added)

[18] Here Charron, J.A. acknowledges that “forthwith” must be defined in terms of its constitutional scope, the same position I believe she concurred in in the Supreme Court of Canada decision in **R. v. Woods**, *supra*. She does however appear to agree that the giving of the rights to counsel may have satisfied any constitutional requirement and therefore made the demand forthwith notwithstanding the delay. The question then is what if the police do provide the defendant with his/her rights to counsel what effect if any does that have on whether the demand is made “forthwith”?

[19] In my opinion the giving of the rights may have some practical effect however I believe the test for the definitional scope of the term “forthwith” is still linked to the constitutional requirements. Notwithstanding the s. 10(b) requirement has been met the other constitutional requirements are still present, namely s. 9 and possibly s. 8. In my opinion this is the implication of the Supreme Court of

Canada decision in **Woods** from the quotes referred to above. It is also consistent in my opinion with Justice Charron's decision in **R. v. Latour**, *supra*. The term "forthwith" still has a meaning even though the defendant has been given his/her rights to counsel. Its meaning is defined in the context of other **Charter** sections.

[20] In my opinion it is not possible to give the demand, provide rights to counsel and then obtain the samples at some future time when either the approved screening device is available, as in the case of many of the authorities noted, or when the defendant is capable or willing in this case or in **Woods**, to provide a sample. At some point the providing of the sample notwithstanding rights are given is not forthwith i.e., it is outside the scope of s. 254(2) without legal authority and therefore the necessary detention is arbitrary.

[21] Whether that time period necessarily corresponds to the range of minutes referred to in the cases where s. 10(b) was at play is not clear. In my opinion direct comparisons are not appropriate. In other words, a delay of 18 minutes which would have allowed contact with counsel as in **R. v. George**, [2004] O.J. No. 3287 (Ont. C.A.) and no rights to counsel were given and it was held not to be forthwith and the demand was not valid, may have had a different result had the rights been given. Had the rights been given I am not satisfied "forthwith" would necessarily have been defined in any particular case the same.

[22] Therefore in my opinion in a case where rights to counsel are given, the meaning of "forthwith" is still required to be defined in constitutional terms but in those cases the phrase has to be defined in terms of whether the detention necessary to comply with the demand is arbitrary. The many cases dealing with s. 10(b) rights are therefore not that helpful. However, I still believe that the general guidelines about the meaning of "forthwith" apply. The period of detention should be brief and of relatively short duration. The same arguments presented in **Thomson**, **Grant** and **Latour** apply *mutatis mutandis* to the arguments under s. 9 of the **Charter** as they were applied under s. 10(b) of the **Charter**.

[23] The Supreme Court of Canada in **Woods,** *supra* I believe adopts the same approach, see para. 44. Clearly the police when acting pursuant to s. 254(2) are acting not arbitrarily provided they are acting within its scope. There is no violation of s. 9 in that case. However for the reasons that I have expressed below the detention under s. 254(2) is based only on reasonable suspicion and not

reasonable and probable grounds. It is designed specifically to be of short duration. Periods of long duration justified on that basis would be arbitrary when the legal authority requirement is defined in terms of the word “forthwith”.

[24] Accordingly even if the **Charter** rights are given the demand must still be to provide samples forthwith which contemplates a brief period of time. In fact in **Woods** the second demand which the Court found was not forthwith was after rights to counsel were given and the defendant in fact spoke to counsel.

[25] Allow me for a moment to consider s. 254 in a wider context which I believe touches on the constitutional issues. Section 254(2) allows the police to detain people who are operating or have care or control of a motor vehicle and who are reasonably suspected of having alcohol in their bodies and require them to provide a breath sample forthwith and to accompany police for that purpose. There is no requirement for any suspicion of impairment or requirement for reasonable and probable grounds for any belief in impairment or even alcohol consumption. The test is a very low one–reasonable suspicion that the person has alcohol in his body. It also requires the police find the person operating or in care or control of a motor vehicle or in circumstances contemporaneous to such operation or control. In my opinion the wording of s. 254, the low threshold and the necessity of finding the suspect in actual care or control all contemplate the detention required be of a short duration.

[26] For the reasons I explained above I believe the authorities support this conclusion. This is an investigative detention. While this is a statutorily prescribed detention, in my opinion the same constitutional principles which were considered in **R.v. Mann**, [2004] 3 S.C.R. 59, apply here, although the investigative detention there was one which was prescribed by common law.

[27] However because the scope of s. 254 is inextricably linked to its applicable constitutional principles I believe the case is helpful. There Iacobucci, J. said, at para. 45 the investigative detention should be brief in duration and later in the same paragraph said, “[The] investigative detention [is] ... to be distinguished from an arrest” –where reasonable and probable grounds exist that a criminal offence has been committed.

