IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Simmons, 2006 NSPC 29

Date: 20060628
Docket: 1358642
Registry: Bridgewater

Between:

R.

v.

Ross Clayton Simmons

Judge:	The Honourable Judge Anne E. Crawford
Heard:	December 22, 2005 in Bridgewater, Nova Scotia
Charge:	s. 254(4) of the Criminal Code of Canada
Counsel:	Paul Scovil, for the Crown David Hirtle, for the defence

By the Court:

[1] Ross Clayton Simmons is charged under s. 254(5) of the *Criminal Code* with refusing to provide a breath sample to an approved screening device.

Facts

[2] The defence elected not to call evidence. From the testimony of the various Crown witnesses, I make the following findings of fact.

[3] On August 31, 2003 at approximately 1830 hours Bridgewater Police received a report of an intoxicated individual threatening patrons and staff with a machete at the River Pub located on King Street in Bridgewater, Nova Scotia. The police were also advised that the accused had gone to his truck to get a gun. They were given the licence plate number of the truck.

[4] Cst. Ramey located the truck as it left the parking lot of the Irving Station in Cookville, on the outskirts of Bridgewater. The officer engaged his emergency equipment and pursued the truck for a kilometer before it pulled over and stopped on the shoulder of Highway #10. Csts. Ramey and Foster undertook a "high risk takedown", approaching the defendant's vehicle at gunpoint. He ignored their commands to remain in his vehicle and keep his hands where they could see them. He got out of his truck, facing the officers, saying, "Shoot me; why don't you just shoot me?"

[5] At 1843 he was handcuffed and placed in the back seat of Cst. Foster's police car, where he was informed that he was under arrest for possession of a weapon and threats with a weapon and was read his *Charter* rights and police caution. The defendant replied that he understood his rights and the caution and said, "I'll get a lawyer later." Cst. Foster noticed the smell of liquor on the defendant's breath when he was dealing with him in the police vehicle.

[6] Other police officers, including members of the nearby RCMP detachment and Sgt. Sutherland, the Bridgewater Police shift supervisor that evening, arrived and were briefed.

[7] Sgt Sutherland spoke briefly with the defendant and then conferred with Cst. Foster. It was decided that, as there was a smell of alcohol on the defendant's breath

and they had reports that he had been intoxicated at the pub, an approved screening device demand should be given.

[8] Traffic was backing up and Sgt. Sutherland was concerned to get the defendant away from the scene. When it was determined that no one present had an approved screening device, Sgt. Sutherland told Cst. Foster to make the demand at the Bridgewater Police office, where they were going to deal with the defendant in regard to the other charges and where a device was available.

[9] At 1917 they arrived back at the police office in Bridgewater and Cst. Foster read the Approved Screening Device (ASD) demand. The defendant's reply was, "I don't drink; call my doctor."

[10] By this time Sgt. Sutherland was also present. Both Cst. Foster and Sgt Sutherland explained that if the defendant refused to provide a sample he would be charged with refusal. The defendant again said, "No; call my doctor."

[11] Cst. Foster said that Sgt. Sutherland asked the defendant if he wanted to call a lawyer; Sgt. Sutherland did not remember doing so. In any event, it is clear that the defendant was not formally re-read his *Charter* rights or police warning.

[12] When it was clear that he was not going to comply with the demand he was lodged in cells on the original charges and the charge of refusal was laid.

Issue

[13] Was the demand valid under s. 254 (2) of the *Criminal Code*?

Section 254 (2)

[14] Section 254 (2) of the *Criminal Code* states:

> (2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle . . . , whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

[15] This case once again raises the issue of the meaning of the word “forthwith” in the context of the demand for an approved screening device breath sample.

[16] The defence argues that the demand does not fall within the immediacy requirements of s. 254(2) because it was not made until some thirty-three to thirty-five minutes (from shortly after 6:43 p.m. to 7:17 p.m.) after Cst. Foster first noted the smell of alcohol emanating from the defendant.

[17] The Crown replies that, given the fact that the defendant was under arrest and had been given his *Charter* rights in regard to another offence, and that the police were involved in a perilous situation involving public safety, the delay was not undue and is satisfactorily explained.

[18] In order to determine whether or not the demand made here was within or outside the scope of s. 254(2), it is necessary to go back to some first principles.