[28] In the context of s. 254 application it is possible for a motorist to be detained while having consumed a very small amount of alcohol given the low

threshold–reasonable suspicion. The motorist would then be required to provide a breath sample under the threat of criminal prosecution for failure to do so. This however is a reasonable request and obligation and is justified in a free country like Canada where the menace of drinking and driving has been identified as a serious threat to other motorists and the public generally. This minimal infringement with a motorist's liberty is reasonable given the objective it is aimed at addressing. However the reasonableness depends on the extent of the impairment to liberty.

[29] Clearly the prescribed limit in s. 254 contemplates a detention of short duration and a detention beyond this would strain the scope of s. 254 which is defined in its constitutional limits. It is therefore clear, in my opinion, that a detention for an approximate hour is outside the period of detention contemplated by s. 254 and could not be considered to be having a person “provide forthwith” a breath sample.

APPLICATION TO CASE AT BAR

[30] How then does this apply to the defendant in this case? Does the fact that the delay was necessitated by the defendant's need to get her inhaler or puffer in order to do the test alter the circumstances such that either the requirement to provide samples was still forthwith and was within the scope of s. 254 or that it fell outside of s. 254 and notwithstanding s. 254 is linked to the constitutional issues it was still not a violation of any of the constitutional sections referred to.

[31] In my opinion it does not and I will explain why. The defendant here was found operating a motor vehicle and there was a reasonable suspicion she had alcohol is her body. Constable Nesbit was legally entitled to require her to provide forthwith a sample of her breath and to accompany him for that purpose. Constable Nesbit's authority was limited to requiring the sample to be provided forthwith–beyond that there was no legal authority. In my opinion he could not “require” the defendant to take remedial measures to facilitate the providing of the sample. He was limited to requiring the sample to be provided forthwith. When the defendant was driven home, albeit at her agreement, it was in furtherance of the demand made by Constable Nesbit to provide the sample.

[32] While it might be possible to say the defendant “agreed” to go to her residence, she did not “consent” in that she waived her rights and went voluntarily. After all, she was not being asked to comply but demanded under the threat of

criminal prosecution. In short she did not provide the sample voluntarily as Fish, J. used this term in para. 9 of **Woods**. This measure 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. Of course, if she failed or refused to comply with such a demand without reasonable excuse she may be liable to criminal prosecution under s. 254(4) of the **Criminal Code.**

[33] At this point, in my opinion, the officer could not require a breath sample to be taken which would have extended the period beyond its statutory limit without any legal authority to do so which in this case, in my opinion, he did not have. The officer would have had to resort to other acceptable investigative techniques. In my opinion the breath sample into the approved screening device was provided outside the scope of s. 254 and there was therefore no legal authority to do so, the detention necessary to obtain the samples was arbitrary and because it lacked legal authority and the samples were seized as well without legal authority.

[34] These actions breached the defendant's s. 9 and s. 8 **Charter** rights. It also appears that the defendant was not given her complete s. 10(b) rights in full compliance with constitutional requirements at the detachment and a violation of s. 10(b) also occurred, although this was not vigorously argued.

[35] In my opinion the fail result from the approved screening device should be excluded from evidence pursuant to s. 24(2) as well as the breathalyzer certificate, demand for which was based almost entirely on the result of this approved screening device.

[36] Constable Nesbit testified that other than the odour of alcohol and the fact that the defendant's eyes were red–a little bloodshot–there were no signs of impairment. He specifically said her mobility was fine and her speech was not out of the ordinary. This would have been an hour after he had her under his control and detention. Without the approved screening device result there was no reasonable and probable grounds to give the breathalyzer demand.

[37] I did consider the Crown's request in relation to s. 24(2) application. I recognize that Constable Nesbit considered that he was trying to accommodate the defendant and he seemed very understanding concerning the defendant's medical

condition. Constable Nesbit was acting within his duty to uphold the law and protect the public throughout this. However in my opinion both the trial fairness issue and the seriousness of the **Charter** breach, the first and second branches of the **Collins** test are engaged here, particularly as well as the third branch. The extent of the detention was not minimal or a technical violation. The defendant was detained for almost an hour before the sample was provided. Notwithstanding Constable Nesbit's good faith this was a serious violation. Also it was conscripted evidence.

[38] Finally given the principles I described above I do not believe that the exclusion of the evidence would bring the administration of justice into disrepute, the so-called third branch of the **Collins** test. Accordingly I am satisfied that the evidence should be excluded as the administration of justice would be brought into disrepute if the evidence was admitted. The results of both tests are excluded. There being no admissible evidence for the s. 253(b) charge and the defendant is found not guilty. With respect to the s. 253(a) charge the evidence which I outlined described by Constable Nesbit does not make out or support that charge beyond a reasonable doubt and the defendant is found not guilty under the s. 253(a) charge as well.

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Alan T. Tufts, J.P.C.