[19] In *R. v. Grant* (1991) 67 C.C.C. (3d) 268 (S.C.C.) Lamer, C.J.C. stated for the court:

> The crucial point is that, unless the demand made by a police officer falls within the ambit of s. 238(2) [now s. 254(2)], the person to whom the demand is addressed is under no obligation to comply with the demand, and does not commit the offence under s. 238(5) if he refuses to do so. Nor is the provision available to authorize the absence of a s. 10(b) warning upon detention, and hence it cannot constitute a limitation on the s. 10(b) rights to counsel "prescribed by law" which would be capable of justification under s. 1. In other words, if the actions of the officer fell outside the purview of s. 238(2), those actions must be independently analyzed under s. 10(b) of the Charter without reference to the Code provision. The judgment of this court in *Thomsen* could only have application if the police action had fallen within s. 238(2).

[20] In that case it was held that, where the defendant was made to wait 30 minutes after the demand for the arrival of the ASD, the demand was outside the protection of the section and refusal to comply with it was not an offence.

[21] In *R.v. Cote* (1992), 70 C.C.C. (3d) 280 (O.C.A.), Arbour, J.A. stated for the court:

> If the accused must be taken to a detachment, where contact with counsel could more easily be accommodated than at the side of the road, a large component of the rationale in *Thomsen* disappears. In other words, if the police officer is not in a position to require that a breath sample be provided by the accused before any realistic opportunity to consult counsel, then the officer's demand is not a demand made under s. 238(2). The issue is thus not strictly one of computing the number of minutes that fall within or without the scope of the word "forthwith". Here, the officer was ready to collect the breath sample in less than half the time it took in *Grant*. However, in view of the circumstances, particularly the wait at the police detachment, I conclude that the demand was not made within s. 238(2). As the demand did not comply with s. 238(2), the appellant was not required to complywith the demand and his refusal to do so did not constitute an offence.

[22] In *R. v. Debaie* (2000), 187 N.S.R. (2d) 188 (P.C.), Gibson, A.C.J.P.C. stated:

> ¶ 22 I recognize in this case that Constable Thorne delayed making the s. 254(2) demand until the screening device arrived. I conclude that the police cannot stop time from running re: the "forthwith" requirement simply by delaying the demand. The case of *R. v. Demers* [1997] O.J. No. 4860 (Ont. Prov. Div.) addresses this issue. It took 20 minutes in the *R. v. Demers* case for the device to arrive. The Court held in that case that the officer's attempt to delay the "start" time by delaying the s. 254(2) demand until the screening device arrived at the location of the detention and his failure to advise the accused of his s. 10 *Charter* rights resulted in a breach of the "promptly" requirement in s. 10(a) of the *Charter* and a failure to meet the "provide forthwith" requirements in s. 254(2) of the *Criminal Code*.

[23] In *R. v. Woods*, 2005 SCC 42, [2005] 2 S.C.R. 205 Fish, J. stated for the court:

> ¶ 43 It is true, as I mentioned earlier, that "forthwith", in the context of s. 254(2) of the Criminal Code, may in unusual circumstances be given a more flexible interpretation than its ordinary meaning strictly suggests. For example, a brief and unavoidable delay of 15 minutes can thus be justified when this is in accordance with the exigencies of the use of the equipment: see *Bernshaw*.
>
> ¶ 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.

[24] From the foregoing cases, it appears that the reason underlying the “forthwith” requirement in s. 254(2) is two-fold:

> 1. To provide a quick way for the police to sort out possibly impaired drivers from those who are not, so that innocent drivers will be inconvenienced as little as possible;
>
> 2. To ensure that the right of possibly impaired drivers to be informed of their right to counsel is infringed for as short a period of time as possible.

[25] Considering the present case in the light of those underlying reasons, it appears to present a somewhat different scenario from that in *Woods*, *Debaie, Cote*, or *Grant*, and, in my opinion, falls into the category of "unusual circumstances" where the "forthwith" requirement can be given a more flexible interpretation, as suggested in *Woods, supra*.

[26] My reasons for this conclusion are as follows:

> 1. The defendant had been given his right to counsel in regard to the more serious charges for which he was already under arrest;
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> 2. The defendant would be held on those charges regardless of the outcome of the ASD demand;
>
> 3. Unlike *Debaie*, the police here did not simply delay making the demand at roadside to avoid the running of time. The defendant had involved them in a difficult situation on a public highway, and they were dealing with public safety, as well as with the defendant;
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> 4. The defendant was transported by the most direct route to the police station, where the demand was made immediately upon arrival, unlike *Cote*, where there was a further delay after arrival at the police detachment;
>
> 5. Unlike *Woods*, only one demand was made, and, after ensuring that the defendant understood the consequences of refusal and giving him a reasonable opportunity to comply, the police charged him with refusal.

Conclusion

[27] I find that, in the unusual circumstances of this case, the demand does fall within the ambit of s. 254(2). It was therefore a lawful demand with which the defendant was required to comply. It follows that his refusal is an offence under s. 254(5) and that he is guilty as charged.